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Robbery and the Principle of Fair Labelling

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KEYWORDS: Robbery; fair labelling; theft; proportionality; force

ABSTRACT: Robbery is a somewhat unusual offence in the sense that it combines two distinct wrongs: an offence against property and an offence against the person. It is also a particularly broad crime since it does not distinguish between different levels of force which might be used against the person. Consequently, the defendant who uses a slight push in order to steal a bag, commits the same offence as a masked gang who enters a bank whilst in possession of firearms, making off with substantial amounts of cash in the process. As such, the current definition of robbery conflicts with the principle of fair labelling which seeks to ensure that crimes are defined to reflect their wrongfulness and severity. This article explores options to reform robbery in order to bring it in line with the principle of fair labelling. Ultimately, it argues that the scope of the offence should be narrowed by incorporating a minimum-force threshold so that offences involving low levels of force cease to be regarded as robberies and are instead treated as thefts.

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It is now 15 years since Andrew Ashworth wrote his seminal 'Robbery Re-assessed'¹ in which he argued that the offence of robbery is too broadly defined, calling for it to be re-cast in order to properly distinguish between offences involving different levels of harm: 'Where force or the threat of force is used in order to steal, the category of robbery covers everything from a push or a raised hand in order to snatch a bag, to the most violent robbery of a security vehicle with guns fired and so forth.'² As such, Ashworth argued that the current definition of robbery is 'objectionable because it fails to mark in a public way the distinction between a mere push and serious violence',³ and that robbery is therefore too vague and is liable to stereotypical interpretations which risk misrepresenting the true nature of the offender's conduct.⁴ To redress the generality in the law, Ashworth suggests that the offence should be sub-divided 'into at least two degrees'⁵ so as to more accurately reflect and describe the nature of the offence committed, allowing the law to properly distinguish the most serious forms of robbery from those involving lower degrees of force.

The present article similarly argues that the offence of robbery is too widely defined and is in need of reform. However, rather than dividing the offence into two or more narrower forms of robbery, it is argued here that the scope of the offence should be limited by incorporating a minimum force-threshold so that offences involving low

¹ A. Ashworth, 'Robbery Re-assessed' [2002] Crim LR 851

² *Ibid.* at 855

³ *Ibid.* at 856

⁴ *Ibid.* at 856

⁵ *Ibid.* at 871

levels of force are no longer regarded as robberies and are instead treated as thefts, with the use of force constituting an aggravating factor taken into consideration at the sentencing stage. It is argued here that the use of minimal force does not sufficiently change the nature of the offence vis-à-vis a non-forceful taking, and so treating minimal-force thefts as robberies represents an unnecessary contravention of the principle of fair labelling.

Since 'Robbery Re-assessed', the law has developed only very little through judicial statements to the effect that using a level of force which is only sufficient to take possession of property from an unresisting owner may not constitute robbery. Thus in *DPP v RP*⁶, the offender could not be guilty of robbery when he snatched a cigarette from the victim's hand, since it could not be said that the act amounted to force used against a person for the purposes of robbery. The reasons behind this decision will be considered later, but for the time being, it is enough to say that this decision may have the effect of removing from the scope of robbery those offences where the level of force used is sufficient only to take possession from an unresisting owner. That said, it is questionable whether such minimal-force takings were ever intended to fall within the scope of robbery. The Criminal Law Revision Committee, upon whose report the Theft Act 1968 was largely based, did not regard the 'mere snatching of property...from an unresisting owner as using force for the purposes of robbery.'⁷ This

⁶ [2012] EWHC 1657 (Admin)

⁷ Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences*, Report Cm 2977 (1966) page 65

view appears in much of the academic commentary since the Act came into force. A. T. H. Smith points to a strong argument that force used merely to obtain possession, and not to overcome or prevent resistance, is insufficient for robbery.⁸ But even if such cases are removed from the offence, robbery remains a troubling one. The single offence is used to cover a wide range of harm levels, from low-value street muggings involving little or no injury, to large-value organised and armed bank robberies.

The offence of robbery

Robbery was originally an offence at common law, but is now defined in section 8 of the Theft Act 1968:

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

(2) A person guilty of robbery, or of assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.

Robbery is therefore an offence based on two wrongful acts - theft and the use or threatened use of force - committed during a single 'transaction' or 'venture'.⁹ In this respect, robbery is somewhat unusual in that it combines a property offence with an

⁸ A.T.H. Smith, *Property Offences* (Sweet and Maxwell, 1994) 405.

⁹ B. Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64(3) MLR 393 at 396.

offence against the person.¹⁰ The maximum penalty of life imprisonment for robbery is significantly greater than the punishments available for the constituent offences of theft and assault,¹¹ and a number of possible justifications have been put forward for this.

First, the use of force may make completion of the theft more likely.¹² This in itself is unconvincing as it implies that the criminalisation of robbery is principally concerned with reducing the incidence of theft. It does not explain why the maximum penalty for robbery is greater than that for theft if the law is primarily concerned with preventing complete thefts. Second, the use of threat of force makes the theft more highly motivated, and risks exposing the victim to greater injury and to a different type of harm. There is obvious merit in this argument, yet it fails to fully recognise the causal relationship between the theft and assault as required for robbery. A defendant who steals the victim's property and then opportunistically commits an assault is not guilty of robbery as the force is not used in order to facilitate the theft – the theft is complete without recourse to the use of force. Nevertheless, the victim here suffers two types of harm: deprivation of property and physical injury; the same types (and perhaps the

¹⁰ A.P. Simester & G.R. Sullivan, 'On the Nature and Rationale of Property Offences', in R.A. Duff & S. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, 2005) 194

¹¹ Robbery might also be committed where very serious violence is used, constituting grievous bodily harm with intent, for which the maximum sentence is also life imprisonment (Offences Against the Person Act 1861, s.18).

¹² Simester & Sullivan, above n.10 at 194

same degrees) of harm as suffered by the robbery victim, yet no robbery is committed. In this sense, robbery is more than the sum of its parts: it is more than merely a theft and an assault. The rationale for robbery ought to recognise the causal relationship between the theft and the force. More convincingly perhaps, it has been argued that the use or threatened use of force, which is inextricably linked to a theft, fundamentally changes the moral character of the offence from a simple theft to an offence which threatens both property rights and personal integrity.¹³ A person who uses force during the course of a theft demonstrates not only a dishonest character, but a violent one also.

To be guilty of robbery, the prosecution must prove that the defendant used force on any person (not necessarily the victim of the theft), threatened to use force, or sought to put another person in fear of force being used.¹⁴ The Act does not define force, nor does it quantify the level of force required.¹⁵ It has been left to the jury to decide whether the level of force used is sufficient to constitute robbery. In *Dawson and*

¹³ A.P. Simester, J.R. Spencer, G.R. Sullivan & G.J. Virgo, *Simester and Sullivan's Criminal Law: Doctrine and Theory* (Hart, 5th ed, 2013) 575-576

¹⁴ Any threat must relate to an *immediate* use of force; a threat of the future use of force in order to facilitate a theft may constitute blackmail contrary to the Theft Act 1968, s.21.

¹⁵ Interestingly, it is generally agreed that the term 'force' is wider than 'violence', so a robbery may occur where the offender pins down the victim during the course of the theft; whilst his act does not constitute violence, he has used force through the exercise of physical strength. See D. Ormerod & D.H. Williams, *Smith's Law of Theft* (Oxford University Press, 9th ed, 2007) at 239

James,¹⁶ the Court of Appeal held that the jury had been entitled to convict of robbery where the defendant had nudged the victim, causing him to lose his balance and thereby making it easier for the defendant to steal his wallet. Similarly, the Court of Appeal in *Clouden*¹⁷ held that whether the defendant's act of wrenching the victim's shopping basket from her hand constituted the use of force for the purposes of a robbery conviction was a matter for the jury and as such, the jury had been entitled to convict on that basis.¹⁸ The term 'force' has therefore been interpreted widely by the courts so as to include only the slight force used in a nudge or slight push. The effect of this is to regard such offences involving only slight force as robberies rather than thefts, thereby placing them in a category of offence which carries life imprisonment as its maximum sentence.¹⁹ One limitation has however been placed on the level of force required for a robbery conviction. In *DPP v RP*,²⁰ the Court held that snatching a cigarette from the hand of the victim with no physical contact between the two, is incapable of amounting to a robbery as the act does not amount to the use of force. Whilst the verdict may be correct, the reasoning behind it should

¹⁶ (1977) 64 Cr App R 170

¹⁷ [1987] Crim LR 56

¹⁸ In *Corcoran v Anderton* (1980) 71 Cr App R 104, the defendant had snatched the victim's handbag by force. The bag fell to the floor and the defendant fled empty-handed. The Court held that he could still be convicted of robbery as theft does not rely on actual permanent deprivation, only the intention to permanently deprive, and the snatching constituted both an appropriation of property and the use of force.

¹⁹ Ashworth, above n.1 at 855.

²⁰ [2012] EWHC 1657 (Admin).

be treated with some caution The High Court supported its conclusion by reference to an argument that snatching a cigarette ‘cannot cause any pain unless, perhaps, the person resists strongly, in which case one would expect inevitably there would be direct physical contact between the thief and the victim as well’,²¹ yet the definition of robbery does not require any such physical contact between the parties.

There has been considerable academic criticism of the decisions in *Clouden* and *Dawson & James* which upheld robbery convictions for cases involving relatively little force used in pursuit of the theft:

‘...it may well be thought that conduct such as that in [*Clouden*] is more akin to that of a pickpocket than a bank robber and it is quite adequately dealt with by the offence of theft which is, after all, punishable with a maximum of [seven] years’ imprisonment.’²²

That said, not all commentators share the view that bag-snatching is comparable to pickpocketing: some suggest that bag-snatching should rightly be regarded as robbery because snatching will involve some force exerted on the person, whereas the pickpocket will not usually be guilty of robbery because he acts not with force but with stealth.²³ Nevertheless the Criminal Law Revision Committee, upon whose report the

²¹ Per Mitting J at [15]. The definition of the offence does not require pain, merely the use of force;

see D. Ormerod, ‘*DPP v RP* Case Comment’ [2013] Crim LR 151 at 152

²² J.C. Smith, ‘*R v Clouden*: Case Commentary’ [1987] Crim LR 56 at 57

²³ Ormerod & Williams, above n.15 at 240

Theft Act was largely based,²⁴ was of the opinion that bag-snatching from an unresisting victim should not be regarded as using force for the purposes of robbery, although it might constitute a robbery where the owner put up some resistance against the offender,²⁵ grappling to retain possession of the property.

The principle of fair labelling

When a crime is committed, it is not enough that an offender be convicted of *something*, what matters is *of what* he has been convicted.²⁶ To achieve this, the law must distinguish between different types of offending and varying degrees of wrongdoing, and offences need to be sufficiently narrow and appropriately labelled so as to represent the nature and seriousness of the criminal behaviour.²⁷ The criminal law could theoretically operate with a relatively small number of widely-defined offences, 'but we shrink from this in the belief that the label applied to an offence ought fairly to present the offender's wrongdoing.'²⁸ More accurately defined and

²⁴ The suggested definition put forward by the Committee was, a person will be guilty of robbery 'if he steals and in order to do so, wilfully uses force on any person or wilfully puts or seeks to put any person in fear of being subjected to force.' The words 'then and there' were subsequently added, and the word 'wilfully' was removed. See Criminal Law Revision Committee, above n. 7 at para. 65

²⁵ Criminal Law Revision Committee, above n. 7 at para. 65

²⁶ J. Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14(3) OJLS 335 at 351

²⁷ S. Demetriou, 'Not Giving Up the Fight: A Review of the Law Commission's Scoping Report on Non-fatal Offences Against the Person' (2016) 80(3) *Journal of Criminal Law* 188 at 192

²⁸ A. Ashworth, 'The Elasticity of *Mens Rea*', in C.F.H. Tapper (ed), *Crime, Proof and Punishment* (Butterworths, 1981) 53.

narrowly labelled offences are able to convey to both the public and the offender the relative seriousness of the offence, whilst also confining the courts' sentencing powers appropriately to the seriousness of the conduct.²⁹ The first role of the principle of fair labelling is to ensure that the labels attached to offences (and thereby to offenders) adequately describes the type of conduct committed.³⁰ It would be unfair to convict of murder a person who has not caused the death of another person,³¹ since causing death is a defining feature of murder. However, the principle of fair labelling³² goes beyond this by seeking to draw distinctions between offences with widely differing levels of harm or offender culpability. The second role of the principle is therefore to ensure that each label appropriately distinguishes different degrees of a type of harm. In the context of homicide, the principle has led some to question the fairness of convicting of the same offence those who kill in 'cold blood' and those who kill a relative in an act of mercy:

'One of the long-standing criticisms of English homicide law is that the crime of murder, which is supposed to encompass the most serious forms of homicide, is in

²⁹ A. Ashworth, 'Taking the Consequences', in S. Shute, J. Gardner & J. Horder (eds), *Action and Value in Criminal Law* (Clarendon Press, 1993) 114.

³⁰ J. Chalmers & F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217 at 222.

³¹ V. Tadros, 'Fair Labelling and Social Solidarity', in L. Zedner & J.V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press, 2012) 67

³² When first imagined, the principle was referred to as 'representative labelling'; see Ashworth, above n.28. Glanville Williams later suggested that the term 'fair labelling would serve better'; see G. Williams, 'Convictions and Fair Labelling' (1983) 42(1) CLJ 85 at 85. Fair labelling has since become the more widely-used term.

some respects defined too widely. Some defendants who are convicted of murder do not deserve anything like the same degree of moral censure and level of punishment as others.³³

Accordingly, the principle of fair labelling seeks not only to accurately describe the offending conduct, but also to distinguish between acts that could be classified under the same offence group despite differences in their degree of wrongdoing.³⁴ An unfair label risks misrepresenting the nature and seriousness of the offender's conduct, thereby potentially misleading the public into believing that the conduct was more serious than it in fact was.³⁵ Fair labelling does not only have to be considered from the offender's perspective. An unfair label may also affect the victim of the offence by failing to properly reflect the wrong that they have suffered.³⁶ In addition to these normative concerns, there are also practical justifications for adherence to the principle of fair labelling. The criminal label attached to the person is important for determining the maximum penalty available to the court upon conviction, whilst also establishing the relevance of any previous convictions, and the classification of prison in which the offender will serve his sentence in the event that a custodial sentence is

³³ Chalmers & Leverick, above n.30 at 246. See also B. Mitchell & J.V. Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart, 2012) 7

³⁴ H.M. Zawati & T.A. Doherty, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, 2014) at 26

³⁵ Chalmers & Leverick, above n.30 at 226

³⁶ Tadros, above n.31 at 68

imposed.³⁷ In addition, the label may lead to the offender being be shunned by the community, ultimately raising greater challenges to securing future employment.³⁸ A label which accurately and precisely describes the nature and seriousness of the conduct helps to ensure that accurate records are kept, and reduces the likelihood of misrepresenting the nature or seriousness of the offender's conduct.³⁹

Robbery and fair labelling

The current definition of robbery clearly violates of the principle of fair labelling. The offence carries a maximum penalty of life imprisonment, and conjures up an image of an armed raid by a masked gang seeking substantial gains.⁴⁰ Yet, as already outlined, the offence is also made out by a slight push used in order to snatch a bag from the victim's possession. The single 'robbery' label does not reflect the obviously different degrees of force used or threatened in these very different cases. Ashworth has argued that an offence as broad and undifferentiated as robbery should be rejected on the basis that it:

‘...fails to mark in a public way the distinction between a mere push and serious violence, and because the label ‘robbery’ is therefore too vague and too liable to

³⁷ A. Ashworth & J. Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013), p.77

³⁸ Tadros, above n.31 at 70

³⁹ Ashworth, above n.28 at 56

⁴⁰ Ibid. at 56

stereotypical interpretations – some may assume that serious violence, or a weapon, was involved when this was not necessarily the case.⁴¹

He continues to say that whilst robbery is often regarded as a serious offence, this is only true of some robberies: others involve only a small theft with only slight force which itself would not amount to anything more than an assault or battery.⁴² Indeed, there are other robberies in which the threatened use of force need not amount to a criminal offence at all: to be guilty of an assault, the defendant must cause the victim to apprehend immediate and unlawful violence,⁴³ but a person can be guilty of robbery even where the threatened use of force does not lead the victim to apprehend violence.

According to the principle of fair labelling, offences should reflect meaningful distinctions in the public mind between types of culpable wrongdoing. Offences should be drafted to distinguish significant differences in harmfulness, wrongdoing, and culpability.⁴⁴ Green and Kugler's study on the public's perception of the seriousness of property offences offers some evidence of noticeable distinctions in

⁴¹ Ashworth, above n.1 at 856

⁴² Ibid.

⁴³ *R v Ireland* [1998] AC 147

⁴⁴ A.P. Simester & A. von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart, 2014) 204

the public mind between robberies involving varying degrees of harm and wrong.⁴⁵ The study asked 166 respondents to rank different property offences by seriousness. On average, the respondents regarded armed robbery (involving the threatened use of a gun in order to steal property) as more than four times more serious than simple robbery (involving the snatching of the same property).⁴⁶ Both offences would fall within the current English definition of robbery, yet the perceived difference in seriousness between the two forms of robbery was, according to the study's respondents, greater than the difference between simple robbery and any other form of theft.

This suggests that robbery is currently too wide and should be narrowed or subdivided in order to properly reflect the extent of the force used or threatened. An argument could also be made in favour of redrafting the offence of theft – itself a constituent element of robbery – so as to reflect the difference between a low-value taking and a high-value theft,⁴⁷ but this is probably secondary to the issue of violence which will often represent the more serious element of the robbery and which ultimately explains the disparity between the maximum penalty for theft and that of robbery. Fair labelling is already adopted for non-fatal offences against the person, and there would surely be little – if any – support for a single all-encompassing offence of using

⁴⁵ S.P. Green & M.B. Kugler, 'Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation' (2010) 7(3) *Journal of Empirical Legal Studies* 511

⁴⁶ *Ibid.* at 527

⁴⁷ J. Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 428

force against another person,⁴⁸ yet where the force is used in conjunction with a theft, that is precisely what the law currently provides: a single offence which does not differentiate the extent of the force used.

As has already been established, there is no minimum level of force required in order to convict a person of robbery; even the slightest nudge or push would entitle the jury to convict of robbery instead of the less serious offence of theft. Imagine a fairly typical street theft: a person is standing at a bus stop with a shopping bag placed at her feet. Concealed from her, another person approaches from behind, snatches the bag from the ground, and runs off. Here it is likely that the offender would be charged with theft; there is no force used against the person because the shopping bag is not in the immediate possession of the victim at the time of the theft. Alternatively, imagine that our victim is holding the bag in her hand whilst waiting at the bus stop. As before, the offender approaches from behind and snatches the bag – this time from the victim's hand. The fact that the assailant approaches from behind might mean that the victim was unaware of his presence, and she may not have put up much resistance against the grabbing. Nevertheless, the offender in this instance could be convicted of robbery: he has used force to facilitate the theft and the victim's apparent unawareness of the impending taking would not preclude a robbery charge. Whilst the latter case would certainly be regarded as more serious than the former, it is questionable whether the relatively limited force used in order to steal the bag from the victim's hand should be sufficient to elevate the offence from theft to robbery, as

⁴⁸ Ibid. at.409

the minimal force used may not adequately change the nature of the offence from a simple theft.⁴⁹ Moreover, the offence could quite adequately be dealt with under the law of theft by regarding the use of force as an aggravating factor, whilst still sentencing the offender within the seven year maximum for theft.

Reform

There are strong arguments in favour of reforming the current law on robbery based on the principle of fair labelling. If it is accepted that the offence is in need of reform, a number of options might be considered. This part considers a number of possible options for reform and examines the merits of each.

One radical solution would be to abolish the offence of robbery and instead rely on the offence's constituent parts – namely theft and assault. There is some academic support for this suggestion, chiefly by Paul Robinson who has argued that:

⁴⁹ A.T.H. Smith claims there is a strong argument that force used merely to obtain possession and not to overcome or prevent resistance is not sufficient for robbery, as it was manifestly not the legislature's intention that section 8 of the Theft Act would cover every theft involving asportation from the victim should amount to robbery. See Smith, above n.8 at.405. For a similar, Australian, perspective, see C.R. Williams, *Property Offences* (LBC, 3rd ed, 2009) 197-198.

‘...creation of a robbery offence adds nothing to the law’s statement of prohibited conduct; the theft and assault prohibitions already clearly criminalise the conduct described in the robbery offence.’⁵⁰

However, some might suggest that this disaggregation approach fails to appreciate what is distinctive about robbery: the offence is not simply the sum of a theft with assault; it is a distinct wrong which ‘is not ultimately reducible to its constitutive elements.’⁵¹ Divorcing the assault from the theft fails to appreciate the causal relationship between the two; it is not enough that the theft and assault simply coincide.⁵² Robbery is only made out where force is used or threatened *in order to facilitate the theft*. The proposal to abolish the offence of robbery would lead to current robberies being charged in the same manner as cases where the defendant assaults the victim and then opportunistically steals his property,⁵³ or where a person

⁵⁰ P.H. Robinson, P.D. Greene, & N.R. Goldstein, ‘Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication’ (1996) 86 *Journal of Criminal Law and Criminology* 304 at 309-310

⁵¹ S.P. Green, *Thirteen Ways to Steal a Bicycle* (2012, Harvard University Press) 92; see also Simester & Sullivan, above n.44 at 195

⁵² See *R v Hale* (1978) 68 Cr App R 415, which decided that where the defendant has appropriated goods in a house, the theft continues while he removes the goods from the premises, so he may be guilty of robbery if he uses or threatens to use force in order to get away with the goods.

⁵³ Cases of opportunistic thefts following an assault do not satisfy the definition of robbery: see *R v Vinall & J* [2012] EWCA Crim 2652 in which it was held that the offender could not be guilty of robbery as the force had not been used to facilitate the theft. Rather, the subsequent theft was opportunistic and the intention to steal the property had not been formed at the time of the assault.

commits a theft alongside a distinct and unrelated assault. A further objection to this proposal is that the offence of assault is not an essential element of robbery⁵⁴: the force used in pursuit of the robbery need not constitute an assault, and the *threatened* use of force may not warrant criminalisation at all since there are no general offences of threatening to use force other than common assault and threatening to kill or inflict serious injury.⁵⁵ This leaves a middle ground, between threats of minor harm constituting common assault, and more serious threats to kill or inflict serious injury, for which a new offence would be required. Ashworth has argued that this gap ought to be closed through the creation of a new offence, suggesting that, were this to happen, there would be a strong argument that the offence of robbery would become obsolete.⁵⁶ But this implies that robbery exists only in order to fill a lacuna in the law where the threat falls between the two criminalised extremes of common assault or a threat to kill. Surely it cannot be right to suggest that robbery – as an indictable offence carrying a maximum of life imprisonment – is to be used only where the threat made is not sufficiently serious to constitute a threat to kill, particularly given that threats to kill are triable either way and carry a maximum of 10 years' imprisonment, substantially less than the maximum for robbery.⁵⁷

⁵⁴ *R v Tennant* [1976] Crim LR 133

⁵⁵ Hoder, above n.47 at.409

⁵⁶ Ashworth, above n.1 at 863

⁵⁷ Offences Against the Person Act 1861, s.16

An alternative solution would be to divide the broad offence of robbery into narrower types, based on the degree of force used or threatened. This would allow the law to distinguish robberies involving the use or threatened use of lesser degrees of force from those involving significant violence or the use of firearms. Ashworth has argued that 'consideration must be given to dividing the offence [of robbery] so as to mark out as particularly serious those robberies which involve the use or threat of serious violence.'⁵⁸ Stuart Green has similarly proposed a system by which robberies are graded according to offence seriousness. He suggests two forms of robbery: aggravated or armed robbery for thefts that involve the use of a weapon or the infliction, or threat, of immediate serious bodily injury, and simple robbery covering thefts committed through the infliction or threat of non-serious bodily injury.⁵⁹ One difficulty with this proposal is that the label 'robbery' carries connotations of a serious offence,⁶⁰ and division of the offence into narrower categories which retain the robbery label (eg 'simple robbery' and 'aggravated robbery') would not necessarily redress the perception of seriousness.⁶¹ This could be overcome through the creation of a new offence, which avoids the use of the stigmatic robbery label; perhaps 'aggravated theft', 'theft aggravated by assault' or 'assault in the course of a theft'. Each of these would signify that the offence involved an element of violence, but would avoid use of the term 'robbery' and its associated connotations. Any use of the

⁵⁸ Ashworth, above n.1 at 856

⁵⁹ Green, above n.51 at 63

⁶⁰ Ashworth, above n.1 at 871

⁶¹ Simester & von Hirsch, above n.44 at 203

term 'robbery' to describe the less serious forms of the offence risks misrepresenting the seriousness of the offence and may ultimately 'have a more detrimental effect on the offender's prospects and reputation' than is deserved.⁶²

Glanville Williams argued it would be both impractical and undesirable to fragment offences into a series of narrow offences which – in the case of robbery - are distinguished on the basis of the level of force used.⁶³ This fragmentation would add to the jury's task and would increase the chance of an 'unmeritorious defence'.⁶⁴ At the heart of Williams' criticism is the impact that offence definitions have on the prosecution's duty in establishing guilt: if offences are defined very broadly, the prosecution's task is eased, but the opposite becomes true if offences are defined narrowly.⁶⁵ The creation of many narrow offences risks overcomplicating the law by raising 'needless arguments about the appropriate charge in respect of indisputably criminal conduct'.⁶⁶ On the other hand, some might question the fairness of the law's generality which is defended primarily on the basis of convenience for the prosecution.⁶⁷

⁶² Chalmers & Leverick, above n.30 at 242

⁶³ The Criminal Law Revision Committee was similarly opposed to creating various grades of robbery 'in accordance with our policy to simplify the law by avoiding unnecessary distinctions between offences', see Criminal Law Revision Committee, above n.7 at para. 66.

⁶⁴ G. Williams, above n.32 at 93

⁶⁵ Ibid.

⁶⁶ Chalmers & Leverick, above n.30 at.239

⁶⁷ Simester & von Hirsch, above n.44 at 207

A third option for reform would be to introduce a minimum level of force to the definition of robbery, thereby narrowing the scope of the offence and preserving it for the more serious examples involving higher degrees of force and corresponding threats. Any offence involving force falling below the minimum level would not constitute robbery and instead would be charged as theft, with the use of force constituting an aggravating factor. Under the Model Penal Code, only those thefts which involve the infliction or threat of immediate 'serious bodily injury' are regarded as robbery and therefore subject to greater punishment. If the theft involves only minimal force, the Model Penal Code treats it as an 'ordinary theft'. In contrast to the option of introducing a new offence of theft aggravated by assault, this solution does not require any new offences to be enacted, and thereby benefits from a simpler framework as the prosecuting bodies would only need to determine whether the offence constituted a theft or a robbery.

Minimal use of force

If a minimum force threshold was introduced into robbery, any offence involving less than the required minimum level of force would fall outside of the scope of robbery and could instead be charged as theft, with the use of force - however slight - would constitute an aggravating factor to be taken into consideration at sentencing. Provision for this is currently made in the existing sentencing guidelines for theft. According to these, the use or threatened use of force during a theft demonstrates a high degree of culpability, which places the offence within the highest of the three

culpability categories.⁶⁸ In addition, the risk or infliction of injury to persons during a theft constitutes a higher than normal degree of harm, and has the effect of pushing the offence into a higher harm category than it would otherwise fall within.⁶⁹ Therefore, where a theft involves the use or threatened use of force which causes or risks injury to another person, the sentencing guidelines regard this as aggravating both the offender's culpability and the level of harm caused or risked. This is likely to have a significant impact on the sentence imposed. If we assume a somewhat typical theft against the person committed on the street where the property stolen is worth less than £500 and in which there are no other obvious aggravating or mitigating factors, the sentencing guidelines prescribe a community order as a starting point, with a sentence ranging from a fine to a community order.⁷⁰ Were this same offence also to involve the use or threatened use of force causing or risking injury, the guidelines point to a starting point of one year imprisonment, with a sentence range of 26 weeks' to two years' imprisonment.⁷¹ This is broadly similar (although narrower) to the range prescribed in the sentencing guideline for robbery, which prescribes, for the least serious form of robbery, a starting point of one year imprisonment and a range from a high-level community order to three years' imprisonment. The sentencing guideline for theft therefore anticipates that the use of force will have a significantly aggravating effect, enough to push the offence over the custody

⁶⁸ Sentencing Council, *Theft Offences: Definitive Guideline* (Sentencing Council, 2015) at 3

⁶⁹ *Ibid.* at 4

⁷⁰ *Ibid.* at 5

⁷¹ Where the force used or threatened does *not* result in the risk of or actual injury to another, the maximum prescribed by the guidelines is 36 weeks' imprisonment.

threshold. Conversely, where force is not used during a low-value theft against the person, the guidelines imagine that our theoretical offender would be spared prison and would instead be dealt with by way of a non-custodial penalty.

The current theft sentencing guidelines therefore show how the use or threatened use of force during a theft can be treated as an aggravating factor of theft rather than charging with the more serious offence of robbery. Of course, there are times when the level of force used will warrant a robbery charge, but where only minimal force is used or threatened, the force used can be taken into account during sentencing for theft without recourse to a robbery conviction. This would more adequately reflect the seriousness of the offence and would satisfy the principle of fair labelling.

Threatened use of force

Instances involving the actual use of force should be regarded as more serious than where the same level of force is merely threatened.⁷² Since the proposal made here is to introduce a minimum level of force to the offence of robbery, should the threatened use of force –however severe - be discounted from the definition? The threat of very little force is perhaps unlikely to result in a robbery; a threat of ‘give me your wallet or I will tap you on your nose!’ is unlikely to instil such fear into the victim’s mind that he actually proceeds to hand over his wallet. In order for the threat to

⁷² Ashworth, above n.1 at.864; A. von Hirsch & N. Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11(1) OJLS, pp.30-31.

facilitate the theft, the level of force threatened must be sufficient for the victim to relinquish his property.

Whilst the actual use of force might be regarded as more serious than the threatened use of force, some threats could be particularly serious and should rightly be sufficient for the purposes of robbery. Entering a bank whilst brandishing a firearm is one obvious example of a particularly serious threat, and the potential conviction for robbery should not be contingent on whether the gun is fired. That is to say, the inherent threat posed by the apparent possession of a firearm should suffice for robbery. Equally, if the offender is carrying an imitation firearm, or if he has a real gun loaded with only blank cartridges which is incapable of being discharged, the victim's perception of the use of force will be very real, and that itself should satisfy the definition of robbery, despite the fact that the firearm poses no real danger.

Ashworth has suggested that if causing *fear* is generally regarded as less serious than causing *injury*, then the law ought to also draw a distinction between causing fear with a real firearm, and causing fear with an imitation firearm since a real firearm is capable of causing an injury which the imitation is not.⁷³ He suggests that the amount of fear in both cases will be the same as victims will rarely realise that the firearm is merely an imitation. Yet the potential for actual injury will be significantly greater if the offender holds a real gun capable of discharge, rather than an imitation, a 'toy gun or

⁷³ Ashworth, above n.1 at.864

even a banana or cucumber in a bag.⁷⁴ There is strength in the argument that causing fear with the potential for actual danger is more serious than causing fear without such risk of danger, but distinguishing threats of real from impossible danger through the creation of a further grade of robbery (if this is what Ashworth proposes), is perhaps unnecessary. Offenders who make threats with the use of real or imitation firearms can both be regarded as robbers without sacrificing the principle of fair labelling, and the distinctions in the levels of harm caused or risked could be dealt with at the sentencing stage. Those who use a real firearm during the course of a robbery could be liable to a sentence premium over those who use an imitation in order to reflect the additional risk posed by the authentic firearm.⁷⁵

Conclusions

One of the major functions of the criminal law is to provide a proportionate response to crime and criminality.⁷⁶ Criminal offences are categorised to symbolise the differing degrees of moral wrongfulness and relative gravity of different types of conduct,⁷⁷ but this symbolic declaratory function cannot be conveyed adequately through broad

⁷⁴ Ibid.

⁷⁵ The possession of a firearm or imitation firearm is also likely to give rise to a separate offence under the Firearms Act 1968, principally section 16 possession with intent to injure, section 16A possession with intent to cause fear of violence, or section 18 carrying a firearm with criminal intent.

⁷⁶ B. Mitchell, 'Minding the Gap in Unlawful and Dangerous Act Manslaughter: a moral defence for one-punch killers' (2008) 72(6) *Journal of Criminal Law* 537 at.547

⁷⁷ Mitchell, above n.9 at 398

uninformative labels.⁷⁸ There is a stark difference between tugging a bag from the victim's hand and robbing a bank whilst in possession of a firearm, yet both are covered by the single offence of robbery.⁷⁹ The function of fair labelling is to ensure that distinctions in the nature and gravity of behaviour are marked out in the offence committed through the label used to describe the conduct and the offender.⁸⁰

This article has argued for the recognition of a minimum force threshold within the definition of robbery in adherence to the principle of fair labelling, thereby ensuring that only offences which meet this minimum force threshold are described as robberies. Fair labelling has been criticised as leading to 'an unnecessary multiplicity of offences, each based on very narrow definitions and reflecting minute variations between factual situations.'⁸¹ But this objection would not apply to the proposal made here. Aligning the definition of robbery to the principle of fair labelling by incorporating a minimum force threshold does not require the creation of any new offences. That said, a graded system akin to that proposed by the likes of Stuart Green and Andrew Ashworth need not require a deluge of new forms of robbery either. After all, Green proposes only two forms of robbery: simple and aggravated. Arguably the principle of fair labelling should seek only to distinguish between *significant*

⁷⁸ C.M.V. Clarkson, 'Theft and Fair Labelling' (1993) 56 MLR 554 at.555.

⁷⁹ D.J. Baker, *Glanville Williams' Textbook of Criminal Law* (2015, 4th edition, Sweet and Maxwell) 1343.

⁸⁰ J. Horder, above n.26 at 342

⁸¹ Mitchell, above n.9 at 411

differences in the nature or wrongfulness of conduct.⁸² This article has sought to establish an argument that the use or threat of minor force does to adequately change the nature of the offence such that the charge against the offender should be uplifted from theft to robbery.

Having argued for the recognition of a minimum force threshold, one obvious matter remains: if the law should distinguish between levels of force which are capable of amounting to robbery and those that are not, where should the line of demarcation fall? At what point does the level of force become sufficient for robbery? If the minimum force threshold is drawn low on the force-spectrum, robbery would remain a relatively wide offence since a broad range of degrees of force would suffice for robbery. According to Simester and von Hirsch, the law must occasionally accept some over-inclusive criminal prohibitions as it will often be impractical to draft offences which encompass all – but only – instances of conduct to which a particular offence should be aimed.⁸³ On the other hand, if the threshold was drawn higher on the force-spectrum, robbery would become a narrow offence reserved only for the most serious forms of violence. This would mean that thefts involving a moderate level of force would not constitute a robbery, yet labelling such behaviour as a mere theft would also contravene fair labelling and would not reflect the type of conduct experienced by the victim.

⁸² Simester & von Hirsch, above n.44 at 204

⁸³ Ibid. at 208

Wherever the force-threshold may fall, the argument made here is that the minimal force used in *Dawson & James* and bag-snatchings with little or no victim resistance should not amount to robberies. The principle of fair labelling requires that offences be labelled and defined in such a way as to convey accurately the nature and seriousness of the conduct, ensuring that the label does not mislead through vagueness or over-generalisation.⁸⁴ The force-threshold should therefore be drawn at a point where the force changes the nature of the offence from a theft aggravated by force, to a robbery.

WORD COUNT: 6,025 (excl. footnotes)

⁸⁴ Ibid. at 208