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The Prosecution of Bruno Richard Hauptmann: An Imitation of Falconry

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ABSTRACT: The trial of Bruno Hauptmann is critiqued in terms of the overriding prosecutorial interest in securing the death penalty. The intricate and ingenious methods by which the prosecution blended the law of New Jersey and the common law and the trial testimony of numerous witnesses, both scientific and lay persons, to achieve its objective are explicated. The author mentions other alternatives to those employed as well as the strategies of prosecution and defense at the trial.

KEYWORDS: plenary session, jurisprudence, Lindbergh kidnapping case

From any viewpoint, the prosecution of Bruno Richard Hauptmann glowers forth as another frowning glory of the American system of criminal justice [*1*]. It proved, if proofs were needed, that on occasion the American System of Criminal Justice is indistinguishable from falconry. That should come as no surprise, for Hauptmann was charged with the killing of the son of the most notable of notables, the internationally acclaimed "Lone Eagle." Criminal trials, in such cases, are destined to reveal the worst flaws and most tawdry aspects of the legal system and those who manage it. Witness, in proof, the recent trial of John W. Hinckley, Jr. for the shooting of President Reagan.

In other respects, the death of Charles Augustus Lindbergh, Jr. and the apprehension and trial of Bruno Richard Hauptmann was a melange of improbable occurrences and surprising quirks, sometimes of fate. By all rights the Lindberghs should not have been at their home near Hopewell, NJ on the night of 1 March 1932, but their 20-month old son's cold kept them there. The shutters to one and only one of the three windows in the baby's nursery could not be closed snugly enough to be locked, leaving a point of entry for a burglar. President Roosevelt might not have called in all gold notes, thereby making the ransom notes possessed by the kidnapper more conspicuous.

Even today, upon a re-evaluation of the evidence in the trial and conviction of Hauptmann, surprises tumble forth. We learn for example that William Kuntsler, that fiery and contentious attorney for the unpopular and the underprivileged, has written a book describing in detail the facts of various murder cases that will not die [*2*]. The Hauptmann case is one of them [*3*], and is reported, most uncharacteristically, without the statement of fanfare or outrage from the author, who maintains his letter-perfect objectivity throughout. Whereas Kuntsler thought the case worthy, at least, of passing mention, the law reviews in the 1930s overlooked it altogether, all save one [*4*] of the lesser lights among them, that is.

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No Harvard, Yale, or Stanford law review jumped into the breach with a case note on it. Apparently, the case was more of a journalist's toy than intellectual grist for the law review mills.

And the yahoos were everywhere. Where the Hauptmann trial did not give them the impetus to surface, its appellate court aftermath did. We find them even in the august precincts of the United States Supreme Court, which rejected [5] Hauptmann's plea to review the New Jersey Court of Errors and Appeals affirmance of his conviction [6] and also later denied a death row petition for habeas corpus from him [7]. Squirreled away in the retired writ of certiorari files at the National Archives is an affidavit from one Eduarda K. Baltuff, a self-styled Tacoma, WA "special investigator." This affidavit maintains that the Lindbergh kidnapping had its source in an "Internationale scandal and intregue" in which Colonel Lindbergh was a party. This plot did not result in the baby's death, Ms. Baltuff maintained. Thus Hauptmann must be reprieved. How this astounding affidavit ever found its way into the Supreme Court's files is a mystery and a surprise.

Even sober assessments of the Hauptmann trial contain their own inexplicable features. Professor Seidman's masterly and exhaustive review of the constitutional law dimensions of the Hauptmann trial [8] is a case in point. One looks in vain in his long article for a discussion of the exact crime for which Hauptmann paid the ultimate penalty. Only in a footnote does he casually mention "the technical questions concerning the elements of common law and statutory burglary" [9] to which the New Jersey appeals court gave its overriding attention. Only there do we find a glimmer of what we know to be the truth, namely, that Hauptmann was found guilty of burglary in which he stole a child's sleeping suit and then, by some mishap, caused the child's death. This was "the terrible crime" [10] he had committed and for which he was electrocuted. This was in the words of French author/politican, Andre Maurais, "a crime which deserves no pity" [11].

It is to this as yet untold story of the crime of Bruno Richard Hauptmann and the prosecutorial shennanigans involved in its proof that this paper is directed.

The Quest for Capital Punishment

As Shakespeare tells us, "Hanging is the word, sir" [12]. What hanging was to Shakespeare's Cymbeline, electrocution was to New Jersey's Attorney General Wilentz and his staff in the trial of Bruno Richard Hauptmann.

Hauptmann had to die. That much was certain. The great god demos had to be served. The public's cry was, as defense attorney Lloyd Fisher perceived, a "cry for blood" [13]. Just as at the ancient common law "a price is set on life," called wergild [14], so in Flemington, NJ in 1935, the killer of "Little Lindy" had to pay the ultimate price for causing the death of the internationally feted Lone Eagle's first born son. The price was to be commensurate with the deed. The proportion must be exact, according to the resurrected common law prescription.

But it cannot be gainsaid that Prosecutor Wilentz's desire to gratify the mob's passion for revenge was in accord with what some respected legal scholars have seen as the proper function of the criminal process. "The first requirement of a sound body of law is," said Justice Oliver Wendell Holmes, Jr. "that it should correspond with the actual feelings and demands of the community, whether right or wrong" [15]. Sir James Stephen, noted commentator on the criminal laws of England, put it more quaintly. "The criminal law," he said, "stands to the passion of revenge in much the same relation as marriage to the sexual appetite" [16]. On the other hand, Dean Pound, while realizing that the law "must reckon with a deep-seated popular desire for vengeance in crimes appealing to the emotions," still considered the crowd's blood lust to be an "inherent difficulty in all criminal justice" [17]. The reasoned stirrings of the community should be respected, but "not its views when momentarily inflamed" [18].

It is easy to see which way the prosecution resolved any doubts it might have had over which of these competing jurisprudential claims was more meritorious. The trial transcript is packed with illustrations of its appeals to, what a contemporary account called, the "mass orgy of hatred and revenge," [*19*] which could be sated only by the execution of Hauptmann.

In implementing this death directed prosecution, it was imperative at the outset that no talismen with scruples against the imposition of the death penalty be allowed to sit on the jury. In pursuit of that aim, the prosecutor of the pleas, Mr. Hauck, asked each prospective juror whether he or she was opposed to capital punishment. When, for example, Mrs. Lillian B. Johnson, the first venireman questioned responded "Yes, I think I am," [*20*] the prosecutor immediately requested the judge to excuse her "for the reason that she is opposed to capital punishment" [*21*].

Judge Trenchard, however, was not quick to accede to the prosecutor's plea. "Does that mean that you have conscientious religious scruples against capital punishment?," [*22*] he inquired of Mrs. Johnson. "Well, it doesn't seem right to take a man's life," [*23*] she responded. After further probing by Judge Trenchard, it became clear that Mrs. Johnson had reservations, not fixed opinions, in opposition to the death penalty. The court, therefore, refused to excuse her on the basis of a bias or predilection that would impair her impartiality. This procedure accorded with the now current practice mandated by the United States Supreme Court's opinion in *Witherspoon v. Illinois* in 1968 [*24*].

But the prosecutor was not content that Mrs. Johnson would vote to execute Hauptmann. He, therefore, used one of his peremptory challenges to strike Mrs. Johnson from the jury panel. This practice of challenging veniremen who exhibited the slightest hesitancy toward the imposition of the death penalty and following an unsuccessful challenge with an automatic removal through the prosecutor's exercise of a peremptory challenge was regularly employed throughout the voir dire of the talismen. The prosecutor, in this fashion, secured what he sought, that is, a death-qualified jury. In today's legal world, such a death-qualified jury, it has been argued, is more prone to convict. even if it is neutral on the merits of capital punishment. The decisions [*25*] indicate that the courts have not set aside convictions based on such assertions of a jury's partisanship.

Once the jury was empanelled and the trial underway, the prosecutor's all encompassing strategy to secure the death penalty for Hauptmann became brutally obvious. At one point the prosecutor came close to proclaiming that as his objective, without insinuation or equivocation. In his summation, Wilentz called upon the Old Testament to refute Defense Attorney Reilly's reliance upon the compassion and mercy of the New Testament. "Judge not lest ye be judged, my adversary says," [*26*] orated Wilentz, "but he forgets the other biblical admonition, 'and he that killeth any man shall surely be killed, shall surely be put to death' " [*27*]. A better, more direct expression of the retributive stance of the lex talionis [*28*] and of its invocation by the prosecution against Hauptmann would be difficult to find. Needless to say, such cliché-ridden expressions are not and should not be substituted for an argument grounded on admissible evidence. "Prosecutors have been admonished repeatedly" [*29*] to eschew such inappropriate, albeit colorful, appeals to nonevidentiary matter.

Wherever the occasion called for it and, more often, where it did not, Prosecutor Wilentz would seek to arouse and inflame the jury with deft sulphurous touches to a fever pitch against Hauptmann. It did not suffice for him to charge Hauptmann with the death of Mrs. Lindbergh's cherished "fat lamb." He also accused him [*30*] of hastening the death of Violet Sharpe, an employee in the Lindbergh household who committed suicide after unremitting interrogation by the police, and of seeking to crush, in his word, Betty Gow. But these reckless and unsubstantiated charges were nothing in comparison to his characterization of Hauptmann as "Public Enemy Number One of the World" [*31*] as a "cold-blooded murderer," [*32*] as "a fellow that had ice water in his veins, not blood" which ice water would be "thawed out ... when he hears that switch" [*33*]. One can imagine the telling gesture of throwing a switch that might well have accompanied the use of the word "switch."

But the most egregious of these appeals to the jurors' baser instincts appeared during the prosecutor's opening statement when he, quite gratuitously and most outrageously and without objection, gave the jury a detailed description of the condition of the victim's body when located a month after the kidnapping. "The body was horribly decomposed," [*34*] he began. Not satisfied, he expatiated: "One leg had been eaten away and carried away, one hand had been taken away, a great part of its body had been eaten away, the rest of it decomposed, the skin, the flesh, rotted away, in that hole, the grave that Hauptmann had placed for it" [*35*].

This was no intimation. This was a statement, an emphatic assertion. Hauptmann deserved to die, if not for the murder he had committed, then for the desecration of the baby's dead body by a combination of natural decomposition and the action of animals. Even the New Jersey appeals court seemed overcome by the condition of the victim's body when discovered, for it referred to the body as not only decomposed but "mutilated" [*36*]. The ominous implication of Hauptmann's accountability for the sad and tragic state of the victim's body when found had insinuated itself even into the emotions of the appellate court.

The Legal Path to Hauptmann's Conviction

So Hauptmann must die, but by what legal route was his execution to be accomplished? Unfortunately, kidnapping, although then a punishable offense in New Jersey, was only a high misdemeanor and consequently, not punishable by death.

The murder statutes were the most obvious recourse, since a conviction of murder in the first degree required the death penalty unless the jury voted against it. A verdict of murder in the first degree, in the absence of a recommendation of mercy, would, therefore, mandate execution.

In 1932, New Jersey, after the pattern of the Pennsylvania revisions of 1794, had divided murder into two degrees. The Pennsylvania legislators, motivated by deep Quaker sentiment or lobbying, had adopted this innovation to limit the situations when capital punishment could be invoked. As a result, in New Jersey, as in Pennsylvania, capital punishment was available only for homicides constituting murder in the first degree. But, in order to distinguish murder in the first degree from murder in the second degree, a new terminological formulation was forthcoming. Upon a trial for murder in the first degree, there had to be proof not only of an intent to kill but also of premeditation and deliberation. Lacking such premeditation and deliberation, the murder would be noncapital murder in the second degree, unless a felony murder trap could be sprung.

As at the common law, capital murder in New Jersey in 1932 could be established without proof of premeditation and deliberation or even without an intent to kill. Such murder devoid of intent had long been dubbed felony murder. It seemed ready-made for the killer of Charles A. Lindbergh, Jr.

Felony murder, both in its common law garb and in its modern day usage, has had a most uncertain, checkered, and controversial history and application. Blackstone's statement that "(i)f one intends to do another felony, and undesignedly kills a man, this is murder" [*40*] is most frequently cited as the definitive exposition of the common law on the subject. If nothing else, it was the most succinct statement of the rule. But at a time when a man could be hanged for any felony, whether death ensued as a consequence or not, "it was considered immaterial whether a man was hanged for one felony or another" [*41*].

Since, at the common law, murder was not divided into degrees and all murder required proof of malice aforethought, it became important to erect a theoretical framework to allow unintended homicides in the course of the commission of a felony to bridge the malice aforethought gap between murder and manslaughter. With the semantic ingenuity of the common law, felony murders were said to possess a constructive or implied malice. The distinc-

tion, which became well settled, was between murders with malice in fact and those with malice in law, in which latter grouping was to be found felony murder.

In recognition of the overreach and underpersuasiveness of the felony murder doctrine at the common law, statutes in this country, most notably the Pennsylvania statute of 1794, limited the underlying felonies for which one could be charged as a felony murderer to a few presumptively dangerous ones. Typically, robbery, rape, and burglary were among the chosen few. At the time of the death of "Little Lindy" in 1932, New Jersey had a statute listing only certain felonies as capable of bearing the stigma of felony murder, and for which the death penalty was imposable [*42*].

Such was the statutory state of affairs in New Jersey when the Lindbergh case developed. The options available to a prosecutor hell bent on capital punishment were, essentially, two, either

(1) charge Hauptmann with a premeditated first degree murder or
(2) charge Hauptmann with a killing occurring in the course of one of the statutorily specified felonies.

In resolving this dilemma, a practical consideration intrudes. Which of the two alternatives would be simpler for the prosecution to prove in order to obtain a conviction?

It is well known that "the rule (of felony murder) is too attractive to law enforcement to be easily surrendered. It provides a formal track of liability, which permits a conviction regardless of the jury's assessment of culpability for causing death ..." [*43*]. It may not be entirely accurate to describe felony murder as a prosecutor's darling, what with conspiracy making its own urgent claim to such top billing, but felony murder is an inestimable prosecutorial favorite. It achieves that high ranking by its elimination of the need to prove a premeditated intent to kill in order to convict of murder in the first degree.

The choice, therefore, in the prosecution of Hauptmann seemed predetermined. Felony murder it was, but which felony was to be alleged to be the underlying felony. Why, that goes without saying. Kidnapping, of course, for was not that the entire design and motive of Hauptmann in his avaricious quest for the ransom money. Yet, there was a snag.

Kidnapping was not listed among the enumerated felonies in Section 107, the murder section, of the Crimes chapter of the Compiled Statutes of New Jersey in 1932. Indeed, it was not included in the felony murder statute until 1952 [*44*]. Thus, in spite of the determined assertion of esteemed Dean William Prosser that "Bruno Richard Hauptmann was unquestionably proved guilty of the kidnapping and murder beyond any ghost of a reasonable doubt," [*45*] Hauptmann could not be and was not charged or convicted of a death occurring in the course of a kidnapping.

What then was to be the grounding for a charge of felony murder? The possibilities were detailed in Section 107 as "arson, burglary, rape, robbery or sodomy." Of these five felonies, only two were even minimally chargeable to Hauptmann, burglary or robbery.

The Indictment

After all was said and done then, Hauptmann was to be indicted for a death occurring in the perpetration of either robbery or burglary. But hold.

The indictment of Hauptmann, filed on 8 Oct. 1934, by the Hunterdon County grand jury recited that Hauptmann "did wilfully, feloniously and of his malice aforethought, kill and murder Charles A. Lindbergh, Jr." Nary a word is said of felony murder in the perpetration of burglary or robbery or any other crime. On its face the indictment seems to be a straightforward and unambiguous charge of an intentional and premeditated murder in the first degree.

Yet such an interpretation would be a misunderstanding, for it would be a disservice to the verbal legerdemain that was at the core of the common law of crimes. Inherent within the

common law meaning of malice aforethought lies the solution. According to Sir James Stephen "the word malice here means a variety of totally different states of mind" [*46*]. Even though malice aforethought has been said by responsible authority to be an "elusive and vague" phrase [*47*] still it is undisputed that it encompasses both intentional killings and killings in the course of a felony. If the killing is intentional, the malice is said to be express and if the death occurs in the course of a felony, the malice is implied [*48*]. But, in either event, it is all packaged under the same label, malice aforethought.

So it seems that the prosecution was not, on its own volition, about to make an election between felony murder and intentional homicide, at least not at the early indictment stage of the proceedings. Indeed, the prosecution did not even spell out in informative detail in the indictment that Hauptmann was to be proved guilty of felony murder or, in the alternative, premeditated murder or, conceivably, both. The prosecution could have made its indecision, or lack of evidence, whichever it was, plain in the language of the indictment while still leaving its options open until the introduction of evidence. Instead, it chose to charge the nebulous crime of murder with malice aforethought. The prosecution was, as the platitude has it, to have its cake and eat it too, while leaving Hauptmann's attorneys to speculate as to its intentions.

Waller, in the least emotionally or factually flawed of all the accounts of the Lindbergh crime, suggests another interpretation for the brevity of the indictment. No felony nor even felony murder was mentioned, according to Waller, "in order to prevent Hauptmann from pleading guilty to the lesser charge and thus escaping the death penalty if convicted of the capital offense" [*49*]. How wide of the mark can a journalist qua lawyer be? Hauptmann could not have avoided the death penalty so handily, regardless of whether one or one-hundred felonies were charged in the indictment. A plea of guilty cannot be foisted on the state or the court, particularly when the plea is a trick to avoid a conviction and sentence upon a greater crime. The law may be rife with occasions for ruses and subterfuges but this is not one of them. Nor could the state and the court be so readily taken in.

Whatever else may be said of the trial of Hauptmann in these revisionist days, if we assume that Hauptmann was the wrongdoer, there are still two puzzling questions that are unanswered. One is "whether Hauptmann had an accomplice" [*50*] and the other is "whether he deliberately murdered the baby after taking it from the nursery, or whether the child was killed in an accidental fall when a rung of the ladder broke" [*51*]. The possibilities, in responding to this second inquiry, were either guilt of a premeditated murder or guilt of felony murder, without premeditation.

Ah, but you argue, what difference did it make since whether accidental or intentional, it was murder in the first degree, a capital offense either way. True, but this assessment gives little credit to the artful prosecutorial strategems that such an undifferentiated, uninformative indictment would intimate and encourage.

In the first place, there is a Federal constitutional imperative that an accused be informed of the charge upon which he is to stand trial [*52*]. There are various constitutional underpinnings for this precept, arising from considerations of double jeopardy, the need to prepare a defense, and the right to a grand jury's indictment. The New Jersey courts have made explicit their recognition of the necessity that an indictment set forth "in reasonably understandable language ... all of the critical facts and each of the essential elements which constitute the offense alleged" [*53*].

That the defense was in some dismay over the exact nature of the crime charged to Hauptmann is manifest from the request for a bill of particulars that the defense filed asking for elaboration and specificity on the charges. The first two requests state the tone. "1. Is it the intent of the indictment to allege that murder was committed with premeditation and with malice aforethought? 2. Is it the intent of the indictment to allege that the murder was committed while the indicted subject was engaged in the commission of a felony?" [*54*].

It is reported [*55*] that of the twelve demands made for information, the prosecution replied only to the last item which asked "What does the State contend was the cause of the

death of the said Charles A. Lindbergh, Jr.?" The answer to that question cast no light on whether an intentional or accidental (felony murder) homicide was being charged, for either could have caused the child's fractured skull.

Since 1932, at least one New Jersey appellate court opinion has suggested that an indictment in the manner of the Hauptmann indictment, unclarified by a bill of particulars, might not pass muster on appeal. However, the Hauptmann indictment's tracking the statutory form has been held not to be objectionable, in New Jersey [*56*] or in other states [*57*]. Today, the New Jersey court rules require "a bill of particulars ... if the indictment or accusation is not sufficiently specific to enable the defendant to prepare his defense ..." [*58*]. But all of this is after the fact and of no possible solace so far as Hauptmann is concerned.

There is another possible basis for the generality of the Hauptmann-style indictment, aside from its having become hoary with usage in New Jersey prior to the advent of Hauptmann. It might be submitted that the vague terms of the indictment would allow the prosecutor to introduce proof and to make allegations encompassing both intentional and accidental homicide. In the eyes of the United States Supreme Court, such prosecutorial ambivalence and vacillation is impermissible for it leaves the state "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal" [*59*]. The real possibility of resulting jury confusion exists, to the extent that some jurors might have found an accidental killing in the course of a rather tenuously proved felony only because of the strong, albeit unprovable, and even intemperate allegations of intentional homicide.

Hauptmann's petition for review by the United States Supreme Court, which was denied out of hand, notes the "flip-flop" remarks of the prosecution in its summation at Hauptmann's trial [*60*]. On the one hand, the prosecutor maintained that "We have proved first that the blow was inflicted by the fall from the ladder-" [*61*], which would, of course, presuppose an accidental fall. But, contrariwise, the state submitted that it had proved Hauptmann to be guilty of intentional murder, never mind how it was accomplished. He either "smothered and choked that child" [*62*] while still in the nursery or used "the chisel to crush the skull at the time or to knock it into insensibility" [*63*].

The prosecutor's interest, in the common phrase, in keeping his options open is a commendable trial tactic. It is otherwise, however, when the concrete and positive allegations of an intentional killing are entirely baseless, that is, totally unsupported by the evidence received at the trial. Of course, there is no impropriety so long as the prosecutor's comments are "confined ... to the evidence" [*64*]. But, in this case, the record is devoid of support for a theory of intentional murder.

True, Sidney Whipple, in his running account [*65*] of the police investigation that resulted in the apprehension of Hauptmann, does assert that the state authorities were persuaded that the kidnapper had killed the child intentionally in "a clearing high above the Lindbergh manor" so as to make himself less conspicuous as he sought to make his escape from the Hopewell area. Although this surmise was as plausible as so many others that went the rounds, still no factual support for it was introduced at the trial. And, in any event, this speculation would place the murder well beyond the confines of the Lindbergh home, while the prosecutor's summation pinpointed the nursery as the scene of an intentional murder.

Regardless of whether the defense was misled by the murder indictment or not, neither Trial Judge Trenchard nor the New Jersey Court of Errors and Appeals were deceived. Both Judge Trenchard, in his instructions to the jury, and the appellate court, in affirming Hauptmann's conviction, highlighted Hauptmann's crime as felony murder, if anything, which was precisely what the prosecutor had himself done in his opening statement to the jury at the commencement of the trial [*66*].

Naming the Felony: Kidnapping, Burglary, or Robbery

Kidnapping—Once Over Lightly

If felony murder was to be the avenue by which Hauptmann was to be executed, then the next question stood out more boldly than its resolution. On which felony was the charge to

be grounded? Kidnapping, as has been already observed, could be instantly rejected for it was not named in the then existing New Jersey murder statute [*67*] as warranting a murder charge for deaths occurring in the course of its commission. Nor was kidnapping a felony at the common law [*68*]. Only burglary or robbery were legitimate contenders for prosecutorial attention.

Robbery—A Second-Guesser's Choice

Both robbery and burglary found their origins in the rubic's cube-like intricacies of the common law. Both crimes had New Jersey statutory counterparts [*69*] for their common law antecedents. With the benefit of almost 50 years worth of hindsight, we now know that the prosecution chose to rely upon proving that Hauptmann was involved in a burglary, or its aftermath, when the child was killed. Robbery did not enter the picture at all, although, for all we know, the prosecution's camp might have considered and discounted it, for reasons about which we can now only conjecture.

That burglary was uppermost in the estimation of the prosecution is immediately evident. The prosecutor's opening statement to the jury emphasized it and enunciated the elements of it which the prosecutor would seek to prove. The trial transcript reveals numerous instances in the testimony of the witnesses when the prosecution's inquiries were noticeably aimed at proving the necessary elements of burglary. Judge Trenchard's instructions to the jury conscientiously outlined the items that it was the jury's prerogative to determine on the issues of the alleged commission of burglary. And, finally, the New Jersey appeals court, in reviewing the trial and affirming the conviction and sentence of Hauptmann, gave credence only to burglary as the felony undergirding the felony murder charge.

But why was robbery slighted? What, if anything, were its hazards for the prosecution which made it a less attractive alternative than burglary? For myself, benefiting from the twenty-twenty vision of hindsight, robbery seems more tenable, and less susceptible to the shoals of inadequate proof than burglary, under the known or reasonably inferable facts of the killing of the Lindbergh baby.

Robbery was, both at common law and under the New Jersey statutes in 1932, an aggravated form of larceny. The aggravation resulted from the force or fear, engendered by the threat of force, or other threats, which caused the victim to relinquish possession of some personal property. As Blackstone put it [*70*], robbery is "open and violent larceny from the person." Now, one might ask: what does the forcible theft of personal belongings have to do with the death of Charles A. Lindbergh, Jr. or the guilt of Hauptmann?

Hauptmann was a kidnapper, if anything, one might assert. Correct, but that was only the primary motivation for his actions. Subsidiarily, Hauptmann could be charged as a thief. But what did he steal? Ah, now you have the heart of the matter. He stole the baby, of course. Therefore, to charge a forcible theft of the baby would be but a deft prosecutorial ploy to introduce kidnapping into the felony murder statute under the guise of robbery qua larceny. Good, but it is not quite so simple as that, since there is much doubt and murkiness on whether a person, baby or otherwise, could be the subject of larceny at the common law, the precepts of which had not been expressly abrogated in New Jersey in 1932. But more on this subject hereafter on the issue of burglary.

Thus, if it was questionable that robbery could be charged in the stealing away of the baby, what then could be the subject of the larcenous intent. The baby's sleeping garments, obviously. But there again difficulties rise up to meet even a nimble-witted prosecutor. It is conceded that the baby was discovered, in its shallow grave, clothed in sleeping apparel later identified to have been sewn that very night of 1 March 1932 by Betty Gow. Yet the dead baby's body was lacking one item of clothing in which he was dressed when he was bedded down on that fateful night. I refer to the Dr. Denton sleeping suit, No. 2 (for a two-year-old child), which was his outermost garment.

And this same Dr. Denton suit had been mentioned in the course of the ransom negotiations conducted between Jafsie (Dr. John F. Condon) and John (identified as Hauptmann). Indeed it had appeared as an item in one of the ransom notes [*71*]. Further, the suit had been returned to Jafsie in verification of John's claim to having the Lindbergh baby safely in his custody. Finally, at the final, Mrs. Lindbergh positively identified the suit received by Dr. Condon as the Dr. Denton suit in which her son was clothed on 1 March 1932.

So the net had closed on Hauptmann as the thief who stole a Dr. Denton suit in the course of which the baby died. But proof of larceny would not be enough to convict for felony murder since robbery not larceny was a listed felony in the New Jersey murder statutes. The issue boiled down to whether it could be convincingly established that the Dr. Denton suit was stolen with the use of force or fear. Judge Trenchard seemed persuaded that it was for he spoke, in his jury instructions, of "stripping" the suit from the baby somewhere in the vicinity of the Lindbergh home and near the place where the thumbguard was mysteriously and almost miraculously discovered one month later. Notice that Judge Trenchard termed the act a "stripping," not a removal of the suit. The implication, if one is not wantonly reading between the lines, was that the sleeping suit was forcibly removed from the dead or dying child.

How could Judge Trenchard know that the suit was "stripped" forcibly from the body of the baby? The suit itself was returned, laundered and intact, with no evidence of substantial tears or other damage indicative of a forcible removal. No one testified to having seen the act of stripping being accomplished. And there was no circumstantial evidence, of blood or otherwise, from the body, the location where the thumbguard was discovered or elsewhere to support the trial judge's use of the word stripping with the connotation of force.

Yet even without such proof of a forcible removal, still both common law and New Jersey authorities, as well as others, have supported a conviction for robbery where the exercise of force preceded the taking. Blackstone asserted: "If a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a robbery" [*72*]. The New Jersey decisions rather uniformly concur in Blackstone's view [*73*].

Yet, unlike the facts of these cases and Blackstone's remarks as well, the stealing of the Lindbergh baby's sleeping suit might well have been an afterthought, arising only when the perpetrator realized his kidnap victim was, wholly by accident, either dead or dying. Does it make any difference that the larceny from the baby stemmed from its being unconscious as a result of some other crime that had gone awry? "In other words, does robbery require that the defendant's violence-or-intimidation acts be done for the very purpose of taking the victim's property, or is it enough that he takes advantage of a situation he created for some other purpose?" [*74*]. By "the great weight of authority" [*75*] the theft is properly chargeable as a robbery.

So much having been said of the positive side of a robbery prosecution, what were its pitfalls? Certainly not that the victim, the baby, was not the owner of the sleeping suit. It goes without saying that robbery, like larceny, protects a possessory interest of the victim which is greater than that of the thief. Ownership is nowhere in issue [*76*]. On that incontrovertible basis, the baby's possession of its own sleeping suit would sustain a robbery charge.

Is it then that the sleeping suit lacked sufficient value to be the subject of robbery? No, again no. As Blackstone pithily put it, "(i)t is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery" [*77*].

Was there then no fatal flaw? The only one reasonably perceivable under common law authorities, which New Jersey had incorporated into its robbery statute [*78*], was the requirement that the robbery be, in all essential legal respects, a larceny. And larceny, from time immemorial, has required a very specific and a very difficult to prove intention, namely, that the accused intended to keep the stolen object permanently. The scholars have long termed this, in Latin, the animus furandi of larceny. It might be a snare for the prosecution to

charge robbery, where it was known that Hauptmann had made only temporary use of the sleeping suit and returned it during the ransom negotiations. But more on this hereafter.

Burglary: The Prosecutor's Choice

At bottom, Hauptmann went to his death for an accidental killing in the course of a burglary. That is not what the rather abbreviated, blunderbuss indictment said, but that was what the prosecutor defined for the jury in his opening statement. The proof at trial turned upon a burglary murder and no other crime. And the New Jersey appeals court [*79*] addressed and affirmed the conviction as one for felony murder in the course of a burglary. The only uncertainty is whether the jury truly decided Hauptmann's fate on that basis, or whether they found him guilty of the unproved and unproveable charge of premeditated murder.

A burglar, in the common law view of Lord Coke, was one who "in the night breaketh and entreth into the mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not" [*80*]. As Blackstone perceived it: "In this definition there are four things to be considered; the time, the place, the manner, and the intent" [*81*]. The "several intricacies" of burglary which Sir James Stephen neatly sidestepped by simply saying "I need not notice (them) here" [*82*], were the screws upon which Hauptmann's fate turned. We cannot, therefore, so blithely pass them by.

The individual ingredients of burglary at the common law which had to be proved in the aggregate can be enumerated, shortly, as follows [*83*]:

(1) a breaking and
(2) an entry of
(3) a mansion house
(4) of another
(5) at night
(6) with intent to commit a felony
(7) therein.

In recent years these common law features of burglary have, rather typically, been condensed by the elimination of the breaking requirement. New Jersey is presently of such a mind [*84*]. Other aspects have remained firmly imbedded in burglary statutes, even to the extent that an occasional conviction is reversed for a failure to prove, say, a nighttime breaking and entry [*85*].

Some scholars have pressed even further than mere emendations in the common law of burglary. "The best way to deal with the offense of burglary would be to abolish it," says Professor La Fave. And the influential draftsmen of the American Law Institute's Model Penal Code at first agreed and so proposed [*86*]. But burglary "was so imbedded in the laws and minds of legislatures" [*87*] that such a radical departure, no matter how well intentioned, was recognized to be impossible to implement.

Abolish burglary, I say. How so? Not of course by leaving a void that criminals could exploit, but simply because "(b)urglary is in fact a rather unique type of attempt law, as all the required elements merely comprise a step taken toward the commission of some other offense ... The law of attempts is now adequate to reach such conduct" [*88*].

In 1932, however, burglary had not yet been touched by such revisionist scrutiny. Nevertheless, by a stroke of good fortune, only three of the common law elements of burglary were seriously in contention in the Hauptmann trial. These were: was there a breaking and an entry, a fregit et intravit in the quaint description of Sir Matthew Hale [*89*]? And was there an intent to commit a felony of some variety or other?

Some, the more perspicacious few, might alter my list of the components of burglary by

pointing to the New Jersey burglary statute in existence in 1932 as being the source of all burglary dogma in New Jersey then. Possibly, but the New Jersey Court of Errors and Appeals, on Hauptmann's appeal, declared that "the common-law offense of burglary is fully included" [*90*] in that statute.

More troublesome was both the prosecutor and Trial Judge Trenchard's apparent reliance upon the need to prove that Hauptmann entered with an intent to commit a battery. Judge Trenchard went so far as to comment that "(t)here is evidence from which you may conclude ... that the defendant ... broke and entered ... with intent to ... commit a battery upon the child ..." [*91*]. Unhappily, Judge Trenchard nowhere explains exactly what evidence he had in mind that was supportive of an intent to commit a battery on the Lindbergh baby. No one else, to my knowledge, has ever since viewed the evidence in that light. And the New Jersey appeals court construed this "error, if any" as "too favorable to the defendant" and "prejudicial to the state" [*92*]. Apparently, Judge Trenchard's "intent to commit a battery" requirement exceeded the bounds of common law burglary and imposed an unwarranted burden of proof on the state.

Was There a Breaking, In Law?—Breaking, in the common law crime of burglary was a most abstruse notion, which has given birth to "absurd distinctions" [*93*]. There must be "an actual breaking" as opposed to a mere crossing of an "invisible ideal boundary" [*94*]. Scoring a goal by breaking the plane of the goal line in football may be, to the opposing team, a foul blow, but it would not be a breaking within the technical meaning of that term in the common law of burglary.

Certainly, therefore, if Hauptmann had entered the Lindbergh's Hopewell home through a window then already open, he could not be convicted of burglary. Indeed, on the authority of one scholar [*95*], whose opinions, in other respects, were relied upon by the New Jersey appeals court on Hauptmann's appeal, even a partially opened window or door that is opened further to allow egress would not satisfy the very demanding common law. But, observe, a breaking in burglary law is not necessarily a breaking in actual fact. No breaking of locks, no smashing of windows, no jamming of doors or windows need be established. The prosecution had to prove then that Hauptmann had opened a closed window or door in order to prove he had broken within the meaning of burglary. Did he succeed?

Was There a Breaking, In Fact?—The uncompromised position of the prosecution throughout the Hauptmann trial was that entry to the baby's second-floor nursery had been secured through one of the three windows in it. Indeed, the prosecutor was more specific. Entry had been obtained through the southeast window, for a ransom note had been found in proximity to it in the nursery and tell-tale ladder marks were observed in the muddy ground below it and ladder scrape marks were found on the wall of the house just below that window. Finally, a wood chisel was discovered on the ground beneath that window. Furthermore, the southeast window was the only one of the three in the nursery whose exterior shutters could not be locked.

But could the state prove that either the window or the shutters to the southeast window or both were completely closed at the time Hauptmann entered. That factual finding was crucial to the state's case even though Prosecutor Wilentz, at one point, sought to de-emphasize the significance of the matter. During the testimony of the state's jack-of-all-professions, expert Frank A. Kelly, the defense had objected to the admission of a photo of the exterior of the Hopewell house as not depicting the house as it was on the night of the crime. The claimed differences were that the shutters were off and "the window open, the general condition not as heretofore testified" [*96*]. Prosecutor Wilentz waved aside these charges with the statement that the photo showed "the same house, everything identical, except for the physical fact that a window may have been closed or opened, which is a minor matter after all" [*97*]. A minor matter, indeed. Possibly it was for the authenticity of the photo but not for the appropriateness of a burglary conviction.

In seeking to prove the window and shutters were closed, the prosecutor relied upon the

testimony of Mrs. Lindbergh and Betty Gow. Mrs. Lindbergh took the witness stand first. In her rather terse direct testimony, Mrs. Lindbergh was asked whether, in the course of her late afternoon's walk about the grounds of the Hopewell house, she had "played from the downstairs to the window" in the upstairs nursery. She replied that she "walked around from the driveway under his window and tried to look for him" [*98*]. She indicated she had "attracted the attention of Ms. Betty Gow by throwing a pebble up to the window, and she then held the baby up to the window to let him see me" [*99*]. She further asserted that the window against which she had thrown the pebble was not open at that time [*100*]. So far so good.

But of the three windows in the nursery, had her pebble struck the southeast window. Under the prosecutor's gentle leading, she stated "I don't remember" [*101*] at which window she threw the pebble. In some apparent dismay, the prosecutor repeated her answer. "You don't remember" [*102*], and went instantly to another line of questioning.

Clearly the prosecutor had been caught be surprise by Mrs. Lindbergh's answer, which could in no way advance his theory that Hauptmann had entered by opening the closed southeast window. Others also might be startled to learn of Mrs. Lindbergh's reply. George Waller, for example, both opens and closes his best selling book *Kidnap* with the pebble episode [*103*]. In both places, he has Mrs. Lindbergh striking the corner, southeast window when, in fact, the transcript tells us she could not recall which window she had struck.

Anthony Scaduto, in his mightily flawed apologia in behalf of Hauptmann [*104*], does not even mention the pebble striking the window, not even any window. In his view of the incident, Mrs. Lindbergh had interrupted her stroll and "called up to Betty Gow to bring her son to the window" [*105*]. It is no wonder that there is some confusion among the commentators on this issue since Mrs. Lindbergh herself might have had her memory befogged or, rather, refreshed concerning it. We find that Mrs. Lindbergh's signed and meticulously detailed statement of her perambulations which was given on 13 March 1932 to Lt. John J. Sweeney and Detective Hugh Strong of the Newark Police Department fails to mention the pebble episode at all. As she matter-of-factly reminisced, "(h)is cold seemed much better. I left them and went for a walk down the driveway. When I came back, about 5:00, I went up into the baby's room where I found Betty, Elsie and the baby" [*106*].

If the southeast window were to be proved to be closed, then, it would have to await Betty Gow's testimony. And the prosecutor was not disappointed in her. Ms. Gow, who was a most unflappably testy witness on cross-examination, was immensely helpful to the state on direct. She volunteered to mention that Mrs. Lindbergh "was throwing pebbles up to the window," but upon being interrupted, the prosecutor never returned to press home his advantage which Ms. Gow's unsolicited comment had given him. Instead, the prosecutor tried a different tack and once again Ms. Gow spontaneously came to his aid.

"Well, finally the child was ready for bed, I take it and she left the room?" inquired the prosecutor. "Yes, the child was ready for bed. I put him in his bed" [*107*], Ms. Gow replied, but then, without defense objection, she hurried on to add: "Mrs. Lindbergh and I went around the windows, closed the shutters, we closed all the shutters tight except the one at the window, the southeast window; this one we couldn't quite close. It had evidently warped, so we closed it as best we could and left it that way" [*108*].

If this unresponsive but telling testimony did not cement the prosecutor's allegation of entry through a closed aperture, Ms. Gow later testified quite responsively that the shutters to the southeast window were unlocked but "drawn against the window" [*109*]. She also asserted that the southeast window, as well as the shutters, was closed [*110*]. And that was that on this essential feature of burglary, for on cross-examination Ms. Gow could not be shaken, or even put in doubt on this issue.

Did Hauptmann Enter Through the Window?—The state's proof of such an entry by Hauptmann rested largely on the handwriting identification and the wood expert, Arthur Koehler's testimony tying the wood used in the construction of the ladder to Hauptmann's attic flooring. Additionally, the footprints in the mud below the window, the marks on the

side of the house, the prints of the heel of the ladder in the mud below the window, the discovery of the abandoned ladder itself and finally, and most disputably, the eyewitness testimony of persons who claimed to have seen Hauptmann in the vicinity of the Hopewell house all implicated someone in the entry to the house.

There has been some difference of opinion over the years as to what was the most compelling evidence of Hauptmann's having entered the house. The New Jersey appeals court found that "the handwriting of the ransom notes" and "the wood used in the construction of the ladder" pointed "unerringly" to Hauptmann's being "inescapably" guilty [*111*]. One newspaper reporter [*112*], a witness to the Flemington trial, has recently given his list of the proofs that led him to conclude that "Hauptmann and nobody else" was guilty. Yet, unaccountably, he does not, as the New Jersey appeals court did, enumerate the handwriting analysis as supportive of Hauptmann's guilt.

Certainly if the handwriting on the ransom notes was not that of Hauptmann, either he did not enter the baby's nursery or he did enter, leaving a ransom note penned by an accomplice. A flaw in the handwriting identification would make the failure of the state's expert, Frank A. Kelly, to find any evidence of anyone's fingerprints in the nursery or on the ransom note or envelope more improbable than it otherwise was. That a careful and thoroughgoing dusting for fingerprints in a well-used room should fail to disclose any evidence of fingerprints raises more than eyebrows.

The state's handwriting experts placed heavy faith in what has today come to be known as "linguistic analysis" in making their identification of Hauptmann as the author of the ransom notes. This technique has been defined as "an in-depth evaluation of linguistic characteristics of text, including grammar, syntax, spelling, vocabulary, and phraseology, which is accomplished through a comparison of textual material of known and unknown authorship in an attempt to determine whether the authors could be identical" [*113*]. This method of analysis is not today considered to be credible testimony in a court [*114*], and the FBI is hesitant to make courtroom-at-trial identifications based on it, at least at the time of this writing [*115*].

Hauptmann's misspellings as well as his unique phrasing were all singled out as individualistic. At the same time he was said to have deliberately misspelled and otherwise sought to throw his trackers off his handwriting trail. Such deceptions were used in the first American child kidnapping for ransom which occurred in Philadelphia in 1874 [*116*]. And they are apparently encountered by document examiners with some regularity.

Albert S. Osborn was, because of his eminence, the chief among the document examiners for the state. Osborn, if he were alive today, would most assuredly cringe if he were to hear Waller's description of him as "perhaps the best-known graphologist in the nation" [*117*]. To a document examiner, no matter how renowned, a graphologist is what an astrologist is to an astonomer. Indeed graphologists are routinely refused permission to testify as qualified experts on handwriting identification [*118*].

The New Jersey appellate court, in reviewing Hauptmann's conviction, reiterated Osborn's claim that the handwriting on the ransom notes was irresistably, unanswerably, and overwhelmingly that of Hauptmann. Yet a recently disclosed 1934 FBI memo reveals that Osborn's son, who also testified for the state, "found a lot of dissimilarities which outweighed the similarities, and is convinced he (Hauptmann) did not write the ransom notes" [*119*]. But Osborn entirely reversed himself 1 h after being advised that the ransom money had been found in Hauptmann's garage.

Regardless, however, of questions engendered by current re-analysis of the handwriting identification, a New Jersey state police re-examination of the evidence in 1980 [*120*] continues to maintain the notes' ties to Hauptmann's authorship. Others, like journalist Davidson [*121*], just avoid mentioning the handwriting analysis, emphasizing, instead, other proofs of Hauptmann's having entered the nursery. The resolution of these disputes is, providentially, not within my present mandate.

The Felony in the Nursery—Seemingly, the intentions of the person who entered the Lind-

bergh baby's nursery on the night of 1 March 1932 could not be in dispute. A kidnapping for ransom was, most indisputably, in the offing. Or so it would seem. But there was still another wrinkle to furrow the prosecutor's brow.

For there to be burglary, the intention had to be to commit a felony inside the nursery, which felony had to be one known to the common law. And the short of it was that kidnapping was not a felony at common law [*122*], nor was kidnapping one of the enumerated offenses under the New Jersey burglary statute in 1932 [*123*].

Therefore, Hauptmann had to be proved to have had some other felonious intent. The most likely prospect was larceny. And so it came to be. Not, mind, because Hauptmann's true and overriding intent was to commit larceny, but because, in default of kidnapping, something else had to be selected, else the hangman would be out-of-pocket and out-of-sorts.

The Larcenous Intent

Sir James Stephen, as usual, put it on the line. "No branch of the law is more intricate, and few are more technical" [*124*] than larceny as known to the common law.

There were three facets of this maze that the state had to penetrate to prove Hauptmann guilty of a larceny-motivated burglary.

The Object of the Larceny—Most commonly, larceny is defined as "the trespassory taking and carrying away of the personal property of another with intent to steal the same" [*125*]. In early common law the crime was left undefined for as "the crime of crimes" it was, according to Stephen, considered to be "plainer than any definition of it could be." Yet even Stephen could not resist tendering his own definition which added to Perkins' the notion that the object of larceny must be "anything capable of being stolen" [*126*].

The first question, therefore, for the state was what did Hauptmann intend to steal. The most obvious answer was, inopportunely, the least likely to succeed. Hauptmann, quite self-evidently, intended to steal the Lindbergh baby. So the prosecutor argued and so Judge Trenchard instructed the jury [*127*]. But the appellate court was not exactly supportive of this theory. It relied for its affirmance of the conviction not upon the theft of the baby, but upon the theft of the baby's "sleeping garment" [*128*]. The state and the trial judge's reliance upon an intent to steal the baby were, implicitly, considered to be surplusage for "to steal the child's clothing ... would have sufficed" [*129*] to constitute the larcenous intent.

It was a prudent gesture on the part of the New Jersey appellate court to sidestep the issue of whether a living person could be the subject of larceny at the common law. To entertain that question would have been an unfilling enterprise, for the common law authorities, if not in disarray on the issue, are most unpromising.

The closest to the mark was Sir Matthew Hale who asserted summarily, that "Taking an Infant Ward no Felony" [*130*]. Pollock and Maitland reported that "(i)n the old days slaves could be stolen, but we hear nothing of stolen villeins ... (freemen)" [*131*]. Apparently, at bottom, the question is answered by deciding whether a living person is a "thing of no value to anyone" [*132*].

The discourse became somewhat morbid for each scholar had his own opinion on the hottest issue of the time, namely, was a dead body the subject of larceny? To us today, the resolution of this question is unimportant, save to note that if a dead body could not be the subject of larceny, then neither, on one view, could the clothes in which it was interred. Now that conclusion could be upsetting to a prosecutor bent on proving the theft of a sleeping suit from a baby which itself might not be susceptible to being stolen.

Blackstone would have us believe that "stealing the corpse itself which has no owner (though a matter of great indecency) is no felony" [*133*]. But stealing the shroud from the deceased would be larceny, in his view, for it was "the property of those, whoever they were, that buried the deceased" [*134*]. But the "boxes of deeds" case added a measure of confusion and uncertainty, as if any were wanting.

We start with the premise that, like dead bodies, deeds, not being personal property, could not be stolen at the common law. We are on sure footing thus far. Now suppose the deeds are placed in a box which is personal property and which is taken without right along with the deeds within it. Does this situation not seem to resemble the theft of a sleeping suit then worn by a child, itself not subject to being stolen?

William Wody was indicted for stealing six boxes containing deeds to real property. The Exchequer Chamber held this not to be a felony of either the deeds or the boxes. The court's reasoning seems to have been that "the boxes were of the same nature as the deeds contained in them" [*135*]. Thus the deeds not being capable of being stolen, neither could the boxes which "were merely appurtenant to the deeds" [*136*].

Stephen, in reporting on Wody's case, berated it as "(t)he most irrational case which I have quoted from the Yearbooks" [*137*] and as "one of the most pedantic and unmeaning decisions in the whole law" [*138*]. Sir William Russell, upon whom the New Jersey appeals court relied in another connection on Hauptmann's appeal, was not so disapproving of the result in Wody's case, citing it as the law "laid down" in Lord Coke's Institutes [*139*]. Sir Matthew Hale also, but noncommittally, states the holding in Wody's case as the governing law.

None of these miasmic common law disquisitions found their way into Hauptmann's trial or appeal. But if they had, the New Jersey Court of Errors and Appeals would have been forced to a task of historical research and analysis which might have benefitted Hauptmann.

A Valuable Object?—Hauptmann's attorneys maintained on appeal that the sleeping suit had not been proved to have any value. Thus, if not valuable, the argument runs, there could not be larceny. They might have noted, further, that Judge Trenchard did not instruct the jury on its fact-finding responsibilities in regard to the state's proving that the sleeping suit had value. But was proof of value necessary?

According to Professor Perkins, "(t)o be the subject of larceny the thing taken must be of some value, although it need not be worth as much as the smallest known coin" [*140*]. Stephen thought of that as having value "which could command a price" [*141*]. Corpus Juris Secundum restates the law to require proof of "intrinsic value" [*142*], whatever that elusive concept might be.

The New Jersey appeals court refused to join the controversy. It saw "no merit" [*143*] in the point that the value the sleeping suit had had not been proved. Value is required as an item of proof in a larceny indictment, said the court, to distinguish grand from petit larceny. But on a burglary charge no such distinction is necessary, nor, consequently, is proof of value needed. A later New Jersey opinion has taken the Hauptmann appeals court to mean that "(w)here an item is stolen and there is no proof of its value, it will be deemed to have nominal value" [*144*]. Hauptmann, therefore, then and now in New Jersey would not profit from the lack of proof of that which need not be proved at all.

The Intent to Deprive Permanently—If one were to isolate one issue of supreme importance to the question of Hauptmann's guilt for the burglary underlying the felony murder charge, it would be whether he was proved to have had the necessary larcenous intent at the time he entered the Lindbergh's home through the nursery window. Burglary, it bears reminding, is a crime that is complete upon the entry into the premises, regardless of what happens thereafter. That fixed rule controls in today's law [*145*] as well as in that of 1932. Thus Hauptmann, to be guilty, had to have had the intent to steal the Dr. Denton sleeping suit, not as an afterthought when he accidentally killed the baby, but at the exact moment he entered the nursery.

Moreover, Hauptmann's intent had to be to keep the Dr. Denton suit *permanently*. This most meaningful requirement, which has most assuredly given prosecutors many anxious moments at trial, was long a fixture of the common law of larceny [*146*]. And it continues to torment the courts today [*147*]. Note that a taking temporarily is a taking that lacks what came to be known as the animus furandi of larceny [*148*]. "Taking another's bicycle just for revenge, to cause the other anxiety, and to return it after a short time, is not larceny" [*149*].

Holmes saw this element as the core of larceny for the interest protected by the law of larceny is not the deprivation of a mere transient possession in personal property but "the loss of it wholly and forever" [*150*].

This permanent deprivation intent, therefore, is at odds with and cannot exist in the face of proof that the putative thief took steps to restore or return the stolen goods. Such a return is strong and compelling evidence that there was no intent to keep permanently at the time of the unlawful taking. Of course, if the return resulted from a change of heart for whatever reason, the pre-existing intent to keep permanently cannot be retroactively expunged. "(T)he crime was already complete when the property was carried off" [*151*].

It is conceded, arguendo, that the proof was that Hauptmann took the baby and its sleep suit. But the facts also revealed that he did not keep the sleeping suit permanently. Indeed, he returned it as part of the ransom negotiations when on 16 March 1932 it was delivered by mail to Dr. Condon's Bronx home together with another one of the ransom notes. Mrs. Lindbergh was called upon for the sad and grim task of identifying that suit at the trial.

The prosecutor inquired [*152*]: "I show you what purports to be a sleeping suit, No. 2 Dr. Denton, and ask you whether or not you recognize that sleeping suit." "I do," came the unhesitating and unequivocal response. "What sleeping suit is that, Mrs. Lindbergh?" the prosecutor, of necessity, continued. "It is the sleeping suit that was put on my child the night of March 1," she said. Just so that all loose ends would be tied, the prosecutor asked, "1932?" "1932" was the reply.

So the sleeping suit had been returned and identified. Or had it? Neither the prosecutor nor Mrs. Lindbergh gave any details of uniqueness that would have enabled Mrs. Lindbergh so assuredly to have identified the suit. As a matter of historical fact, the Dr. Denton type suit was commonplace in the 1930s. Indeed, Mrs. Lindbergh is said to have had four or five of them alone for her beloved "fat lamb." All the more reason, therefore, for the state to have pinpointed those features distinctive to this particular suit that would make it identifiable.

Was it its color that was remarkable or signs of wear or marks or stains on it? Was it bloodied or torn? Was it that it had a pocket in the upper left front portion whereas other Dr. Denton suits of the same era did not?

We know from the E.R. Squibb Laboratory report of 27 May 1932 that the suit, upon inspection and testing, was "found to be freshly laundered. Stains noted but examination was negative." The Edel report was "essentially same as Squibb" [*153*]. But was it?

From the report of Dr. Albert E. Edel, chemist and toxicologist for the New Jersey Chief Medical Examiner's Office, we learn that Lieutenant Keaton and Corporal Leon delivered a sleeping garment (presumptively that shown to Mrs. Lindbergh at the trial) for analysis to Dr. Edel's Chemical and Toxicological Laboratory on 30 April 1934. The report of the "macroscopic and chemical findings" from the laboratory examination is both informative and, in at least one respect, curious.

The garment is said to be "of woolen cloth," which would apparently preclude its being a composition of wool and cotton or other fiber, as other Dr. Denton suits of 1932 vintage were. This in itself would be a distinguishing feature of this particular sleeping suit. Further, the report noted that a piece of the garment "at the collor had been cut out" before it was received by the Edel laboratory. How or why this cut out or rip or tear occurred is nowhere explained, nor did the prosecutor ask Mrs. Lindbergh if she could account for it. It is another of the many mysteries in a very mysterious case.

The garment was not found to be in like-new condition for the report indicated that it "shows wear." A button was missing from the rear and another button had a "loose thread." The button with the loose thread was said to be "the second one from the top, on the front," but an examination of the garment indicates that there are no buttons of any kind anywhere on the front of the sleeping suit. That this was an unfortunate lapse on the part of the Edel examiner was seemingly all it ever was since Hauptmann's defense team did not notice if or,

if they did, did not elect to use it against the state as an example of slovenly preparation or worse.

Various other features of the sleeping garment were described in the Edel report, many of which might have given Mrs. Lindbergh the opportunity to relate specific grounds for her identification of it. "Bluish purple marks were noted." On this finding, questions gush forth. Where were these marks located? What size were they? What might have caused them? On all of these issues, the report is silent.

The right sleeve revealed "an impression 1 inch to 1 1/8 inch from the edge and running parallel to it" which, the report states in a conclusory way, "was caused by some external force other than the normal wear of the garment." How the Edel examiner arrived at this causal finding is not mentioned nor does the report explain the meaning of the work "impression" as used by it.

Suffice it to say that the Edel report was replete with enough details or suggestions of details to enhance the certainty of Mrs. Lindbergh's identification or to quicken the pulse of an exacting and ardent cross-examiner. The prosecutor, however, let the matter slide by.

With such gaps in Mrs. Lindbergh's testimony on this crucial matter, did Defense Attorney Reilly leap to the frey? On the contrary, he asked no questions of her at all but stated only that "the defense feels that the grief of Mrs. Lindbergh requires no cross-examination" [*154*]. Scaduto applauds Reilly's conduct in this regard as a matter of "good sense" [*155*]. But was it?

On the one hand, if Reilly had, even with due respect and circumspection, cross-examined Mrs. Lindbergh on her identification of the sleeping suit, he stood the chance, the irremediable chance, that she might in dignified and solemn sorrow have captured, even more than she had already, the jury's emotional allegiance. Can you imagine her pointing to this or that tearful reminder of her deceased "fat lamb" reflected on his sleeping suit? No, a cross-examination, without knowing where it would lead would be risky business. One wonders, in light of this possibility, why the prosecutor did not grasp the moment to capitalize on it himself. On other occasions, he was quick to appeal to the mob spirit.

Any effort by Reilly to discredit Mrs. Lindbergh's identification might boomerang in another respect. If her identification went unchallenged, then Reilly could always argue that the return in fact indicated a lack of the intent to keep the suit permanently. Regardless, therefore, of what Hauptmann might have done, kidnapper withal, he could not be convicted of the felony murder. But that too was a crafty strategy that might backfire. The jury could simply turn a deaf ear to the refinements of a plea that the return of the sleeping suit crippled the entire prosecution.

On the other hand, if Mrs. Lindbergh's identification were shaken on cross-examination, then the suit returned would be a replica, a bogus suit. The genuine item, then, would still be at large, and Hauptmann would be an extortionist, not a murderer. It seems that whichever way Reilly might turn in weighing the risks and benefits of a cross-examination of Mrs. Lindbergh, there were substantial gains and equally significant losses. Such is the well trod path of criminal trial strategy.

The most mystifying aspect of this returned sleeping suit imbroglio is why the prosecutor made a case for the defense by having Mrs. Lindbergh identify it. If Mrs. Lindbergh could not do so, then the real suit was still missing and permanent deprivation had resulted. If it were proved to have been restored to its owners, however, then the defense could chuckle and assert their client's lack of the appropriate intent for larceny. Certainly, in default of Mrs. Lindbergh's identifying the suit, the defense could hardly have been expected to press her to do so. That would be putting their heads in a noose, quite literally. In sum, trial strategies present dilemmas for both the prosecution and the defense, and this incident just welds the point.

On appeal, Hauptmann's attorneys raised the issue of the returned sleeping suit as Point VII of their argument. "(T)here was no evidence of intent to steal, and the court erroneously

charged the jury" (on that issue), quoted the New Jersey appellate court [*156*]. The appeals court agreed with the basic precept that larceny involves "an intent to deprive the owner permanently of his property," but added that "the intent to return should be unconditional." Hauptmann's intent in surrendering the suit was conditioned upon and was an "initial and probably essential step" in the negotiations, said the court. "It was well within the province of the jury to infer that, if Condon had refused to go on with the preliminaries, the sleeping suit would never have been delivered. In that situation, the larceny was established" [*158*].

Professor LaFave, in his much respected and often quoted text on *Criminal Law*, cites the decision on Hauptmann's appeal as illustrative of the general rule that "it is no defense to larceny that the taker intended to return it only if he should receive a reward for its return, or only upon some other condition which he has no right to impose" [*159*]. Yet there are decisions to the opposite effect, both old and new. In one very recent North Carolina case [*160*], the accused was held not guilty of the larceny of a television which he took to coerce the payment of $150 for its return. In the early common law, it was held not to be larceny for a man to take a girl's bonnet and other items of attire when he did so to induce her to go with him to a hay mow, so that he could seduce here there [*161*]. The decisions, as few as there are on the subject, seem to be equally divided, with the Hauptmann appeals court's choosing one over the other without articulating any rational defense of its election. It can be noted that there is common law authority that "in doubtful cases the safest rule is to incline to acquittal, rather than conviction" [*162*].

Point VII had also asserted an error in Judge Trenchard's instructions in "erroneously" charging the jury on the requisite intent for larceny. The decision on the appeal merely mentions the matter and passes it by entirely unanalyzed. But, in New Jersey [*163*] as elsewhere [*164*], the jury must be instructed on the essential elements of the offense charged. The New Jersey Supreme Court has called this a "mandatory duty" and "fundamental principle" [*165*]. The trial judge's duty "is not affected by the failure of a party to request that it be discharged" [*166*].

One can comb Judge Trenchard's instructions long and hard without getting the slightest glimmer of his informing the jury that the law requires them to find Hauptmann to have had an intent to keep the sleeping suit permanently and that this was his intent when he entered the Lindbergh's premises. Yes, he did instruct on the need for an intent to steal but not on the duty of the prosecutor to prove that the intent to steal was accompanied with an intent to keep permanently. This is not to say that the giving of a proper instruction on the matter would have made any difference in the jury's outlook on the issue of Hauptmann's guilt or innocence, but, in law, the failure of such an instruction should have resulted in a reversal of the conviction. The issue was most definitely not a passing whimsy.

How Many More Steps to Execution? Three, Sir.

Having survived challenges to his theories of felony murder, burglary, and larceny in the New Jersey court, the prosecutor was within a whisper of the summit. Three hurdles remained. The baby would have to be shown to have died, the criminal agency already being settled as Hauptmann; the place of death must be established; and death must have occurred in the course of committing the burglary. None, as it turned out, was an extraordinarily prickly problem for the prosecutor.

The Baby's Death: the Corpus Delicti

Obviously, there is no murder without a deceased victim, whose death resulted from a criminal act. That the Lindbergh baby was missing was indisputable. That the remains of a baby's body had been found in a shallow grave within 6 to 8 km (4 to 5 miles) of the Lindbergh's Hopewell residence could be conceded. The fact that was and, like so much else in

this potboiler, still is in dispute was whether the remains accidentally discovered were those of the Lindbergh baby.

On that issue, Colonel Lindbergh identified the remains at a brief viewing. And, most tellingly, Betty Gow [*167*] identified undergarments that clothed the dead baby as remnants of a petticoat she had torn and sewn into a nightshirt for the Lindbergh baby on the same day as his disappearance. Reilly himself, in open court, agreed not to "question at all that this was Colonel Lindbergh's child" [*168*]. The appellate court simply noted that "(t)he identity of the dead child was expressly admitted" [*169*]. That, for legal purposes, settled the matter.

The Place and Time of Death

The remains of the child had been found in Mercer County, whereas the Lindbergh's Hopewell residence was in Hunterdon County. The proper place of trial, or venue, would have to be located either in Mercer or Hunterdon County.

The prosecution opted for Hunterdon County. In support of this venue, the state introduced the evidence of Dr. Charles H. Mitchell who stated that "(t)he child died of a fractured skull" [*170*]. Upon being pressed to state whether the fracture was a result of external violence, Dr. Mitchell answered that "(i)t had every indication of it" [*171*]. This statement was consonant with Dr. Mitchell's autopsy report which also listed as the cause of death "a fractured skull due to external violence." Now that is a most curious way of describing it. "Eternal violence" as opposed to . . .? Do skulls fracture as a result of internal violence? Is this merely a gaff of the medical profession, like their oh-so-frequent testimony to having found male sperm in rape cases [*172*]?

My concern is not with picking nits, but with whether the phrase "external violence" was another prosecutorial effort to insinuate the commission of a deliberate homicide by Hauptmann. It is difficult to tell, for the medical profession rather indiscriminately uses the wording external violence, both where it is tautologous [*173*] and where it truly appertains [*174*].

Even the New Jersey appeals court seems to have been taken in by this "external violence" gambit for it spoke of the child's suffering, not a fractured skull caused by external violence but "three violent fractures of the skull" [*175*]. The suggestion, not borne out by any testimony at the trial or even the autopsy report, was that three separate acts of violence had resulted in three distinct fractures of the baby's skull, which would, of course, be a far cry from an accidental dropping of the baby while descending the ladder.

After some byplay between Defense Attorney Pope and the prosecutor over whether Dr. Mitchell was qualified to state the time of death, Dr. Swayze was allowed to state that "death in this case occurred either instantaneous or within a very few minutes following the actual fracture occurring." He also observed that the fracture was inflicted antemortem rather than postmortem. He came to this conclusion since "on the inner wall of the skull at the point of fracture" there were still the remains of a blood clot. In Dr. Swayze's view, "(t)hat blood clot could not come there if the child was dead when the fracture occurred. . . . It bled" during life [*176*].

The Res Gestae Rule Or Not?

Even assuming Hauptmann entered through the nursery window, snatched the child and its clothing, and the child died sometime afterwards, it remains to be seen whether the burglary was still under way at the time the child received the fatal blow. Like so many other states, the New Jersey first degree murder statute in 1932, following the Pennsylvania paradigm, required that the death occurring in the course of a felony must be committed "in perpetrating or attempting to perpetrate" the underlying felony. The prosecutor, therefore, had to satisfy the requirement that Hauptmann was still committing the burglary when the child died, even though death occurred during flight at or some distance from the crime scene.

Undoubtedly, the burglary ended when Hauptmann entered the nursery with the requisite felonious intent. Thus if the child died at any time afterward, that death would most certainly not have been during the perpetration of a burglary, which had already been completed. That was solid and unambiguous burglary law, but the New Jersey appeals court [*177*] refused to carry it over to felony murder, even where burglary was the basis for the charge.

The killing must occur within the res gestae of the felony, said the appellate court. Assuming that the child died while the burglar was "still on the Lindbergh premises," which the appellate court quite inscrutably, felt "the jury was clearly entitled to find" [*178*], then Hauptmann's conviction was proper.

This rule was not a makeweight to catch Hauptmann, but had a respectable following both in New Jersey and elsewhere. According to Professor Perkins, "the res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence" [*179*]. Indeed, one New Jersey case in 1936 [*180*] found a trial court's instruction on felony murder proper even though the felony of robbery had occurred in Philadelphia some 100 km (60 miles) from the scene of the killing and the New Jersey police officer killed was not, at the time, in pursuit after or investigating the commission of the Philadelphia robbery. Other jurisdictions [*181*] have taken a similarly expansive view of when a felony is in the process of perpetration.

Conclusion

This exposition has been more than an historical exercise in the verbal legerdemain of the common law of crimes. That we can agree with Professor Milsom's coldly sardonic view that "(t)he miserable history of crime in England ... had attained an incoherence which seemed to defy even the modest order of the alphabet ..." [*182*] provides no excuse for the continuation of such "savage laws" [*183*] or for subterfuges committed in their name. The "medieval accident" [*184*] which had made the common law of crimes as ridiculously inane as counting the number of angels on the head of a pin had fueled the fury that enveloped the Hauptmann trial and had caught Hauptmann in its meshes.

The evidence supports the verdict on the trial of the trial of Hauptmann. The prosecution and trial was an abject lesson in adroit prosecutorial manipulation of the arcana of the common law of crimes. Worse yet, the execution of Hauptmann was insanely disproportionate to the crime for which he was actually convicted. To execute a person for stealing a baby's sleeping suit during a burglary in consequence of which the baby accidentally dies is, on any moral theory, totally indefensible. More, such a rankly disproportionate sentence erodes the firmly rooted principle of the Anglo-American system of criminal justice which insists that criminal liability be predicated upon personal accountability. A criminal law that punishes acts which are unintentional as if they were wilful and then with the maximum penalty plays hob not only with epistemological postulates of commutative justice. It also cuts too wide a swath, so that one day even the great god demos may rebel at what has been done in its name.

The day of societal repentance for the sins perpetrated upon the Hauptmann's of our society may be in the offing. Felony murder, as a prosecutorial plaything, may not be in total rout but it is being assaulted on all sides. England has long since abolished it by legislation [*185*]. The prestigious Model Penal Code of the American Law Institute, after deciding that "principled argument in its defense is hard to find" [*186*], recommended the abrogation of the rule in its entirety and a substitution for it of a rebuttable presumption of homicidal intent if a killing occurs in the course of certain enumerated felonies [*187*].

The Delaware legislature has sent the felony murder rule packing to oblivion [*188*]. Alaska [*189*], Hawaii [*190*], and Kentucky [*191*] toe the line requiring a full homicidal mens rea for

murder. Other jurisdictions have taken judicial swipes at the rule. Michigan abolished it in *People v. Aaron* [*192*] and other states have narrowed but retained it for a limited category of felonies inherently dangerous to life only [*193*].

Even though the felony murder rule has received a sound drubbing, both near and far, as "a highly artificial concept" [*194*] and as a merely "formal approximation of extremely reckless homicide" [*195*], still most legislatures continue to be enamoured of it. That is the case in spite of the persuasive arguments of legal scholars that the whole concept is violative of Federal constitutional standards mandating equal protection of the law [*196*].

But if felony murder has managed to survive in spite of the barbs directed at it, capital punishment as a sanction for felony murder has not had the same staying power. Even in New Jersey today [*197*], capital punishment could not be imposed upon one convicted of burglary murder under the facts which implicated Hauptmann.

The day may just be dawning, although the signs are still too meager, when injustice will be countered by justice, when wrong will be offset by right. To paraphrase the timeworn aphorism, the law should do good to avoid evil. There is an exchange principle in operation in the law as there is in the natural order, to which the forensic sciences instinctively respond.

When the stakes are as high as capital punishment, the mechanisms of justice must be scrupulously fair. Just as those who are not incarcerated for their misdemeanors have no federal constitutional right to an attorney [*198*] and just as those whose confinement will not exceed six-months imprisonment have no federal constitutional right to a jury trial [*199*], so those who stand to be executed must undergo a criminal trial that is purer than pure. It should be the punishment that is the measure of the law's beneficence. Capital punishment should be the exchange for the acts of a criminal justice system which are beyond reproach. Only in return for an impeccably fair trial should a person's life be exchanged. And a trial is not fair, it bears stating, when it is grounded on outworn, illogical anachronisms of the common law, as Hauptmann's was.

Hauptmann may have been a kidnapper. He probably was an extortionist. He was not provably a deliberate murderer. And his execution for stealing a baby's sleeping suit during a burglary in which the baby, by a fortuity, died resulted from ineffable quirks in the common law of crimes which the prosecution vulpinely exploited to sate the public's sanguinary outburst.

Hauptmann, in the hours immediately following his sentencing, is said to have been heard to whisper: "Little men, little pieces of wood, little scraps of paper" [*200*]. Today, knowing what we now do, his words, uttered in more magenta tones, might have been: little pebbles, little sleeping suits, common law muckery.

And so Bruno Richard Hauptmann went to his death. But, unlike Lady Macbeth's exclamation upon the murder of Duncan, no one heard "the owl scream and the crickets cry" [*201*].

Acknowledgment

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Notes

[*1*] Such a characterization is not intended to praise with faint damn, as does Professor Seidman who viewed the Hauptmann trial as "not a high point in the history of criminal justice in this country." Seidman, "The Trial and Execution of Bruno Richard Hauptmann: Still Another Case that 'Will not Die'," *Georgetown Law Journal*, Vol. 66, No. 1, 1977, p. 14.

[*2*] Kuntsler, *First Degree*. Oceana Publications, New York, 1960, pp. 137–150.

[*3*] See note 2.

[*4*] *Dickinson Law Review*, Vol. 40, 1936, pp. 193–199. The article in the now nonlaw school pub-

lished *Journal of Criminal Law, Criminology and Police Science* traced the legal aspects of the Hauptmann trial with more care and comprehension than any other to date. See *Journal of Criminal Law, Criminology and Police Science*, Vol. 26, 1936, p. 759.

[5] *Hauptmann v. New Jersey*, 296 U.S. 649 (1935).
[6] *State v. Hauptmann*, 180 Atl. 809 (N.J. Ct. E. & A. 1935).
[7] *Ex Parte Hauptmann*, 297 U.S. 693 (1936).
[8] See note 1.
[9] See note 1 at p. 16, footnote 85.
[10] See note 1 at p. 42.
[11] Waller, *Kidnap*, The Dial Press, New York, 1961, p. 582.
[12] Shakespeare, *Cymbeline*.
[13] See note 11 p. 222.
[14] II Pollock and Maitland, *The History of English Law*, 2nd. ed., Lawyers' Literary Club, Washington, DC, 1959, p. 450; Walsh, *A History of Anglo-American Law*, 2nd. ed., p. 24.
[15] Holmes, *The Common Law*, Little, Brown and Company, Boston, 1881, p. 41.
[16] See note 15.
[17] Pound and Frankfurter, Eds., *Criminal Justice in Cleveland*, The Cleveland Foundation, Cleveland, 1922, p. 576.
[18] See note 17.
[19] "Both Guilty," *New Republic*, 27 Feb. 1935, p. 62. See also Waller, see note 11 at p. 269-271.
[20] Transcript p. 6.
[21] Transcript p. 7.
[22] Transcript p. 7.
[23] Transcript p. 7.
[24] 391 U.S. 510.
[25] *People v. Smith*, 136 Cal. App. 3d. 961 (1982); *Hovey v. Superior Court*, 616 P.2d; 1301 (Cal. 1980); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981).
[26] Transcript pp. 7525-7526 which is a reference, apparently, to Matthew 7:1.
[27] Harking back to Levitacus 24:17.
[28] As expounded at Exodus 21:23-25.
[29] *Dyson v. U.S.*, 450 A.2d 432, 438 (D.C. App. 1982).
[30] Transcript pp. 7572-7573.
[31] Transcript p. 4407.
[32] Transcript p. 4449.
[33] Transcript p. 4363.
[34] Transcript p. 245.
[35] See note 34.
[36] *State v. Hauptmann*, see note 6 at p. 813.
[37] 2 Compiled Statutes N.J., 1910, p. 1783. sec. 114. Not until 1933 was kidnapping a capital crime in New Jersey. See N.J.R.S. 2A:118-1 (1951). See 56 N.J.L.J. 196 (1933). Under current New Jersey Law, kidnapping is no longer punishable by death. N.J.S.A. 2C:13-1(c) (effective 1 Sept. 1979).
[38] 2 Compiled Statutes N.J., 1910, p. 1780, sections 106 and 107.
[39] Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," *University of Pennsylvania Law Review*, Vol. 97, 1949, p. 759.
[40] Blackstone, *Commentaries on the Laws of England*, Vol. IV, Beacon Press, Boston, 1962, pp. 200 and 223.
[41] *Powers v. Comm.* 615 S.W. 735. 741 (Ky. 1901).
[42] 2 Compiled Statutes N.J., 1910, p. 1780, section 107.
[43] Fletcher, *Rethinking Criminal Law*, Little Brown and Company, Boston, 1978, p. 318.
[44] N.J.S.A. 2A:138-2(a) (1951).
[45] Prosser, "The Lindbergh Case Revisited: George Waller's *Kidnap*," *Minnesota Law Review*, Vol. 46, 1961, pp. 383, 386.
[46] Stephen, *A General View of the Criminal Law of England*, 2nd. ed., Macmillan and Company, London, 1890, p. 75.
[47] Clark and Marshall, *A Treatise on the Law of Crimes*, 7th. ed., Callaghan & Co., Chicago, 1967, p. 637. It has also been derided as "a euphonious phrase used to conceal the absence of an idea." Perkins, "A Re-Examination of Malice Aforethought," *Yale Law Journal*, Vol. 43, 1934, p. 537. In general, see Anno, "Modern Status of the Rules Requiring Malice 'Aforethought,' 'Deliberation,' or 'Premeditation.'
[48] Hale, *History of the Pleas to the Crown*, Vol. 1, Professional Books Limited, London, 1971, p. 44.
[49] Waller, see note 11 at p. 274.
[50] Davidson, "The Story of the Century," *American Heritage Magazine*, Vol. 27, Feb. 1976, pp. 23, 29.

[51] See note 50.
[52] United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...."
[53] *State v. Wein*, 404 A.2d. 302, 305 (N.J. 1979). N.J.R.R. 3:4-3 now requires an indictment to state "the essential facts constituting the offense charged."
[54] Transcript p. 4560.
[55] Waller, see note 11 at pp. 279-280. Waller says that the last question, No. 12, in the request for a bill of particulars asked: "By what method does the State contend Charles A. Lindbergh, Jr., met his death?" On the contrary, however, the request was phrased: "What does the State contend was the cause of the death of the said Charles A. Lindbergh, Jr.?" See Transcript p. 4560. The inquiries, it is to be noted, are substantially at variance. Waller also claims defense attorney "Reilly appealed to the New Jersey Supreme Court" to force compliance with his twelve demands. But, the record does not reflect any such appeal, nor did New Jersey even have a Supreme Court at that time.
[56] *State v. Hunt*, 138 A.2d. 1, 5 (N.J. 1958); *State v. Brink*, 73 A.2d. 249 (N.J. 1950), cert. denied 340 U.S. 839.
[57] *People v. Nichols*, 230 N.Y. 221, 129 N.E. 883 (1921); *People v. Roper*, 250 N.Y. 170, 181 N.E. 88 (1932).
[58] N.J.R.R. 3:7-5.
[59] *Russell v. U.S.*, 369 U.S. 749 (1962).
[60] Hauptmann's Brief in the U.S. Supreme Court on petition for certiorari, p. 19.
[61] Transcript p. 4338.
[62] See note 60 and Transcript p. 4406.
[63] See note 60 at p. 20 and Transcript p. 4407.
[64] *State v. Grillo*, 93 A.2d. 328, 334 (N.J. 1952).
[65] Whipple, *The Lindbergh Crime*, Blue Ribbon Books, New York, 1935, pp. 241-243.
[66] Transcript p. 233.
[67] 2 Compiled Statutes N.J., 1910, p. 1780, section 107.
[68] Fisher and Maguire, "Kidnapping and the So-called Lindbergh Law," *New York University Law Review*, Vol. 12, 1935, p. 646; Finley, "The Lindbergh Law," *George Washington Law Review*, Vol. 28, 1940, p. 908; Perkins and Boyce, *Criminal Law*, 3rd. ed., The Foundation Press, Mineola, New York, 1982, p. 229.
[69] 2 Compiled Statutes N.J., 1910, p. 1787, sec. 131 (burglary); 2 Compiled Statutes N.J., 1910, p. 1785, sec. 120 (robbery).
[70] Blackstone, see note 40 at p. 279.
[71] Exhibit S-52.
[72] Blackstone, see note 40 at p. 280.
[73] *State v. Hill*, 221 A.2d 725 (N.J. 1966), *State v. Wolf*, 207 A.2d. 670 (1965), *State v. Greely & Deady*, 95 A.2d 1, 4 (N.J. 1953).
[74] LaFave and Scott, *Handbook on Criminal Law*, West Publishing Co., St. Paul, MI, 1972, pp. 701-702.
[75] See note 74.
[76] *People v. Needham*, 155 N.W. 2d. 267 (Mich. App. 1967), *State v. Hoag*, 114 A.2d 573 (N.J. Super, 1955).
[77] Blackstone, see note 40 at p. 280.
[78] *State v. Cottone*, 145 A.2d. 509 (N.J. Super. 1958).
[79] *State v. Hauptmann*, see note 6.
[80] Coke, *Third Institute*, p. 63 as cited in II Pollock and Maitland, see note 14 at p. 492.
[81] Blackstone, see note 40 at p. 254.
[82] Stephen, *A History of the Criminal Law of England*, Vol. III Macmillan and Company, London, 1883, p. 150.
[83] East, *Pleas of the Crown*, Vol. II, Professional Books, Ltd., London, 1972, p. 484.
[84] N.J.S.A. 2C:18-7.
[85] *Blankenship v. State*, 447 A.2d. 428 (Del. 1982).
[86] Model Penal Code, Tentative Draft 11, sec. 221.1, page 57 (1960).
[87] LaFave and Scott, see note 74 at p. 716.
[88] LaFave and Scott, see note 74 at p. 715.
[89] Hale, see note 48 at p. 550.
[90] *State v. Hauptmann*, see note 6 at p. 818.
[91] Transcript p. 4514.
[92] *State v. Hauptmann*, see note 6 at p. 819.
[93] LaFave and Scott, see note 74 at p. 716.
[94] Blackstone, see note 40 at p. 256.
[95] Russell, *A Treatise on Crimes and Misdemeanors*, 4th. ed., Vol. II, Stevens & Sons, London, 1865, pp. 2-6.

[96] Transcript p. 874.
[97] Transcript p. 876.
[98] Transcript p. 324.
[99] See note 98.
[100] See note 98.
[101] Transcript p. 326.
[102] Transcript p. 325.
[103] Waller, see note 11 at 3 and 592. An additional reference appears at p. 138.
[104] Scaduto, *Scapegoat*, E.P. Putnam's Sons, New York, 1976.
[105] Id. at page 39.
[106] Mrs. Lindbergh's statement at pp. 3 and 4.
[107] Transcript p. 636.
[108] Transcript p. 647. Scaduto, see note 104 at p. 30 erroneously asserts that "it was the southwest window which was warped."
[109] Transcript p. 647.
[110] Transcript p. 679.
[111] *State v. Hauptmann*, see note 6 at p. 826.
[112] Davidson, see note 50 at p. 28.
[113] *U.S. v. Clifford*, 543 F. Supp. 424 (D.C.W.D. Pa. 1982), reversed on other grounds in U.S. 3rd Circuit on 8 March 1983.
[114] See note 113.
[115] But it is used for investigative purposes. See, Rice, Berkeley, "Between the Lines of Threatening Messages," *Psychology Today*, Vol. 52, Sept. 1981.
[116] Zierold, Norman, *Little Charley Ross*, Little Brown and Company, Boston, 1967. Linguistic analysis is said, also, to have played a role at the poisoning murder trial of Roland B. Molineux in New York City in 1898. Borowitz, "Packaged Death," 69 A.B.A.J. 282 March 1982.
[117] Waller, see note 11 at p. 141.
[118] *Carroll v. State*, 634 S.W. 2d. 99 (Ark. 1982).
[119] Zito, "Did the Evidence Fit the Crime?," *Life*, March 1982, p. 42.
[120] Prepared by S.F.C. Richard Tidey on 27 March 1980.
[121] Davidson, see note 50.
[122] *State v. Hauptmann*, see note 6 at p. 818. See also the authorities cited in footnote 68.
[123] 2 Compiled Statutes N.J., 1910, p. 1787, sec. 131.
[124] Stephen, see note 82 at p. 122.
[125] Perkins, see note 68 at p. 292; Blackstone, see note 40 at p. 260 and Pollock and Maitland, see note 14 at p. 498.
[126] Stephen, see note 124 at p. 129.
[127] Transcript p. 4513.
[128] *State v. Hauptmann*, see note 6 at p. 819.
[129] See note 128.
[130] Hale, *Summary of the Pleas to the Crown*, p. 66; Hale, see note 48 at p. 509.
[131] Pollock and Maitland, see note 14 at p. 499.
[132] Stephen, *A Digest of the Criminal Law*, 6th. ed., Macmillan and Company, London, 1904, p. 253.
[133] Blackstone, see note 40 at p. 272.
[134] See note 133. See also Hale, *History of the Pleas to the Crown*, Vol. 1, p. 515.
[135] Stephen, see note 124 at p. 138.
[136] Stephen, see note 124 at p. 143.
[137] Stephen, see note 124 at p. 143.
[138] Stephen, see note 124 at pp. 138-139.
[139] Russell, see note 95 at p. 261.
[140] Perkins and Boyce, see note 68 at p. 296.
[141] Stephen, see note 124 at p. 143.
[142] 52 C.J.S. sec. 2(b), p. 406.
[143] *State v. Hauptmann*, see note 6 at p. 818.
[144] *State v. Miller*, 272 P.2d 539, 541-542 (N.J. Super 1971).
[145] *State v. Lucero*, 648 P.2d 350 (N.M. 1982).
[146] Stephen, see note 124 at p. 132.
[147] *People v. Thompson*, 165 Cal. Rptr. 289, 293 (1980).
[148] East, see note 83 at p. 655. Clark and Marshall, see note 47 at pp. 825-826. Pollock and Maitland, see note 14 at p. 499, quoting from Bracton.
[149] Perkins, see note 68 at p. 327 footnote 62 citing *People v. Brown*, 38 P. 518 (Cal. 1894).
[150] Holmes, see note 15 at p. 71.
[151] Holmes, see note 15 at p. 72.

[152] Transcript p. 337.
[153] Report from Lt. Vincent M. Peterson, New Jersey State Police, Forensic Science Bureau.
[154] Transcript p. 348.
[155] Scaduto, see note 104 at p. 123.
[156] *State v. Hauptmann*, see note 6 at p. 819.
[157] *State v. Hauptmann*, see note 6 at p. 819.
[158] *State v. Hauptmann*, see note 6 at pp. 819-820.
[159] LaFave and Scott, see note 74 at p. 639.
[160] *State v. Watts*, 212 S.E. 2d. 557 (N.C. App. 1975).
[161] *Rex v. Dickerson*, (Russ. & R. 420); Clark and Marshall, see note 47 at p. 825, footnote 96; Russell, see note 95 at pp. 159-160.
[162] East, see note 83 at p. 661.
[163] *State v. Butler*, 143 A.2d. 530, 550 (N.J. 1958).
[164] 52A C.J.S. 150, p. 700.
[165] *State v. Butler*, see note 163.
[166] *State v. Butler*, see note 163.
[167] Transcript pp. 640-642.
[168] Whipple, see note 65 at p. 314.
[169] *State v. Hauptmann*, see note 6 at p. 814.
[170] Transcript p. 2635.
[171] See note 170.
[172] *Flanagan v. Henderson*, 496 F.2d 1274 (5th Cir. 1974).
[173] *People v. Townsend*, 141 N.E. 2d. 729 (Ill. 1957); *State v. Dampher*, 109 N.E. 2d. 705 (Ill. 1963).
[174] *People v. Woods*, 118 N.E. 2d 248 (Ill. 1954).
[175] *State v. Hauptmann*, see note 6 at p. 813.
[176] Transcript p. 2641.
[177] *State v. Hauptmann*, see note 6 at p. 820.
[178] *State v. Hauptmann*, see note 6 at p. 820.
[179] Perkins and Boyce, see note 68 at p. 135 quoting from *State v. Fouquette*, 221 P.2d., 404, 416-7 (Nev. 1950).
[180] *State v. Metalski*, 185 Atl. 351 (N.J. 1936); see also *State v. Artis*, 269 A.2d. 1, 5 (N.J. 1970).
[181] *U.S. v. Naples*, 192 F. Supp. 23 (D.C.D.C. 1961) in which Judge Holtzoff canvasses the authorities.
[182] Milsom, *Historical Foundations of the Common Law*, 2nd. ed., Butterworths, Toronto, 1981, p. 417.
[183] Id. at p. 403.
[184] Id. at p. 428.
[185] English Homicide Act of 1957, ch. 11. sec. 1.
[186] Model Penal Code, *Tentative Draft #9*, p. 37 (1959).
[187] Model Penal Code, *Proposed Official Draft*, sec. 210.2, p. 125 (1962).
[188] Del. Code Ann., tit. 11, sec. 636(a)(2) (Rev. 1974) which requires proof that the accused "recklessly" caused the death if it occurs "in furtherance of the commission of a felony or immediate flight therefrom."
[189] Alaska Stat., sec. 11.41.100 (1962) (murder in first degree).
[190] Hawaii Rev. Stat. 707-701 (1976).
[191] Kentucky Rev. Stat. 507.020.
[192] *People v. Aaron*, 299 N.W. 2d 304 (Mich. 1980).
[193] *State v. Crump*, 32 Cr. L. Rptr. 2323 (1/19/83) (Kansas Sup. Ct., 12/3/82); *People v. Wilson*, 462 P.2d 22, 28 (Cal. 1969).
[194] Fletcher, "Reflections on Felony-Murder," *S.W.U.L. Review*, Vol. 12, 1981, pp. 413, 415.
[195] Fletcher, see note 43 at p. 319.
[196] Fletcher, see note 194 at p. 425.
[197] N.J.S.A. 2C:11-3(c). See also Ky.Rev.Stat. 507.020(2) which requires an "intentional" homicide in the commission of certain enumerated felonies.
[198] *Scott v. Illinois*, 440 U.S. 367 (1979).
[199] *Duncan v. Louisiana*, 391 U.S. 145 (1968).
[200] Waller, see note 11 at p. 494.
[201] Shakespeare, *Macbeth*, Act II, sc. ii. line 15.

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