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## Assault, Battery and Maiming in New York: From Common Law Origins to Enlightened Revision

### Cover Page Footnote

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# ASSAULT, BATTERY AND MAIMING IN NEW YORK: FROM COMMON LAW ORIGINS TO ENLIGHTENED REVISION

ROBERT M. BYRN\*

ON July 20, 1965, the Governor of the State of New York approved several bills which substantially revised the New York Penal Law.<sup>1</sup> The revision was the result of almost four years' work on the part of the commissioners and staff of the New York State Temporary Commission on Revision of the Penal Law and Criminal Code.<sup>2</sup> Describing the end product of these labors, the Commission has said:

The new Penal Law is not a patchwork project which renovates or refurbishes the existing Penal Law, but a reconstruction job from the ground up. Entirely new in structure, form and general pattern, it revises virtually every substantive area of the existing Penal Law in varying degrees ranging from the mild to the drastic.<sup>3</sup>

With obvious justification, Governor Nelson A. Rockefeller referred to the Revised Penal Law as "a major and rarely equalled accomplishment," and commended the Commission and its staff "for their prodigious efforts."<sup>4</sup>

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1. N.Y. Sess. Laws 1965, chs. 1030-31, 1037-39, 1046-47. To avoid confusion with the current law, the revised statute will be cited as N.Y. Rev. Pen. Law.

2. "This Commission was legislatively created in 1961 for the purpose of studying 'existing provisions of the penal law, the code of criminal procedure, the correction law and other related statutes,' and of preparing, 'for submission to the legislature, a revised, simplified body of substantive laws relating to crimes and offenses in this state, as well as a revised, simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings . . .'" (Laws 1961, chapter 346, as amended by Laws 1962, chapter 548)." N.Y. Leg. Doc. No. 14, p. 9 (1964). (Third Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code). As of this writing, the Commission has rendered four interim reports: N.Y. Leg. Doc. No. 41 (1962), N.Y. Leg. Doc. No. 8 (1963), N.Y. Leg. Doc. No. 14 (1964), and N.Y. Leg. Doc. No. 25 (1965). During the 1964 Session of the Legislature, the Commission submitted, for study purposes only, its proposed Revised Penal Law, Sen. Intro. No. 3918, Pr. No. 4630; Ass. Intro. No. 5376, Pr. No. 6187, N.Y. State Leg. 187th Sess. (1964), to which were annexed unofficial explanatory notes authored by the Commission's staff. The proposed Revised Penal Law and the Commission Staff Notes were reprinted in pamphlet form by Edward Thompson Co. in 1964. Citations to the Commission Staff Notes are to pages in this pamphlet.

The legislature acted upon a new draft of the revision at its 1965 Session. Since the 1964 and 1965 drafts differed in a number of respects, supplementary unofficial notes by the Commission's staff were submitted with the 1965 draft in order to explain the changes. Edward Thompson Co. has also reprinted in pamphlet form the Revised Penal Law and the Supplementary Commission Staff Notes. Citations to the latter are to pages in this pamphlet.

3. Commission Foreword to N.Y. Rev. Pen. Law at x.

4. Memorandum by Governor Rockefeller, in N.Y. Sess. Laws 2120 (McKinney 1965).

The Revised Penal Law will not become effective until September 1, 1967.<sup>5</sup> The postponement was motivated in part by a feeling that extensive time should be allowed to interested parties "for study and absorption of the numerous changes and new principles involved" before the revision becomes law.<sup>6</sup> This article has been undertaken in the hope that it may be of some assistance in this process of study and absorption.

One way to approach the Revised Penal Law is to forgo any preparation and to begin immediately a careful and thoughtful examination of each of its provisions. No doubt this method would produce some understanding of what the revisers intended, but the results would almost certainly lack depth. A meaningful analysis requires both a knowledge of pertinent history and an appreciation of the problems, both new and old, which confronted the revisers as they undertook to reform the law. With this in mind, and before starting to probe assault, battery and maiming in the new law, I have attempted to trace these offenses from their common-law origins, through the early New York decisions, and into the present New York statutes. Only with this background is one equipped for a critical appraisal of the revised law.

#### I. ASSAULT, BATTERY AND MAIMING: IN GENERAL

Assault, battery and maiming (mayhem) all share in common a man-injuring *mens rea*. In fact, maiming includes both assault and battery. Since the crimes are similar in nature, it seems appropriate to begin by defining them generally (to the extent that conflicting definitions may admit of a general statement) and by indicating how they are interrelated.

There is no single definition of assault which meets unanimous acceptance. "The more generally received definition is that of Hawkins, to wit: 'An attempt or offer with force and violence to do a corporal hurt to another.'"<sup>7</sup>

Battery has been defined as "the unlawful application of force to the person of another."<sup>8</sup> Traditionally, the amount of force applied has not been regarded as significant vis-à-vis guilt or innocence. "The law deemed the person of a man sacred, and would not allow the least violence to it. And this is not so much for the *injury* that might be offered and suffered, as the insult and indignity."<sup>9</sup>

"Every battery includes an assault,"<sup>10</sup> but, while the actual application

5. N.Y. Rev. Pen. Law § 500.10.

6. Commission Foreword to N.Y. Rev. Pen. Law at x.

7. May, Crimes § 205, at 196 (3d ed. 1905), quoting from 1 Hawkins, Pleas of the Crown 110 (8th ed. 1824). (Footnote omitted.)

8. Perkins, Criminal Law 80 (1957), quoting from State v. Hefner, 199 N.C. 778, 780, 155 S.E. 879, 881 (1930).

9. People v. Powers, 1 Wheel. Cr. Rec. 405, 410 (N.Y. City Hall 1823).

10. Barbour, Criminal Law of New York 86 (2d ed. 1852).

of force to the person assaulted is necessary to constitute a battery, it is not required for the commission of an assault.<sup>11</sup> If a battery does occur, the preceding assault is said to merge into it,<sup>12</sup> and, yet, it is not unusual to find the whole transaction referred to as an "assault and battery" or simply an "assault."<sup>13</sup> Unless otherwise indicated, the term "assault" is used in this article in its technical sense and not as a shorthand reference to a battery.

Although assault, at common law, was only a misdemeanor, the court was vested with discretion to vary the punishment depending upon the circumstances surrounding the perpetration of the crime.<sup>14</sup>

There is no doubt but that the wrong doer is subject . . . to an indictment, at the suit of the king, wherein he shall be fined according to the heinousness of the offence.<sup>15</sup>

Even with the addition of "heinous" circumstances, and the consequent likelihood of increased punishment, the crime, in most instances, remained a misdemeanor.<sup>16</sup> On the other hand, in modern times it has not been unusual for legislatures to codify and make felonious certain of the assaults which typically evoked heavier sanctions at common law—for instance, an assault with a deadly weapon with intent to kill.<sup>17</sup> In common parlance, such felonious assaults are referred to as "aggravated assaults,"<sup>18</sup> a term which appears not to have been used at common law.<sup>19</sup> The non-aggravated (misdemeanor) degrees of the crime are called "common"<sup>20</sup> or "simple"<sup>21</sup> assaults.

The common law knew no crime of "aggravated battery." If the actor's conduct amounted to a separate felony, such as murder, rape, or mayhem, the battery merged therein; otherwise, the offense remained a mis-

11. See *id.* at 85-86; 12 Minn. L. Rev. 405 (1928).

12. May, *Crimes* § 206 (3d ed. 1905).

13. Kenny, *Criminal Law* 153 (14th ed. 1933); see, e.g., N.Y. Pen. Law § 242, wherein both assaults and batteries are designated as "Assault in the second degree."

14. See 2 Bishop, *Criminal Law* § 43 (9th ed. 1923). This was also true in early New York law. "No circumstances attending the offence [of assault] on either side being shown, the courts have no criterion by which to regulate their discretion in fixing the punishment. We are therefore bound to consider it as a common offence; and, accordingly, impose a fine of one dollar." *People v. Cochran*, 2 Johns. Cas. 73 (N.Y. Sup. Jud. Ct. 1800) (*per curiam*).

15. 2 Hawkins, *Pleas of the Crown* 17 (7th ed. 1795).

16. 2 Bishop, *Criminal Law* § 55(2), at 39 (9th ed. 1923). This was also true in early New York law. E.g., *People v. Pettit*, 3 Johns. R. 511 (N.Y. Sup. Ct. 1803) (*per curiam*), where the court stated that assault with intent to murder "was, after all, but a misdemeanor."

17. N.Y. Pen. Law §§ 240(1), 242.

18. See, e.g., *People v. Katz*, 290 N.Y. 361, 365-66, 49 N.E.2d 482, 484 (1943).

19. Perkins, *Criminal Law* 95 (1957).

20. See, e.g., *People v. McKenzie*, 6 App. Div. 199, 202, 39 N.Y. Supp. 951, 953 (2d Dep't 1896).

21. *People v. Wood*, 10 App. Div. 2d 231, 234, 199 N.Y.S.2d 342, 345 (3d Dep't 1960).

demeanor.<sup>22</sup> As with assault, the court had the discretion to increase the punishment for battery in the presence of aggravating circumstances.<sup>23</sup> Today, by statute, some of the more egregious batteries have been designated felonies.<sup>24</sup>

As previously indicated, maiming (mayhem) was one of those common-law felonies into which the crime of battery merged. Generally, maiming was defined as "the violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary,"<sup>25</sup> and was punished by the loss of the same member of which the actor had deprived the party maimed.<sup>26</sup> Proof of the fact of maiming raised a presumption of intent to maim which continued until the contrary appeared from the evidence.<sup>27</sup>

## II. FROM COMMON-LAW ORIGINS TO 1900

The first significant attempt at codification of the criminal law of New York occurred in 1829 with the passage of the Revised Statutes,<sup>28</sup> but it was not until 1881 that a comprehensive penal code was enacted.<sup>29</sup> The 1881 Code purported to set out, under the general heading of "Assaults," the entire law of assault and battery in New York.<sup>30</sup> Neither crime, however, was specifically defined, but this lack of definition is not surprising. "[B]ecause assault and battery is a 'common-law' crime, the statutory provisions, as in the case of most of the common-law crimes, do not purport to define the crime with the same particularity as those crimes which have a statutory origin initially . . ."<sup>31</sup> As a consequence of this absence of statutory definition, New York courts have traditionally referred to common-law principles when confronted with the threshold problem of whether an assault or battery has occurred. In the present discussion, therefore, I have not attempted to distinguish the New York decisions relating to these crimes, on the basis of unwritten versus statutory law. The chronology of the decisions stops at the beginning of the twentieth

22. Perkins, *Criminal Law* 86 (1957).

23. *Ibid.*

24. E.g., N.Y. Pen. Law § 242(3) (willfully and wrongfully inflicting grievous bodily harm upon another).

25. *Foster v. People*, 50 N.Y. 598, 604 (1872).

26. *Id.* at 604-05.

27. 2 Wharton, *Criminal Law* § 1172 (6th rev. ed. 1868).

28. 2 N.Y. Rev. Stat. 655, ch. 1 (1829).

29. N.Y. Sess. Laws 1881, ch. 676.

30. N.Y. Sess. Laws 1881, ch. 676, §§ 217-22. These provisions are preserved, substantially intact, in the present N.Y. Pen. Law §§ 240-45.

31. *People v. Young*, 12 App. Div. 2d 262, 263-64, 210 N.Y.S.2d 358, 360 (1st Dep't 1961), rev'd per curiam on other grounds, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962).

century. For several reasons, the later cases are deserving of, and will be accorded, separate treatment.<sup>32</sup>

The discussion of the New York law of maiming is also limited to pre-twentieth century decisions, but for a different reason. After 1900, the crime, although it remained a part of our penal law, faded into virtual obscurity.

#### A. Assault

The definition of assault is a matter of long-standing dispute,<sup>33</sup> although there does seem to be some consensus on certain of the elements of the crime; namely, there must be "[1] an attempt or offer, [2] with force and violence, [3] to do a corporal hurt [injury] to another."<sup>34</sup> As to other elements, some have said that the offense requires a genuine intent and actual present ability to inflict a battery, and that it is irrelevant whether the victim is aware of the actor's attempted violence.<sup>35</sup> Others have maintained that the victim's apprehension of an imminent battery is the key, and that it makes no difference whether the intent is to batter or to frighten or whether the present ability is real or apparent.<sup>36</sup>

In effect, the choice is between a species of attempted battery and a tortious assault. To illustrate: (1) A, intending to injure B, shot at him and missed. B was at all times oblivious to A's conduct. A has attempted a battery. (2) C, intending only to frighten D, menaced him with an unloaded gun. D believed that the gun was loaded and that C intended to shoot. C has tortiously assaulted D. (3) F, intending to injure G, struck at him with a knife, but G dodged the blow. F has committed both an attempted battery and a tortious assault. The "attempt" adherents would find an assault in case (1) but not in case (2). The "tort" adherents would

32. See notes 135-81 *infra* and accompanying text.

33. For expositions of the conflicting viewpoints, see Clark, *Criminal Law* §§ 81-83, at 253, 262-68 (3d ed. 1915); Clark & Marshall, *Crimes* §§ 10.15-.16 (6th ed. 1958); May, *Crimes* § 213, at 205-06 (3d ed. 1905); Miller, *Criminal Law* §§ 98-99, at 302-03 (1934); Model Penal Code § 201.10, comment 3 (Tent. Draft No. 9, 1959); Perkins, *Criminal Law* 86-93 (1957); Kegwein, *Assault—Is an Intent To Do Harm Requisite to a Criminal Assault?*, 17 *Geo. L.J.* 56 (1928); Perkins, *Non-Homicide Offenses Against the Person*, 26 *B.U.L. Rev.* 119, 132-39 (1946); Perkins, *An Analysis of Assault and Attempts To Assault*, 47 *Minn. L. Rev.* 71 (1962); Turner, *Assault at Common Law*, 7 *Camb. L.J.* 56 (1941); Note, 33 *Ky. L.J.* 189 (1945); Note, 57 *U. Pa. L. Rev.* 249 (1909); 1 *Calif. L. Rev.* 62 (1913); 7 *Cent. L.J.* 162 (1878); 26 *J. Am. Inst. Crim. L. & C.* 128 (1935); 11 *Rocky Mt. L. Rev.* 104 (1939); 13 *U. Det. L.J.* 227 (1950).

34. Miller, *Criminal Law* § 98, at 302 (1934).

35. The leading case is *Chapman v. State*, 78 *Ala.* 463 (1885). See 11 *Rocky Mt. L. Rev.* 104 (1939).

36. See Turner, *supra* note 33. This is, of course, the tort definition of assault. Restatement (Second), *Torts* §§ 21-24 (1965). The leading case supporting this viewpoint is *Commonwealth v. White*, 110 *Mass.* 407 (1872).

find an assault in case (2) but not in case (1). Both would agree that an assault occurred in case (3). Those who favor the tort concept to the exclusion of attempted battery have not been particularly influential. Most courts, which have adopted the former, continue to incorporate the latter within the crime of assault.<sup>37</sup>

Professor Rollin Perkins, a lending authority on offenses against the person, maintains that criminal assault in early times was an attempt to commit a battery.<sup>38</sup> However, it seems unlikely that the early common law had arrived at a precise and universally applied definition. For instance, the Duke of York's Laws, which were promulgated in New York in 1665 and remained in force until at least 1687,<sup>39</sup> defined assault as follows:

Assaults are made either by Blowes or offering of hurtful blowes or at least by threatening and menacing speeches . . . .<sup>40</sup>

Evidently, no distinction was drawn between an assault and a battery, and, contrary to subsequently settled opinion,<sup>41</sup> mere words were sufficient to constitute the crime. On the other hand, a definition of assault which resembled attempted battery appeared in a colonial edition of the *Conductor Generalis*:

Assault is derived from the old *Latin* Word *Assultus*; which signifies a *Leaping on another*, so that *ex vi termini* it cannot be performed without the Offering some Hurt to the *Person*, as by striking, &c.<sup>42</sup>

It is probable that there was no single, generally accepted definition of assault until Hawkins published his *Pleas of the Crown* in 1716. Hawkins defined the crime as follows:

It seems that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him at such a distance to which the gun will carry; or pointing a pitch-fork at him, standing within reach of it; or by holding up one's fist at him; or by any other such-like act done in an angry threatening manner . . . . Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault.<sup>43</sup>

At least by 1772, Hawkins' definition had been incorporated into a

37. Perkins, *Criminal Law* 88-89 (1957). Stephen adopted both views and also catalogued false imprisonment as a species of assault. Stephen, *Criminal Law* 162 (1877). This principle has been criticized, and it is probably erroneous to include such conduct within the crime unless an independent assault accompanies the imprisonment. Turner, *supra* note 33, at 61-63.

38. Perkins, *An Analysis of Assault and Attempts To Assault*, 47 *Minn. L. Rev.* 71 (1962).

39. Cumming, *Historical Note*, 1 *Colonial Laws of New York* at xii (1894).

40. 1 *Colonial Laws of New York* 15 (1894).

41. "[I]t is now settled that no words can, of themselves, amount to an assault." 2 Wharton, *Criminal Law* § 1242, at 226 (6th rev. ed. 1868). See 22 *Mich. L. Rev.* 731 (1924).

42. *Conductor Generalis* 18 (1722).

43. 2 Hawkins, *Pleas of the Crown* 16 (7th ed. 1795).



colonial edition of Burn's *Justice of the Peace*,<sup>44</sup> and is also to be found in an 1803 edition of the *Conductor Generalis* published in New York.<sup>45</sup> It was to become the generally accepted definition.<sup>46</sup>

The principal problem with Hawkins' statement of the crime is to decide whether there is a distinction between "attempt" and "offer," that is, whether "attempt" is meant to indicate an attempted battery, and "offer," a tortious assault. Consistent with his view that a criminal assault originally signified an attempted battery, Professor Perkins argues that "offer" is synonymous with "attempt" and that duplicity of expression was not unusual in the early law.<sup>47</sup> Nor is his view unsupported. Professor Kegwein wrote: "An attempt or offer, of course, necessarily implies a purpose; and if those words are properly employed in the definition, it necessarily follows, as is usually held, that there can be no assault without a definite intent to do harm . . ."<sup>48</sup> A "definite intent to harm" is characteristic of an attempted battery and completely unnecessary for a tortious assault. Furthermore, "it would seem that the learned editors of Archbold<sup>49</sup> identify these two words, for although they refer to Hawkins they omit the word 'offer'."<sup>50</sup> Finally, in the early New York case of *People v. Powers*,<sup>51</sup> the court, in discussing the crime of battery, incidentally referred to "the *injury* that might be offered and suffered."<sup>52</sup> Apparently, it was assumed that the injury might be "suffered" because it was "offered." Therefore, "offer" must have meant something more than conduct intended to cause a battery to be apprehended; it must have meant conduct intended to cause a battery to be "suffered," *i.e.*, an attempted battery.

While there is respectable authority for the proposition that Hawkins meant an attempted battery when he defined assault, nevertheless, his definition is hardly precise. One writer characterized it as a "loose description"<sup>53</sup> and thought that it manifested "a struggle in describing the pattern of punishable behavior which has not produced actual physical harm."<sup>54</sup> Furthermore, if, as Professor Perkins contends, "attempt or offer" is mere duplicity of expression,<sup>55</sup> why was not the disjunctive used

44. An Abridgement of Burn's *Justice of the Peace and Parish Officer* 29 (1773).

45. A New *Conductor Generalis* 45 (1803).

46. 2 Bishop, *Criminal Law* § 23, at 16 n.2 (9th ed. 1923); Clark, *Criminal Law* §§ 81-83, at 253 (3d ed. 1915); Miller, *Criminal Law* § 98, at 302 (1934).

47. Perkins, *supra* note 38, at 75-76.

48. Kegwein, *supra* note 33, at 58.

49. Archbold, *Criminal Pleading, Evidence & Practice* (30th ed. 1938).

50. Turner, *supra* note 33, at 56-57.

51. 1 Wheel. Cr. Rec. 405 (N.Y. City Hall 1823).

52. *Id.* at 410.

53. Clark & Marshall, § 10.15, at 642 (6th ed. 1958).

54. *Id.* § 10.15, at 643.

55. Perkins, *supra* note 38, at 75-76.

in the phrase "force and violence,"<sup>56</sup> which is also duplicity of expression?

As if the waters were not sufficiently muddied, East, in 1803, published his own *Pleas of the Crown*. He defined assault as

any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even by holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it.<sup>57</sup>

East, who was not an outstanding theoretician of the criminal law,<sup>58</sup> may have intended no more than to paraphrase Hawkins, but, if this be so, his language was ill-chosen. Indeed Professor Perkins pinpoints East's definition as the probable cause for the incorporation of the tort theory into criminal assault.<sup>59</sup> Certainly East's phrase "denote at the time an intention" is consistent with both apparent and actual intent, and he does not seem to have distinguished the two.<sup>60</sup> It is perhaps not coincidental that the leading decision urging the tort theory asserted that "it is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances *denote* at the time to the party assaulted."<sup>61</sup>

Handicapped by this common-law inheritance of imprecision and loose definition, the early nineteenth century courts of New York began to grope for the meaning of criminal assault. This is not to imply that they were inexperienced in dealing with the crime, for, during the prior century, assault was "constantly and in every county the most frequent offense."<sup>62</sup> However, it appears that the courts had not yet made an effort to analyze precisely the elements of the offense.

Three New York decisions in the 1820's illustrate the struggle of the courts to cope with criminal assault. In *Fairme's Case*,<sup>63</sup> the court laid down the rule that an assault might be committed with a fork even though the assailant were never to come within striking distance of his

56. "As it has been said, 'violence' and 'force' are synonyms when used in this connection . . ." Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U.L. Rev. 119, 120 (1946).

57. 1 East, *Pleas of the Crown* 406 (1803).

58. "As regards criminal theory, he . . . represented a retrogression." Hall, *Criminal Law* 10 (2d ed. 1960).

59. Perkins, *supra* note 38, at 79.

60. See *ibid.*

61. *Commonwealth v. White*, 110 Mass. 407, 409 (1872). (Emphasis added.)

62. Goebel & Naughton, *Law Enforcement in Colonial New York* 99 (1944).

63. 5 City Hall Rec. 95 (N.Y. Ct. Gen. Sess. 1820).

victim, provided he "came so near him, as that danger might reasonably be apprehended . . . ." <sup>64</sup> Both Hawkins and East had emphasized the necessity of the assailant's being within striking distance, <sup>65</sup> and East had specifically put this requirement in terms of "present ability." <sup>66</sup> Yet, the extension of the crime to include one who (as another writer described the situation) "would almost immediately reach" his victim <sup>67</sup> is neither startling nor necessarily inconsistent with the definition of assault as an attempted battery. What is more significant is the measurement of physical proximity in terms of apprehension of danger. This is typical tort language. Here again, however, the language can be rationalized. If the court consciously intended to extend the physical orbit of assault (attempted battery) beyond actual striking distance, then it needed a substitute measure of proximity. An objective standard of the distance, within which a battery might reasonably appear to be imminent, is certainly the next logical step. So viewed, there is nothing in the "apprehension-of-danger" test which is inconsistent with the concept of criminal assault as merely an attempt at battery.

In *Goodwin's Case*, <sup>68</sup> one of the questions was whether defendant had been guilty of an assault when he pointed a cane at another and said, "There is a scoundrel and a coward . . . ." <sup>69</sup> The court seems to have held that such conduct did not even manifest an intent to frighten, <sup>70</sup> so there was no real issue of a choice between an attempted battery and a tortious assault. Nevertheless, the headnote writer, perhaps articulating the contemporary approach to the crime, summarized that part of the decision as follows:

It is not an assault to point a cane to one in derision in the street, for the purpose of insulting him, but *without an intention of striking him*. <sup>71</sup>

If, as the headnote writer believed, an intention to strike was an indispensable element of assault, then the crime more resembled attempted battery than civil assault.

64. *Id.* at 96.

65. See text accompanying notes 43 & 57 *supra*.

66. See text accompanying note 57 *supra*. There seems little doubt that East meant physical proximity and not the effectiveness of a weapon, e.g., an unloaded gun, when he spoke of "present ability." The editors of Selwyn, in referring to the requirement of present ability, cited *Stephens v. Myers*, 4 Car. & P. 349, 172 Eng. Rep. 735 (C.P. 1830), which dealt solely with physical proximity. 1 Selwyn, *Nisi Prius* \*26 n.(c) (7th Am. ed. from 11th London ed. 1857); see Roscoe, *Criminal Evidence* 287 (4th Am. ed. from 3d London ed. 1852).

67. *Ibid.*

68. 6 City Hall Rec. 9 (N.Y. Ct. Sittings 1821).

69. *Id.* at 16.

70. See *ibid.*

71. *Id.* at 9. (Emphasis added.)

Finally, in *People v. Lee*,<sup>72</sup> the court gave a definition of assault which was apparently drawn from Hawkins, except that the word "offer" was omitted:

[A]n assault was an attempt, with force and violence, to do a corporeal hurt to another, as by striking at him with a weapon, or without a weapon, being within striking distance, or presenting a gun at him at a distance the gun will carry, or pointing a pitchfork at him, being within reach of it . . . .<sup>73</sup>

There is very little room for a tortious assault in this statement of the law. A criminal assault is an attempt to do a corporal hurt to another, an attempt to batter. Certainly, the reporter of the *Lee* case so understood the law, for he wrote in his annotation to the decision that "a battery, is where *that attempt* [referring to the "attempt" mentioned in the court's definition of assault] is carried into execution to the injury of a person . . . ."<sup>74</sup> A battery, in other words, is a successful assault.

Were it not for the ambiguous apprehension-of-danger test in *Fairme's Case*, we would be safe in concluding that New York in the 1820's viewed criminal assault as an attempt at battery—and only that. At the very least, we are justified in saying that the law was moving in that direction.

In 1841, the decision which ought to have laid all doubts to rest was rendered in the leading case of *Hays v. People*.<sup>75</sup> The defendant had enticed a young girl into a building "for the purpose of ravishing her; and was detected, while standing within five feet of her in a state of indecent exposure."<sup>76</sup> The court stated:

This is clearly an assault within all the authorities. An assault is defined by these, to be an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person.

There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient.<sup>77</sup>

72. 1 Wheel. Cr. Rec. 364 (N.Y. City Hall 1823).

73. *Id.* at 365. At least one textbook writer appeared not to consider the omission of the word "offer" as significant. Miller, in defining assault as an "attempt or offer" cited the *Lee* case. Miller, *Criminal Law* § 98, at 302 & n.82 (1934).

74. 1 Wheel. Cr. Rec. at 365. (Emphasis added.) The contemporary case of *People v. Powers*, 1 Wheel. Cr. Rec. 405 (N.Y. City Hall 1823), seemed to agree that "offer" meant "attempt." See text accompanying notes 51 & 52 *supra*.

75. 1 Hill 351 (N.Y. 1841).

76. *Id.* at 352.

77. *Id.* at 352-53.

There are several reasons for concluding that the court intended to define assault as attempted battery. First, the word "offer" is omitted from the definition. Secondly, the term "any indirect preparation towards it" closely follows the description of a criminal attempt in the Revised Statutes.<sup>78</sup> Finally, the same court, when called upon two years later to decide whether criminal solicitation constituted a criminal attempt, observed in passing that "an *attempt* may be immediate—an assault, for instance . . . ."<sup>79</sup>

Most interpreters of the *Hays* case have agreed in substance that the New York court intended to identify assault with attempted battery.<sup>80</sup> Yet, the unfortunate inclusion in the opinion of East's phrase, "denote at the time an intention," has led others astray. Thus, one writer seemed to think that the language was broad enough to cover both an attempted battery and a civil assault,<sup>81</sup> and one court thought that it furnished no certain or satisfactory solution to the problem of whether the tort theory was included within criminal assault.<sup>82</sup>

The efforts to interpret *Hays* were not helped by the opinion in *People v. Bransby*.<sup>83</sup> While conceding that *Hays* required an intent to use actual

78. "Every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same . . ." 2 N.Y. Rev. Stat. 698, § 3 (1829).

Professor Perkins has observed that "the original concept of criminal assault developed at an earlier day than the doctrine of criminal attempt in general, and crystallized on a much narrower basis in the sense of a greater degree of proximity." Perkins, *supra* note 38, at 76. He cites for this proposition the case of *State v. Davis*, 23 N.C. 125 (1840), wherein it was held that the defendant must be in the act of offering violence before it may be said that an assault (attempted battery) has occurred. *Id.* at 127. Perhaps the *Hays* court, speaking shortly thereafter, had the North Carolina decision in mind when it referred to "indirect preparation towards" violence, and intended to bring assault more in line with the general law of criminal attempts vis-à-vis proximity.

79. *People v. Bush*, 4 Hill 133, 135 (N.Y. 1843) (dictum).

80. See *State v. Creighton*, 98 Me. 424, 57 Atl. 592 (1904) (intent to injure and present ability required); *People v. McKenzie*, 6 App. Div. 199, 201, 39 N.Y. Supp. 951, 953 (2d Dep't 1896) (actual present ability required by *Hays*); *People v. Terrell*, 53 Hun 602, 11 N.Y. Supp. 364, 365-66 (5th Dep't 1890) (intent to injure and present ability required); *Degenhardt v. Heller*, 93 Wis. 662, 663-64, 68 N.W. 411, 412 (1896) (intent to injure required); 2 Wharton, *Criminal Law* § 1241, at 225-26 (6th ed. 1870) ("intentional attempt, by violence, to do an injury to another"). In *People v. Sullivan*, 4 N.Y. Crim. 193, 197 (App. Div. 5th Dep't 1885), the court cited the *Hays* case for the proposition that "to constitute a criminal assault and [sic] intent to do bodily harm, or by violence to insult, is requisite." The intent mentioned is obviously an intent to batter, since, it will be recalled, battery includes not only harmful, but also insulting contacts with the person. See text accompanying note 9 *supra*.

81. 7 Cent. L.J. 162 (1878).

82. See *State v. Godfrey*, 17 Ore. 300, 20 Pac. 625 (1889).

83. 32 N.Y. 525 (1865).

violence against the person,<sup>84</sup> Judge Porter opined that "a criminal conviction for an assault cannot be upheld where no battery has been committed, and none *attempted, intended or threatened* by the party accused. It is indispensable to the offence that violence to the person be either *offered, menaced or designed*."<sup>85</sup> If the use of the disjunctives was meant to differentiate between "intended" and "designed" on the one hand, and "threatened" and "menaced" on the other, then the language is broad enough to encompass both an attempted battery and a tortious assault. In that sense, the statement of the crime is completely at odds with the court's own interpretation of *Hays*, and the court did not expressly purport to overrule this latter case.

In at least one subsequent decision, *Bransby* was cited for the proposition that a successful attempt to cause apprehension of a battery (with no actual intent to batter), accompanied by only apparent present ability, was sufficient for a criminal assault.<sup>86</sup> The seeds of clarification, which had been sown in the 1820's, and which *Hays* had nurtured in 1841, were scattered to the winds in 1865 by *Bransby*.

In 1881, the New York Penal Law was completely revised. It may be that this revision promoted more scholarly insights into the criminal law which, in turn, brought the problems of criminal assault into clearer focus. For whatever reason, the intermediate appellate courts of New York were frequently called upon in the 1880-1890's to explore the elements of the crime. Among the reported decisions, *People v. Sullivan*<sup>87</sup> and *People v. Terrell*<sup>88</sup> interpreted *Hays* to require an actual intent to batter, and so the court in each instance embraced the attempted battery theory. On the other hand, the courts which decided *People v. Morehouse*,<sup>89</sup> *People v. Connor*,<sup>90</sup> and *People v. McKenzie*<sup>91</sup> were ranged on the tortious assault side of the controversy—at least to the extent of adopting this concept as an additional basis for the crime. *Morehouse*

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84. *Id.* at 534.

85. *Id.* at 532. (Emphasis added.)

86. See *People v. Morehouse*, 53 Hun 638, 6 N.Y. Supp. 763, 765 (4th Dep't 1889). Other jurisdictions had preceded *Bransby* in holding that a tortious assault was included within the crime of assault. See, e.g., *State v. Shepard*, 10 Iowa 126 (1859); *R. v. St. George*, 9 Car. & P. 483, 173 Eng. Rep. 921 (N.P. 1840).

87. 4 N.Y. Crim. 193, 197 (Sup. Ct. 1885).

88. 58 Hun 602, 11 N.Y. Supp. 364, 365-66 (5th Dep't 1890).

89. 6 N.Y. Supp. 763, 765-66 (App. Div. 4th Dep't 1889).

90. 53 Hun 352, 6 N.Y. Supp. 220 (1st Dep't 1889) (dictum).

91. 6 App. Div. 199, 39 N.Y. Supp. 951 (2d Dep't 1896) (dictum). New York was not the only state to focus on the controversy during this period. The law was crystallizing in other jurisdictions. See, e.g., the leading cases of *Chapman v. State*, 78 Ala. 463 (1885); *Commonwealth v. White*, 110 Mass. 407 (1872); *People v. Lilley*, 43 Mich. 521, 5 N.W. 982 (1880).

relied on *Fairme's Case*,<sup>92</sup> *People v. Lee*,<sup>93</sup> and *People v. Bransby*,<sup>94</sup> as well as on a number of out-of-state decisions. *Connor* cited no authority, and *McKenzie*, in holding that a common assault might be committed without an intent to batter and with only apparent present ability, seemed to concede that *Hays* was to the contrary.<sup>95</sup>

Of all these late nineteenth century cases, the *Morehouse* opinion is the most thoughtful, and it was this decision that made the deepest impression upon the courts and the text writers.<sup>96</sup> In addition, the *Morehouse* court opened a new frontier of the crime in New York. Morehouse, without justification, had pointed a cocked gun at one Decker on a public street and had threatened to shoot if Decker came any closer. On appeal from his conviction for assault, Morehouse contended that his conduct had not constituted a crime because the threat to shoot had been conditional. The court disagreed:

[T]he contingency was illegal, and one that the defendant had neither a right to demand nor enforce. If the defendant's position is correct, he might with equal justice enter the house of another, and by similar acts require him to leave his home and family, and still be innocent of an assault. We do not think such is the law.<sup>97</sup>

No previous New York case had dealt precisely with the question of whether an unjustified conditional threat, accompanied by an offer of violence, might constitute an assault.<sup>98</sup> In this respect, the *Morehouse* case pioneered new law.

92. 5 City Hall Rec. 95 (N.Y. Ct. Gen. Sess. 1820).

93. 1 Wheel. Cr. Rec. 364 (N.Y. City Hall 1823).

94. 32 N.Y. 525 (1865).

95. See 6 App. Div. 199, 201-02, 39 N.Y. Supp. 951, 953 (2d Dep't 1896).

96. For instance, in *People v. Tremaine*, 129 Misc. 650, 653-54, 222 N.Y. Supp. 433, 436 (Sup. Ct. 1927), the *Morehouse* decision was cited as the controlling law of New York, and in *People v. Wood*, 10 App. Div. 2d 231, 234, 199 N.Y.S.2d 342, 346 (3d Dep't 1960), it was considered persuasive authority. In the 1905 edition of *May, Crimes* § 213, at 205 (3d ed. 1905), *Morehouse* was mentioned as the prevailing New York view of assault. The decision is at least noted in every leading textbook.

97. 6 N.Y. Supp. at 764.

98. In *People v. Johnson*, 9 Weekly Dig. 384 (N.Y. App. Div. 3d Dep't 1890) (*per curiam*), it had been held that a conditional threat of a battery was not an assault because, in effect, there had been no battery attempted, threatened, or intended. However, as pointed out in *Morehouse*, the actor in the *Johnson* case had possessed a legal right both to impose the condition and to enforce it by violence. 6 N.Y. Supp. at 764. Whether the *Johnson* court would have reached the same decision had these rights not been present is problematical.

While *Morehouse* was the first case in New York to deal with unjustified conditional threats, other jurisdictions had already held that such conduct constituted an assault. See *United States v. Myers*, 27 Fed. Cas. 43 (No. 15845) (D.C. Cir. 1806); *Hairston v. State*, 54 Miss. 689 (1877); *State v. Horne*, 92 N.C. 805 (1885).

Conditional threats must be distinguished from words which completely negate any threat of a battery; e.g., "If it were not for your gray hairs, I would tear your heart out." Com-

Professor Perkins points out that conditional threats are not attempted batteries (there being no unequivocal intent to batter), and, hence, the actor's conduct should not be sufficient to constitute an assault in a state limiting the offense to this basis alone.<sup>99</sup> By the same token, it has been argued that the victim of such conduct is not in apprehension of an immediate battery—at least up until the time that he refuses to comply with the condition imposed by the actor—so that no tortious assault has occurred.<sup>100</sup> In light of these conflicting views, it is preferable to regard conditional threats as *sui generis*, having no particular relevance to the attempted battery versus tortious assault controversy. As the *Morehouse* court implied, such threats should be considered criminal assaults primarily as a matter of public policy. We ought to approach the actor's conduct, without reference to the condition, as though the attempt or offer to batter were immediate.

The appellate court which decided *Morehouse* had definite and informed opinions on the meaning of criminal assault. However, its counterpart in another section of the state seemed unable to cope with the problem. In July 1889, the first department decided, in *People v. Connor*,<sup>101</sup> that an actual intent to batter was not necessary for the crime of assault. A few months later, the same court rendered the decision in *People v. Ryan*.<sup>102</sup> While the language of the opinion is not clear, the holding seemed to be: (1) the crime is satisfied by violence menaced as well as by violence designed,<sup>103</sup> but, (2) in either case, it is not an assault to threaten another with an unloaded pistol.<sup>104</sup> Taking *Connor*

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monwealth v. Eyre, 1 S. & R. 346 (Pa. 1815). Since the actor in such a situation intends neither to batter nor to create apprehension of a battery, there is no assault under any theory of the crime.

99. Perkins, *Criminal Law* 93 (1957); accord, Comment, 1956 Wash. U.L.Q. 479, 483 n.31.

100. Note, 57 U. Pa. L. Rev. 249, 250 (1909). However, the Restatement takes the position that such conduct causes apprehension. See Restatement (Second), Torts § 30, comment b (1965).

101. 53 Hun 352, 353, 6 N.Y. Supp. 220, 221 (1st Dep't 1889).

102. 55 Hun 214, 8 N.Y. Supp. 241 (1st Dep't 1889).

103. The court quoted the definition of assault in the Hays case, see text accompanying note 77 supra, and noted that in *People v. Bransby*, 32 N.Y. 525 (1865), "this principle was so far sanctioned and followed as to declare it to be only indispensable to create an assault 'that violence to the person be either offered, menaced or designed.'" 55 Hun at 216, 8 N.Y. Supp. at 242. Evidently, the court viewed Bransby as a limitation upon Hays.

104. "And Wharton, in his *American Criminal Law* . . . states . . . that 'it is an assault to point a loaded pistol at any one, but not an assault to point a pistol at another which is proved not to be so loaded as to be able to be discharged.'" *Id.* at 216, 8 N.Y. Supp. at 242, quoting from Wharton, *Criminal Law* § 1244, at 614-15 (4th ed. 1857). It is true that in *Ryan* the appeal was from a conviction of assault with a loaded firearm with intent to kill (assault in the first degree), but, in the portion of the opinion just quoted, the court was addressing itself to the crime of assault in the abstract.



and *Ryan* together, we arrive at the novel proposition that a genuine intent to batter is not required for criminal assault, but actual present ability is indispensable. The court resolved the tort assault-attempted battery controversy by borrowing one-half of a definition from each side. The resulting principle of law makes no sense at all.

Armed with this unique definition of assault, the first department next confronted the case of *People v. O'Connell*.<sup>105</sup> O'Connell had been indicted on a charge of feloniously assaulting one Daly with the aid of an axe and with the intent to kill (assault in the first degree). At his arraignment, O'Connell pleaded guilty to an attempt to commit assault in the first degree, and judgment was entered accordingly. On appeal, it was urged that the judgment was void because there was no such offense known to the law as an attempt at assault. Defendant's theory evidently was this: An assault is itself an attempted battery, and one cannot be guilty of an attempt to attempt a crime.

The court suspected the defendant of perpetrating a hoax and affirmed the judgment.<sup>106</sup> In support of the affirmation, one of the judges asserted: "To make the assault itself it was necessary that he should be so near as to be able to strike him, and should attempt to do so."<sup>107</sup> By requiring that the actor be within striking distance<sup>108</sup> and in the very act of offering violence,<sup>109</sup> the court was able to manufacture a situation wherein a crime of attempted assault might occur. "To make an attempt to assault him required no more than that he should arm himself with the axe and endeavor to place himself in the position to use it by executing his intention to kill."<sup>110</sup> The *O'Connell* decision was the first in New York to put forward a crime of attempted assault.<sup>111</sup>

Despite this extensive late nineteenth century litigation, New York, at the turn of the century, was in no better position to resolve the assault controversy than it had been one hundred years before. Still, the cases

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105. 60 Hun 109, 14 N.Y. Supp. 485 (1st Dep't 1891).

106. "While the utmost care should be taken in criminal cases to preserve the rights of the accused, he should not be allowed upon specious pretext and cunningly devised expressions to mean one thing and say another." Id. at 112, 14 N.Y. Supp. at 488 (Lawrence, J., concurring).

107. Id. at 115, 14 N.Y. Supp. at 486 (Daniels, J.).

108. Contra, *Fairme's Case*, 5 City Hall Rec. 95 (N.Y. Ct. Gen. Sess. 1820), holding that, if the threatened battery appeared imminent, an assault occurred although the actor had not yet come within striking distance of his victim.

109. Contra, *Hays v. People*, 1 Hill 351 (N.Y. 1841), holding that a direct attempt at violence was unnecessary and that indirect preparations towards it might suffice.

110. 60 Hun at 115, 14 N.Y. Supp. at 486-87.

111. For cases in other jurisdictions, some of them agreeing with defendant's claim in the *O'Connell* case that no crime of attempted assault is possible, see Annot., 79 A.L.R.2d 597 (1961). For an exposition in depth, see Perkins, *An Analysis of Assault and Attempts To Assault*, 47 Minn. L. Rev. 71 (1962).

had not been totally unproductive. Two new theories had been formulated: (1) a conditional threat of a battery, accompanied by an offer of violence, may constitute an assault, and, (2) under some circumstances, it is possible to commit a crime of attempted assault.

### B. Battery

As already observed, battery is defined as "the unlawful application of force to the person of another."<sup>112</sup> "Force to the person" did not necessarily mean bodily injury at common law. "Spitting in the face was not calculated to injure the person, yet it was a violent outrage and assault upon the person, an indignity to, and contempt for, the feelings of a man, not to be tolerated."<sup>113</sup>

The crime did not require person-to-person contact. In one New York decision, the conduct of the defendant in seizing and turning around the horses that were drawing complainant's sleigh was held to constitute the application of force to the person of the complainant.<sup>114</sup>

Until recent years, the crime of battery has been relatively free from complications. It is true that for some time a disagreement existed among the English authorities on the question of whether the administration of poison to another with the intent to injure constituted a battery.<sup>115</sup> Fortunately, however, such conduct has long been the subject of statutory law in New York. In addition to a section dealing with the administration of poison with the intent to kill, the Revised Statutes provided that every person who mingled poison with any food, drink or medicine was subject to imprisonment in a state prison for not more than ten years, or in a county jail for not more than one year, or by fine and/or imprisonment.<sup>116</sup> Similar provisions were contained in the 1881 Code,<sup>117</sup> and these have been continued in our present Penal Law.<sup>118</sup>

Criminally negligent battery is a familiar offense today, but did it exist at common law? In *Jaques' Case*,<sup>119</sup> an early New York court treated driving a rig at an excessive rate of speed (at least six miles an hour instead of the statutory limit of five) as sufficiently culpable conduct to support a conviction of battery when the rig hit and injured

112. Perkins, *Criminal Law* 80 (1957). (Footnote omitted.)

113. *People v. Powers*, 1 Wheel. Cr. Rec. 405, 410 (N.Y. City Hall 1823).

114. *People v. Moore*, 50 Hun 356, 3 N.Y. Supp. 159 (3d Dep't 1888).

115. See Note, 29 Mich. L. Rev. 87, 89-90 (1930). The principal objection was that the indispensable element of force was lacking in such conduct.

116. 2 N.Y. Rev. Stat. §§ 37-38, at 665-66 (1829). For a discussion of both sections, see Barbour, *Criminal Law* 92-94 (2d ed. 1852).

117. N.Y. Sess. Laws 1881, ch. 676, §§ 217(2), 218(1)-(2).

118. N.Y. Pen. Law §§ 240(2), 242(1)-(2).

119. 5 City Hall Rec. 77 (N.Y. Sup. Jud. Ct. 1820).

a pedestrian. The case seems to have preceded by some years the general evolution of a theory of criminally negligent battery. Professor Livingston Hall traces the flowering of this concept to the latter half of the nineteenth century, and finds its roots in an analogy drawn by courts to the previously developed law of reckless manslaughter.<sup>120</sup> Other courts have proceeded on the assumption that an intent to batter may be inferred from grossly negligent conduct,<sup>121</sup> and at least one authority thought that the common-law crime, like the general law of assault and battery, was based on a breach of the peace.<sup>122</sup>

The 1881 Code made no specific reference to negligent battery; however, in the present New York Penal Law, it is a misdemeanor to injure another by culpably negligent driving or hunting.<sup>123</sup> It was not until the advent of the automobile in the twentieth century that battery by negligence became a significant (and troublesome) offense. In fact, all of our problems with battery in New York have been the product of this century.

### C. *Maiming*

At common law, maiming was deemed an offense against the state because its effect was to disable the maimed person permanently from serving king and country.<sup>124</sup> The early common-law writers were clear on the theory of the offense, but appeared to disagree on the kinds of injury which were appropriate to it—for instance, whether breaking the skull was maiming.<sup>125</sup>

The Revised Statutes, drawing upon earlier English legislation,<sup>126</sup> defined maiming as follows:

Every person who, from premeditated design, evinced by laying in wait for the purpose, or in any other manner; or with intention to kill or commit any felony; shall,

1. Cut out or disable the tongue: or,
2. Put out an eye: or,
3. Slit the lip, or slit or destroy the nose: or,
4. Cut off or disable any limb or member,

Of another, on purpose, upon conviction thereof, shall be imprisoned in a state prison, for such term as the court shall prescribe, not less than seven years.<sup>127</sup>

120. Hall, *Assault and Battery by the Reckless Motorist*, 31 *J. Am. Inst. Crim. L. & C.* 133-34 (1940).

121. See cases collected in Moreland, *A Rationale of Criminal Negligence*, 32 *Ky. L.J.* 127, 188-89 (1944).

122. Barbour, *Criminal Law* 231 (2d ed. 1852).

123. *N.Y. Pen. Law* §§ 244(2), 245, 247-48.

124. See *Foster v. People*, 50 *N.Y.* 598, 604-05 (1872).

125. See *id.* at 605-06.

126. See *id.* at 607.

127. 2 *N.Y. Rev. Stat.* § 27, at 644 (1829). (Footnote omitted.)

Slitting the lip was not such an injury as would necessarily render a person less able to defend himself, but by the time that the Revised Statutes were enacted, the theory of the crime had changed from an offense against the state to one against the person. As a consequence, certain acts of disfigurement were included.<sup>128</sup> In *Foster v. People*,<sup>129</sup> it was held that the maiming section of the Revised Statutes was intended as a comprehensive definition of the offense, and, hence, breaking the skull was not maiming.

The present New York Penal Law provisions on maiming<sup>130</sup> are drawn *in haec verba* from the 1881 Code.<sup>131</sup> The crime is defined as follows:

A person who wilfully, with intent to commit felony, or to injure, disfigure or disable, inflicts upon the person of another an injury which:

1. Seriously disfigures his person by any mutilation thereof; or,
  2. Destroys or disables any member or organ of his body; or,
  3. Seriously diminishes his physical vigor by the injury of any member or organ,
- Is guilty of maiming . . .<sup>132</sup>

Maiming today is considerably broader in scope than it was under the Revised Statutes. All serious disfigurements and most other serious and debilitating injuries are included. In addition, while the Revised Statutes required purposive and premeditated conduct,<sup>133</sup> the existing offense may be committed "with mere intent to 'injure.' Hence, for example, one who, with no intent to maim, happens to destroy an eye in the course of a routine assault is guilty of 'maiming.'"<sup>134</sup>

### III. THE TWENTIETH CENTURY

In the following discussion, the focus will be upon the developments in the law of assault and battery in twentieth century New York. Maiming has not been included, except by way of incidental mention, because there have been no recent developments in this area of the law. Since the more important New York decisions during this period have centered on one or another of the degrees of assault and battery, the statutes have assumed a greater significance, and the chronological discussion of cases

128. The statute did not contemplate every disfigurement. In *Burke v. People*, 4 Hun 481, 485-86 (N.Y. 1st Dep't 1875), the court indicated, in dictum, that disfiguring an ear was not maiming if the ear was not otherwise disabled.

129. 50 N.Y. 598, 606-07 (1872).

130. N.Y. Pen. Law §§ 1400-04.

131. N.Y. Sess. Laws 1881, ch. 676, §§ 206-10.

132. N.Y. Pen. Law § 1400.

133. *Godfrey v. People*, 63 N.Y. 207 (1875).

134. Proposed Pen. Law, Commission Staff Notes § 125.10, at 333. "[I]t is immaterial by what means or instrument, or in what manner, the injury was inflicted." N.Y. Pen. Law § 1401.

which was suited to the nineteenth century must yield to a "degree-by-degree" analysis of these statutes.

All crimes of assault and battery are generically denominated "Assault" in New York. There are three degrees of the crime,<sup>135</sup> together with a separate misdemeanor—"Criminal Negligence While Engaged in Hunting Resulting in Injury to Another."<sup>136</sup> Although the label "Assault" applies to both assault and battery, the word is also used in its traditional sense to describe specific assaultive conduct which falls short of a battery. For the sake of clarity, the traditional assault will be referred to in this section of the article as a "true assault."

#### A. Assault in the First Degree

The *mens rea* of assault in the first degree "is an intent to kill or to commit a felony upon the person or property of the one assaulted or another."<sup>137</sup> The *actus reus* is either (a) a true assault with a loaded firearm or other weapon or force likely to produce death, or (b) the administration of a noxious substance so as to endanger life. This latter is a species of battery, and, in order for the crime to be complete, the life of the person poisoned must actually be endangered.<sup>138</sup>

When the crime charged is a true assault, rather than a battery by poisoning, there arises the inevitable problem of defining assault. The statute expressly requires present ability vis-à-vis the instrumentality used, *i.e.*, a deadly force or weapon; and *People v. O'Connell*<sup>139</sup> requires present ability vis-à-vis the actor's physical proximity to his victim, *i.e.*, he must be within actual striking distance.<sup>140</sup> If we add to these elements the intent to kill, we have an attempted battery. If, on the other hand, the intent is not to kill, but only to commit a felony, then a conditional threat suffices. For instance, it has been said that a robbery accomplished by pointing a loaded revolver at another contains the elements of an assault in the first degree.<sup>141</sup> Conditional threats, as we have seen, belong

135. N.Y. Pen. Law §§ 240-45. The two higher degrees are felonies (aggravated assaults), while assault in the third degree is a misdemeanor (simple assault). *People v. Katz*, 290 N.Y. 361, 49 N.E.2d 482 (1943).

136. N.Y. Pen. Law §§ 247-48.

137. N.Y. Pen. Law § 240. This section is drawn in haec verba from the 1831 Code. N.Y. Sess. Laws 1831, ch. 676, § 217. Forerunner statutes may be found in 2 N.Y. Rev. Stat. §§ 36, 37, at 665-66 (1829).

138. *People v. Burgess*, 45 Hun 157 (N.Y. 1st Dep't 1887).

139. 60 Hun 109, 14 N.Y. Supp. 485 (1st Dep't 1891).

140. But see text accompanying notes 157-62 *infra*, discussing *People v. Knapp*, 17 App. Div. 2d 65, 231 N.Y.S.2d 341 (3d Dep't 1962).

141. However, in *Zovick v. Eaton*, 259 App. Div. 585, 20 N.Y.S.2d 447 (3d Dep't 1940), it was held that the court may enter judgment only on the crime of robbery since both crimes were part of a single transaction. The practice today would permit the imposition of con-

in a sui generis category, having no reference to the attempted battery-tortious assault controversy.

Aside from conditional threats, a first degree assault with intent to commit a felony may involve either an attempted or a completed battery. Beyond these instances, the subsection appears to have no application.

### B. *Assault in the Second Degree*

Assault in the second degree may be committed by the administration of a dangerous substance with intent to injure or of a drug with intent to abet the commission of a felony,<sup>142</sup> both being batteries. A person "who willfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon," also commits the crime.<sup>143</sup> This last subsection came under scrutiny in *People v. Katz*,<sup>144</sup> where a divided court of appeals held that a specific intent to wound or inflict grievous harm was an indispensable element of the offense. The majority reasoned that, since the crime is a felony, it necessarily requires, as the *mens rea*, a felonious intent, *i.e.*, to injure *grievously*.<sup>145</sup> Thus, the actor who entertains only a general intent to harm is guilty, at most, of a misdemeanor, regardless of the extent of the injury that he inflicts. The dissenters discounted the lack of felonious intent and found sufficient basis for the crime in the concurrence of an intent to injure and the infliction of serious bodily harm.<sup>146</sup>

The *Katz* rule results in something of an anomaly. One who, with intent to do slight harm, causes a serious and debilitating injury to a member or organ of another, is guilty only of a misdemeanor assault, except that, if his victim has not recovered by the time of the trial, the actor may be convicted of a felony on an indictment for maiming.<sup>147</sup> Thus, that which distinguishes felonious maiming from misdemeanor assault is not felonious intent, but the extent of the harm done.

In addition to the three batteries already mentioned, assault in the second degree encompasses four true assaults. Willfully and wrongfully

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current sentences for both offenses. See *People ex rel. Maurer v. Jackson*, 2 N.Y.2d 259, 140 N.E.2d 282, 159 N.Y.S.2d 203 (1957).

142. N.Y. Pen. Law §§ 242(1)-(2). These subsections are drawn in haec verba from the 1881 Code. N.Y. Sess. Laws 1881, ch. 676, §§ 218(1)-(2).

143. N.Y. Pen. Law § 242(3). Section 218(3) of the 1881 Code omitted the phrase "willfully and wrongfully." N.Y. Sess. Laws 1881, ch. 676, § 218(3).

144. 290 N.Y. 361, 49 N.E.2d 482 (1943).

145. *Id.* at 365, 49 N.E.2d at 484.

146. *Id.* at 366-68, 49 N.E.2d at 485-86 (dissenting opinion).

147. "Where it appears, upon a trial for maiming another person, that the person injured has, before the time of trial, so far recovered from the wound, that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming can be had; but the defendant may be convicted of assault in any degree." N.Y. Pen. Law § 1404.

assaulting another by the use of a weapon or other instrument likely to produce grievous bodily harm is such a true assault.<sup>148</sup> In *People v. Wood*,<sup>149</sup> it was held that to point an unloaded shotgun at another was not within this subsection because the weapon, in the way it was used, was not likely to produce grievous bodily harm.

Perhaps without intending it, the *Wood* court left open the question of whether, if the gun had been loaded, an intent to frighten would have been sufficient. In *People v. Connor*,<sup>150</sup> it was said that no intent to harm was required by this subsection.<sup>151</sup> In *People v. Terrell*,<sup>152</sup> however, the court refused to follow *Connor* (by the simple expedient of misreading the decision) and indicated that the *mens rea* of the offense was an intent to do grievous bodily harm.

It may well be that both *Connor* and *Terrell* were wrong. A predecessor assault statute, from which the present subsection seems ultimately to be derived, contemplated no more than an intent to do bodily harm with a dangerous weapon.<sup>153</sup> If this statute is relevant, *Connor* was in error in dismissing the necessity of any intent to injure, and *Terrell* was in error in requiring an intent to injure grievously. Rather, the *mens rea* of the offense is an intent to do some bodily injury, and the *mens rea* is rendered felonious by the intentional use of a dangerous instrument.<sup>154</sup>

148. N.Y. Pen. Law § 242(4). Section 218(4) of the 1881 Code omitted the phrase "willfully and wrongfully." N.Y. Sess. Laws 1881, ch. 676, § 218(4).

149. 10 App. Div. 2d 231, 199 N.Y.S.2d 342 (3d Dep't 1960).

150. 53 Hun 352, 6 N.Y. Supp. 220 (1st Dep't 1889).

151. *Id.* at 353, 6 N.Y. Supp. at 220-21 (dictum).

152. 11 N.Y. Supp. 364 (App. Div. 5th Dep't 1890). It is true that this case and *People v. Connor*, 53 Hun 352, 6 N.Y. Supp. 220 (1st Dep't 1889), were decided before the word "willfully" was added to the statute. However, willfulness signifies nothing more than evil intention which would seem to be satisfied equally by an intent (a) to frighten, (b) to do minor harm, or (c) to do grievous injury. See generally Perkins, *Criminal Law* 687-91 (1957).

153. N.Y. Sess. Laws 1854, ch. 74, § 1.

154. *Cf.* *People v. Wood*, 10 App. Div. 2d 231, 199 N.Y.S.2d 342 (3d Dep't 1960), where the court stated: "Applying the reasoning of *People v. Katz* (supra) the specific [felonious] intent required would be the intent to commit an assault with a weapon likely to produce grievous bodily harm." *Id.* at 234, 199 N.Y.S.2d at 345. (Italics omitted.) In *People v. Katz*, 290 N.Y. 361, 49 N.E.2d 482 (1943), the court noted that this subdivision "has been construed to require a specific intent. (*People v. Rytel*, 284 N.Y. 242, 245; *People v. Osinski*, 281 N.Y. 129, 131.)" *Id.* at 365, 49 N.E.2d at 484. (Italics omitted.) Neither of the two cases cited by the *Katz* court requires that this "specific intent" be an intent to injure grievously. In *People v. Osinski*, 281 N.Y. 129, 131, 22 N.E.2d 311, 312 (1939), it was said that an intent to do bodily harm was an indispensable element of the crime, but the extent of the harm was not specified. In *People v. Rytel*, 284 N.Y. 242, 245, 30 N.E.2d 578, 580 (1940), the court found sufficient evidence in the record to support a jury finding of intent to injure grievously, but it did not say that such an intent was necessary. These cases, therefore, are not contrary to the proposition that the specific intent required by the *Katz* dictum is satisfied by an intent to use a dangerous instrument to inflict some bodily harm, not necessarily grievous.

It is also assault in the second degree to assault another with the intent to commit a felony.<sup>155</sup> As we have already seen, such conduct constitutes the first degree of the crime when the actor employs a deadly weapon to accomplish his purpose. With the exception of the weapon, everything that we said heretofore about the higher degree of assault is applicable here.

The third true assault contained in the section is one committed with the intent either to interfere with the execution of process or to resist arrest.<sup>156</sup> In *People v. Knapp*,<sup>157</sup> a judgment of conviction under this subsection was affirmed by a divided appellate division. The factual basis for the conviction had been the conduct of the defendant in intentionally driving his automobile at a police officer near a roadblock which had been set up as a means of apprehending the defendant for another offense. According to a dissent written by Judge Bergan, there had been no evidence introduced at the trial sufficient to establish the distance separating the officer from the car when the officer stepped aside to avoid being hit. Since the People had failed to prove the apparent imminency of a battery, no crime of assault had been made out.<sup>158</sup>

Two observations are in order. First, Judge Bergan measured present ability, *i.e.*, physical proximity, by the apprehension-of-danger test of *Fairme's Case*,<sup>159</sup> and not by the striking-distance test of *People v. O'Connell*.<sup>160</sup> (He did not cite either case, however.) Secondly, the majority made no attempt to dispute Judge Bergan's persuasive analysis of the trial evidence, except to state that the officer had been required to "jump from the path of the oncoming vehicle."<sup>161</sup> This leads us to speculate whether the majority did not, in fact, embrace an extended standard of physical proximity. If such is the fact, the court did not lack precedent. It has been held in North Carolina that to cause another to retreat before the threat of a battery is sufficient for an assault even though the distance between the assailant and his victim never closes to the point at which a battery appears imminent.<sup>162</sup> At least the *Knapp* case opens the door for the entrance into New York of such a standard of proximity.

155. N.Y. Pen. Law § 242(5).

156. *Ibid.* This entire subsection is drawn in haec verba from the 1881 Code. N.Y. Sess. Laws 1881, ch. 676, § 218(5).

157. 17 App. Div. 2d 65, 231 N.Y.S.2d 341 (3d Dep't 1962) (per curiam).

158. *Id.* at 67, 231 N.Y.S.2d at 342-43 (dissenting opinion).

159. 5 City Hall Rec. 95 (N.Y. Ct. Gen. Sess. 1820); see text accompanying notes 63-67 *supra*.

160. 60 Hun 109, 14 N.Y. Supp. 485 (1st Dep't 1891); see text accompanying notes 105-11 *supra*.

161. 17 App. Div. 2d at 66, 231 N.Y.S.2d at 342.

162. *State v. Rawles*, 65 N.C. 334 (1871). Judge Daniels, in dictum in *People v. O'Connell*, 60 Hun 109, 114, 14 N.Y. Supp. 485, 486 (1st Dep't 1891), had indicated that such conduct might constitute an "attempted assault" in New York.



The final, and as yet uninterpreted true assault, which lies within the second degree of the crime, is one committed in aid of collecting a usurious loan.<sup>163</sup>

### C. Assault in the Third Degree

Anyone who commits an assault or battery, not specified as first or second degree, is guilty of assault in the third degree, a misdemeanor.<sup>164</sup> During the twentieth century, the appellate divisions of two departments have split on the question of whether a tortious assault satisfies the true assault branch of this offense.<sup>165</sup> As a result, the fundamental and long-standing conflict surrounding the meaning of criminal assault was still unresolved when the revisers undertook to reform the law. In addition, an even more serious problem had developed with respect to the *mens rea* of the battery branch of the crime.

Hawkins characterized the *actus reus* of battery as an injury done to another "in an angry, revengeful, rude, or insolent manner,"<sup>166</sup> and, in *People v. Hale*,<sup>167</sup> the *mens rea* was described as a "vicious intention and criminal design."<sup>168</sup> It is possible to effect an intentional and rude contact upon the person of another without viciousness or criminal design, and it was to such a situation that the court of appeals addressed itself in *People v. Young*.<sup>169</sup> Young had forcibly intervened in what appeared to him to be an attack by two strangers upon a boy. Actually, the two men were detectives attempting to make a lawful arrest. For this conduct, Young was tried and convicted of assault in the third degree, but the judgment was reversed by the appellate division on the ground that Young's reasonable mistake of fact was a complete defense.<sup>170</sup> The court of appeals reversed the order of the appellate division and reinstated

163. N.Y. Pen. Law § 242(6). This section was added by N.Y. Sess. Laws 1965, ch. 323, § 4.

164. N.Y. Pen. Law §§ 244(1), 245. A battery upon a newsmen is a separately delineated species of assault in the third degree, N.Y. Pen. Law § 244(3), but, since such conduct would constitute a battery without this provision, the subsection is not given independent treatment here.

165. Compare *People v. Wood*, 10 App. Div. 2d 231, 234-37, 199 N.Y.S.2d 342, 345-48 (3d Dep't 1960), wherein it is stated in dictum that a tortious assault is a criminal assault in the third degree, with *People v. Lay*, 254 App. Div. 372, 373, 5 N.Y.S.2d 325, 327 (2d Dep't 1938) (per curiam), aff'd mem., 279 N.Y. 737, 18 N.E.2d 686 (1939), wherein the appellate division stated in dictum that no assault is committed without an intent to batter. By the time of the decision in *Wood*, a majority of jurisdictions defined criminal assault to include both an attempted battery and a tortious assault. See Model Penal Code § 201.10, comment 3 (Tent. Draft No. 9, 1959).

166. 2 Hawkins, Pleas of the Crown, ch. 62, § 2 (7th ed. 1795).

167. 1 N.Y. Crim. 533 (Sup. Ct. 1883).

168. Id. at 536.

169. 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (per curiam).

170. 12 App. Div. 2d 262, 210 N.Y.S.2d 353 (1st Dep't 1961).

the information. The court took note of a split in authority in other jurisdictions on the defense of reasonable mistake by an intervenor, and then decided that "one who goes to the aid of a third person does so at his own peril . . ."<sup>171</sup> at least when his conduct would otherwise constitute the misdemeanor degree of assault.<sup>172</sup>

As Judge Froessel pointed out in a vigorous dissent, the offense in these circumstances has been transformed by the majority from *malum in se* to *malum prohibitum*.<sup>173</sup> With respect to good faith intervenors, the *mens rea* of vicious intention and criminal design, expounded in the *Hale* case, is no longer necessary. The Good Samaritan (if any there remain) proceeds at his own risk.

The *Young* decision dealt particularly with a battery, but there is nothing in the opinion to preclude its application to a simple assault. For instance, if a person mistakenly comes to the rescue of another by pointing an unloaded pistol at the other's supposed assailant, he may be guilty of assault in the third degree, even though he entertains no vicious intent and his purpose is not to injure but only to frighten.

In addition to the catch-all assault and battery subsection, assault in the third degree includes a culpably negligent vehicular battery by which another is injured.<sup>174</sup> As we have observed, the theory of negligent battery is principally an outgrowth of reckless manslaughter.<sup>175</sup> "The use of this analogy has probably contributed a great deal to the fact that negligence in manslaughter and negligence in battery have developed along parallel lines and that they are identical in kind and in degree."<sup>176</sup> The identity of the two is particularly apparent in New York, where the leading

171. 11 N.Y.2d at 275, 183 N.E.2d at 319, 229 N.Y.S.2d at 2. (Citations omitted.) The majority view was roundly criticized in the law reviews. See, e.g., 29 Brooklyn L. Rev. 141 (1962); 63 Colum. L. Rev. 160 (1963); 31 Fordham L. Rev. 206 (1962); 41 Texas L. Rev. 929 (1963); 20 Wash. & Lee L. Rev. 98 (1963). More sympathetic opinions, short of outright approval, were expressed in 27 Albany L. Rev. 123 (1963); 111 U. Pa. L. Rev. 506 (1963).

172. It is doubtful that a conviction of felonious assault would have been proper. *People v. Katz*, 290 N.Y. 361, 49 N.E.2d 482 (1943), indicates that a felonious intent is required for assault in both the first and second degrees. Therefore, had *Young* been indicted for the second degree of the offense under N.Y. Pen. Law § 242(5) (assault with intent to interfere with a lawful arrest), it would have been necessary to prove that he had known that a lawful arrest was in progress at the time of his intervention.

173. 11 N.Y.2d at 276, 183 N.E.2d at 320, 229 N.Y.S.2d at 3 (dissenting opinion).

174. "A person who . . . operates or drives or directs or knowingly and wilfully permits any one subject to his commands to operate or drive any vehicle of any kind in a culpably negligent manner, whereby another suffers bodily injury . . . is guilty of assault in the third degree." N.Y. Pen. Law § 244(2). A culpably negligent and injurious battery by a hunter is a separate misdemeanor. N.Y. Pen. Law §§ 247-48. These sections were added to the Penn Law by N.Y. Sess. Laws 1921, ch. 238, and N.Y. Sess. Laws 1953, ch. 563, respectively.

175. See text accompanying note 120 supra.

176. Moreland, *A Rationale of Criminal Negligence*, 32 Ky L.J. 127, 192 (1944).

reckless manslaughter case of *People v. Angclo*<sup>177</sup> underlies all the principal vehicular battery decisions.<sup>178</sup>

In *Angelo*, culpable negligence was defined as "something more than the slight negligence necessary to support a civil action for damages. It means disregard of the consequences which may ensue from the act, and indifference to the rights of others."<sup>179</sup> The statement has variously been interpreted to mean conscious risk-taking, a grossly unreasonable failure to perceive risk, and a conscious disregard for the safety of others, so culpable as to be tantamount to intent.<sup>180</sup> Considering this background of inconsistent interpretation, the American Law Institute was completely justified in characterizing the *Anglo* definition as an "ambiguous formulation."<sup>181</sup>

#### IV. THE ACCUMULATED PROBLEMS

When the revisers began their task of reforming the New York law of assault, battery and maiming, they were confronted with these problems: (a) Should a tortious assault be considered a criminal assault? (b) What is the precise status of an unprivileged, conditional threat of violence?<sup>182</sup> (c) If an assault is an attempted battery, then what is an attempted assault?<sup>183</sup> (d) Should the fortuity of the victim's recovery of health distinguish misdemeanor assault from maiming?<sup>184</sup> (e) Should the offense rise from misdemeanor grade to felony grade on the basis solely of the extent of the injury inflicted, and without regard to the absence of a felonious intent?<sup>185</sup> (f) Should an assault with a deadly weapon be felonious even though the intent is to do only minor injury, or no injury at all?<sup>186</sup> (g) Should present ability be measured by striking distance, the distance at which a battery appears imminent, or the distance at which the assailed person is induced to retreat?<sup>187</sup> (h) What effect should be given to an intervenor's mistake of fact?<sup>188</sup> (i) What degree of negligence is

177. 246 N.Y. 451, 159 N.E. 394 (1927).

178. See, e.g., *People v. Biocchio*, 259 App. Div. 267, 268, 13 N.Y.S.2d 786, 787 (1st Dep't 1940); *People v. Waxman*, 232 App. Div. 90, 92, 249 N.Y. Supp. 180, 183 (1st Dep't 1931); *People v. Saroff*, 227 App. Div. 114, 115-16, 237 N.Y. Supp. 73, 75 (2d Dep't 1929) (per curiam).

179. 246 N.Y. at 457, 159 N.E. at 396.

180. See Byrn, *Homicide Under the Proposed New York Penal Law*, 33 *Fordham L. Rev.* 173, 205-06 (1964) [hereinafter cited as Byrn].

181. Model Penal Code § 201.4, comment 1A (Tent. Draft No. 9, 1959).

182. See text accompanying notes 96-98 supra.

183. See text accompanying notes 105-11 supra.

184. See text accompanying note 147 supra.

185. See text accompanying notes 143-46 supra.

186. See text accompanying notes 150-54 supra.

187. See text accompanying notes 156-62 supra.

188. See text accompanying notes 166-73 supra.

appropriate to a culpably negligent battery?<sup>189</sup> (j) What other kinds of conduct, if any, should be assumed into the crimes of assault, battery, and maiming?

In the pursuant discussion, these problems will be referred to by the letter used to designate them above. We shall find that all the problems have been dealt with in the Revised Penal Law. Although most of them have been resolved, some questions remain.

## V. THE REVISED PENAL LAW

The Revised New York Penal Law is divided into four "Parts," comprising "General Provisions," "Sentences," "Specific Offenses," and "Administrative Provisions." Part Three, "Specific Offenses," is arranged by categories of related offenses, in place of the haphazard alphabetical system presently in use. Each category bears a "Title," and the separate but related offenses within each title are given individual "Article" numbers, the articles being further subdivided into "Sections" by a decimal system.

The offenses of assault, battery and maiming are located in article 120 (Assault and Related Offenses) of title H (Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation). Article 120 contains (a) three degrees of "assault," all of which contemplate a completed and injurious battery that has been inflicted as a result of criminally negligent, reckless, depraved, or intentional conduct;<sup>190</sup> (b) a crime of "menacing," analogous to a tortious assault;<sup>191</sup> (c) two degrees of "reckless endangerment";<sup>192</sup> and (d) the felony of "promoting a suicide attempt."<sup>193</sup> This last offense is not within the scope of this article.<sup>194</sup>

### A. *Intentional Battery*

There are seven intentional batteries scattered through the three degrees of assault. Each one involves conduct which is intended to, and does, cause physical injury or serious physical injury.<sup>195</sup> A person who,

189. See text accompanying notes 174-81 *supra*.

190. N.Y. Rev. Pen. Law §§ 120.00, .05, .10. There may, however, be one instance of an innocently caused injurious battery. See text accompanying notes 264-68 *infra*.

191. N.Y. Rev. Pen. Law § 120.15.

192. N.Y. Rev. Pen. Law §§ 120.20, .25.

193. N.Y. Rev. Pen. Law §§ 120.30, .35.

194. For studies in depth of the suicide problem and laws relating thereto, see St. John-Stevas, *Life, Death and the Law* 232-61 (1961); St. John-Stevas, *The Right to Life*, 55-79 (1963).

195. "Physical injury" means impairment of physical condition or substantial pain." N.Y. Rev. Pen. Law § 10.00(8). "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily

with intent to cause physical injury to another, causes such injury is guilty of assault in the third degree, a Class A misdemeanor,<sup>193</sup> unless he uses a deadly weapon or dangerous instrument to inflict the intended injury, in which case he is guilty of second degree assault, a Class D felony.<sup>197</sup> An actor is also guilty of assault in the second degree if he causes serious physical injury with intent to do so,<sup>193</sup> except that, if he intentionally causes such injury with a deadly weapon or dangerous instrument, or in the course of and in furtherance of a felony or the immediate flight therefrom, he is guilty of the first degree of the offense, a Class C felony.<sup>193</sup>

The solutions to two of the accumulated problems, (e) and (f), are provided by the delineation of these five batteries. The offense rises from misdemeanor grade to felony grade only if the intent is to cause *serious* physical injury,<sup>200</sup> or if the actor has used a deadly weapon or dangerous instrument with the minimum intent of causing *some* injury. The unarmed actor, who intends to inflict minor harm but causes serious injury, is not guilty of a felonious assault. The actor, who intends to effect an offensive contact, but not to injure, commits no intentional battery under article 120, but may be guilty of the separate offense of harassment.<sup>201</sup>

One is also guilty of assault in the first degree if, with intent to dis-

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organ." N.Y. Rev. Pen. Law § 10.00(9). For a discussion of the Revised Penal Law provision relating to a homicide resulting from an act intended to cause serious injury, see Byrn 184-85.

196. N.Y. Rev. Pen. Law § 120.00(1). Misdemeanors are classified, in order of seriousness, as "A" and "B." N.Y. Rev. Pen. Law § 55.05(2).

197. N.Y. Rev. Pen. Law § 120.05(2). Felonies are classified in order of seriousness from "A" through "E." N.Y. Rev. Pen. Law § 55.05(1). A "'deadly weapon' means any loaded weapon from which a shot may be discharged by gunpowder, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, metal knuckles, or slungshot." N.Y. Rev. Pen. Law § 10.00(11). These, of course, are the weapons that are typically used for violent purposes. A "'dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury, and includes a 'vehicle' . . ." N.Y. Rev. Pen. Law § 10.00(12).

198. N.Y. Rev. Pen. Law § 120.05(1).

199. N.Y. Rev. Pen. Law § 120.10(1), (4). "Felony assault" is not unknown to the criminal law, but heretofore it has been employed most frequently in transferred intent situations. See Comment, 30 Yale L.J. 184 (1920). The present section is more analogous to felony murder, see N.Y. Rev. Pen. Law § 125.25(3), although the characteristics of the two crimes differ radically. Perhaps the most striking distinction is found in the requirement of an independent mens rea, either intent or recklessness, for felony assault. No such requirement exists for felony murder. See Byrn 196-99.

200. The actor must inflict serious injury before the crime is complete. However, even if he fails in this respect, he may nevertheless be guilty of a felonious attempt at assault. See notes 207-20 infra and accompanying text.

201. N.Y. Rev. Pen. Law §§ 240.25(1), (4). Harassment is a violation, and therefore not a crime. N.Y. Rev. Pen. Law § 10.00(1)-(5).

figure another person seriously and permanently, or to destroy, or amputate or disable permanently a member or organ of his body, he causes such injury.<sup>202</sup> This is the revisers' version of maiming. Unlike the existing law, the revised provision "requires a specific intent to achieve the mayhem result."<sup>203</sup> This more restricted *mens rea*, together with the requirement of permanent injury, eliminates problem (d) among the accumulated problems. We are no longer forced to choose between misdemeanor assault and felonious maiming solely on the basis of whether the victim has recovered his health.

The last intentional battery in the assault article neither solves old problems nor creates new ones.

A person is guilty of assault in the second degree when:

5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same.<sup>204</sup>

Before turning to attempted battery, we should note the rehabilitation of the Good Samaritan. The Revised Penal Law's defense of justification provides for the use of physical force by a person "in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by [another person] . . ." <sup>205</sup> The defense is apposite, "not only when the physical force to be repelled is in fact 'unlawful' but also when it is in fact lawful but the actor 'reasonably believes' it to be unlawful . . ." <sup>206</sup> The dilemma of the mistaken intervenor, problem (h) among the accumulated problems, seems to be solved.

### B. Attempted Battery

The Commission's staff has stated that

the proposed assault formulation, requiring actual physical injury, places the crime of assault in the main category of offenses (robbery, larceny, perjury, etc.) which are committed only when the offender succeeds in his criminal objective. And as with other offenses of this nature, an unsuccessful endeavor (a common law assault not resulting in a battery) constitutes an attempt.<sup>207</sup>

202. N.Y. Rev. Pen. Law § 120.10(2).

203. Proposed Pen. Law, Commission Staff Notes § 125.10, at 333.

204. N.Y. Rev. Pen. Law § 120.05(5). Compare text accompanying notes 115-18 *supra*.

205. N.Y. Rev. Pen. Law § 35.15(1).

206. N.Y. Rev. Pen. Law, Supplementary Commission Staff Notes p. 259. See also N.Y. Rev. Pen. Law § 15.20(c): "A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless . . . such factual mistake is of a kind that supports the defense of justification . . ."

207. Proposed Pen. Law, Commission Staff Notes pp. 330-31. "If it were competent for

Evidently, the law of attempted battery ("attempted assault" in the parlance of the Revised Penal Law) is to be governed by the same rules which apply in general to attempts to commit other crimes. It is necessary, therefore, to give consideration to certain recurrent problems of the law of attempts, in particular proximity and impossibility, and to put the new law of attempted battery into the context of these problems.

### 1. Proximity

The conflict among the New York cases, dealing with physical proximity in assault situations, mirrors the more generalized problem of distinguishing between mere preparation to commit a crime and a criminal attempt.<sup>208</sup> In the case of assault *qua* attempted battery, the problem has been compounded because the offense evolved prior to the general law of attempts and developed its own unique characteristics of physical proximity.<sup>209</sup> Fortunately, these anachronisms have not survived in the Revised Penal Law.

Under the Revised Penal Law, "a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."<sup>210</sup> The definition is not designed materially to change the existing concept of attempts,<sup>211</sup> and, therefore, prior New York cases remain significant.

In deciding what conduct "tends" to effect the commission of a crime, New York courts have generally employed the "dangerous proximity" test. "'Acts in furtherance of a criminal project do not reach the stage of an attempt unless they carry the project forward within dangerous proximity to the criminal end to be attained.'"<sup>212</sup>

The New York decision, which gives widest scope to this test, and the one most relevant to attempted battery, was handed down in *People v.*

a text-writer to give new shape to the law, I should after defining a battery, say: An assault is any indictable attempt to commit a battery. We could then resort to the doctrine of attempt . . . for the settlement of all undecided questions respecting assault . . ." 2 Bishop, Criminal Law § 23 n.2, at 17-18 (9th ed. 1923). In the Revised Penal Law, an unsuccessful assault with intent to kill is attempted murder, and does not fall within the assault article. See N.Y. Rev. Pen. Law, Supplementary Commission Staff Notes p. 272.

208. For an analysis of this problem, see Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 Colum. L. Rev. 571, 586-92 (1961).

209. See note 78 *supra*.

210. N.Y. Rev. Pen. Law § 110.00.

211. N.Y. Rev. Pen. Law, Supplementary Commission Staff Notes p. 270.

212. *People v. Ditchik*, 288 N.Y. 95, 96, 41 N.E.2d 905 (1942) (*per curiam*), quoting from *People v. Werblow*, 241 N.Y. 55, 61, 148 N.E. 786, 789 (1925). Accord, *People v. Rizzo*, 246 N.Y. 334, 337, 158 N.E. 888, 889 (1927); *People v. National Radio Distribs. Corp.*, 9 Misc. 2d 824, 827, 168 N.Y.S.2d 886, 890 (Bronx County Ct. 1957).

*Gormley*,<sup>213</sup> which affirmed a judgment of conviction for attempted robbery. Defendants had been apprehended while lying in wait outside a bank for the purpose of robbing a payroll messenger who arrived at the bank shortly after the arrest. The appellate division applied the dangerous proximity test in these terms:

[I]t would be a travesty upon justice to permit them to escape punishment for the carefully planned robbery which was only frustrated by the timely intervention of the police.<sup>214</sup>

There is no reason to apply a different formula for attempted battery. Robbery, after all, contemplates the use or threatened use of physical force upon the person of another.<sup>215</sup> The presence of the common element of force renders attempts at robbery and battery indistinguishable so far as proximity is concerned. The batterer who lies in wait is just as culpable as the lurking robber.<sup>216</sup>

When attempted battery is placed in the mainstream of the dangerous proximity doctrine, the assault-attempted assault dichotomy becomes ir-

213. 222 App. Div. 256, 225 N.Y. Supp. 653 (1st Dep't 1927), *aff'd mem.*, 248 N.Y. 583, 162 N.E. 533 (1928).

214. 222 App. Div. at 259, 225 N.Y. Supp. at 656.

215. N.Y. Rev. Pen. Law § 160.00.

216. It was suggested in *People v. O'Connell*, 60 Hun 109, 115, 14 N.Y. Supp. 485, 486-87 (1st Dep't 1891), that "to make an attempt to assault him required no more than that he should arm himself with the axe and endeavor to place himself in the position to use it by executing his intention to kill." This is the closest that any New York court has approached to a "dangerous proximity" test in attempted battery cases. In opting for the proximate danger test under the Revised Penal Law, I am not unaware of the arguments of those who urge that "the primary purpose of punishing attempts is to neutralize dangerous individuals and not to deter dangerous acts." Model Penal Code, § 5.01, comment 7(b) (Tent. Draft No. 10, 1960). They would judge the conduct of the defendant, not in terms of proximity to success, but as probative of a firmness of criminal purpose. See *id.* comment 7(g). Perhaps this doctrine will one day be acceptable, but presently it is not. The common-law evolution of criminal attempts was prompted by a psychological reaction to the danger inherent in particular inchoate criminal conduct—a feeling that the actor had "come too close for comfort" to a successful invasion of a specific sphere of interest. See Hall, *Criminal Law* 583-86 (2d ed. 1960). In terms of battery and, to a lesser extent, robbery, the sphere of interest is personal safety. Thus far, we have not regarded this sphere as threatened until the actor has advanced to within dangerous proximity of success. See cases collected at note 212 *supra*. This is not to say that the actor's preparatory conduct may not threaten some other sphere of interest. For instance, his acquisition of a weapon may be looked upon as a threat to public safety, see N.Y. Rev. Pen. Law § 265.05; or his possession of burglar's tools may be regarded as a threat to the property of the entire community, see N.Y. Rev. Pen. Law § 140.35. However, neither species of inchoate criminal conduct is viewed as a criminal attempt. See *People v. Werblow*, 241 N.Y. 55, 62, 148 N.E. 786, 789 (1925) (dictum) (acquisition of a weapon not sufficient for an attempt at murder); *People v. Collins*, 234 N.Y. 355, 359, 137 N.E. 753, 755 (1922) (dictum), stating that, "merely procuring tools to commit a burglary may not be enough" for an attempt.



relevant. Of little significance too are the anachronistic striking-distance, apprehension-of-danger and retreat rules of physical proximity. Thus, problems (c) and (g) among the accumulated problems have been eliminated.

## 2. Impossibility

Regardless of proximity, an attempt to commit a crime may be ineffective because the instrumentality chosen by the actor is not suited to his criminal purpose. Despite such "intrinsic impossibility,"<sup>217</sup> a criminal attempt may occur. For instance, in New York, it is no defense to a charge of attempted burglary that the tools chosen to aid in breaking into the premises were inadequate.<sup>218</sup> On the other hand, attempted battery requires "present ability." "If the alleged assailant has no intent to injure, or *if his gun is unloaded*, there is no assault."<sup>219</sup> Here, then, is another anomaly. Certainly, the assailant who pulls the trigger of an unloaded pistol, thinking it to be loaded, is no less culpable than the burglar who attempts to break into a building with an inadequate jimmy.

In the Revised Penal Law, this anomaly disappears. Both the burglar and the batterer will be governed by the general law of attempts, and the defense of intrinsic impossibility will be available to neither. The actor who fails in his endeavor to inflict physical injury, whether because his aim is bad or his weapon is unloaded, is guilty of an "attempted assault."<sup>220</sup>

217. So labelled in Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. Pa. L. Rev. 962 (1930).

218. *People v. Lawton*, 56 Barb. 126 (N.Y. Sup. Ct. 1867). For additional examples of intrinsic impossibility, see Wechsler, Jones & Korn, *supra* note 208, at 531-32. The Revised Penal Law specifically excludes impossibility as a defense to a charge of an attempted crime. N.Y. Rev. Pen. Law § 110.10.

219. Model Penal Code § 201.10, comment 3 (Tent. Draft No. 9, 1959). (Emphasis added.) (Citation omitted.)

220. One unresolved problem remains. We know that the assailant who mistakenly uses an unloaded gun with intent to cause serious injury to another is at least guilty of attempted assault in the second degree. But does his intent to use a deadly weapon raise the grade to an attempt at the first degree of the offense? There is no clear answer. On the one hand, it may be argued that the mens rea of both degrees is restricted to the intent to inflict serious injury. The use of a deadly weapon is a circumstance extrinsic to mens rea (just as, for instance, nighttime is a circumstance extrinsic to the mens rea of burglary), and, thus, the offense is aggravated only if the weapon is in fact deadly, i.e., loaded. Certainly, a literal reading of N.Y. Rev. Pen. Law §§ 120.05(1), .10(1) lends support to this position. On the other hand, it is also true that the use of a deadly weapon raises the grade of an assault from misdemeanor (third degree) to felony (second degree) even though the intent is to do only minor harm. See N.Y. Rev. Pen. Law §§ 120.00(1), .05(2). In this case the intent to use a deadly weapon is part and parcel of the mens rea, which would otherwise be non-felonious. See the discussion of the existing offense of assault with a dangerous weapon in text accompanying notes 150-54 *supra*. By analogy, the intent to use a deadly weapon must also be a

### C. *Tortious Assault and Conditional Threats*

When New York's legislators enacted the Revised Penal Law in 1965, they gave fitting, if unknowing, recognition to the tricentennial of the Duke of York's Laws, the first statutory definition of assault in New York,<sup>221</sup> and to the centennial of *People v. Bransby*,<sup>222</sup> the last New York Court of Appeals decision to speak to the tortious assault-attempted battery conflict. Both the statute and the decision had indicated that menacing conduct might be sufficient as an assault. In the Revised Penal Law, "Menacing" has been designated a separate crime:

A person is guilty of menacing when, by physical menace, he intentionally places or attempts to place another person in fear of imminent serious physical injury.<sup>223</sup>

In creating this new offense, the revisers compromised between extremes. At one end of the spectrum were those who found nothing to distinguish an attempted battery from a tortious assault:

There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created. For his suffering is the same in the one case as in the other, and the breach of the public peace is the same.<sup>224</sup>

The fallacy of equating the two offenses lies in the failure to recognize that an intent to injure is more serious than an intent to cause apprehension of injury, even if the latter be considered a crime.

At the other extreme were those who urged that no crime was committed unless the actor intended to inflict a battery:

In the first place crimes are usually considered subjectively, not objectively—the state of mind of the accused is the important consideration, not the state of mind of the person injured. Therefore the test should be the intent of the accused, not the fear of injury of the victim of the alleged assault. Secondly . . . it is a general principle of law that there is no crime unless intent accompanies the act.<sup>225</sup>

The error of this position is its assumption that intent to cause apprehension of injury is not a socially harmful *mens rea*. While it is true that such a state of mind is less serious than a genuine intent to injure, nevertheless, it is deserving of punishment.

The Revised Penal Law recognizes the culpability of an intent to

part of the *mens rea* of assault in the first degree (as much a part as the intent to inflict serious injury). This being so, the intrinsic impossibility of effectuating that intent, because the gun is unloaded, should be no defense to a charge of attempted first degree assault.

Both arguments seem to have merit. I readily confess my inability to choose between them.

221. 1 Colonial Laws of New York 15 (1894). The laws were initially promulgated in 1665.

222. 32 N.Y. 525 (1865).

223. N.Y. Rev. Pen. Law § 120.15.

224. 2 Bishop, Criminal Law § 32.1 (9th ed. 1923). (Footnote omitted.)

225. Clark, Criminal Law §§ 81-83, at 262-63 (3d ed. 1915). (Footnote omitted.)

frighten but denies that it is equal to that of an intent to injure. This compromise is achieved by (1) separating the crimes of menacing and assault, (2) downgrading the former to a Class B misdemeanor, and (3) requiring that the menace be of a serious physical injury.

The separation of menacing from "attempted assault" solves the tortious assault-attempted battery controversy, problem (a) among the accumulated problems, but it also gives rise to several new questions.

First: May words alone, with no accompanying offer of violence, constitute a menace? It is probably significant that the formulation specifies a physical menace rather than a menacing act. "Act" is defined in the Revised Penal Law as a bodily movement.<sup>226</sup> Apparently, the revisers contemplated the possibility of a physical menace without a neuromuscular offer of violence.<sup>227</sup> For instance, if X stands with his right hand in his coat pocket, and threatens to shoot Y, his physical posture, in the light of his words, is genuinely menacing. "This might cause more apprehension on the part of the other man than if he saw a man pointing a pistol at him (because what is unseen often has added terror) although the speaker might be standing with his hands in his pockets."<sup>228</sup>

The ambiguity of the formulation gives rise to a second question. Does "physical menace" imply such conduct as would cause fear to a reasonable man, or is the standard a purely subjective one? By analogy to civil assault, the norm should be objective, unless the actor is aware of the peculiar timidity of his victim and seeks to take advantage of it.<sup>229</sup> An obviously empty threat to inflict serious injury is not so significant a social harm as to deserve the attention of the criminal law.

The third question is prompted by the inclusion within the offense of an unsuccessful attempt to put another in fear. There are a number of possibilities: (1) the victim apprehends the danger but does not fear it; (2) the actor's conduct is such as would cause fear to a reasonable man, but the intended victim is aware that the actor will not inflict the threatened harm; *e.g.*, he knows that the actor's gun is not loaded; (3) the intended victim is unaware of the actor's threat; *e.g.*, he is blind and does not know that the actor is pointing a gun at him; or (4) the actor's conduct is such as would not put a reasonable man in fear nor is the actor afraid; *e.g.*, the intended victim is a man of superior strength and the actor is an unarmed physical weakling. Probably, it was the revisers' intent to include the first three cases within the offense. The

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226. N.Y. Rev. Pen. Law § 15.00(1).

227. The Commission Staff Notes are ambiguous in this respect. The only case to which reference is made involved an intent to cause apprehension of a battery by pointing an unloaded gun. See Proposed Pen. Law, Commission Staff Notes § 125.15, at 333-34.

228. Perkins, Non-Homicide Offenses Against the Person, 26 B.U.L. Rev. 119, 140 (1946).

229. See Note, 33 Ky. L.J. 189, 194-95 (1945).

last one, however, seems to lack the basic element of "physical menace." The conduct is not such as would cause fear to a reasonable man.

The last question has been raised by a student writer and concerns a conditional threat of violence.<sup>230</sup> The writer poses the hypothetical case of a person holding an axe by his side and saying to another: "'If you engage in that conduct, I will chop you to pieces with this axe.'" <sup>231</sup> Such conduct, the writer points out, may constitute both menacing and attempted (or completed) coercion.

Menacing is a Class B misdemeanor. On the other hand, unlawfully coercing another to engage or refrain from engaging in conduct by a threat to "cause physical injury to a person"<sup>232</sup> is the crime of coercion in the first degree, a Class D felony. The student writer thought that the added penalties for coercion were inappropriate to the conduct of his hypothetical axe wielder, and preferred to classify the conduct as menacing only. I would favor instead a rewriting of the coercion sections to effect the following changes: (1) If the actor's threat to inflict injury is genuine, then the crime ought to remain coercion in the first degree; if the threat is ineffective, then the actor is guilty of an attempt at this crime, a Class E felony;<sup>233</sup> (2) If the actor's threat is merely a bluff, then the crime ought to be downgraded to coercion in the second degree, a Class A misdemeanor.<sup>234</sup> An attempt at this crime would be a Class B misdemeanor.<sup>235</sup>

By so rearranging the offenses, we give appropriate recognition to the specific intent to coerce as a *mens rea* more serious in nature than a general intent to menace. At the same time, we draw a desirable distinction between an intent to injure and the less serious intent to frighten.

To some extent, the delineation of the separate crime of coercion pinpoints the status of unprivileged conditional threats, problem (b) among the accumulated problems. On the other hand, some further work on the coercion sections is required.

#### D. *Negligent Assault and Battery*

The revisers have endeavored to solve the problem of culpable negligence by distinguishing between conscious (reckless) and inadvertent (criminally negligent) risk-taking. The Assault article of the Revised

230. Note, *The Proposed Penal Law of New York*, 64 *Colum. L. Rev.* 1469, 1530-31 (1964).

231. *Id.* at 1531. (Footnote omitted.)

232. N.Y. Rev. Pen. Law § 135.65.

233. An attempt to commit a Class D felony is a Class E felony. N.Y. Rev. Pen. Law § 110.05(4).

234. N.Y. Rev. Pen. Law § 135.60.

235. See N.Y. Rev. Pen. Law § 110.05(6).

Penal Law includes three reckless batteries, one reckless assault, and one criminally negligent battery.

### 1. Reckless Battery

Recklessness is defined in the Revised Penal Law as follows:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.<sup>236</sup>

A person who recklessly causes physical injury to another is guilty of assault in the third degree,<sup>237</sup> unless the injury is serious and (a) the actor causes the injury by means of a deadly weapon or dangerous instrument, in which case the offense is upgraded to assault in the second degree;<sup>238</sup> or (b) the actor causes the injury in the course of and in furtherance of a felony or the immediate flight therefrom, in which case the offense becomes first degree assault.<sup>239</sup>

I have previously commented in this *Review* upon the revisers' definition of recklessness.<sup>240</sup> No fault can be found with it, nor can we challenge the propriety of incriminating the reckless actor. The characterization of the voluntarily intoxicated person as reckless, although he may be unconscious of the risk involved in his conduct, is also quite appropriate.

[T]he drunken driver, for example, who causes injury or fatality seems deserving of the higher culpability. His overall conduct and culpability should be appraised not alone as of the time of the accident but as of an entire period commencing when he deliberately began to destroy his 'powers of perception and of judgment' by becoming intoxicated, and continuing through his drunken driving and the accident . . . .<sup>241</sup>

Although I commend the concept of recklessness, I entertain doubts concerning the distribution of reckless batteries in the assault article. In particular, I find nothing but an archaic notion of constructive intent to support the distinction in degree between a reckless battery committed in furtherance of a felony (first degree) and one inflicted by means of a deadly weapon or dangerous instrument (second degree).<sup>242</sup> Were the

236. N.Y. Rev. Pen. Law § 15.05(3).

237. N.Y. Rev. Pen. Law § 120.00(2).

238. N.Y. Rev. Pen. Law § 120.05(4).

239. N.Y. Rev. Pen. Law § 120.10(4).

240. Byrn 206-07.

241. Proposed Pen. Law, Commission Staff Notes § 45.10, at 313-14. (Citation omitted.)

242. N.Y. Rev. Pen. Law § 120.05(4).

batteries intentional in each case, the crimes would be equivalent.<sup>243</sup> Nor is it appropriate to equate a reckless and an intentional battery solely because the conduct which gives rise to each is undertaken in furtherance of a felony. A reckless "felony-assault" should be classified as assault in the second degree.

## 2. Reckless Assault

Both reckless manslaughter and negligent battery contemplate physical injury to the person. With this element in common, it was inevitable that the latter should spring from the former. On the other hand, assault is committed without physical contact. There was no basis for analogizing a "negligent assault" to reckless manslaughter, and no such crime evolved.<sup>244</sup> The Revised Penal Law, however, is not premised on arbitrary tradition. Negligent assault enters our law, as a species of reckless conduct, under the label "Reckless Endangerment in the Second Degree."<sup>245</sup>

"A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."<sup>246</sup> The offense might be called an inchoate reckless battery. Since it will almost invariably be committed with a deadly weapon or dangerous instrument, *e.g.*, an automobile, it is appropriately designated a Class A misdemeanor, on a par with a reckless battery by the "unarmed" actor and two grades below the counterpart crime of reckless battery by means of a deadly weapon or dangerous instrument.

## 3. Criminally Negligent Battery

Criminal negligence is defined in the Revised Penal Law as follows:

A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.<sup>247</sup>

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243. Compare N.Y. Rev. Pen. Law § 120.10(4), with N.Y. Rev. Pen. Law § 120.10(1).

244. See Hall, Assault and Battery by the Reckless Motorist, 31 J. Am. Inst. Crim. L. & C., 133, 136-37 (1940). For a discussion of reckless manslaughter in the Revised Penal Law, see Byrn 188-89, 206-07.

245. N.Y. Rev. Pen. Law § 120.20.

246. *Ibid.* "In a sense this is analogous to attempted assault based on an unsuccessful attack made with a specific assaultive intent. Non-injurious reckless conduct, however, does not technically amount to attempted assault, for one cannot attempt to commit an act recklessly; and, hence, the crime of 'reckless endangerment' is necessary to cover such conduct." Proposed Pen. Law, Commission Staff Notes p. 331.

247. N.Y. Rev. Pen. Law § 15.05(4).

There is only one criminally negligent battery in the assault article:

A person is guilty of assault in the third degree when:

...

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.<sup>248</sup>

I have urged elsewhere the impropriety of punishing inadvertent risk-taking.<sup>249</sup> By definition, the criminally negligent actor is afflicted with a "gross" lack of perception. His ability to detect a risk in a given situation will not be increased by remote legislation which vaguely warns him not to be more than ordinarily negligent.

The dual concept of recklessness and criminal negligence is the revisers' answer to the dilemma of culpable negligence, problem (i) among the accumulated problems. It is not an altogether satisfactory one.

#### E. *Depraved Assault and Battery*

The common law classified as murder a homicide resulting from conduct which carried with it an extreme risk of causing death and the doing of which evidenced "a depraved heart, regardless of human life," "a wicked heart," and "a mind grievously depraved."<sup>250</sup> The revisers have imported this *mens rea* into the Revised Penal Law, and have created a new "depraved" battery:

A person is guilty of assault in the first degree when:

...

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person . . . .<sup>251</sup>

If such conduct causes no injury or only minor harm, the offense is called "Reckless Endangerment in the First Degree," *i.e.*, a "depraved assault."<sup>252</sup> A depraved battery is a Class C felony. A depraved assault is a Class D felony.

In a prior article, I made certain observations on the depraved-mind murder formulation in the initial draft of the Revised Penal Law. These observations are equally pertinent to depraved assaults and batteries.

*First:* The *mens rea* of depravity is totally subjective; it is equivalent in spirit and moral culpability to an intent to kill. Therefore, the reason-

248. N.Y. Rev. Pen. Law § 120.00(3). If injury does not occur, then "criminal negligence" is not a crime. If death results, then, under the Revised Penal Law, the offense becomes a homicide. See Byrn 207-10.

249. See *ibid.*

250. See *id.* at 185 & n.63.

251. N.Y. Rev. Pen. Law § 120.10(3).

252. N.Y. Rev. Pen. Law § 120.25.

able man should not be a part of the definition of depravity (any more than he is a part of the definition of intent), and recklessness, which is a mixed subjective-objective test, has no place in the definition of depraved crimes.<sup>253</sup> With this in mind, I suggested that the following definition of wantonness be inserted in the Revised Penal Law:

A person acts wantonly when he engages in conduct involving a grave risk of human fatality under circumstances evincing a realization and appreciation of the nature and gravity of the risk and a willingness that death should occur.<sup>254</sup>

Assuming that such a definition were adopted, the depraved mind crimes in the assault article would be rephrased to read as follows:

A person is guilty of assault in the first degree when:

...

3. He wantonly causes serious physical injury to another.

A person is guilty of reckless endangerment in the first degree when he engages in wanton conduct.

*Second:* Under existing law, neither specifically directed violence, nor conduct which endangers no one but its ultimate victim is considered to be within the definition of depraved mind homicide. This is primarily because the statute requires that the conduct be "imminently dangerous to others"<sup>255</sup> and the use of the plural is interpreted to mean more than one. What is required, therefore, is indiscriminate violence which literally endangers "others."<sup>256</sup> Since the phrase "to others" is omitted from the Revised Penal Law's crimes of depravity, there seems no longer to be any requirement that the actor's conduct threaten anyone but the ultimate victim, and it is possible that some instances, in which the violence appears to be specifically directed, may be considered depraved. For instance, let us assume that the driver of a speeding automobile makes a decision not to slow down until he reaches his destination. Along the way, he encounters a lone pedestrian. He appreciates that, if he continues at the same speed, he will gravely endanger the life of the pedestrian; yet, he adheres to his prior decision not to slow down. His objective is to arrive at his destination as soon as possible—not to kill the pedestrian, but he is willing that the latter's death should occur. Let us assume further (1) that the pedestrian was seriously injured; (2) that he escaped injury; and (3) that he was killed. It might be argued that the driver intended to kill the pedestrian. Therefore, in cases (1) and (2), he is guilty of an attempt<sup>257</sup>

253. Byrn 186-91; see Note, The Proposed Penal Law of New York, 64 Colum. L. Rev. 1469, 1533 (1964).

254. Byrn 191.

255. N.Y. Pen. Law § 1044(2).

256. Byrn 185-86 & n.67.

257. N.Y. Rev. Pen. Law § 110.00.



at murder<sup>258</sup> and in case (3) he is guilty of murder. However, "a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct,"<sup>259</sup> and the death of the pedestrian was not the conscious objective of the driver. Therefore, in none of the three cases is he guilty of attempted or completed intentional murder. It follows, too, that he "intended" to do no injury to the pedestrian and, hence, is not guilty of any attempted or completed intentional battery within article 120. In fact, if his conduct is not considered depraved, he has committed only crimes of recklessness: assault in the second degree in case (1),<sup>260</sup> reckless endangerment in the second degree in case (2)<sup>261</sup> and manslaughter in the second degree in case (3).<sup>262</sup> Yet, his state of mind is equivalent in spirit and moral culpability to intent to kill. Convicting him of various reckless offenses is not sufficient. Actually, he is depraved, and he is guilty in case (1) of assault in the first degree,<sup>263</sup> in case (2) of reckless endangerment in the first degree,<sup>264</sup> and in case (3) of murder.<sup>265</sup>

#### F. *Battery Upon a Peace Officer*

A person is guilty of assault in the second degree when:

...

3. With intent to prevent a peace officer from performing a lawful duty, he causes physical injury to such peace officer . . . .<sup>266</sup>

A similar offense is contained in the existing Penal Law:

A person who . . .

...

5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person . . .

Is guilty of assault in the second degree.<sup>267</sup>

258. N.Y. Rev. Pen. Law § 125.25(1).

259. N.Y. Rev. Pen. Law § 15.05(1).

260. N.Y. Rev. Pen. Law § 120.05(4).

261. N.Y. Rev. Pen. Law § 120.10(4).

262. N.Y. Rev. Pen. Law § 125.15(1).

263. N.Y. Rev. Pen. Law § 120.10(3).

264. N.Y. Rev. Pen. Law § 120.25.

265. N.Y. Rev. Pen. Law § 125.25(2).

266. N.Y. Rev. Pen. Law § 120.05(3). There is no analogous crime in the homicide section of the Revised Penal Law. However, N.Y. Pen. Law § 1045(4) provides that, if the victim of a murder "was a peace officer who was killed in the course of performing his official duties," the convicted murderer may, after specified proceedings, be sentenced to death. This section was enacted at the 1965 Session of the Legislature, N.Y. Sess. Laws 1965, ch. 321, § 1, and will become a part of the Revised Penal Law. See N.Y. Rev. Pen. Law § 500.00.

267. N.Y. Pen. Law § 242(5). See text accompanying notes 156-62 supra.

At first blush, the two offenses may appear identical in substance, but there is a marked distinction between them. The gravamen of the existing offense is an intentional assault directed against the person of the officer.<sup>268</sup> The revised offense seems to require no inherently culpable assaultive conduct. If the actor merely remonstrates with the officer and, while so doing, accidentally injures him, the crime is complete.

Deterrence and punishment of those who interfere with the police is highly desirable. The Class A misdemeanor of "obstructing governmental administration"<sup>269</sup> is directed toward these ends. On the other hand, constructive intent serves no valid purpose in the criminal law.<sup>270</sup> I suggest that "peace officer battery" be rephrased as follows:

A person is guilty of assault in the second degree when:

...  
 4. With intent to prevent a peace officer from performing a lawful duty, he uses or attempts to use physical force upon the person of such officer and thereby causes injury to such officer or a third person.

#### VI. CONCLUSION

The more that one studies and absorbs the Revised Penal Law, the greater becomes his admiration for the monumentally productive labors of the Temporary Commission and its staff. Even in the narrow field of the assaultive crimes, they confronted an accumulation of multifarious problems and conflicting philosophies. Yet their final product is exactly what Governor Rockefeller called it, "a major and rarely equalled accomplishment." No criticism or suggestion made in this article can, or should, detract from it.

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268. *People v. Hüter*, 184 N.Y. 237, 77 N.E. 6 (1906).

269. N.Y. Rev. Pen. Law § 195.05.

270. Cf. *Byrn* 196-99 (discussing felony murder).