Assault-Related Conduct under the Proposed California Criminal Code

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ASSAULT-RELATED CONDUCT UNDER THE PROPOSED CALIFORNIA CRIMINAL CODE

In 1872 the California Legislature defined criminal assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."1 Today, the adequacy of this definition is being questioned by the California Legislature as it endeavors to revise the Penal Code and enact a new Criminal Code.2 The purpose of this note is to encourage the legislature to enact revisions of the assault-related offenses which define with particularity the types of conduct which should be punished.

This note first will analyze the current law of criminal assault in California and will illustrate the role which the courts have played in shaping it.3 Particular attention will be paid to three distinct problems of judicial interpretation: the present ability requirement, the intent requirement, and the relationship between the statutory definition of assault and the statutory definition of general criminal attempt. This initial part of the discussion will describe the sphere of conduct punishable by California's current definition of assault. This part of the note will also question the adequacy of the current legislative definition of assault as a guide for judicial interpretation.

The note will next review and criticize the proposed offenses of "aggressive conduct" and "aggravated criminal injury" which would replace the current Penal Code offenses of assault and aggravated assault if the proposed Criminal Code is enacted into law.4 This part of the note will demonstrate that the proposed offenses would do little more than change the names and rearrange the present definitions of assault and aggravated assault.

1. CAL. PEN. CODE § 240 (West 1970).
2. The Joint Legislative Committee for Revision of the Penal Code was formed in 1963. The Committee published three tentative drafts between 1967 and 1969. The project was reorganized in 1969 to include a full-time staff composed of a project director and two attorneys who prepared a staff draft of the proposed Criminal Code with the aid of an Advisory Board. JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, CRIMINAL CODE iii (Staff Draft 1971) [hereinafter cited as CRIMINAL CODE DRAFT]. A bill to enact a new criminal code was introduced in the California Legislature on January 15, 1973, and was passed by the Senate on January 21, 1974. S.B. 39, § 1 (1973), as amended Jan. 21, 1974 [hereinafter cited as S.B. 39].
3. See text accompanying notes 7-64 infra.
4. See text accompanying notes 65-86 infra.
The note will finally describe the trend in the law of criminal assault. This trend can be discerned by examining the definitions of assault-related conduct in the Model Penal Code and the New York Penal Law of 1965 which have been adopted in nine states. This last part of the discussion will demonstrate that the tendency in these nine jurisdictions is to abandon the common law definition of assault by defining attempts to inflict physical injury as they have defined other attempts to commit crimes. They have achieved this result by eliminating the requirement of present ability and by specifically requiring that a person must have intended to injure another person in order to be guilty of an attempt to inflict injury. Further, these jurisdictions have expanded the common law concept of criminal assault by including variations of the tort definition of assault and by punishing reckless conduct which creates a substantial risk of causing injury to another.

This note will demonstrate that while the tendency in other jurisdictions has been to redefine assault, the California Legislature has failed to do so in the proposed Criminal Code. This note criticizes both the current Penal Code definition of assault and the proposed Criminal Code definitions of “aggressive conduct” and “aggravated criminal injury” in order to encourage the legislature to amend the proposed offenses so that they more clearly proscribe that conduct which should be punished.

California’s Present Definition of Assault

At common law, criminal assault was defined as an attempt to commit a battery; a battery was any nonconsensual application of force to another person’s body regardless of whether that force inflicted pain or injury. This common law meaning of battery was incorporated into the California Penal Code’s definition of battery as “any willful and unlawful use of force or violence upon the person of another.” Although California’s definition of criminal assault is essentially that of the common law, the original drafters of the Penal Code specifically included a requirement of present ability to commit a battery. Hence, the Penal Code currently defines assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”

It has been necessary for the California courts to construe this statu-
tory definition. The three areas of judicial interpretation which are crucial to an understanding of the current Penal Code definition of assault involve the present ability requirement, the intent requirement, and the relationship between criminal assault and attempts to commit other crimes.

The Present Ability Requirement

By specifically requiring present ability, the original drafters of the Penal Code recognized that a greater degree of proximity is required to commit an assault than is required for attempts to commit other crimes. But while the requirement of present ability has narrowed the scope of criminal assault, it has been necessary for the courts to determine just how narrow that scope is because the California Penal Code does not define present ability.

Present ability under the common law meant being within striking distance. California courts, however, have expanded this common law interpretation of present ability; the requirement is satisfied under the present definition of assault when a battery would have resulted if the actor had not been interrupted. This broader interpretation means that the present ability requirement is met if the actor had the means to carry out the battery and if he were sufficiently close to his victim so that the infliction of some type of unlawful touching would have been a reasonable certainty if the actor's conduct had not been interrupted in some way. For example, in 1925 an appellate court found the requisite present ability to commit an assault with a deadly weapon when it was shown that the defendant threatened to shoot his victim with a loaded gun which he had concealed in his sock. By contrast, an earlier supreme court decision in 1888 had held that the defendant's brandishing a knife while not being able to

11. PERKINS, supra note 7, at 118-19.
12. Id. at 119.
come within striking distance of his victim was insufficient evidence of present ability.\textsuperscript{17}

The Intent Requirement

Just as the California Legislature's inclusion of the present ability requirement in the definition of criminal assault has required judicial interpretation of what circumstances satisfy that requirement, so has the legislature's omission of a \textit{mens rea} requirement in the definition of assault.\textsuperscript{18} Because criminal assault was defined legislatively as an attempt with present ability to commit a battery, the intent required for an assault would seem to be a specific intent to commit a battery. This inference is supported by cases which have held that an attempt to commit a crime requires a specific intent to commit that crime\textsuperscript{19} or at least some crime.\textsuperscript{20} Nevertheless, the California courts have not had an easy task defining the nature of the intent required to commit a criminal assault. While the majority of criminal assault cases in California have held that a specific intent to commit a battery is \textit{not} required for the commission of an assault,\textsuperscript{21} a number of cases have held that a specific intent is required.\textsuperscript{22} The California Supreme Court faced the problem

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\item \textsuperscript{17} People v. Dodel, 77 Cal. 293, 19 P. 484 (1888).
\item \textsuperscript{18} CAL. PEN. CODE § 240 (West 1970).
\item \textsuperscript{19} People v. Goldstein, 146 Cal. App. 2d 268, 303 P.2d 892 (1956) (specific intent to commit the crime attempted); \textit{accord}, People v. Miller, 2 Cal. 2d 527, 42 P.2d 308 (1935).
\item \textsuperscript{22} People v. Coffey, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967); People v. Wilson, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (1967); People v. Carmen, 36 Cal. 2d 768, 228 P.2d 281 (1951); People v. Fanning, 265 Cal. App. 2d 729, 71 Cal. Rptr. 641 (1968); People v. Wheeler, 260 Cal. App. 2d 522, 67 Cal. Rptr. 246 (1968); People v. Corson, 221 Cal. App. 2d 579, 34 Cal. Rptr. 584 (1963); People v. Roshid, 191 Cal. App. 2d 692, 12 Cal. Rptr. 794 (1961); People v. Alexander, 41 Cal. App. 2d 275, 106 P.2d 450 (1940). In 1970, the Committee on Standard Jury Instructions defined an assault as "an unlawful attempt, coupled with a present ability
of defining the intent required for an assault in two recent cases. The court considered the problem in conjunction with a determination of whether voluntary intoxication would negate the requisite for an assault.

The first of these two cases was People v. Hood, a 1969 supreme court opinion which confronted, but did not solve, the problem of the intent required for an assault. In Hood, the evidence tended to show that the intoxicated defendant had shot at two police officers who were attempting to subdue him. The supreme court considered at length whether a specific intent to commit a battery is required for an assault and concluded that it did not have to decide the issue. The court stated:

[I]n most cases specific intent has come to mean an intention to do a future act or achieve a particular result, and assault is appropriately characterized as a specific intent crime under this definition. An assault, however, is equally well characterized as a general intent crime under the definition of a general intent as the intent merely to do a violent act. Therefore, whatever reality the distinction between specific and general intent may have in other contexts, the difference is chimerical in the case of assault with a deadly weapon or simple assault.

The supreme court followed this analysis in People v. Rocha. There, the court stated it hoped to “eliminate the confusion on this issue [of the intent required for an assault] which [had] developed throughout the courts of [the] state.”

The evidence in Rocha tended to show that, during an argument over who had the right to occupy a bar stool, the defendant had swung at another man with a knife and had wounded him. Following his conviction, Rocha appealed and cited as error the trial judge’s failure to instruct the jury on the effect of voluntary intoxication to negate the intent required to commit an assault with a deadly weapon. The supreme court relied on People v. Hood and held that voluntary intoxication would not negate the requisite intent for two reasons. First, “since alcohol is so often a factor inducing simple assaults and assaults with a deadly weapon it would be anomalous to permit excul-
pation because of intoxication."^31 This is clearly a consideration of social policy. Second, the court stated that the nature of the intent required for an assault is not susceptible to negation by intoxication because in California only a general, and not a specific, intent to commit a battery is required for an assault. The supreme court indicated that specific intent to commit an assault is the intention to cause injury whereas the general intent to commit an assault is the general intent to attempt to commit a battery. It defined this general intent as the "intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another."^34

Confusion might arise from the general intent definition in *Rocha* because it is difficult to conceive of a situation when someone would intend to attempt to commit a battery without intending to commit an actual battery. That is, whenever someone attempts to commit a substantive crime, regardless of whether the crime requires a specific intent or a general intent, that person intends to cause the result or to do the act constituting the substantive crime. The attempt is an anticipatory, not a substantive, crime. Thus, because assault is an attempt to commit a battery, the battery is the substantive crime. For the purpose of this argument, it does not matter whether a battery requires a specific intent to actually touch or injure another person or whether a general intent to do a violent act which causes that result is sufficient. Regardless of this distinction, it seems obvious that a person must intend an actual physical touching to be guilty of an assault. It is only necessary, however, for him to have intended to cause no more than the least touching.^37

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31. *Id.* at 898, 479 P.2d 372, 92 Cal. Rptr. at 175.
32. The writer's recent research indicates that, unlike California, the majority of jurisdictions requires specific intent to inflict injury for an assault. See *Perkins*, *supra* note 7, at 116, 130.
33. 3 Cal. 3d 893, 898-99, 479 P.2d 372, 376-77, 92 Cal. Rptr. 172, 176-77.
34. *Id.* at 899, 479 P.2d at 376-77, 92 Cal. Rptr. at 176-77.
35. "The word 'attempt' means to try; it implies an effort to bring about a desired result. Hence an attempt to commit any crime requires a specific intent to commit that particular offense." *Perkins*, *supra* note 7, at 573 (citations omitted).
37. *See* People v. *Rocha*, 3 Cal. 3d 893, 899, 479 P.2d 372, 377, 92 Cal. Rptr. 172, 177 (1971). The *Rocha* case itself seems to support this point. While *Rocha* holds that the intent required for an assault is only the general intent to commit an act the probable consequences of which would be an injury to another, a short footnote commenting upon the court's definition of the intent requirement contradicts that holding. The footnote states that "[a] battery must be contemplated, but only an 'injury' as that term is used with respect to a battery need be intended." *Id.* at 899 n.12, 479 P.2d at 377 n.12, 92 Cal. Rptr. at 177 n.12. The "injury" the court refers to means the "least touching." *Id.* It follows from this that an actor must intend at least to touch another in order to commit an assault. If this is so, then the actor must
People v. Rocha underscores the major shortcoming of the present definition of assault. That is, while assault is statutorily defined as an attempt to commit a battery with present ability, the courts have been inclined to view assault as a substantive rather than as an anticipatory crime. In Rocha, the supreme court treated assault as if, unlike attempts to commit other crimes, it were a crime in which an actor intends to attempt a battery (commit an assault) without intending to inflict the least touching. The supreme court held in both Hood and Rocha that considerations of social policy dictate that voluntary intoxication should not be allowed to negate the mens rea for an assault; but the court should not have sought additional support for that conclusion by manipulating the definition of the intent required for an assault.

Attempted Assault

A question related to that of determining the intent required for an assault is whether the crime of assault is one which can be attempted. In re James M.\(^3^8\) dealt with this question on first impression. The supreme court accepted the assault provision as a statutory given\(^3^9\) and then analyzed the relationship between that provision and the Penal Code’s general attempt provision in order to determine whether legislative intent and considerations of judicial administration and public policy would tolerate the judicial creation of the crime of attempted assault. Because the supreme court’s decision in James M. is important not only for its holding that attempted assault is not a crime punishable under the Penal Code but also for its wider implications regarding the adequacy of the current definition of assault as a guideline for the courts, the case will be considered here in detail.

In re James M. was originally a proceeding in juvenile court. James had allegedly hurled an object, determined by the court to have been a rock, at two policemen who were conducting an interview with two other youths. At the time James allegedly threw the rock, he was separated from the policemen by a twelve-foot high fence and thirty-five feet of pavement. The rock allegedly struck a police vehicle which was located approximately eight feet in front of the officers. James was arrested and charged with assault with a deadly weapon on a peace officer.\(^4^0\)

\(^3^8\) See id. at 521-22, 510 P.2d at 35-36, 108 Cal. Rptr. at 91-92.
\(^3^9\) Id. at 519, 510 P.2d at 34, 108 Cal. Rptr. at 90. James was also charged
The juvenile court ruled that the offense charged had not been established by the evidence because James had not struck his alleged target. Rather than dismissing the charge or convicting James of the lesser included offense of simple assault on a peace officer, the court found James guilty of an attempted assault with a deadly weapon on a peace officer. At the disposition hearing which followed, the juvenile court ignored James's assertion that such offense does not exist under the law of California and adjudged him a ward of the court.

The court of appeal passed over the juvenile court's conclusion that since James had not struck one of the policemen he could only be convicted of an attempted assault; James's conviction was justified on another ground. The appellate court utilized the Penal Code's general attempt provision and thus determined that attempted assault is a crime in California. It defined attempted assault as an unsuccessful attempt to commit a battery "where the actor lacks the present ability to consummate it."

The supreme court reversed James's conviction. Although the court conceded that attempted assault as defined by the court of appeal was a logical application of the general attempt provision, the court refused to sanction such an application in California. Relying on section 6 of the Penal Code which provides that "[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by this code" as well as on the doctrine of manifested legislative intent which provides that "an omission from a penal provision evinces a legislative purpose not to punish the omitted act," the court decided unanimously that the legislature had intended that an attempt to commit a battery where present ability was lacking should go unpunished.

with disturbing the peace, a violation of Penal Code section 415, but the juvenile court dismissed the charge because there was insufficient evidence. Id. at 519-20, 510 P.2d at 34, 108 Cal. Rptr. at 90.

41. Id. at 520, 510 P.2d at 34, 108 Cal. Rptr. at 90.
42. Id. Under the California Welfare and Institutions Code a minor may be adjudged a ward of the court if the juvenile court determines that the minor has violated any state or federal law and finds that, based on evidence presented to the court, adjudging the minor a ward of the court is the proper disposition to be made of the minor. CAL. WELF. & INST'NS CODE §§ 602, 701, 702, 725(b) (West 1972 & Supp. 1973).
44. CAL. PEN. CODE § 664 (West 1970).
45. 105 Cal. Rptr. 809, 812 (1972).
46. 9 Cal. 3d at 521, 510 P.2d at 35, 108 Cal. Rptr. at 91.
47. CAL. PEN. CODE § 6 (West 1970).
48. 9 Cal. 3d at 522, 510 P.2d at 35-36, 108 Cal. Rptr. at 91-92; see PERKINS, supra note 7, at 126.
49. 9 Cal. 3d at 522, 510 P.2d at 35-36, 108 Cal. Rptr. at 91-92.
Further, because of the established rule of statutory construction that specific provisions prevail over general provisions, the court determined that the assault statute necessarily pre-empts the general attempt statute. The supreme court thus concluded that if a California court judicially defined attempted assault as an attempt to commit a battery without present ability to inflict a violent injury, that court "would . . . invade the province of the Legislature by redefining the elements of the underlying crime." 51

As additional support for this conclusion, the supreme court prophesied that introducing the issue of attempted assault into prosecutions for assault would result in unwarranted reversals; this could occur because trial courts would have to instruct on the lesser included offense of attempted assault if the presence of one of the elements of the charged assault or aggravated assault was uncertain or put in issue. 52 The court further stated that "[j]uries should not be required to engage in fruitless metaphysical speculation as to the differing degrees of proximity between an assault and a general attempt . . . ." 53

The importance of James M. lies not only in the supreme court's determination that attempted assault is not an offense defined by the Penal Code, but also in the fact that the question arose in the first place. The confusion surrounding the statutory definition of assault at the trial and intermediate appellate levels in James M. seems to suggest that the definition of assault has developed into "something more" than merely an attempted battery. That is, California courts increasingly seem to view assault as a substantive rather than as a purely anticipatory crime. It seems likely that a major cause of this metamorphosis is the statutory scheme of punishments for assault-related offenses in the Penal Code.

Three basic types of assaults are punished in the Penal Code: simple assault, 54 assault with a deadly weapon or force likely to produce great bodily harm, 55 and assaults committed with the intent to commit some other crime. 56 None of these three crimes requires that the defendant has inflicted physical injury. Only two crimes punish inflictions of physical injury which do not result in death: battery 57

50. Id.
51. Id. at 522, 510 P.2d at 36, 108 Cal. Rptr. at 92.
52. Id.
53. Id.
54. CAL. PEN. CODE § 240 (West 1970).
55. Id. § 245 (West Supp. 1973).
56. Id. §§ 217 (with intent to murder), 220 (with intent to commit rape, sodomy, mayhem, robbery or grand larceny), 221 (with intent to commit any other felony) (West 1970).
57. Id. § 242.
and mayhem. Battery includes a wide spectrum of injuries from the slightest touching to serious injuries which do not involve maiming; mayhem punishes those inflictions of injury which deprive another of the use of an organ or limb. Significantly, the punishments for battery, mayhem, and the three types of assaults vary greatly. For example, the maximum imprisonment for assault with a deadly weapon is life, while the maximum imprisonment for battery is six months and for mayhem is fourteen years. The disparity between possible punishments may be one of the reasons why district attorneys are more likely to charge assault with a deadly weapon even if an injury was actually inflicted. Thus, the assault statutes have developed into catchall provisions under which actual inflictions of injury are punished more often than attempts to inflict injury are punished. With this understanding, it is possible to comprehend why the trial judge in *James M.* determined that since James had not struck anyone, he had only attempted an assault.

**Criminal Injury and Related Offenses Under the Proposed California Criminal Code**

The proposed California Criminal Code, in a chapter entitled “Criminal Injury and Related Offenses,” would punish actual inflictions of physical injury which do not result in death as well as attempts to inflict physical injury. “Criminal injury” is defined as the use of “unlawful force upon the person of another.” This definition is substantially the same as the current Penal Code’s definition of battery and

58. Id. § 203.
60. CAL. PEN. CODE § 203 (West 1970).
61. Id. § 245 (West Supp. 1973).
62. Id. § 243.
63. Id. § 204 (West 1970).
65. S.B. 39, supra note 2.
66. Id. div. 8, ch. 2.
67. Id. § 7302(a).
68. CAL. PEN. CODE § 242 (West 1970): “A battery is any willful and unlawful use of force or violence upon the person of another.”
would, therefore, punish conduct which results in the infliction of physical injuries ranging from the slightest touching which causes no physical harm to contact which causes serious harm.\textsuperscript{69} There is no provision in the proposed Criminal Code which proscribes the use of unlawful force against another that results in the deprivation of the use of an organ or limb, currently defined as the crime of mayhem.\textsuperscript{70} Therefore, the proposed offense of "criminal injury" seems to include inflictions of even the most serious physical injury.

In addition to punishing actual inflictions of physical injury, the chapter also punishes attempts to inflict physical injury upon another person. Such attempts would be punished as either "aggressive conduct" or "aggravated criminal injury."

The Proposed Offense of Aggressive Conduct

A person would commit "aggressive conduct" in situations "when, having present ability, he attempts to commit a violent injury upon the person of another."\textsuperscript{71} This definition represents no substantial change from the current Penal Code's definition of simple assault.\textsuperscript{72} "Aggressive conduct," like the present assault provision,\textsuperscript{73} retains the present ability requirement and fails to specify the intent required for the commission of the offense.\textsuperscript{74} But with regard to the intent requirement for all offenses in which the intent has not been explicitly set forth, the proposed Criminal Code states that "[u]nless the statute defining an offense expressly requires a specific intent, knowledge, criminal negligence, or ordinary negligence as the culpable mental state, voluntariness satisfies the culpable mental state requirement . . . ."\textsuperscript{75} It further states that "[a] person acts voluntarily when he consciously and willingly performs the act or fails to perform the act described in the statute defining an offense."\textsuperscript{76} Since the action which would be punished as aggressive conduct is an attempt to inflict injury, it appears that in order to commit aggressive conduct a person would have to have consciously and willingly attempted to inflict a violent injury upon the person of another. However, it also appears that the offense could

\begin{itemize}
  \item \textsuperscript{69} See text accompanying notes 57 & 59 supra.
  \item \textsuperscript{70} See text accompanying note 60 supra.
  \item \textsuperscript{71} S.B. 39, supra note 2, div. 8, ch. 2 § 7301(a).
  \item \textsuperscript{72} See text accompanying notes 7-10 supra.
  \item \textsuperscript{73} See text accompanying notes 11-37 supra.
  \item \textsuperscript{74} S.B. 39, supra note 2, div. 8, ch. 2 § 7301(a).
  \item \textsuperscript{75} \textit{Id.}, div. 4, ch. 1 § 2002(a)(1).
  \item \textsuperscript{76} \textit{Id.} § 2002(a)(2). "The term 'voluntary conduct' in subdivision (a) embodies the concept of general criminal intent. It would exclude, for example, reflex acts, acts committed during unconsciousness or sleep, and acts committed during hypnotic suggestion or under hypnotic suggestion. 'Voluntary conduct' requires only that the person intend to engage in conduct; it does not require a specific purpose or motive or an intent to violate the law."\textit{ Criminal Code Draft, supra note 2, at 30-31.}\\
\end{itemize}
be committed if a person consciously and willingly did an act which constituted an attempt to inflict injury. But there is a marked difference between these two possible interpretations. In order to attempt consciously and willingly to inflict injury, a person would have to have intended to inflict physical injury because it is unlikely that a person would attempt to inflict injury without actually intending that very result. Since the proposed Criminal Code provides no guidance for determining what constitutes the *mens rea* for an attempt to commit an offense under the Code, the legislature must intend to adopt the present, judicially established rule that a specific intent to commit a particular crime is a necessary element of an attempt to commit that crime. Thus, if a person consciously and willingly attempts to inflict physical injury, he must specifically intend to inflict injury in order for the offense of aggressive conduct to have been committed. This is not to say, however, that a person must intend to inflict a specific type or degree of physical injury; it is necessary only that the person have contemplated a battery, meaning at least the slightest unlawful touching.

But if, in contradistinction to an intention to inflict physical injury, the *mens rea* requirement for aggressive conduct would be satisfied by consciously and willingly doing an act which constitutes an attempt to inflict a violent injury, a person would not have to intend any sort of touching at all. Thus, the *mens rea* requirement would depend on how the courts would construe the intent element of an attempt to inflict injury. If the courts decided that an attempt to inflict injury is, unlike attempts to commit other crimes, merely a voluntary act which comes dangerously close to resulting in some sort of touching, then aggressive conduct would be committed by a person who conducted himself in such a way that a violent injury to another would result if his act were not in some way interrupted. It also could be argued that a person would commit aggressive conduct if his act created a substantial risk of inflicting injury to another. Consciously and willingly creating a substantial risk of inflicting injury to another is a definition of recklessness. But recklessness was rejected as an acceptable mental state for attempts to inflict injury by the California Supreme Court in *People v. Carmen*. However, the effect of defining the mental state for aggressive conduct as voluntarily doing an act which creates a substantial risk of causing injury would necessarily overrule the *Carmen* holding.

As this discussion demonstrates, the *mens rea* required for aggressive conduct is just as uncertain as that required for an assault

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77. See note 35 supra.
78. See note 20 & accompanying text supra.
79. See text accompanying note 37 supra.
81. 36 Cal. 2d 768, 228 P.2d 281 (1951).
under the Penal Code. In addition, it appears that the proposed offense would perpetuate the confusion surrounding the current definition of assault which led to the juvenile court's misconstruction of the definition of assault in James M.\textsuperscript{82} By retaining the current definition of assault under the new name of "aggressive conduct," the proposed Criminal Code would do nothing to eliminate that definition's inadequacy to proscribe the type of conduct which the legislature believes to be socially harmful.

The Proposed Offense of Aggravated Criminal Injury

Like the proposed offense of "aggressive conduct," "aggravated criminal injury" is essentially a restatement of the current definition of aggravated assault.\textsuperscript{83} The proposed Criminal Code states that "[a] person is guilty of aggravated criminal injury when he commits an assault upon the person of another with a deadly weapon or by any means of force likely to produce great bodily injury."\textsuperscript{84} This definition is subject to two criticisms. First, the name of the offense, aggravated criminal injury, could cause confusion; the proposed offense of criminal injury requires the application of unlawful force, while aggravated criminal injury requires only an assault, which has always been defined in California as requiring no physical contact.\textsuperscript{85} This problem, created by an unfortunate choice of terminology, could be easily solved by changing the title of the offense to "aggravated aggressive conduct."

Second, the definition of aggravated criminal injury uses the term "assault," which is otherwise abandoned by the proposed Criminal Code. In order that it conform with the provision for aggressive conduct, the definition of aggravated criminal injury should be amended to state that a person is guilty of aggravated aggressive conduct when he "commits aggressive conduct with a deadly weapon or by any means of force likely to produce great bodily injury." If the term "assault" is retained in the definition of aggravated criminal injury, it is conceivable that the meaning of assault could change through judicial interpretation because assault would no longer be defined by statute. In several jurisdictions which have not statutorily defined assault, the definition of criminal assault (an attempted battery) has merged with the tort definition of assault, i.e. the intentional placing of another in reasonable apprehension of receiving a battery.\textsuperscript{86} If this merger were to

\textsuperscript{82} See text accompanying notes 38-64 supra.


\textsuperscript{84} S.B. 39, supra note 2, div. 8, ch. 2, § 7303(a) (emphasis added).

\textsuperscript{85} E.g., People v. Helbing, 61 Cal. 620 (1882); People v. McCaffrey, 118 Cal. App. 2d 611, 258 P.2d 557 (1953).

\textsuperscript{86} Restatement (Second) of Torts § 21 (1965); see Perkins, supra note 7, at 117.
occur in California under the proposed Criminal Code, an anomalous situation would result. That is, aggressive conduct would only punish attempts to inflict injury whereas aggravated criminal injury would punish both attempts to inflict injury as well as the placing of another in apprehension of receiving an injury with a deadly weapon or by force likely to produce great bodily injury.

The proposed Criminal Code is likely to make no change in the current definitions of assault and aggravated assault except to assign different names to each. The legislature has failed to redefine the current Penal Code definitions of the assault-related offenses either because it believes the current assault provisions define these offenses adequately or because it is not aware of what has been done in other jurisdictions to improve the definitions of the offenses. As indicated earlier, the current definitions of these offenses are inadequate; thus, it is necessary to examine the possible alternatives to them based upon the Model Penal Code and the New York Penal Law of 1965. This concluding section of the note hopefully will encourage the California Legislature to amend the proposed Code so that it defines more precisely what conduct will be punished as harmful to society.

The Trend in the Law of Criminal Assault

The jurisdictions which have recently revised their criminal assault provisions can be divided into two groups. The first group has followed the Model Penal Code and includes Montana, Pennsylvania, Utah, and Vermont. The second group has followed the example of the New York Penal Law of 1965 and includes Colorado, Connecticut, Hawaii, and Oregon. The difference between these two groups is essentially one of the form in which the various assault-related offenses are set forth rather than one of the types of conduct which each punishes as assault-related conduct. The Model Penal Code includes a broadly drafted provision which punishes both attempts to inflict injury as well as actual inflictions of injury. The New York Penal Law divides the conduct which causes injury into three degrees of offenses and pun-

87. See text accompanying notes 7-64 supra.
ishes attempts to inflict injury through the application of its general criminal attempt provision to each of the three degrees of assault. Both the Model Penal Code and the New York Penal Law punish reckless conduct which creates a risk of causing injury. Further, both statutory schemes punish tort-related conduct which is an attempt to place another in apprehension of receiving an injury.

The Model Penal Code

The Model Penal Code's definition of assault punishes two major categories of conduct. The first category is simple assault and includes the common law crimes of assault and battery. In addition, the definition of simple assault punishes negligent conduct with a deadly weapon and reckless conduct which causes bodily injury. Finally, the definition of simple assault punishes attempts to place another in fear of receiving serious bodily harm. The second category is aggravated assault and includes both attempts to inflict injury and actual inflictions of bodily injury with a deadly weapon.

The Model Penal Code's definition of attempts to cause bodily injury contained within its broad provision for assault-related conduct differs from the proposed California Criminal Code's definitions of "ag-

94. Compare id. § 110.00, with id. §§ 120.00-10.

Assault

(1) Simple Assault. A person is guilty of assault if he:
(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
(b) negligently causes bodily injury to another with a deadly weapon; or
(c) attempts by physical menace to put another in fear of imminent serious bodily harm.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:
(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly [sic] weapon.

98. See text accompanying notes 7-8 supra.
gressive conduct" and "aggravated criminal injury" in four ways. First, the Model Penal Code requires an attempt to inflict a more serious injury than the degree of injury required for aggressive conduct or aggravated criminal injury. The Model Penal Code requires an attempt to cause bodily injury, defined as "physical pain, illness or any impairment of physical condition." The proposed California Code, however, requires only an attempt to inflict a violent injury; this has been judicially defined as the least touching. Thus, the Model Penal Code's provision for attempts to inflict bodily injury is, at least in this respect, a narrower definition than that proposed in California.

Second, unlike its counterparts in the proposed California Code, when read in conjunction with its definition of criminal attempt the Model Penal Code's definition of assault specifically prescribes the mens rea required for attempts to inflict injury. Under the Model Penal Code, a person is guilty of an attempt to cause bodily injury if he either (1) does an act with the purpose of causing or with the belief that it will cause bodily injury without further conduct on his part or (2) purposely does anything which constitutes a substantial step toward causing bodily injury. The Model Penal Code requires that the person act purposely (with a conscious objective) to cause injury in order to be guilty of an attempt to cause bodily injury. This requirement of acting purposely makes the Model Penal Code's definition of assault more restrictive than the proposed California definitions of aggressive conduct and aggravated criminal injury, which require only a general

101. See text accompanying notes 7-8, 37 supra.
(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime he:

   (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

   (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.


104. Id. § 2.02(2)(a): "A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes they exist."
criminal intent to do a violent act.¹⁰⁵ Further, the Model Penal Code has abandoned the present ability requirement and has replaced it with the substantial step test; that test is met by conduct "strongly corroborative of the actor's criminal purpose."¹⁰⁶ Thus, the Model Penal Code's definition punishes conduct which would constitute only preparation under the proposed definition of aggressive conduct. While the Model Penal Code enlarges the scope of conduct which would be punishable as an attempt to inflict injury by its failure to require present ability, the definition has the advantage of bringing attempts to inflict injury in line with its definition of attempts to commit other crimes. This is desirable because, as it has been demonstrated,¹⁰⁷ the tendency in California has been to confuse the definition of assault so that the term means more than merely an attempt to inflict injury.

Third, unlike the proposed California Code, the Model Penal Code punishes "attempts by physical menace to put another in fear of imminent serious bodily harm."¹⁰⁸ This definition punishes tort-related assault but differs from the tort concept in two ways.¹⁰⁹ The first difference is that while the actor needs only to attempt to place another in fear of imminent injury under the Model Penal Code's definition, under the tort definition it is necessary that the victim actually was put in apprehension. The second difference is that while the Model Penal Code requires the fear to be one of receiving serious bodily harm, the tort definition requires only apprehension of receiving a battery; this apprehension can be one of receiving the least offensive touching.¹¹⁰ Those jurisdictions which have recently enacted new criminal codes have all embraced some variety of the tort concept of assault.¹¹¹

Fourth, the Model Penal Code punishes reckless conduct which creates a risk of placing another in danger of death or serious bodily injury.¹¹² Although reckless conduct is not included with the attempts

¹⁰⁵. See note 76 supra.
¹⁰⁷. See text accompanying notes 18-36 supra.
¹¹¹. E.g., UTAH CODE ANN. § 76-5-102 (Supp. 1973); VT. STAT. ANN. tit. 13, § 1023 (Supp. 1973). An interesting example is in ILL. ANN. STATS. ch. 38, § 12-1 (Smith-Hurd Supp. 1973): "A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery." This is the closest that any criminal statute has come to the tort definition of assault.
¹¹². MODEL PENAL CODE § 211.2 (Proposed Official Draft, 1962): "A person commits a misdemeanor if he reckless engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded."
to inflict batteries under the common law, reckless conduct has been statutorily proscribed in many jurisdictions. 113 For example, the current California Penal Code punishes a variety of reckless acts which include throwing a hard substance at a public conveyance, 114 dropping an object from a toll bridge, 115 and operating machinery near high voltage overhead conductors. 116 Perhaps the best example of this kind of legislation was the enactment in 1951 of an offense which punishes anyone failing to remove the latch from a refrigerator which is no longer in use. 117 The characteristic similarity between these offenses is that the legislature enacted each offense in order to punish one particular type of reckless conduct which creates a risk of death or serious injury that far outweighs the utility of the conduct. In order to avoid the consequence of continuous new enactments of reckless conduct offenses each of which deals with only one specific type of reckless conduct, the Model Penal Code punishes all reckless conduct which creates a substantial risk of serious injury. 118

Comparison Between the Model Penal Code
and The New York Penal Law

The treatment of assault-related conduct in the New York Penal Law is useful here to demonstrate a method of delineating the assault-related offenses which is different from that of the Model Penal Code. The New York Penal Law punishes substantially the same conduct as attempted assault that the Model Penal Code punishes as attempts to cause bodily injury under its definition of assault. While the Model Penal Code contains one provision which punishes attempts to inflict injury and actual inflictions of injury, the New York Penal Law contains three different degrees of assault offenses which punish only inflictions of injury. 119 Attempts to inflict injury are punished by applying the gen-

113. See Model Penal Code § 201.11, Comment (Tent. Draft No. 9, 1959).
115. Id. § 219.3.
116. Id. § 385.
117. Id. § 402b.
119. The statutory scheme for assault-related offenses in New York is as follows:
N.Y. Penal Law § 120.00 (McKinney 1968):
A person is guilty of assault in the third degree when:
1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
Id. § 120.05 (McKinney 1967 & Supp. 1973):
A person is guilty of assault in the second degree when:
1. With intent to cause serious physical injury to another person, he causes such
eral attempt provision to each of the three degrees of assault.\textsuperscript{120} The New York Penal Law punishes the intentional placing or attempt to place another in apprehension of receiving serious physical injury as a separate offense entitled "menacing."\textsuperscript{121} Further, the offense of reckless endangerment is divided into two degrees:\textsuperscript{122} one punishing reckless conduct which creates a risk of serious physical injury and the other punishing reckless conduct which creates a risk of death.

Although assault-related conduct is divided into narrower offenses in the New York Penal Law, the progressive severity of punishments assigned to specific unlawful acts is essentially the same in both the New York Penal Law and the Model Penal Code. For example, the New York Penal Law prescribes identical punishments for attempts to inflict physical injury and attempts to place another in apprehension of receiving physical injury despite the fact that they are defined as the separate of-
fenses of "attempted assault in the third degree" and "menacing." The Model Penal Code punishes both types of conduct as simple assaults with identical punishment for each. Further comparison between similar assault-related conduct defined in the two Codes reveals that in each statutory scheme, the seriousness of the several types of assault-related conduct is directly reflected in the increasing punishments assigned to each. The only major difference between the two Codes is that in the Model Penal Code attempts to inflict injury and actual inflictions of injury are punished equally while under the New York Penal Law attempts to inflict injury are punished less severely than actual inflictions of injury. Despite this difference, not only do both Codes punish the same types of assault-related conduct, they also both assign punishments to that conduct in the same order of severity.

Summary of the Trend in the Law of Criminal Assault

A definite trend toward similarly defining assault-related conduct has been demonstrated by the recent revisions of the assault-related offenses in the nine jurisdictions. There are five basic characteristics of this trend. First, the essential elements of the assault-related offenses are defined with particularity; both the requisite mens rea and the degree of injury required are statutorily defined. Second, it is only the attempts to inflict injury rather than mere attempts to offensively touch another person which are punishable. Third, the common law definition of assault has been replaced by definitions which treat attempts to inflict injury as they do other attempts to commit crimes. This is manifested by the elimination of the requirement of present ability and the specific requirement that a person must intend to cause injury to be guilty of an attempt to inflict injury. Fourth, the tort definition of assault has been included in the definitions of criminal assault. Fifth, reckless conduct which creates a risk of serious physical injury or death is punished as a general offense; that offense replaces those offenses which punish specific reckless acts, and it anticipates future enactments.
punishing other reckless acts.\textsuperscript{131} By only punishing attempts to inflict injury rather than merely offensive contact, as well as by requiring an intent to cause injury, the Model Penal Code and the New York Penal Law restrict the scope of punishable conduct. However, by eliminating the present ability requirement and by punishing both the tort definition of assault and reckless conduct, both Codes enlarge the scope of punishable conduct. In general, the established trend is a marked departure from the common law definition of criminal assault, replacing it with a particularized list of assault-related conduct.

Conclusion

In contrast to the new definitions of assault which have been adopted in nine states, the proposed California Criminal Code definitions of "aggressive conduct" and "aggravated criminal injury" would not make any substantial change in the current Penal Code definition of assault.\textsuperscript{132} In light of the trend in other jurisdictions to modify the common law definition of assault and considering the confusion which surrounds the present definition of assault in California, the legislature should amend the proposed assault-related offenses to define with greater particularity the types of conduct which will be punished.

In order for the new Criminal Code to provide a framework for judicial administration, the legislature should specify the \textit{mens rea} required for attempts to inflict injury. Further, it should consider punishing the tort definition of assault and creating a general provision which would punish reckless conduct. Finally, the legislature should define in unambiguous language the essential elements of the assault-related offenses. Toward this end, the California Legislature should regard the assault provisions of the Model Penal Code and the New York Penal Law both as a guide in considering ways to improve the current Penal Code definition of assault and as a challenge to enact a new Criminal Code which prescribes exactly the types of assault-related conduct which should be punished.

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\textsuperscript{131} See notes 112-18 & accompanying text \textit{supra}.

\textsuperscript{132} See notes 65-89 & accompanying text \textit{supra}.

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