Assaults as criminal offence type in the common law tradition: doctrinal and criminal policy issues

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Law–historical Background

Assault is deeply rooted in the common law tradition. Within this tradition a procedure had been established for claiming redress for *trespass* before the courts, when injury were committed either through direct or through indirect force, the latter form being the so called 'trespass on the case', which flourished long after the initial trespass procedure was established, to which also assault belonged. In cases where the final injury was the result of prior attempts to injure others, whoever avoided the risk by transferring it to the final victim against whom it materialized (the so called *'squib cases'*) was held as candidate for both trespass categories. Whereas now Blackstone held in a naturalistic manner that the intervention of third persons made the injurious force indirect, the majority of the court in *Scott v. Shepherd* (1773) held – in a way prefiguring the modern doctrine of exemptions from barring regress to the initial act when objective imputation so requires – that the self-defensive acts of the intermediate persons left the responsibility of the defendant intact, so that the injurious act was finally direct. Assault has thus its origins in a wrongdoing partaking to the provisions on the rights of a civil law plaintiff against trespass, as well as to the criminal law protection against inchoate attacks.[1]

[1] Erickson 1967: 14-5 and at footnote 9; Rollison 1941: 7-8, also commenting on *Scott v. Shepherd* (1773) (*ibid.*, at 8); Harrison and Bell 1990: 520; Perkins 1962: 78. As

Assault as tort refers to the victim's apprehension of an imminent battery, whereas criminal assault is an attempted battery, i.e. more dangerous than the first and therefore calling for the intervention of public force; criminal assault is inherently akin to the deterioration of 'King's Peace'. Despite the initial civil nature of assault as well as the later 'privatization' of the legal protection from it, it was not the emotional disturbance of the victim but the public order which at the origins set the writ of trespass in motion; the initial combination of trespass with the commission of the act 'vi et armis' is very indicative of the penal-public character of the legal protection against assault. The parallel ways of civil and criminal protection from assault date back to the 13th century in the English law.[2] The public dimension of assault is outstanding in cases where others are involved in that from the act of the defendant they, present at the scene, feel reasonable fear for their own safety, i.e. in cases of *affray*.[3] Battery and assault became statutory offences and ceased to be common law offences since 1861 in Britain.[4] Noteworthy for understanding the development of the penal protection against assault is however, that especially in the US the criminal nature of assault got totally rid of the old Blackstonian notion of criminal assault as violation of public order; as the sense of the 'public' underpinning the criminal nature of assault shifted towards a kind of 'individuated public', protection from criminal assault became a management of interpersonal violence, itself turned to be fundamentally privatized and exempted from state interference.[5]

The Elements of Crime

Recurring back to Blackstone, one can trace a fundamental differentiation as to 'insultus': it had to be conduct short of touching the victim but already beyond mere threats, a conduct inherently unrelated with

to the action against threats producing fear under the Roman law, see Van der Bijl 2012: 4.

[2] Malamuth 1973: 87; Erickson 1967: 19; Rollison 1941: 5-6, 11-4.

[3] See e.g. Card 2008: 212 and at footnote 226.

[4] Card 2008: 19, referring respectively to *DPP v. Taylor; DPP v. Little* (1992).

[5] Cf. *passim* in this regard the legal–historic approach of Stein 2012.

negligence and not reducible to frightening words. Much depends on the context, as one can easily suspect under such a flexible definition, which in tort law tends to encompass even insults through words as intentional infliction of mental suffering or emotional harm as well as reckless or negligent behavior. A *narrow* interpretation of the wrongdoing in assault would exclude full-fledged acts, when they have been frightening to others but not so intended by the defendant; it would also exclude threats without overt act, even when a dangerous device were available with (yet not exhibited by) the defendant. Also some allowance to everyday anger and passion is granted through law, as far as this can be reasonably tolerated, i.e. when the act does not conflict with societal normative expectations.[6] although also non-violent but physically *'exploitative'* wrongs (such as touching another longer than is socially appropriate) are encompassed within the scope of assault.[7] Borrowing from the doctrine and jurisdiction on battery, one can more generally conclude that an assailant does not need to have a *hostile* attitude towards the victim, although such will be the standard case. Unlawfulness does suffice.[8] It goes without saying then that hostility displayed in an objectively clearly menacing manner facilitates the ascription of the required mens rea, at least in the form of recklessness, when the resulting harm has (or in cases of inchoateness would probably have) this behavior as its proximate cause, if only the perpetrator

[6] Erickson 1967: 15-21. Representative as to criminal assault's terms being purpose plus overt act plus inchoateness, see *State v Davis* (1840), to which the author refers (*ibid.*, at 19 and footnote 27). On mere abusive words short of assault, cf. also *Hixson v. Slocum* (1913), to which the author also refers (*ibid.*, at 20). Cf. also Rollison 1941: 12-7, referring (with regard to the requirement that some physical act accompany the verbal aggressiveness) also to *Mortin v. Shoppee* (1828) and *Stephens v. Myers* (1830) (*ibid.*, at 15), as well as to *White v. Sander* (1897) with regard to non-existence of negligent assault (*ibid.*, at 17). For a case, where assault ushered in harm (victim's heart attack), see e.g. *State v. Nosis* (1969), as to which see in details Gamble 1971: 77-8.

[7] Horder 1998: 393, reminding that this width of the notion of assault is due to its rooting in civil trespass (*ibid.*, at footnote 5).

[8] Cf. Card 2008: 201-2, who refers in this regard also to *Faulkner v. Talbot* (1981) and *Re F* (1990) (*ibid.*, at 202). See also Loveless 2008: 453.

knew the possibility that the result would come about. The preponderance of knowledge over the volition *('scienter')* is thus obvious concerning the establishment of mens rea, so much so, when consciously disregarding real and concrete indications of the possibility of a bad outcome might establish already willful blindness beyond recklessness.[9]

However, it is of course significant that after *DPP v. K.* (1990) even the objective recklessness type ('*Caldwell* recklessness') might suffice for assault. This goes clearly beyond requiring grave forms of recklessness for establishing assault culpability, which up to then the courts did require. In *Venna* (1976) e.g. such grave form of culpability, hardly distinguishable from intention ('*Cunningham* recklessness'), has been required for the mens rea of the assailant; afterwards and even until *DPP v. K.* the Caldwell type has not consolidated in assault matters. So the change entails that conviction for assault could even survive acquittals for more serious crimes based on the same facts, if a mistake of fact extinguishes the intention and thus the culpability of the latter's perpetrators (e.g. error as to lack of consent to sexual intercourse in rape).[10]

In the specific constellation of cases of assaults marked by the intent to *resist arrest*, unlawfulness is hardly obvious when the 'assailant' does resist, if he/she misconceives the situation, thinking the officer's act unlawful. To suppose this misconception to be 'mere' mistake of law were too austere, since resistance indicates lack of intention to assault, i.e. tends rather to be a mistake of fact.[11] Until an arrest has to be materialized, assault might always be committed when a police officer restrains a person, except if he/she tries only to gain the latter's attention.[12]

Taking under consideration the importance of a minimum of ag-

[9] Cf. Gamble 1971: 78-81, commenting there respectively on: *State v. Nosis* (1969) and *People v. Carlson* (1941). On recklessness as to causing apprehension of infliction of immediate violence in assault see also Ormerod and Gunn 1997: at Part 2. See also Perkins 1962: 87-91.

[10] See respective critique in Harrison and Bell 1990: 523 and at footnote 43.

[11] Correctly so also Card 2008: 206, 209.

[12] See e.g. *Collins v. Wilcock* (1984) and on this also Loveless 2008: 453.

gressiveness despite the insignificance of hostility, as referring to motives unrelated to the 'epistemic' notion of mens rea, the 'hard core' of assault comes very close to what after Duff one labels *'attacks'*. Indeed, in assault the harm envisaged by the perpetrator is inherently connected with his/her conduct, rather than being contingently so connected, as is the case in endangerments. Therefore, an assault is a wrongdoing in and of itself due the anticipation of the harm it contains, despite the fact that is per definition incomplete: its failure *is* its wrongfulness. This stance distinguishes itself either from downplaying intention concerning criminal wrong or from reducing the latter to a 'thin' objectiveness of merely setting a risk through the conduct in question.[13]

Bodily Harm

On the one hand thus assault covers the wrongdoing remaining after a battery did not establish, like when the requirement of an, at least, slightest degree of physical force is not fulfilled, even though a psychiatric harm is caused; such need for covering lacunae does not, of course, exist, if the agent pulls away from another; then assault is not intelligible.[14] On the other hand, when force took place, actual bodily harm as term for establishing assault occasioning such harm, becomes another field of dispute. Whereas pain need not be caused, a general upset of the victim will not suffice, but, again, cutting off one's ponytail will do. Psychological disorders less than medically recognized illnesses (like panic versus post-traumatic stress disorder or depression) are not sufficient candidates for this crime. Also, transient, trifling, trivial or generally insignificant harms do not amount to actual bodily harm. But harm caused by assault aggravates the latter even if it is the result of an unforeseen development of the force exerted, i.e. mere cau-

[13] See e.g. Duff 2011: 367-71; Reiff and Cruft 2011: 13-4. Contrast Westen 2011: 194-212; Alexander 2011: *passim* and especially at 219-20, 227-9, 233-4, 236-8.

[14] Cf. Card 2008: 195-6 and his respective references to *Walkden* (1845); *Sheriff* (1969); *Ireland; Burstow* (1998).

sality suffices.[15]

But emotional abuse is not to be underestimated; it can often lead not only to victim's bodily harm but also to suicide. Insistence on a clear-cut clinical diagnosis of severe psychiatric illness may not satisfy the need for punishment of an obvious linkage between abuse and resulting harm. In *Dhaliwal* (2006) the lack of such psychiatric illness deprived the court from the ability to convict for bodily harm the defendant whose wife hanged herself after having been emotionally abused for a long time.[16] Besides, to insist in the body/soul distinction according to the Cartesian tradition will not do any more. If bodily integrity has henceforth to be conceived of as unity of physical and mental element, then the *'corpus'* contains also psychic elements. Regarding psyche as less important is not only in civil law obsolete; even criminal law has to be synchronized with the contemporary upgrading of the psychical dimension of personality and its need for criminal protection.[17]

It is clear, that when the threshold of touching has been superseded and the subsequent serious injury acquires an autonomous criminal dimension, assault ceases to remain the 'epicenter' of the act and labeling such injuries 'assaults' has no substance. Such are e.g. the cases of

[15] Card 2008: 203-6, referring to *Savage; DPP v. Parmenter* (1992), *Chan-Fook* (1994), *Dhaliwal* (2006) and *DPP v. Smith (Michael)* (2006); cf. also the casuistry (deemed by the author as of doubtful practicality) contained in the 'Charging Standards' issued by the Crown Prosecution Service (*ibid.*, at 204). See also Loveless 2008: 463-5. After *Chan-Fook* extended bodily harm to include also psychic injury, the critique emerged that this could not apply to 'violence' as an element of assault; the respective inferences in *Ireland* were therefore allegedly wrong; see reference to this critique in Ormerod and Gunn 1997: at Part 3a, who reject it. As to the elements of battery, see also the authors' reference to *Collins v. Wilcock* (1984); *Faulkner v. Talbot* (1981) (*ibid.*, at Part 4). On the above issues and especially the significance of *Ireland; Burstow* in confirming the widening of protection from assault also to the victim's psyche, see also Van der Bijl 2012: 12-8. As to the seriousness of physical injury in the US state laws, cf. Castillo 2015: 53 at footnote 109.

[16] Van der Bijl 2012: 2 and at footnote 4, 14 at footnote 85.

[17] Van der Bijl 2012: 6-10, 18, 20-1.

'assault by penetration' and analogous sexual crimes.[18] Where though indecency is not the effect of a physical force exerted on the victim's body, the autonomous presence of a technical, common assault may still be intelligible, i.e. not absorbed by the sexual crime; this is so e.g. when the defendant forces through phone calls several women to perform upon themselves and describe to him indecent acts, pretending to have kidnapped their children.[19]

The Significance of Referring to Bodily Harm for Common Assault to be Established: *The Normative Focus on the Victim's Personality*

But how *'thick'* has the relation of assaultive behavior to bodily injury as its 'referent' to be? British law recognizes generally the commission by words alone, since they produced the victim's apprehension of application to his/her body of immediate unlawful force, even if the offender remained invisible, as when acting in darkness or in the so called 'silent phone cases'. Further, even apprehension (which need not always amount to 'fear') may be dispensed with, when e.g. the perpetrator creeps up behind the victim or raises a fist towards a blind person. In this respect assault is nearing to harassment in a way tending to blur respective boundaries, among others by downplaying the importance of requiring *immediate* exertion of force as object of the victim's fear.[20] This widening of assault to overlap with bullying and harass-

[18] Card 2008: 212, 353-7. See also Loveless 2008: 541-6.

[19] See respective comments of Ormerod and Gunn 1997: at Part 5d.

[20] Card 2008: 192-5, who refers to the precedents in *Constanza* (1997) and *Ireland; Burstow* (1998). Especially, as Lord Steyn explained in *Ireland; Burstow*, immediate may mean *imminent* or *possibly* immediate force (cf. *ibid.*, at 194), as well as that "a thing said is also a thing done". As the author notices, this standpoint tried to subsume stalking cases, i.e. a special form of harassment, under the crime of assault, before harassment was separately dealt with through the respective 1997 Act in the UK (*ibid.*, at 195). See also Loveless 2008: 452-8, 465, 501-2. For the sufficiency of words to establish assault, see also Wilson (1955), referred to by Harrison and Bell 1990: 520 at footnote 12. That psychic assault is not a prerequisite of battery and thus that it is not always to be conceived of as attempted battery, stresses Horder 1998: 396. Concerning the oscillation of the legal meaning of 'inflicting' and 'caus-

ment becomes extremely crucial in the contemporary entwinement of physical and digital interpersonal contact; outdoor activities in conflict-prone situations and cyber-victimization through threats reinforce mutually each other.[21] There is after all also a 'doctrinal' link connecting assault with harassment. Silent calls cannot be excluded from assault on the grounds that silence is something less than words and mere words do not establish assault; silence after a call is *an act in itself*, qualitatively different from using words or not and thus sufficient for assault. Assault may be excluded not for that reason but for the eventual lack of immediacy of the force threatened due to lack of proximity a telephone call per se entails.[22]

Of course, to base imminence on the subjective status of the victim, analogously e.g. to duress, cannot do. Duress is a defence and it might remain somehow vague in this respect, whereas fair labeling demands exhaustive specificity of the norm, in order that analogia in malam partem be avoided.[23] Taking under consideration also the fact that assault

ing' as to grievous bodily harm occasioned through psychic assault, which the House of Lords decision in *Ireland; Burstow* produced, especially via the apparent abandonment of restrictively interpreting 'infliction' as requiring contact with the victim's body – as it was held in *Clarence* (1888)-, see Gardner 1998: 34-5. The author supports therefore the need for a distinct legislative provision against stalking, despite the low liability threshold it endorses (*ibid.*, at 37-8). As to 'immediacy' a (not very clear indeed) distinction ought supposedly to be made between feared immediate force and immediate fear of force, whereby the latter is not needed. See on this distinction and the above issues also Van der Bijl 2012: 13, 16-8.

[21] On this issue, see in details Van Wilsem (2011): *passim*.

[22] Correctly so Ormerod and Gunn 1997: at Part 5a. The authors dismiss critique on *Ireland* renouncing the decision's reasoning as construal violating the *nullum crimen sine lege* principle. Their (at least abstractly correct) argument is that *Ireland* did not constitute a breach of this principle because it is judicial interpretation of the law, which can also be one extending its literal meaning to its logical *exhaustion* (without, of course, going *beyond* this meaning) (*ibid.*, at Parts 6-7). Cf. respectively also Van der Bijl 2012: 10 and at footnote 54, 21-2. As still allowed the author also considers an interpretation of holding psychological harm as internal injury and the latter as a subcategory of physical harm, inferring from these premises that psychological harm establishes common assault (*ibid.*, at 22).

[23] Horder 1998: 395-6.

functions as a 'gateway' offence to further illegality, the need for complying with fair labeling is increased.[24] Besides, the authority in *Smith v. Chief Superintendent, Woking Police Station* (1983), which held possible the extension of assault to every causing of frightening, has not been followed. Being afraid of something and being in a status of acute anxiety are distinct situations: the latter does not suffice to become assault.[25] However, the reasoning in *Smith v. Chief Superintendent, Woking Police Station*, was insofar flawed as to equate 'apprehension' with 'fear' without requiring also 'anticipation' of the violence to come. Same problem arose also in *Constanza* and *Ireland*. So, if it can be established that the victim apprehended psychic harm then assault (admittedly extensively construed) is established even through silent telephone calls.[26] Admittedly, the inclusion of psychiatric illness to bodily harm after *Ireland; Burstow* might lead to liability for inflicting grievous bodily harm even where the defendant 'assails' by terminating an employment or disengaging from another, who is extremely vulnerable to the doer's knowledge and indeed suffers depression. In such cases prosecutorial discretion to avoid indictment and, if not, then the whole arsenal of justification grounds to avoid conviction are to be set in motion.[27]

According to a very thoroughly elaborated view imminence can be *dropped off* as a term for (psychic) assault, as long as 'sedes materiae' is (as also in crimes like sending threatening letters or hoax crimes, whereby, of course, it is the intention of the doer, which exclusively matters, since these crimes are not result crimes) the fear produced to the victim, which remains relevant also when the doer suspends temporarily the materialization of the threat; this is so because the victim might still fear such materialization upon the elimination of the *suspensory* condition. Even when the threat is genuinely negated (by e.g. the doer's declaring to the victim the existence of a *defeating* condition for

[24] Correctly so Horder 1998: 403.

[25] Gardner 1998: 35-6.

[26] See on this subtle but crucial distinction, Ormerod and Gunn 1997: at Part 3b.

[27] Gardner 1998: 38.

the materialization of the threat), the declaration may be interpreted as connoting some vague form of threat for the future. But even if such conclusion cannot be inferred, what surely remains is the fear, a situation indicating that assault *does not* presuppose threat, save in the form of the victim experiencing in a sensory and contemporaneous manner that it is confronted with an (in a broad sense) menacing situation.[28] In any case specific means used for the perpetration are not required for assault; the infringement on the victim as provided by law does suffice. Insofar, assault is a 'materially defined crime', rendering specification of criminal methods of perpetrating (beyond conduct plus result) irrelevant.[29]

These solutions are in concert with the generous understanding of whether battery is established. Although negligence presupposes there a certain infliction of harm to the victim, so that recovery may be allowed, the impact on the dignity or the feelings of the victim is also to be taken into consideration, resulting, where the de minimis principle

[28] Horder 1998: 396-401, also there commenting on *Light*(1857) and finding out an assault in the case irrespective of the imminence problematic. The author solves (under these terms correctly) also the old classical case in *Tuberville v. Savage* (1669) in favor of there having been an assault: the words of the defendant laying hand on his sword "if it were not assize-time I would not take such language from you" are to be regarded as setting a condition merely suspending the threatened act (*ibid.*, at 402). The problem the author admits is whether such conduct justifies self-defence or not; such justification depends upon the tricky issue of how threatening the victim felt these words to be (cf. *ibid.*, at footnote 57). Besides, the whole construct of assault by setting a suspensory condition entails the problematic of conclusive conduct, i.e. whether such fundamentally indirect conduct is still criminal despite its *plainlyself-negating externalization*, a problematic well known in the German discussion ('*konkludentes Handeln*'). If, alternatively, one is forced due to such indirectness to abandon commission as a term of liability, one must establish it through *omission* with all the problems this entails in the common law tradition. Finally, I respectfully disagree with the assertion of the author that 'wild strikers' barred by the police assault workers willing to 'break' the strike by threatening or insulting them; this may be doctrinally correct but it seems to take for granted that criminal liability might bypass the enactment of social and political *rights* (cf. *ibid.*, at 397).

[29] Van der Bijl 2012: 5-6, 20.

cannot hold, in the plaintiff being adequately awarded.[30] As civil and criminal law aspects tended to be confounded, a shift could be observed in that also criminal assault focused on the conduct bringing about apprehension and fear to the victim irrespective of the conduct's ability to occasion the injury, e.g. of whether the gun was loaded or not. The crucial point as to tortuous assault is indeed the "*mental tranquility of the victim*", which explains why also criminal assault is conceived of as a 'psychic' one. This stresses that assault has to do with the affective and not the narrowly epistemic state of mind of the victim.[31]

This is no *'spiritualized'* wrong though: the link between assaultive conduct, psychic and then physical harm may often be almost automatic. Examples of psychic harm establishing 'psychiatric assault' would be e.g. a shock suffered after the perpetrator lied wanting to joke or cheat or 'defenestration' cases occurred due to feelings of strong panic caused to the victim by another.[32] Therefore, the mere *appearance* of the act as being intentional or able to cause the injury may suffice, which, conversely, of course, entails that if the objectively 'assaulted' victim were unconscious of the attempted battery, no assault has taken place, as well also that a frightened person is assaulted, even if the de-

[30] Rollison 1941: 3-4.

[31] Horder 1998: 393; Erickson 1967: 19, 21. See representatively *Allen v. Hannaford* (1926), to which the author also refers as promoting as protective purpose of the law on assaults the person's right "to live in a society free from being put in fear of personal harm" (*ibid.*, at 16, 19 and footnote 31). See also: Card 2008: 192; Gamble 1971: 75 and at footnote 2. In *Logdon v. DPP* (1976) the fact that a displayed gun was only a 'replica' played no role; cf. also Loveless 2008: 452; Van der Bijl 2012: 3. That a broadened notion of the civil assault wrong might in the risky conditions of late modernity enhance a consumerist culture of litigation remains a possibility. That, however, such allegations of commodification of compensation claims may also be 'ideological' and ungrounded, cf. Ilan 2011: *passim* (and especially at 48-53). High frequency, aggressiveness-burdened relationships between members of the public and working people, as well as systemic-institutional causes for the latter, diagnose as to workplace assaults in Britain, Jones/Robinson/Fevre/Lewis 2011: *passim* (see especially their conclusions at 175-6).

[32] Ormerod and Gunn 1997: at Part 3c; see also *Wilkinson v. Downton* (1897); *Janvier v. Sweeney* (1919); *Lewis* (1970), to which the authors refer.

fendant who acted in a threatening manner declared a lawful demand to the addressee; therefore also, battery *does not* always presuppose the existence of assault; the former may occur without the victim having been placed in apprehension thereof, as noted above.[33] Noteworthy is however that despite a lack of manifestation of apprehension of an imminent battery, assault exists whenever the victim is put in a situation where some act from his/her part is necessary to escape the injury, like an act of self-defence or retreat.[34]

Taking all the above into consideration, a verbal *threat* may qualify as (at least civil) assault if the circumstances allow the inference that the apprehension to which the victim was put was reasonable.[35] As the case may be, the requirement of an overt act can be watered down to the sum of apparent intention plus guilt-indicating circumstances, becoming thus not very different from *a fiction facilitating judgments ascribing responsibility*. It is then very logical that the *blatant immorality* displayed by the defendant's conduct turns out to be a crucial criterion of assault's wrongfulness; terms like 'outrageousness' or 'orneriness' are very illustrative in this regard.[36] The high role normativity plays in assault is apparent in the notion of 'moral turpitude' as to assault and battery in the US case law. Scienter being the necessary condition of turpitude, then aggravation of the conduct is the sufficient condition to so assuming. The conduct being aggravated alone will not do. So, 'simple' assault is not simpliciter non-aggravating and thus allegedly always non-turpitudinous. It might be such without aggravation if scienter committed. The term for so being is then that the assailing conduct shocks public conscience in that it is inherently base, vile, or de-

[33] Rollison 1941: 14-6, 18-20. The author also refers to *State v. Barry* (1912) regarding the lack of assault when the person attacked has not realized the attack (*ibid.*, at 19). See also Card 2008: 192. Also grievous bodily harm can be committed without an assault being committed: Harrison and Bell 1990: 520, referring to *Wilson* (1984).

[34] Rollison 1941: 19-21.

[35] Gamble 1971: 82.

[36] Cf. Gamble 1971: 83-5; Van der Bijl 2012: 22. As to significance of appearance, see also Perkins 1962: 76-81.

praved, and contrary to the accepted rules of morality, as *In re Solon* (2007) summarizes quoting other precedents too. The motive thus counts and not the harm, i.e. the outcome of the conduct.[37] One might thus conclude that assault overlaps significantly with *personality's violation*, i.e. it may encompass also the victim's humiliation, the violation of its dignity, under the term of course that the 'body' is attacked, but at the widest so and by conceiving of 'body' as bodily integrity, including so also psychic harm.[38] The relation of assault to bodily harm is genuinely *'thin'* after all.

This development is predestined in the mixed nature of trespass, which from the beginning had also a penal nature meeting the need for social peace without allowing victims to take refuge to private vengeance and reprisal.[39] On the other hand, the width of the notion of battery let the protection expand beyond harmful touching also to offensive one, whereby indiscrete actions, even slight disdain to the lack of consent of the plaintiff, indignation producing acts like hair cutting, or indifference to the peculiar sensitiveness of the other, may suffice. It is also evident that the 'person' of the battered encompasses also things closely connected with his/her body, if interference with them can be considered as violation of personality or sense of dignity. Accordingly, the offender does not need to touch with his/her own body the victim; instruments or setting force in motion do suffice and in such cases the exertion of force remains direct.[40] The extended construal of violence in *Ireland* would also support the view that touching is not necessary for battery; consideration of use of instruments and of omission responsibility as sufficient for battery, attest to this. Since 'direct communication' with the victim suffices, it follows that, if the harm is a psychiatric

[37] Castillo 2015: *passim* and especially at 44-7, 49 (and at footnote 68), 52-7.

[38] Van der Bijl 2012: 18-9.

[39] Rollison 1941: 5-6.

[40] Rollison 1941: 1-3, 6-9; Card 2008: 195-6. Specifically as to consent to assault and its exemptions, see in details Loveless 2008: 474-96. As to the directness of force without personal contact with the attacker see e.g. *Pursell v. Horn* (1838); *Plunkett v. Matchell* (1958), referred to in Harrison and Bell 1990: 520.

one, there is a battery without touching.[41] However, one may securely take as point of departure as to the criminal assault that such assault does not exist whenever a fear of immediate force cannot logically be assumed due to the *very impossibility of it occurring*, like shaking the fist to someone being far away or when the threat is cancelled simultaneously with its expression by the offender him/herself, as dealt with in *Tuberville v Savage* (1669),[42] but, as now is suggested, only if the act is so *fully 'self-defeated'*, that the addressee feels clearly the impossibility of it being *ever* materialized.

Difficulties with Omission

An omission from the part of the offender does not suffice for an assault, however, except in the case where he/she stands under a duty to act, like in cases of 'ingérence'.[43] This interpretation follows the distinctions made as to battery.[44] The recognition of responsibility through omission tends to blur the boundaries between direct and indirect application of force in this penal field, since it may become extremely difficult to distinguish from this type of omission responsibility, cases where the indirectness of force does not negate that the act was one of *co*mmission. In *Haystead v Chief Constable of Derbyshire* (2000), the injury caused to a baby fallen from the arms of a punched woman established direct battery, but in *DPP v. K.* (1990), referred to above, where the defendant left acid into an air hand and face drier and before he returned to wash out the machine another turned it on and the ejected acid injured his face, the directness of force is dubious. If assault should connote a strong sense of proximity between act and its impact on the victim, cases like *DPP v. K.* cannot establish commission of assault, even if they might establish bodily injury.[45] Insofar, for establishing assault

[41] Ormerod and Gunn 1997: at Part 4.

[42] Card 2008: 193.

[43] Card 2008: 192.

[44] See Card 2008: 197-8, as well as Loveless 2008: 459, 465, on *DPP v. Santana-Bermudez* (2004).

[45] Cf. respectively Card 2008: 196-7, as well as Harrison and Bell 1990: 520-2, both commenting on *DPP v. K* (1990). See on this case as well as on *Haystead v.*

remained only omission responsibility, as the latter has been affirmed in *Miller* (1983). The hyper-normativity such implementation of *Miller* to assaults produces, has been criticized as unbearable for the common law tradition.[46] If the relation between doer's conduct and victim's body is, according to the above submissions, *loosened*, omission responsibility might be (doctrinally) established, whenever the doer knowingly sets in fear the other without, despite such knowledge, desisting from his/her conduct. It is evident though that lack of a commission-like overt act, the principal social conformity of the conduct and the general overburdening of the citizen, practically having to permanently recur to self-censure, are *counter-indicative* for expecting a positive reception by the courts of omission responsibility as to common assault widely interpreted, not to mention the problems with affirming an attempt of assault by omission or with discerning the conditions of establishing a possible withdrawal from it.

'Attempting' Assault?

The majority standpoint in common law jurisdiction and doctrine concerning the possibility of attempted assault has been that such conduct is inconceivable as running contrary to the well established rule that there cannot be an attempt of an attempt, since the consummated assault is defined in terms of an attempt.[47] The sporadic affirmation of attempted assault has taken place to the expense of several criminal law principles. So, in *State v. Herron* (1892) the conviction has been based on shifting the burden of proof to the defendant as to whether the gun he used to threaten the victim was loaded or not. A purely

Chief Constable of Derbyshire (2000), also Loveless 2008: 460.

[46] Harrison and Bell 1990: 522-3. Against indirectness and omission as sufficient for battery, see also Hirst 1999: *passim*.

[47] See e.g. *White v. The State* (1858); *Wilson v. The State* (1874); *Allen v. People* (1971); see also on these decisions Malamuth 1973: 88-9. Out of these decisions emerges the futility of trying to find an answer to the 'metaphysical' question of the beginning of an attempted attempt, as well as the identification of 'present ability' of the conduct to occasion a battery with assault, which thus hardly leaves a space for a discernible pre-stage of assault.

doctrinal differentiation between assault and its attempt has been already made in *People v. O'Connell* (1891), whereby the appeals court had considered attempted assault as an indictable offence by equating the concrete impossibility of assault with the latter's attempt, thus bypassing the defendant's procedural maneuver, who had pleaded guilty of it in the first instance and on appeal argued that such crime did not exist. Analogous has been the opinion of the appellate judges in *State v. Wilson* (1959): what is more than preparation and short of assault is punishable as attempted assault; the latter was held as a distinct offence and could not be evaporated into a (non-existent) attempt of an inchoate battery, in which latter assault has been traditionally understood to be consisting. According to this jurisdiction attempted assault would be any preparation to battery with the present ability to result to a battery without being proximate to the personal sphere of the victim as the consummated assault. Practically, the affirmation of attempted assault ran contrary to the prohibition of analogy in malam partem in criminal matters: in the face of the lack of an expressis verbis penalization of such conduct in the statutes, this affirmation qualifies as criminal a type of conduct, which in default does not supersede tortuous behavior to be dealt with through redress claims within civil law litigation.[48] The problem has arisen in all its perplexity in the California Supreme Court's decision in the case *In re James M.* (1973). The Court held it a violation of the double jeopardy prohibition that the defendant was convicted for attempted assault whereas acquitted of assault, the latter meaning attempt (of personal injury) par excellence. If the injury were impossible, rendering assault unfounded, then the purely logical construct of an attempted assault did not amount necessarily to a criminalized conduct; such necessity could provide only an expressed legislative will, which no opposite judicial construal might override. One can

[48] Malamuth 1973: 84-8. Cf. in favor of the intelligibility of attempted assault Perkins 1962: 81-5, glossing over the respective jurisdiction (critically to some degree). The author bases incrimination of assault's pre-stages on attempts to frighten, to commit battery without present ability or without proximity to the victim and to commit aggravated assault (*ibid.*, at 85-7, 91).

convincingly conclude thus that assault as lex specialis prevails over attempt, deemed as the lex generalis, a conclusion which ushers to *non-incrimination* of attempted assault on the basis of the 'pro libertate' principle.[49]

Harassment as Distinct 'Pre-assault' Offence

Opposite to assault *harassment* has distinct features, which make it a pre-stage of assault as well as a conduct qualitatively different to it. Especially, the requirement of a course of conduct for harassment discerns it from assault in that harassment forms a conduct disconnected from immediate force (the 'systematic' nature of the respective behavior thus compensating for the lack of immediacy of the threatened force), although similar to assault in producing fear, even through speech, to the victim, which has to be a natural person, whereby the fear figures specifically as alarm or distress. Now, *'course'* of conduct depends on several conditions, like the interconnectedness of the separate incidents, temporal proximity of them (but only in principle), similarity of the incidents in nature and lack of interruption of the serial character of the conduct in whole, as when offender and victim have in the meantime been reconciled. Some nexus between the incidents and a degree of connectivity between them are in any case required.[50] More

[49] Malamuth 1973: 89-95. The author considers such judicial construal as bypassing the prohibition of retroactivity of criminal laws in malam partem and through this as a violation of the separation of powers (*ibid*., at 95).

[50] Card 2008: 236-7. See also the referred to authorities *H (Gavin Spence)* (2001); *Lau v. DPP* (2000); *Kelly v. DPP* (2003); *Patel* (2004), *ibid*., at 237. See also Finch 2002: 708. As in *Lau v. DPP* (2000), so also in *Pratt v. DPP* (2001), the interval of time between the acts has been held as insignificant; see on these decisions and generally on the term 'course of conduct', Loveless 2008: 502. As she correctly notes, it is opaque whether a continuous conduct without intervals constitutes one or more distressing acts (*ibid*.). As long as in the common law tradition the naturalistic approach as to the nature of the act holds sway and there are no elaborated doctrinal notions either of a single but enduring act (like the German *'Dauerdelikt'*) or of a perpetuity of conduct consisting in the sequence of similar single acts which concur, forming though some kind of unity (like the German *'Fortsetzungstat'*), a judicial solution of such cases cannot be abstractly prognosticated.

than one individual might be harassed, if they form a 'close knit definable group', allowing thus the interpretation that even members of the group non-present at the scene may be considered as victims.[51]

It is obvious that such widely construed conduct may interfere with ECHR protected rights, such as the freedoms of expression, assembly or association. The eventual *racist* component of such conduct may facilitate conviction, as long as no justification will be then available and the anti-racist provisions should be held as leges speciales compared to the concurrent harassment accusation.[52] In any case, there is in British law no *attempt* of harassment, the latter being only a summary offence.[53] In a manner similar to dealing with affray, a public dimension to harassment exists, when people are *put in fear of violence*. Thereby the violence feared may be not an immediate one for an individual, however the latter must feel it will be used against him/her personally; this is a term prone to impede conviction to a significant degree.[54]

Especially narrow to conformity to the norm comes *stalking*. Innocence at surface is accompanied here with unwanted communication, besetting one in a situation of unpleasantness and deeply characterized through the idiosyncratic nature of offender and victim. Common features in conduct like insistent surveillance or repeated sending of gifts, are the repetitious nature of the conduct, the disdain as to the lack of

[51] As to how the group is to be defined within this wide margin of interpretation, contrast *DPP v. Dunn* (2001) and *DPP v. Dziurzynski* (2002) as commented upon in Card 2008: 238.

[52] Cf. as to ECHR also Card 2008: 240-1; Loveless 2008: 503.

[53] See e.g. Card 2008: 241.

[54] Card 2008: 241-2. In *Henley* (2000) no harassment was found if the victim has been frightened 'merely' as to what might happen, rendering thus 'vague' insecurity insufficient: Loveless 2008: 502. She also notes a protection lacuna insofar as every act of the course of conduct has to be frightful to establish a crime (*ibid.*). See also Finch 2002: 710-1. The author notes that the lacuna can hardly be dealt with through recurrence to bodily harm liability, as long as unsurpassable problems with proving causality as well as with quantifying the psychological harm, will normally lead to acquittals: *ibid.*, at 711-3, 717. To the acquittal for causing fear of violence through harassment in *Curtis* (2010) refers Van der Bijl 2012: 15 at footnote 88.

consent of the addressee and the latter's suffering of adverse psychic reaction.[55] The latter, being the decisive factor in stalking instead of recurring to doer's intentions or objective criteria, displays the significantly context-dependent nature of stalking, which might be established also when the addressee of the conduct only *feels* harassed.[56]

Focusing primarily on the subjective status of the victim on the one hand and requiring something more helpful on the other, lead us to recur back to the mens rea of the doer, since measuring stalking exclusively on the objective parameter of 'harm' is not adequate to the wrong of stalking. Within this frame, the proposal has been made that *intentional* stalking cover the above mentioned protection lacuna in harassment (reserving the recklessness liability as a more lenient proxy); evidence difficulties might be overcome by establishing a legal assumption as to the existence of intent, leaving with the defendant to rebut the assumption. In a case like *Cox* (1998), where the defendant left a chicken's head in a Bible on the victim's front porch an alternative explanation than intent has to be presented by the defendant and this hardly so; easier would be for a defendant, conversely, to explain his/her intransigence in repeating an innocuous conduct after having been asked to desist.[57] From a criminal policy viewpoint, the need for filling the protection gaps as to stalking is great also because the reasonably unexplainable insistence of the perpetrators indicates a *sociopathic* personality in most of the cases, a reason why after conviction stalkers are put under judicial control through restraining orders and subsequent harsh sanctions for their breach.[58]

Concluding with Some Remarks on Criminal Policy

Assault's incrimination puts anew the problem of an effective response to deviant behavior but also of a reasonable one and especially

[55] Finch 2002: 703-5.

[56] Finch 2002: 709. The author notices that subjective factors in the doer's person mitigating liability, like psychosis, do not help: *ibid.*, at 710, commenting on *Colohan* (2001), dealing with a case of schizophrenia.

[57] See in details these solutions proposed by Finch 2002: 713-6.

[58] Finch 2002: 717 and at footnotes 54-5, 57.

one respecting human rights. In his impressively wide œuvre the honored has steadily addressed problems of balancing among these imperatives, such as e.g. in seeking to harmonize security with freedom[59] or seeing crime established on substantive violations of societal values without forgetting principles like proportionality and reliance to constitutional restrictions, favoring thus a concept of 'synthetic criminology', responding both to the need of having commonly shared values and the one of avoiding selectivity by pretending their protection;[60] he also, finally, stresses the need for addressing the socio-psychological factors in properly understanding 'everyday' violence, having thus worked on e.g. how significant for violent deviance might the formation of an aggressive personality be or how social alienation backed by dysfunctional socialization institutions enhances propensity to violence.[61] His remains the optimism, expressed as early as in the '80ties, that one day prison will be considered as a relic of the past.[62]

All this has an impact on assault and the proper mode of dealing with it. Assault flourishes within a society characterized by risk, lack of cohesion, 'polytheistic' as to common values. Aggressiveness is inherent in such conditions, especially as they have become acuter in the frame of a globalized economic crisis. What has been seen as obviously self-evident in the traditional response to assaultive behavior, is no more so. Tranquility of the individual psyche is less deemed of high importance and factually less guaranteed in everyday life. Taking into account the wide notion of assault described above, one cannot anchor the adequate point to begin with, in the first place. Do we need criminal law to deal with acts short of attempting bodily injury, instead of extending the ambit of the latter? Shall we severe tort from crime regarding assault by restricting the latter's presuppositions or further enhance what the common origin of tortuous and criminal assault hints at, that is an overwhelming control over threatening acts with the

[59] Courakis 2006: *passim*.

[60] Courakis 1991(a): *passim* and at 18.

[61] Courakis 1991(b): *passim* and at 50-2, 58-69.

[62] Courakis 1985: 339-40.

possibility thus of paralyzing the social engine, for long and very much acquainted with dignity diminutions in its frenzy for individual consumerist enjoyment?

It seems that a balance has to be found, but this cannot take the form of an easy and merely doctrinally or judicially inspired solution, i.e as either logical or practical 'concordance'. It will rather consist in further legislative mechanics along the following lines:

(a) *Segmentation* of assault has to be intensified. Harassment, stalking and racism form already autonomous fields of scientific investigation; their problems, much alike those of traditional common assault, are to be dealt nonetheless as new demanding fields, where the component of social, political and especially human rights in the strict sense plays an all the more crucial role. In these fields one protects the (out of whatever reason) *vulnerable*;

(b) Assault is to be *absorbed* more systematically by crimes with different protective aim, like manslaughter or rape. As the concurrent assault ceases to be there what really matters, it can be considered as an aggravating circumstance in sentencing and not a separate point of accusation; this is a kind of segmentation of assault too;

(c) The 'core' ambit of assault has, however, to remain *subjective-normative*: no 'thickening' of the nexus to harm will do, much less so one to 'physical' (meaning non-psychic) harm. The *intention* of the doer, as it is *reflected in the fear* of the victim is the correct basis for incrimination. Intent (or recklessness) may primarily be inferred through hostility, outrageousness or blatant disregard of others' interests. *The intimidating bully is the prototype of the behavior in question;*

(d) Assault must remain an *active* conduct; as such should be seen also acts indirectly connoting reasons for fear to others. Graveness of an omission enough to call for criminal law intervention involves usually conduct, which is *really* endangering (short of harming); the interest to be protected lies then already *beyond* distress or fear. Conversely, no assault should be supposed within enactment of political rights, when inchoateness is guaranteed due to authorities' preventive measures. Opposite to the protection of the vulnerable against

assault (this section under [a]), one protects here *the citizen* from accusations of assault.

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