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AGGRAVATED ASSAULTS IN WEST VIRGINIA

WILLARD D. LORENSER

It has been said that the first half of the Twentieth Century belonged to the administrative side of the criminal law, but that the second half will see a resurgence of interest the substantive side.¹ There are signs of such concern which indicate this prediction may be very accurate. The American Law Institute is developing a model penal code.² Two states—Wisconsin and Louisiana—have adopted new penal codes that are substantial and significant revisions and refinements of prior codes.³ Illinois is presently in the process of revising and redrafting its criminal statutes.⁴ In Great Britain, the Homicide Act of 1957 marked a significant revision of substantive criminal law.⁵ These developments could well spell the opening of a new era of intelligent concern for the substance of the criminal law. To say that this modest article is another such development would be much too pretentious. But, in part, this recapitulation of the aggravated assault law of West Virginia can serve as an exemplary reflection of the difficulties and shortcomings of substantive criminal law. To understand, with any degree of thoroughness, such a crime, it is necessary to poke about in history, interpolate the archaic tongue of draftsmen long dead,⁶ and ripen the understanding thus gained in the light of a substantial number of subsequent court interpretations. This may be good fun for the academician, but it’s more a time consuming burden for the practitioner. One aim of this paper then is to collect in one place the relevant materials which go into the definition of aggravated assault as it presently exists in the law of West Virginia. A secondary aim is to point out the shortcomings of the scope of the present statutes which result primarily from the prolonged absence of legislative attention. In this latter particular,

¹ See text at notes 72-75 infra.
³ The twelfth tentative draft of the code was submitted for the consideration of the American Law Institute in May 1960. Provisions covering a number of areas remain to be drafted.
⁶ See text at notes 72-75 infra.
then, the article serves in modest fashion to argue that prediction of increased attention coming to the substantive law of crimes at least ought to be true.

The term aggravated assault is employed to describe non-fatal crimes against the person which rise above the level of the simple misdemeanor assault and battery. Two exceptions are carved out of this broad category, sexual attacks—e.g. rape—and acquisitive crimes—e.g. robbery. Each of these matters pose additional problems sufficiently distinct to permit a more limited endeavor here. Also it should be noted that assault is used in its colloquial rather than technical sense; that is, it is used to denote a completed battery rather than a mere ineffectual attempt to inflict harm upon another. Where it becomes relevant to deal with assault in the more limited technical sense of an act which does not result in corporal injury, the context will so indicate.

I. The Common Law

The common law recognized no separate category of aggravated assaults as does the present West Virginia law, and the present general law of the United States. The range of penalties available for assaults was sufficient to alleviate any pressing need for separate categorization of aggravated versus simple assault.

While the punishment available today for a misdemeanor in West Virginia is limited (in terms of confinement) to no more than a year in jail, the common law judge could punish the misdemeanant much more severely and thus appropriately according to the nature of the assault. One kind of assault—mayhem—was specifically recognized at common law, and in some instances it was a capital offense. Mention of mayhem is necessary since its existence is an

8 Id., at 95-96, 500-05.
10 See note 12, infra.
12 Kenny's Outlines of Criminal Law 510 (16th ed. Turner 1952): "At common law the punishment for misdemeanors (as distinct from felonies) was fine or imprisonment (or both), entirely at the discretion of the court as to the amount of each."
13 At common law, all felonies, save petty larceny, were capital, while misdemeanors were not capital unless express provision was made for such punishment. The numerous other distinctions in procedure and penalty (e.g. forfeiture of goods) distinguished felony from misdemeanor. Mayhem apparently was regarded as a gross misdemeanor, but not as a felony. 4 Blackstone, Commentaries 205-07. However, some of the early authorities note that death was an appropriate penalty where the debilitating wound inflicted was
obvious qualification to the general statement that the common law recognized no distinct crime of aggravated assault. Mayhem can justly be described as a form of common law aggravated assault. Moreover, the present West Virginia law of aggravated assault has evolved from common law mayhem and thus the subject has peculiar historic relevance. Mayhem probably grew as a distinct crime at common law because of the manner in which general criminal law developed historically, and not as a necessary adjustment to the inadequacy of the law of assault. Generally speaking the criminal law grew from a pre-existing law of private vengeance and compensation. The most grievous wrongs were those which first became the matter of public, rather than merely private, concern. In light of such an evolutionary pattern, it is understandable that mayhem became a distinct crime before assaults generally were treated as criminal. The distinctive feature of common law mayhem was the necessity of some diminution of the victim’s ability to defend himself or annoy his adversary. Such injuries, of course, consequently depleted the public war making power and became a matter of public criminal concern. More refined concepts of the King’s peace which expanded to give public cognizance to lesser assaults followed at a later date.

It was the peculiar limitation of the common law mayhem to concern with fighting power which resulted in an early English statutory expansion of that crime. This statute, called the Coventry Act, is of importance here as it is the forerunner of the present West Virginia aggravated assault statute. The act was adopted in 1670 following an episode of violence involving a member of Parliament, Sir John Coventry. Sir John made insinuating remarks about the king’s conduct with certain actresses on the floor of castration. Bishop conjectures that the lack of accurate distinction between felony and misdemeanor as regards mayhem may have resulted from the appeal of felony, an ancient private remedy, in which the death penalty could be adjudged, and could be avoided by buying a settlement from the prosecuting party. See, 2 BISHOP, CRIMINAL LAW 748-54 (9th ed. 1923). 


17 The Coventry Act, 1670, 22 & 23 Car. 2, ch. 1. The Coventry Act was repealed by the Offenses Against the Person, Act. 1828, 9 Geo. 4, ch. 31 with § 12 of the latter act covering generally the type of offense covered by the original Coventry Act. The revision of the Virginia Code in 1847-48 rewrote the Coventry Act in substantially the terms of § 12 of the Offenses Against the Person Act of 1828.
Parliament and was attacked several days later. While no technical mayhem resulted, Sir John's nose was slit and he was permanently disfigured. In consequence, Parliament adopted an act which dealt specifically with those who attacked its member and went on to declare generally that it would henceforth be a capital felony for anyone intentionally to disfigure another. The Coventry Act was copied into the early Virginia Codes and as modified subsequently became a part of the West Virginia Code. In the nearly four centuries that have elapsed since the adoption of the Coventry Act, but two significant modifications of the crime have been made legislatively. Thus today West Virginia relies upon common law assault—with only the limited penalties of misdemeanor available—and upon a four century old statute that has not been revised but in more than 110 years, to cover an important area of criminal conduct.

II. Present West Virginia Law

A. General

The basic aggravated assault provision of the present West Virginia Code, the direct descendant of the Coventry Act, is found in article 2, section 9 of chapter 61. This section defines the crime generally in these terms: "If any person maliciously shoot, stab, cut or wound any person, or by any means causes him bodily injury with intent to maim, disfigure, disable or kill, . . . such person is guilty of a felony." Further provisions of the section dis-

18 See 6 Holdsworth, History of English Law 403 (1924).
19 The Coventry Act, 1670, 22 & 23 Car. 2, ch. 1 §§ 1-6.
20 The Coventry Act, 1670, 22 & 23 Car. 2, ch. 1 § 7.
21 Va. Rev. Code ch. 156 § 1 (1819). In the annotation to Angel v. Commonwealth, 2 Va. Cas. (4 Va.) 231 (1820) it was noted by the trial judge that the Virginia code provision was an offspring of the original Coventry Act.
22 W. Va. Code, ch. 61, art. 2 § 9 (Michie 1955).
23 Parts of the revision of 1849 were completed and adopted in 1847 and 1848. The completed revision of the code as a whole was adopted in 1849. See Preface iii-x, Code of Va. (1849). Reference here will be to the revision of 1849 generally.
24 The full text of W. Va. Code ch. 61, art. 2 § 9 (Michie 1955) is as follows: "If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided, be guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall be guilty of a felony, and, upon conviction, shall, in the discretion of the court, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars."
tistinguish an "unlawful" from a "malicious" assault and provide a lower maximum penalty for such "unlawful" assaults. One additional section supplements the basic provision. This is section 10 of the same article which parallels the "shoot, stab, cut or wound" terminology of section 9 but substitutes participation in some other felony for the intent requirement of the basic provision.\textsuperscript{25}

For convenience in discussing the coverage of the basic provision, the elements of the crime will be divided into two parts, the objective and subjective. Some actual physical injury to the victim is necessary before an assault becomes a felony under this provision. It is the nature of this injury and the means by which it is inflicted which comprise the outward, or objective, portion of the statute. The more crucial factor is the intent, which is the subjective element of the crime.

\textbf{B. Objective Elements}

The objective elements of the aggravated assault are described in two ways in the statute. The first description employs specific terms which are the direct descendants of the old Coventry Act and a Nineteenth Century English modification—viz., the terms "shoot, stab, cut or wound."\textsuperscript{26} Implicit in each of these, of course, is some actual harm to the victim. Shoot, stab and cut are precise enough and only the word "wound" necessitates any elaboration here. The early English cases dealing with the kind of "wounds" that fall within the felony provision limited the statute to those situations in which (a) a weapon was used to inflict the injury,\textsuperscript{27} and (b) a breaking of the skin occurred.\textsuperscript{28} The weapon requirement eliminated from the specific descriptive terms the possibility

\begin{itemize}
\item \textsuperscript{25} The full text of W. Va. Code ch. 61, art. 2 § 10 (Michie 1955) is as follows: "If any person in the commission of, or attempt to commit a felony, unlawfully shoot, stab, cut or wound another person, he shall be guilty of a felony, and upon conviction, shall, in the discretion of the court, either be confined in the penitentiary not less than two nor more than ten years, or be confined in jail not exceeding one year and be fined not exceeding one thousand dollars."
\item \textsuperscript{26} The Coventry Act, 1670, 22 & 23 Cir. 2, ch. 1 § 7 "... with intention in so doing to maim or disfigure in any of the manners before mentioned. ..."
\item \textsuperscript{27} The "wound" terminology, which was added by the Offenses Against the Person Act of 1828 was construed by the English judges to require the use of an instrument in the following cases: Jenning's Case, 2 Lewin 136, 168 Eng. Rep. 1103 (1838); Rex v. Harris, 7 Car. & P. 446, 173 Eng. Rep. 198 (1836); Rex v. Stevens, 1 Mood. 409, 168 Eng. Rep. 1323 (1834). Cf., Elmsy's Case, 2 Lewin 126, 168 Eng. Rep. 1102 (1834) (only weapon alleged were shoes worn by offender while he kicked and stomped his victim; judgment of death recorded.)
\item \textsuperscript{28} See, Harris v. Commonwealth, 150 Va. 580, 142 S.E. 354 (1928); State v. Gibson, 67 W. Va. 548, 69 S.E. 295 (1910).
\end{itemize}
of bringing vicious beatings by fists, knees and feet within the felony provision. This shortcoming was removed by the revision of the Virginia Code of 1849. The other phase of the "wound" requirement—the breaking of the skin—proved fatal to one conviction obtained under the West Virginia statute. This requirement too was altered by the 1849 revision. The West Virginia case in point is State v. Gibson. There a series of practical jokes between workmen blossomed into violence. The climax of this horseplay occurred when Gibson threw an iron bar at his co-worker, striking him in the back, causing internal injuries and hospitalizing him for several weeks. Though there was testimony in the case that internal hemorrhaging had occurred, the court refused to allow a conviction for "wounding" to stand. It viewed the evidence as insufficient to support a jury finding on the necessary element of a breaking of the skin. The court noted however that the statute was not so narrow as not to cover this kind of violence. It pointed to the "any other means" language of the statute.

Added to the specific descriptions by the 1849 revision was the general descriptive terms "by any other means cause bodily injury." As noted in the Gibson case "this addition to the statute does not alter the meaning of its original terms. It simply introduces a new offense made up of new elements. . . ." The expanded scope afforded by this terminology covers assaults without a weapon of any kind. And too, the "bodily injury" term relieves prosecution of the necessity of showing a breaking of the skin, which, under the thrust of the Gibson case, can prove troublesome where internal injuries are involved. In view of the broad sweep of these general descriptive terms, there seems to be no need at all for the preceding specific descriptive terms. But since both forms of description do exist in the statute, it is necessary to keep in mind the distinction pointed out by the Gibson case and be chary in drafting

29 See Note, 7 LA. L. Rev. 584 (1947).
30 See note 23, supra.
31 94 W. Va. 59, 117 S.E. 701 (1923).
33 Id., at 550, 68 S.E. at 296.
34 If the specific descriptive terms served efficiently as examples of the kinds of means deemed to fall within the statutory proscription, their presence could be justified. See, Conard, New Ways to Write Laws, 56 YALE L.J. 458 (1947) encouraging the use of examples in statutory drafting. But, in this case, the terms are not present for that purpose as it seems clear that the general terminology was added to expand the scope of the statute beyond that which would be encompassed by the specific terms so as to cover assaults employing means of a different kind and nature than those described by the specific terms.
indictments. West Virginia has followed the older English and American authorities on the point that the weapon employed need not be alleged in the indictment for wounding.\(^3\) But where the indictment is drawn under the general phraseology of "any other means" it appears necessary to allege the means employed.\(^3\) Of course, it would be fatal to allege a "wounding" where no weapon were in fact used. The continued existence of the dual form of description serves only to complicate the drafting of indictments and has no significant value in helping to define the crime more precisely.

It is important to emphasize two points before proceeding to a consideration of the subjective elements of the crime of aggravated assaults.

First, under either the specific or general descriptive terms of the statutes, some corporal injury must be inflicted upon a victim before a felony assault results. Thus, in more precise terminology, the statute defines an aggravated battery rather than an aggravated assault. An assault, in the narrow sense of the word, failing to result in some harm to another, does not come within the felony provision, no matter how vicious or dangerous.\(^3\)

Second, by adding the general "any other means" terminology to the statute, all substantial and meaningful limitations upon the reach of the felony assault provision in terms of objective description have vanished. This means that the intent or subjective element of the crime provides the sole and crucial divide between misdemeanor and felony assaults. Without further limitation, the man who bloodies another's nose in a simple fist fight could be subject to felony punishment for such would involve a "bodily injury" by "any means."

Unless all batteries are to be treated as felonies, careful attention must be given to the second element of the crime, the subjective intent requirement.

C. Intent Element

While the intent limitation is undoubtedly more necessary under the general descriptive terms of the statute, it is equally applicable under both the specific and the general terms. Thus, a

\(^{35}\) State v. Coontz, 94 W. Va. 59, 117 S.E. 701 (1923).
\(^{36}\) Ibid.
\(^{37}\) An attempt to commit a non-capital felony in West Virginia is punishable as a misdemeanor. W. Va. Code ch. 61, art. 11 § 8 (Michie 1955).
shooting, stabbing, cutting or wounding does not per se constitute an aggravated assault unless it is done with an intent to maim, disfigure, disable or kill. One of the earliest West Virginia cases coming to grips with this problem emphasized that "intent is the gist" of the offense—and that case involved a shooting.\(^{38}\) The view that the intent element is necessary under both the specific and the general descriptive terms of section 9 is certainly sound from the historical point of view. The intent phrase employed in the present statute comes from the original Coventry Act.\(^{39}\) And, the broad effect given the intent limitation is justified on policy considerations too. For example, accidental and non-fatal shootings resulting from criminal negligence would otherwise be felonies. Or, the surgeon, who, for the most humanitarian motives, would operate beyond the express consent of his patient and thus "wound" and "cut" his subject would be subject to stern felony punishment. Classifying such acts as felonies would appear unduly stringent.\(^{40}\)

Two avenues of approach may be taken in reviewing the limiting effect which the intent element has upon the range of the felony assault provision. First, the court has directly amplified the meaning of the intent phrase, adding interpretative gloss to the bare words of the statute. Second, the application of the intent limitation in the borderline cases adds significantly to an understanding of the provision.

The intent which must be harbored is described in the statute as an intent to "maim, disfigure, disable or kill." There is but one West Virginia case which has devoted serious attention to a direct interpretation of the phrase. In that case, State v. Taylor,\(^{41}\) the trial court had refused a defense instruction which would have told the jury it must find an intent permanently to maim, disable or disfigure. The West Virginia Supreme Court ruled that the defendant had been seriously prejudiced by the trial court's refusal to qualify the intent instruction with the work permanent. The court noted that "the character of the wound or the permanency [sic] of the scar [actually inflicted] is not the test."\(^{42}\)

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\(^{38}\) State v. Meadows, 18 W. Va. 658 (1881).

\(^{39}\) See note 26 supra.

\(^{40}\) Compare reckless driving requiring "wilful or wanton disregard for the safety of others" carrying a maximum penalty for second and subsequent convictions of six months in jail and a one thousand dollar fine. W. Va. Code ch. 17C, art. 5 § 3 (Michie 1955).

\(^{41}\) 105 W. Va. 298, 142 S.E. 254 (1928).

\(^{42}\) Id. at 304, 142 S.E. at 256.
But the "intent to produce permanent disability or disfiguration" is crucial. In reaching this conclusion, the court relied heavily on Rex v. Boyce. In that case, the jury found specially that the defendant, in the commission of a burglary had struck two blows with a crowbar with an intent temporarily to disable the victim from preventing his escape, but not with an intent permanently to injure the victim. Upon the case thus reserved, the English judges conclude the assault did not fall within the range of the English statute. While at first blush this might appear an overly stringent reading of the intent element, a moment's reflection may afford a kinder reception for this view. Note that the phrase describing the intent element includes four terms: maim, disfigure, disable or kill. Maiming implies a permanent reduction in the victim's combative ability. And killing is as permanent effect as is imaginable. But disfiguring and disabling deserve closer consideration. In the simplest of common assaults, the person who knocks his opponent to the ground intends some measure of disabling; and a black eye is a temporary disfigurement. It appears then, that to restrict the felony provision to only the more grievous assaults, the intent phrase is appropriately restricted to those situations where it is inferrable that some lasting effect is intended.

The ultimate result in the Boyce case seems unduly sympathetic to the accused. If this be the case, it probably results from a misapplication of the specific intent requirement in general, and not from an unwise choice between requiring temporary or permanent injuries be intended.

To avoid further confusion on this point, it may be wise to pause for a moment and distinguish between real intent, specific intent and general criminal intent, before proceeding to a consideration of the West Virginia cases which illustrate the application of the intent element in this state. As interpreted by the court, the intent which must be harbored is an intent to maim or to kill or permanently to disable or disfigure. In more general terms this means it must be inferrable that there existed an intent to kill or cause some grievous and lasting injury. The difference between the statutory phrase and the general rephrasing helps to introduce the distinction between real intent and specific intent. The "real intent" of the accused in the Boyce case was to prevent

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43 Id. at 304, 142 S.E. at 257.
45 See PERKINS, CRIMINAL LAW 496-505 (1957).
his victim from interfering with his escape. In most instances, the aggressor in a serious assault probably thinks in terms of vengeance, beating up, or pounding to a pulp. In terms of real intent then, it is probably rare that the accused forms his design in terms of maiming or disfiguring. But the intent element—crucial as it is—should not be reduced to a vocabulary game. It is silly to propose that one who viciously beats another should escape felony punishment merely because he thought in terms of bashing in Joe's face rather than in terms of disfiguring Joe. In the Boyce case, it is not crucial whether the accused actually and in fact was motivated by a desire that his victim suffer permanently or only temporarily from the blows of the crowbar. The pivotal question is, did the accused intend to inflict the kind of injuries which he should normally expect to result in lasting disfigurement or disablement? On the other hand, the specific intent test does go beyond the general criminal intent requirement. This is necessary to maintain a meaningful distinction between the misdemeanor and felony assault. Thus, holding it sufficient that the accused intended some kind of wrong would widen the provision too much, just as requiring "real intent" constricts it too much. A more meaningful distinction between real intent, specific intent and general criminal intent is probably available in context of the three leading West Virginia cases.

The first of these cases, State v. Meadows, 48 illustrates the problem of real intent versus specific intent. In the Meadows case, a young woman fired two shots at a neighbor who verbally accosted her while she walked past his home. The shots missed her heckler, but apparently grazed his son (who, incidentally, was a suitor of the young woman and to whom she intended no harm). 47 But the defendant testified and expressly stated that her intent was simply to "hurt" her bothersome neighbor. Does it matter that the accused did not actually, and in truth intend to kill or disable or disfigure or maim? Of course not. In the words of the court:

"To fire a pistol at one is an act, from which the inference must inevitably be drawn, that it was done with an intent to hurt the party shot at. Whether that hurt was intended to be more or less aggravated must depend upon a great variety of circumstances, as for instance, the calibre of the fire-arm used, the distance between the parties, the part of the body aimed at, the motive animating the party and many others, which

48 18 W. Va. 658 (1881).
47 The case also raises the question of inflicting the harm on an unintended victim. This point is discussed in the text at notes 66-71, infra.
naturally suggest themselves. Whether it was 'with intent to
maim, disfigure, disable and kill,' or not is matter to be
inferred from the circumstances of the case."

This case appropriately emphasized the fact that first there
must be an intention to inflict an injury, and second the injury
found to be intended must be considered in the light of the facts
of the assault, not in the verbalization of the mental design uttered
by the accused.

But simply because the real intent of the defendant has not
crystallized into one of the specific descriptions of the statutory
terminology does not mean that the intent element can be handled
in a very mechanical way so as to disregard the facts of a given
case. The proper regard for the specific intent element is illustrated
by the second case here involved—State v. Davis. There a mis-
handling of the intent element caused reversal and the impact of
the decision may be conveniently gleaned from the following
words of the court:

"[The trial court] instructed the jury that if they believed
from the evidence in the case beyond all reasonable doubt
that . . . James Davis, with a club or stick . . . struck the
prosecuting witness therewith a violent blow . . . [knocking] the
prosecuting witness down and cut[ting] his face to the bone,
and thereby wounded him, and from the effect of said blow the
prosecuting witness was necessarily under the care of a
physician for several days, . . . they should find the defendant
guilty as charged in the indictment. This instruction was bind-
ing. It practically instructed the jury that if they believed
the defendant struck the blow mentioned with the effect men-
tioned, . . . they should find the defendant guilty. . . . [The
instruction] did not say that . . . there must have been an intent
to maim, disfigure, disable or kill, but it did in effect say that
if the jury believed the facts mentioned the defendant should
be found guilty regardless of intent. . . ." (italics added)

A syllabus point appended to the Davis case states that the failure
to leave the intent issue to the jury is reversible error. The court
here deftly and accurately handles the application of the intent
element in a case which ranges close to the borderline between

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48 18 W. Va. 668. "The court instructed the jury, that if they believed
from the evidence, that the prisoner maliciously shot the prosecuting witness,
Francis M. Meadows, as charged in the indictment, with intent to maim,
disfigure, disable or kill him, or to cause him bodily injury. . . ." (emphasis
added) the court held the intent instruction erroneous because of the inclusion
of the "bodily injury" phrase.
49 58 W. Va. 94, 51 S. E. 230 (1905).
50 Id. at 95, 51 S.E. at 230.
misdemeanor and felony assault. It is precisely this kind of case in which the intent element becomes the crucial dividing line between felony and misdemeanor. How large was the stick? How was the blow struck? How many blows were struck? These are circumstances which point to the significant frame of mind of the defendant. It is a matter which must be decided upon the facts in every case. So holds the *Davis* case in a sound exposition of the law.

If the matter of the application of the specific intent element could be put to rest here, all would be well. But unfortunately this is not the case.

The third case necessary to consider here—*State v. Mowery*—illustrates how the application of the intent element can go awry. In that case, defendant Mowery was being held in the Pendleton County jail. Water was squirted on him from a hose being held by the eleven year old son of the sheriff and jailer. Mowery threw a piece of coal at the boy, striking him in the forehead, causing a cut about a half-inch in length. The boy was dazed and made ill by the blow. There was substantial conflict in the evidence as to whether the boy intentionally squirted the water on the prisoner, the size of the piece of coal thrown, the force with which it was thrown, and other surrounding circumstances. The defendant's theory apparently was that the injury resulted from mere horseplay between the boy and the prisoners. One of the defendant's requested instructions refused by the trial court was as follows:

"The Court instructs the Jury that they cannot find the defendant guilty unless they find from the evidence beyond all reasonable doubt that he struck Neufer Eye in anger; if they find from the evidence that the striking was as a prank, or in play, they shall find the defendant not guilty." The court rejected defendant's claim of error based upon the refusal to grant this instruction. In prefacing its discussion of this claimed error, the court stated:

"As already noted, the gist of the offense of unlawful assault is the wrongful intent. Upon considering such an offense 'if the act itself is essentially wrongful, it is not necessary to show an unlawful intention, for the intent is necessarily embraced in the wrongful act.' 2 Ruling Case Law, p. 529. Neither is it necessary to show that the accused intended the particular wrong which resulted from his act, nor is it any defense that the act was done in sport or fun. 16 Corpus Jurs. pp. 82, 83."
In relying upon the cyclopedia platitudes about wrongful intent, the court erroneously read the only significant issue right out of the case. Unfortunately, the *Davis* and *Taylor* cases escaped the court’s attention as it considered Mowery’s appeal. Had these authorities been called to the attention of the court, it is difficult to see how the result could have been reached on the rationale employed.\(^5^4\)

Read in its broadest terms, the *Mowery* case stands for this: The intent requirement of the felony assault provision may be dispensed with upon a showing of any wrongful act by the accused. This would mean a jury would be authorized to convict a person of felony for simply bloodying the nose of another. Read in its strictest sense, the *Mowery* case stands for this: Prank or horseplay is no defense to the felony assault charge.\(^5^5\) (Note that the court did not justify the rejection of the instruction on the absence of credible evidence to support such a finding.) Even such a reading stretches the felony provision much too far. Assume a group of boys throwing snowballs in which one is cut by a bit of ice imbedded in the snow. Should this be considered a felonious assault? Of course not, if the thrower were in fact engaged in simple horseplay. Now, what if one participant picks up a piece of ice and at close range throws it into the face of another participant with all the force he can muster? Such an attack could be justly considered felonious but not because horseplay or prank is no defense. Rather it is because the facts naturally support an inference that the accused was not engaged in mere horseplay and prank but desired to inflict serious injury upon his victim. It is unwise to attempt to guard against feigned and fabricated defenses by distorting the law as was done in the *Mowery* case.

Virginia, in applying its identical aggravated assault statute,\(^5^6\) has clearly followed the better view espoused in the older *Davis* and *Taylor* cases. In the illuminating case of *Banovitch v. Commonwealth*,\(^5^7\) the Virginia court said in 1957 “an intent to main or disfigure cannot be presumed from an act which does not *naturally*...

\(^5^4\) The court did note the *Meadows* case and its point that “intent is the gist” of the offense.

\(^5^5\) Where simple horseplay is involved, consent given by voluntary participation would be a valid defense if no breach of the peace is involved or if there is no policy of the law which specifically denies the right of the person to consent, as in cases of sexual molestation of the young. See, *Perkins, Criminal Law* 82-83 (1957); *Clark & Marshall, Crimes* § 5.14 (6th ed. Wingersky 1958).

\(^5^6\) *Code of Va.* § 18-70 (1950).

\(^5^7\) 196 Va. 210, 83 S.E.2d 369 (1954).
bespeak such intent." The case before the Virginia court involved the disfigurement of the victim's face by salve prescribed by defendant—a person who was not licensed to practice medicine. Though the jury was correctly instructed as to the necessity of finding as a matter of fact "the particular intent to maim or permanently disfigure her. . ." reversal followed nonetheless because there was no evidence to support such a finding. The Banovitch case not only stands for the proposition that the specific intent element must be determined separately as a matter of fact, but also for the view that the courts must exercise a close check upon the capacity of the facts proved to support the necessary inference of intent. The West Virginia court has taken this view in administering the specific intent element in other crimes and it may be hoped that in future borderline cases arising under the present aggravated assault statute that the Mowery decision will be recognized as an aberration rather than an authority.

Two more points deserve mention before the intent provision is put aside. First, the impact of drunkenness upon the specific intent requirement bears notice. Second, the problem of the unintended victim poses some peculiar twists.

The general view on the intoxication question is that drunkenness may be considered as a defense to a specific intent crime. This view holds that if a person is so drunk as to be unable to form an intent to maim, disfigure, disable or kill, an essential element of the crime cannot be proved to exist. West Virginia seems to hold that drunkenness need not be given special consideration as a defense in such a crime. No doubt a good bit of time and space

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58 Id. at 217, 83 S.E.2d at 373.  
59 Id. at 215, 83 S.E.2d at 372.  
63 Ibid. See, People v. Koerbert, 244 N.Y. 147, 155 N.E. 79 (1926); State v. Phillips, 80 W. Va. 748, 93 S.E. 828 (1917).  
64 The statement in the text takes some elaboration. No case has been found which deals directly with the question of intoxication and the aggravated assault, and the problem is here dealt with in the context of the specific intent element of burglary. In State v. Shores, 31 W. Va. 491, 505, 7 S.E. 413, 421 (1888), the court said: "Drunkenness is no excuse for crime; and it can only be considered by the jury in one instance, and that is to
could be devoted to a detailed analysis of this point, but it will be dispensed with briefly with an assertion which is admittedly nothing more than the personal opinion of the author.\(^6\) The defense of drunkenness probably has its most significant impact in the one case wherein the appellate court ruled it was error to deny an instruction recognizing the defense. The finding of the intent element is a matter of fact for the jury, and its doubtful that calling specific attention to drunkenness is an instruction has much practical effect in the end result when an assault has any serious consequences.

The identity of the intended victim and the actual victim has posed a bit more difficulty than the intoxication question in West Virginia. One case ran into serious difficulty on this point, another handled it deftly by resort to the supplementary statute.

First, in the *Meadows* case,\(^6\) the accused shot at B and hit C. The indictment was drawn under the aggravated assault provision and conviction obtained. The conviction was quite properly re-

determine in a murder case whether the prisoner could have deliberated and premeditated and thus to see whether he was guilty or [sic] murder in the first or second degree. State v. Robinson, 20 W. Va. 713 [1888] . . . ." (emphasis added). Subsequently in State v. Phillips, 80 W. Va. 748, 95 S.E. 228 (1917) the court held that intoxication would be a defense to a specific intent crime where the evidence thereof was “full, clear and decisive” and the specifically intended act forbidden had not been completely performed. The court reviewed the *Shores* case in *Phillips* and found nothing inconsistent in the two rulings, but they remain most difficult to square. In *Shores*, the burglary charge followed an entering where hard drinking men returned to drink cider previously ordered. The court held that the taking of the cider under these circumstances would not support a finding of intent to steal, since the men apparently intended to pay as they had for cider previously bought and drunk in similar fashion earlier in the same evening. In *Phillips*, no property was taken and only the breaking and entering shown. The court held that the drunken condition should be considered in respect to the intent element here since no goods were taken—that in the *Shores* case where the goods were taken the intent to take was to be inferred from the taking (viz., the completed act). This is a difference, but hardly a sound legal distinction. *Shores* was reversed because of the absence of the necessary intent.

The combined rulings, applied to aggravated assaults, would seem to hold that (a) if the victim is not in fact maimed or permanently disabled or disfigured, drunkenness does deserve special attention as a defense on the intent element; but (b) if the victim does in fact suffer such injury, drunkenness does not deserve special attention.

As a matter of practical application, note the quantum of evidence which is said to be required by the *Phillips* case, *supra*. Compare, State v. Bragg, 140 W. Va. 585, 87 S.E.2d 699 (1955) (holding evidence in homicide case insufficient to necessitate a jury instruction on intoxication and its relation to premeditation).

\(^6\) Giving special consideration to drunkenness as a condition which negates the intent necessary in such crimes as burglary or assault with intent to commit rape is probably more important since the intended act which aggravates the offense is of a different kind and nature than the act which has in fact occurred.

\(^6\) State v. Meadows, 18 W. Va. 658 (1881).
versed for a prejudicially erroneous instruction on the intent element.\textsuperscript{67} The handling of the second element left the law in a confusing state. The trial court refused an instruction which would have told the jury in substance that a conviction could not be had under an indictment alleging assault with intent to maim, etc., C if the intent were actually harbored against B. The court considered at length the older English authorities dealing with attempts to murder and came to the conclusion that (a) where no actual harm is done to the actual victim of the misdirected attempt, no specific intent crime results; but (b) where some harm did occur, the mechanical presumption of "intending the normal consequences of an act" would attack and the accused would be held to have intended the requisite harm to the person actually attacked. But reaching this conclusion, the court said the trial court erred in refusing to give the instruction. This is most confusing. The court states one rationale, but applies another. To make what the court said and what the court did consistent, it seems necessary now to go through a most confusing and fictional bit of word manipulation. The suggested route is this: A specific intent crime not only requires an intent to do a specific kind of harm, but further requires that this harm be aimed at a specific individual and that that be the actual individual upon whom the harm was inflicted. But, the law will conclusively presume that the person harmed is that individual whom the accused actually intended to harm, regardless of how far this may be from the truth. This is the sort of verbal slight of hand that makes the law look silly rather than serious.\textsuperscript{68}

An easy alternative was available in the Meadows case, but it was entirely overlooked. This solution was employed in the State v. Simmons.\textsuperscript{69} The indictment here was drawn under the supplementary aggravated assault provision—Section 10—which makes every "shooting, stabbing, cutting, and wounding" in the course of a felony or attempt to commit a felony an aggravated assault.\textsuperscript{70} Thus when

\textsuperscript{67} The intent instruction given by the court stated that an intent to cause bodily injury would suffice to support a conviction. This is clearly too broad and a reversal upon such a misdirection on the crucial intent element was entirely proper. See note 48, supra.

\textsuperscript{68} In State v. Currey, 133 W. Va. 676, 57 S.E.2d 718 (1950) the court said the Meadows case was authority for the proposition that infliction of harm upon an unintended victim results in a transfer of the specific intent to the actual victim. The Currey case involved a fact situation in which A shot at B with the requisite intent but actually hit C. While this overlooks the holding of the Meadows case the merits of the result reached cannot be criticized.

\textsuperscript{69} 190 W. Va. 33, 42 S.E.2d 827 (1947).

\textsuperscript{70} W. VA. CODE ch. 61, art. 2 § 10 (Michie 1955).
A attempted to shoot B but hit C, it was a simple matter to show A was attempting to commit an aggravated assault upon B, and that, in attempting to commit that felony, he in fact "shot" C. Conviction under the alternative section affirmed.

This leaves the problem of the specific intent and the wrong victim a problem under only the "other means" general provision of the basic aggravated assault provision. The supplementary section covers only injuries by "shooting, stabbing, cutting, or wounding." Thus, if A intends to permanently disfigure B by falling upon him and beating him with his fists, or by gouging out an eye, but mistakenly attacks C, the confusing lead of the Meadows case could still cause some difficulty. State v. Currey,71 which paralleled the Simmons case on its facts, indicates that the Meadows case will be read to mean that the intent to maim will be "transferred" where an unintended victim is injured. This view conveniently ignores the holding of the Meadows case in relation to the propriety of refusing the confusing A, B, C instruction, and follows the more sensible language of the opinion.

D. Malicious Versus Unlawful Assault

The basic aggravated assault provision attempts to divide such assaults into two categories, unlawful assaults and malicious assaults. For malicious assaults, the penalty range is one to ten years confinement in the penitentiary; for unlawful assaults, the range is one to five years in the penitentiary, or in the alternative, confinement in jail for a maximum of one year, combined with a fine of not more than 500 dollars.72

The West Virginia Supreme Court has not been called upon to deal at any length with the distinction between unlawful and malicious, as used in the statute here. It has noted parenthetically on several occasions that the distinction is parallel to that drawn between murder and manslaughter.73 In general this is probably an adequate guide in so far as murder is distinguished from manslaughter in terms of cold blooded killing versus homicide committed in the heat of passion. Thus, it would seem in an aggravated assault case where the facts justify it, an instruction on provoca-

71 See note 68, supra.
72 Though confinement in jail is a permissible penalty the offense is treated as a felony irrespective of the penalty imposed so far as the habitual criminal provisions are concerned. State ex rel. Johnson v. Skeen, 140 W. Va. 896, 87 S.E.2d 521 (1955).
tion ought to be given to guide the jury in its choice between a finding of unlawful and aggravated assault.

The Supreme Court of Virginia in dealing with the same distinction tended to the same general result by a consideration of the meaning of the word malice as used in this context. That court said in *Dawkins v. Commonwealth*,

> "Malice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as result of ill will. . . . [The nature of the assault] showed an unmitigated brutality in keeping with characteristics attributed to one who acts devoid of any consideration for his opponent. They indicated a heart and mind regardless of social duty and a willful and deliberate intent to maim, disfigure, or disable the victim." 

In the context of a specific intent crime, malicious and unlawful are not the most efficient words available to divide the most vicious attacks from those of lesser gravity which none-the-less are still deserving of felony punishment. The Virginia court is to be commended for its attempt to follow the wording of the statute in refining this dividing line, but in terms of practical application the test suggested by the West Virginia court comes off the better. It is difficult to imagine an assault which evinces an intent to maim which would not be a “wrongful act intentionally done,” or the product of “ill will.” At bottom, the Virginia test, for all practical purposes resolves into one of provocation also.

E. The Supplementary Provision

To round out the consideration of the aggravated assault in West Virginia, brief mention of the supplementary provision, section 10, is necessary. This provision, it will be recalled, parallels the basic aggravated assault provision, section 9, generally, save it substitutes participation in some other felony for the specific intent requirement. Thus, if any person “unlawfully shot, cut, stab or wound” another during the commission of or attempt to commit a felony, an aggravated assault occurs. This provision appears to have come before the West Virginia court on only one occasion, and, as previously noted, it was employed there to skirt the problem of injury to an unintended victim. It would be easy to view this particular statute as a legislative reaction to the English case of *Rex v. Boyce*. In that case, it will be recalled, a burglar delivered

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74 186 Va. 55, 41 S.E.2d 500 (1947).
75 Id. at 61-62, 41 S.E.2d at 503-04.
two blows with a crowbar to another person in order to prevent the other from interfering with his escape—and the English judges ruled no conviction could be had under the Coventry statute where the jury found the burglar intended no "permanent" injury. Despite the influence of Parliament upon the early Virginia codes, and consequently upon the present West Virginia Code, there appears no cause and effect relationship. Be that as it may, the much rehearsed criticisms of the felony-murder doctrine would seem equally applicable here, at least on the theoretical plane of discussion. As a practical matter, there appears to be no threat of outlandish results that make the felony murder doctrine unpalatable. The words of the statute seem to require that the "shooting, cutting, stabbing or wounding" be accomplished by the person committing the felony. If this view be correct, one of the avenues to the more distorted thrusts of the felony-murder rule is closed off. It is not impossible, however, that by the uncritical use of analogy, such an application could be made. Under such a view, an intruder who walks into an apparently empty dwelling during the day only to be shot by a zealous defender of the household could find himself not only guilty of statutory burglary in West Virginia, but also both guilty of and victim of a felony assault that could cost him ten additional years of freedom. The fact that no such application of this nature has been attempted as evidenced by the appellate reports is probably a good indication that prosecutors in the Virginias have exercised an intelligent measure of restraint. One more limitation is inherent in the provision. The injury which results is described in the specific terms of the Coventry Act, and thus necessitates the use of some weapon.

III. SUMMARY AND CRITIQUE

Properly read, the aggravated assault crime in West Virginia is limited to those instances in which some harm is inflicted upon a victim and the aggressor intends some grievous harm. The intent—being the pivotal consideration—should properly be determined as a matter of fact in each case and close judicial supervision should be afforded to assure a natural and rational connection between the facts shown and the necessary inference of intent.

79 Ibid.
80 W. VA. CODE ch. 61, art. 3 § 11 (Michie 1955).
81 See note 27 supra.
By limiting the felony assault provision to this scope, two types of conduct which may deserve similar felony treatment are left untouched. The first of these is the assault which fails to inflict injury upon any victim—for example, the brawler who smashes a bottle into jagged edges and advances on his victim, only to be stopped before any cuts can be administered.\(^2\) The second of these is the grievous battery inflicted by reckless and wanton conduct—for example, a person who drives a motor boat through a swimming area in utter disregard for those in the water, severing the arm of a helpless swimmer.\(^3\) At present, such situations could be covered only by a most grievous distortion of the existing code provisions.

The present code provisions are adequate, but not ideal, for the intentional crime which results in some harm to another. The intent element could be rephrased in terms that would be less likely to encourage confusing real, specific and general intent. The grading of the offense within the felony category could more accurately be expressed directly in terms of provocation.

The aggravated assault provision is sadly typical of most of the West Virginia criminal statutes. And the West Virginia Code is no better and no worse than the statute law relating to substantive crimes in most all of the states of the United States. It is, perhaps, time that the rough cut stones handed down by several centuries of common law tradition be polished by Twentieth Century abilities.

\(^2\) Such would be only a misdemeanor presently as an attempt to commit a non-capital felony or a misdemeanor common law assault.

\(^3\) See, MODEL PENAL CODE § 201.10 (Tent. draft 9, 1959). Compare, Brimhall v. State, 31 Ariz. 522, 255 Pac. 165 (1927) (felony assault by reckless driving).