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# State v. Fleck: The Intentional Infliction of General Intent upon Minnesota's Assault Statutes

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**STATE V. FLECK: THE INTENTIONAL INFLICTION OF  
GENERAL INTENT UPON MINNESOTA'S  
ASSAULT STATUTES**

Theodora Gaïtas<sup>†</sup> & Emily Polachek<sup>††</sup>

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I. INTRODUCTION

On a winter morning in 2009, Ronald Fleck, who was indisputably intoxicated at the time, stabbed his romantic partner once in the shoulder with a kitchen knife.<sup>1</sup> Fleck was prosecuted for second-degree assault in Minnesota state court.<sup>2</sup> At trial, he attempted to invoke the statutory defense of voluntary intoxication.<sup>3</sup> Because voluntary intoxication can mitigate the element of specific intent, Fleck’s case turned on whether the State was required to prove that Fleck had the specific intent to injure the victim. Going against precedent, the Minnesota Supreme Court concluded that assault that results in bodily harm requires only a general intent to act and not the specific intent to inflict harm.<sup>4</sup>

The Minnesota Supreme Court’s decision in *State v. Fleck* underscores several vexing problems with the legislature’s definition of assault and, more broadly, with the statutory definitions of culpable mental states used throughout Minnesota’s Criminal Code. This article argues that classifying an assault that results in bodily harm as a general-intent offense essentially imposes strict liability for any volitional physical act that produces bodily harm. This notion is at odds with firmly embedded

1. *State v. Fleck*, 810 N.W.2d 303, 305–06 (Minn. 2012).

2. *Id.* at 305.

3. *Id.* at 306.

4. *See id.* at 308–12. The case also drew the attention of battered-women advocates. Several such organizations submitted a joint amicus brief to the Minnesota Supreme Court. *See* Brief for Minnesota Coalition for Battered Women et al. as Amici Curiae, *Fleck*, 810 N.W.2d 303 (No. A10-0681), 2011 WL 7561619.

principles of criminal jurisprudence and may have additional consequences in the areas of criminal, civil, and administrative law. The article sets forth several proposals for modifying Minnesota's criminal statutes to bring them in line with fundamental criminal law principles and eliminate the collateral damage that results from the supreme court's continued reliance on the common law general/specific intent dichotomy in interpreting criminal statutes.

## II. MINNESOTA'S ASSAULT STATUTE

### A. *Assault Defined*

The criminal offense of assault is defined in the "Definitions" section of Minnesota's Criminal Code, Minnesota Statutes section 609.02.<sup>5</sup> Subdivision 10 of that section provides: "'Assault' is: (1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another."<sup>6</sup>

### B. *Intent Defined*

Section 609.02 also defines the terms "with intent to" and "intentionally" in a separate subdivision. The relevant portions<sup>7</sup> of section 609.02, subdivision 9, provide:

Mental state.<sup>8</sup> (1) When criminal intent is an element of a

5. Minnesota's Criminal Code provides a single, general definition of assault, which is incorporated into multiple specific assault offenses. First-degree assault, for example, is an assault that results in "great bodily harm" or an assault of "a peace officer or correctional employee by using or attempting to use deadly force." MINN. STAT. § 609.221, subdiv. 1, 2 (2012). *See also id.* §§ 609.222 (second-degree assault), .223 (third-degree assault), .2231 (fourth-degree assault), .224 (fifth-degree assault). The criminal code contains separate provisions for the offense of domestic assault. *See id.* §§ 609.2242, .2247. Section 609.2242, entitled "Domestic Assault," restates the general definition of assault provided by section 609.02. *Id.* § 609.2242, subdiv. 1.

6. § 609.02, subdiv. 10.

7. Section 609.02, subdivision 9, contains two additional provisions regarding mental state, which are not relevant to the discussion here.

8. In drafting Minnesota's criminal code in 1963, the legislature "borrowed" from the Model Penal Code's approach for identifying the mens rea required for particular offenses. *See State v. Orsello*, 554 N.W.2d 70, 72-73 (Minn. 1996), *superseded by statute on other grounds*, Act of May 6, 1997, ch. 96, § 7, 1997 Minn. Laws 694, 700, *as recognized in King v. State*, 649 N.W.2d 149, 159 (Minn. 2002). Rather than using the general/specific intent dichotomy, which is susceptible to confusion, the Model Penal Code divided mens rea into four categories: purpose, knowledge, negligence, and recklessness. *Id.* (citing MODEL PENAL CODE § 2.02

crime in this chapter, such intent is indicated by the term “intentionally,” the phrase “with intent to,” the phrase “with intent that,” or some form of the verbs “know” or “believe.”

(2) “Know” requires only that the actor believes that the specified fact exists.

(3) “Intentionally” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, . . . the actor must have knowledge of those facts which are necessary to make the actor’s conduct criminal and which are set forth after the word “intentionally.”

(4) “With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.<sup>9</sup>

### III. STATE V. FLECK

#### A. Facts and Procedural History

##### 1. Facts

Ronald Fleck and K.W. lived together in Alexandria, Minnesota.<sup>10</sup> The morning of January 23, 2009, K.W. arrived home to find an already-inebriated Fleck drinking in the kitchen.<sup>11</sup> Fleck called K.W.’s name, and, as she turned towards him, Fleck stabbed K.W. near her shoulder with a large butcher knife and then walked away.<sup>12</sup>

When law enforcement officers arrived on the scene, they found K.W. in a bathroom with a small puncture wound to her chest near her shoulder.<sup>13</sup> Fleck was sitting in a chair and, before becoming unresponsive, told the officers that he had taken forty sleeping pills.<sup>14</sup> Both Fleck and K.W. were taken to the hospital.<sup>15</sup>

(1962)).

9. § 609.02, subdiv. 9.

10. State v. Fleck, 810 N.W.2d 303, 305 (Minn. 2012).

11. *Id.*

12. *Id.* at 305–06.

13. State v. Fleck, 797 N.W.2d 733, 735 (Minn. Ct. App. 2011). The wound was minor enough that it did not require stitches. Transcript of Trial at 289–90, State v. Fleck, No. 21-CR-09-239 (Douglas Cnty. Dist. Ct. Nov. 3–4, 2009).

14. *Fleck*, 810 N.W.2d at 306; *Fleck*, 797 N.W.2d at 735.

Tests revealed that Fleck had a blood alcohol level of 0.315 g/dL<sup>16</sup>—almost four times the legal limit for operating a motor vehicle.<sup>17</sup>

## 2. *Procedural History*

Fleck was charged with a single count of second-degree assault with a dangerous weapon under Minnesota Statutes section 609.222, subdivision 1.<sup>18</sup> The second-degree assault statute references section 609.02, subdivision 10, for the definition of assault. Although subdivision 10 describes two forms of assault—an act committed with the intent to cause fear of bodily harm (“assault-fear”) and the intentional infliction of or attempt to inflict bodily harm (“assault-harm”) <sup>19</sup>—the complaint in Fleck’s case did not specify a particular form of assault.<sup>20</sup>

Fleck asserted a voluntary-intoxication defense<sup>21</sup> and asked the trial court to provide the jury with a voluntary-intoxication instruction.<sup>22</sup> The State objected to Fleck’s requested instruction,

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15. *Fleck*, 810 N.W.2d at 306.

16. *Id.*

17. See MINN. STAT. § 169A.20, subdiv. 1(5) (2012) (stating that a person is guilty of driving while impaired if the person’s alcohol concentration is 0.08 or greater).

18. *Fleck*, 810 N.W.2d at 306. Second-degree assault is defined as follows: “Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than seven years or to payment of a fine of not more than \$14,000, or both.” § 609.222, subdiv. 1.

19. See § 609.02, subdiv. 10.

20. Criminal Complaint, State v. Fleck, No. 21-CR-09-239 (Douglas Cnty. Dist. Ct. Jan. 30, 2009).

21. *Fleck*, 810 N.W.2d at 306. For the language of section 609.075, see *infra* Part III.C.1. Under this statute, which has essentially remained unchanged since its adoption in 1963, see State v. Bonga, 278 Minn. 181, 185–86, 153 N.W.2d 127, 130 (1967), a defendant’s voluntary intoxication may be considered when determining whether the defendant had the requisite intent to commit a crime. See § 609.075; see also City of Minneapolis v. Altimus, 306 Minn. 462, 466, 238 N.W.2d 851, 854–55 (1976). The defendant bears the burden of proving voluntary intoxication. State v. O’Donnell, 280 Minn. 213, 221, 158 N.W.2d 699, 704 (1968).

22. *Fleck*, 810 N.W.2d at 306. The pattern jury instruction for voluntary intoxication provides:

In this case, the defendant has introduced evidence of intoxication. It is not a defense to a crime that the defendant was intoxicated at the time of the act if the defendant voluntarily became intoxicated. However, if it is an element of a crime that the defendant had a particular intent, you should consider whether the defendant was intoxicated, and if so, whether the defendant was capable of forming the required intent. The

arguing that the voluntary-intoxication defense applies only to crimes with a specific-intent element.<sup>23</sup> The State asked the court to instead instruct the jury only as to assault-harm, which the State characterized as a general-intent crime.

The trial court agreed with the State's argument that assault-harm was a general-intent crime and, therefore, was ineligible for a voluntary-intoxication instruction. Ultimately, the trial court instructed the jury that an assault can be committed in two ways—by acting with intent to cause fear or by the intentional infliction of bodily harm—and gave the jury a voluntary-intoxication instruction.<sup>24</sup> But the court advised the jury that the voluntary-intoxication defense could only be considered to determine whether Fleck was guilty of committing assault-fear and could not apply to assault-harm.<sup>25</sup> The trial court submitted separate verdict forms to the jury for each form of assault.<sup>26</sup> The jury convicted Fleck of second-degree assault with a dangerous weapon, finding that he had committed assault-harm against K.W. Fleck was sentenced to twenty-seven months' imprisonment.<sup>27</sup>

The Minnesota Court of Appeals, in a published opinion, reversed Fleck's conviction and remanded for a new trial.<sup>28</sup> Relying on recent precedent from the Minnesota Supreme Court that defined assault as a specific-intent crime, the court of appeals concluded that Fleck was entitled to a voluntary-intoxication

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burden of establishing intoxication is on the defendant. The defendant must prove the claim of intoxication by the greater weight of the evidence. The greater weight of the evidence means that the evidence must lead you to believe that it is more likely that the claim is true than not true. If the evidence does not lead you to believe that it is more likely that the claim is true than not true, then the claim has not been proven.

10 MINN. DIST. JUDGES ASS'N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES—CRIMINAL, CRIMJIG 7.03 (Stephen A. Forestell & Wayne A. Logan reporters, 5th ed. 2006).

23. *Fleck*, 810 N.W.2d at 306.

24. *See id.*

25. *See id.*

26. *See id.* The trial court also submitted to the jury verdict forms for the lesser-included offense of fifth-degree assault in addition to the charged offense of second-degree assault. *State v. Fleck*, 797 N.W.2d 733, 736 (Minn. Ct. App. 2011). The misdemeanor offense of fifth-degree assault is simply an assault as defined by Minnesota Statutes section 609.02, subdivision 10. *Compare* § 609.224, subdiv. 1 (defining fifth-degree assault), *with id.* § 609.02, subdiv. 10.

27. *See Fleck*, 810 N.W.2d at 306. That sentence was the presumptive term for second-degree assault under the Minnesota Sentencing Guidelines. *See id.*

28. *Fleck*, 797 N.W.2d at 739.

instruction for both forms of assault.<sup>29</sup> The State appealed to the Minnesota Supreme Court, which granted the State's petition for review.<sup>30</sup>

C. *The Minnesota Supreme Court Decision*

1. *The Defense of Voluntary Intoxication Is Only Available for Specific-Intent Crimes*

The Minnesota Supreme Court first considered whether the statutory defense of voluntary intoxication applies to both general-intent and specific-intent crimes.<sup>31</sup> To decide this question, the court referred to the language of the voluntary-intoxication statute.<sup>32</sup> Minnesota Statutes section 609.075 provides:

An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Engaging in a plain-language analysis of the statute, the supreme court focused on the term "particular intent."<sup>33</sup> The court found that the plain and ordinary meaning of the word "particular" is consistent with "specific" and inconsistent with "general."<sup>34</sup> The court further noted that in its past decisions, the terms "particular intent" and "specific intent" were used interchangeably.<sup>35</sup> The court concluded, therefore, that the term "particular intent," as used in the voluntary-intoxication statute, refers only to specific-intent crimes.<sup>36</sup> Stated otherwise, voluntary intoxication is only

29. *Id.* at 737–38 (discussing *State v. Vance*, 734 N.W.2d 650, 656–57 (Minn. 2007); *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998)).

30. *Fleck*, 810 N.W.2d at 307.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (citing BLACK'S LAW DICTIONARY 1119 (6th ed. 1990)).

35. *Id.* (citing *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001); *City of Minneapolis v. Altimus*, 306 Minn. 462, 466, 238 N.W.2d 851, 854–55 (1976)).

36. *Id.* On appeal, Fleck conceded that voluntary intoxication applies only to specific-intent crimes. Brief for Appellant at 15, *State v. Fleck*, 797 N.W.2d 733 (Minn. Oct. 1, 2010) (No. A10-0681), 2010 WL 6644665. It could be argued, however, that the phrase "or other state of mind," which follows "particular intent" in the voluntary-intoxication statute, in fact permits the use of the voluntary-intoxication defense for crimes requiring any mental state, including general intent. See MINN. STAT. § 609.075 (2012).



available as a defense to those offenses that require proof of specific intent.

## 2. *Assault-Harm Is a General-Intent Crime*

The supreme court then turned to Minnesota's assault statute to determine whether it describes a specific- or general-intent crime.<sup>37</sup> Citing several treatises, the court stated that a general-intent crime "simply prohibits a person from intentionally engaging in the prohibited conduct."<sup>38</sup> The person must intend the action but need not intend to accomplish any particular result.<sup>39</sup> By contrast, "a specific-intent crime requires an 'intent to cause a particular result.'"<sup>40</sup> Specific intent refers to a mental state that is above and beyond the mere will to engage in the act itself.<sup>41</sup> The supreme court remarked that the legislature regularly uses the phrase "with intent to" as a means of expressing a specific-intent requirement.<sup>42</sup>

Turning to the definition of assault, the supreme court first noted that section 609.02, subdivision 10, sets forth two definitions of assault. The supreme court paid close attention to the statutory definition of each, noting that assault-fear is "an act done with intent to cause fear in another of immediate bodily harm or death"<sup>43</sup> and assault-harm is "the intentional infliction of . . . bodily harm upon another."<sup>44</sup> The court took special notice of the fact that the legislature used different language regarding intent when defining the two types of assault.<sup>45</sup> Relying in large part on the fact that the legislature used the phrase "with intent to"—a signal phrase for specific intent—only when defining assault-fear,

37. *Fleck*, 810 N.W.2d at 308.

38. *Id.* (citations omitted).

39. *Id.* (citing 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE: CRIMINAL LAW AND PROCEDURE § 44.3 (3d ed. 2001)).

40. *Id.* (quoting MCCARR & NORDBY, *supra* note 39, § 44.3).

41. *Id.* (citing 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(e) (2d ed. 2003)).

42. *Id.* at 308–09 (citing *State v. Mullen*, 577 N.W.2d 505, 510 (Minn. 1998)). In *Mullen*, the court observed that the language referencing specific intent includes "'intentionally,' 'with intent to,' or 'know.'" 577 N.W.2d at 510 (citing *State v. Orsello*, 554 N.W.2d 70, 73–74 (Minn. 1996), *superseded by statute*, MINN. STAT. § 609.749, subdiv. 1(a) (1997), *as recognized in Fleck*, 810 N.W.2d at 311 n.4).

43. *Fleck*, 810 N.W.2d at 308 (quoting MINN. STAT. § 609.02, subdiv. 10(1) (2010)).

44. *Id.* (quoting § 609.02, subdiv. 10(2)).

45. *Id.*

the court concluded that assault-harm is a general-intent crime.<sup>46</sup>

The court stated:

Although the definition of assault-harm requires the State to prove that the defendant intended to do the physical act, nothing in the definition requires proof that the defendant meant to violate the law or cause a particular result. If the Legislature intended to require an additional, special mental element, it could have defined assault-harm as “an act done *with the intent to cause bodily harm to another.*”<sup>47</sup>

Having previously held that voluntary intoxication is a defense to only those crimes requiring specific intent, the court held that the trial court properly instructed the jury and reinstated Fleck’s conviction for second-degree assault with a deadly weapon.<sup>48</sup>

3. *To the Extent that Other Minnesota Supreme Court Decisions Suggested that Assault-Harm Is a Specific-Intent Crime, Those Decisions Were Incorrect*

In the final third of its opinion, the Minnesota Supreme Court conceded that “imprecise language” in some of its prior opinions led to “some confusion in the law.”<sup>49</sup> As the court of appeals observed, the supreme court held in *State v. Lindahl*<sup>50</sup> that “force” in the context of a criminal-sexual-conduct offense, which the legislature defined as an assault, required just general intent.<sup>51</sup> But the court of appeals relied on two more recent cases, *State v. Edrozo*<sup>52</sup> and *State v. Vance*,<sup>53</sup> in which the supreme court explicitly stated that assault-harm was a specific-intent offense.<sup>54</sup>

Reviewing these cases in *Fleck*, the supreme court first reaffirmed the analysis set forth in *Lindahl*.<sup>55</sup> *Lindahl* was charged with criminal sexual conduct involving force.<sup>56</sup> The term “force”

46. *Id.*

47. *Id.* at 309 (emphasis added).

48. *Id.* at 312.

49. *Id.* at 310.

50. 309 N.W.2d 763 (Minn. 1981).

51. *State v. Fleck*, 797 N.W.2d 733, 737 (Minn. Ct. App. 2011) (citing *Lindahl*, 309 N.W.2d at 767).

52. 578 N.W.2d 719 (Minn. 1998).

53. 734 N.W.2d 650 (Minn. 2007).

54. *Fleck*, 797 N.W.2d at 737–38 (citing *Edrozo*, 578 N.W.2d at 723; *Vance*, 734 N.W.2d at 656, 657).

55. *State v. Fleck*, 810 N.W.2d 303, 310 (Minn. 2012).

56. *Id.* (citing *Lindahl*, 309 N.W.2d at 764).

was defined as the commission of an assault or threat of an assault.<sup>57</sup> On appeal, Lindahl argued that he should have received a voluntary-intoxication instruction.<sup>58</sup> The supreme court disagreed, holding that the assault at issue, which involved the infliction of harm, was a general-intent crime: “[A]n assault involving infliction of injury of some sort requires no abstract intent to do something further, only an intent to do the prohibited physical act of committing a battery.”<sup>59</sup> Although the court in *Fleck* acknowledged that *Lindahl* involved criminal sexual conduct and did not specifically address the separate offense of assault, the court observed that the reasoning of the decision was sound.<sup>60</sup> Thus, the court concluded, the holding of *Lindahl* should be extended to cases involving assault-harm.<sup>61</sup>

Next, the court highlighted the factual circumstances in *Edrozo* and *Vance* in an effort to explain their inconsistency with *Lindahl*.<sup>62</sup> The court reasoned that under the facts of *Edrozo*, which involved allegations of just assault-fear, the court’s statement that “[a]ssault is a specific-intent crime” encompassed only the assault-fear offense and not assault-harm.<sup>63</sup> In other words, in *Edrozo*, the court spoke too broadly.<sup>64</sup>

The court acknowledged that its analysis in *Vance* was likewise inexact.<sup>65</sup> At trial, Vance relied on a defense of accident, claiming that he injured the victim when he fell on top of her.<sup>66</sup> On appeal, Vance argued that the trial court committed reversible error in failing to provide the jury with a definition of assault, which requires an intentional act.<sup>67</sup> The supreme court agreed, noting again that assault-harm was a specific-intent crime and holding that the trial court’s erroneous instruction, which did not contain any intent requirement, necessitated a new trial.<sup>68</sup>

The *Fleck* court recognized that *Vance* incorrectly stated that

57. *Id.* (citing *Lindahl*, 309 N.W.2d at 767).

58. *Id.* (citing *Lindahl*, 309 N.W.2d at 766).

59. *Id.* (quoting *Lindahl*, 309 N.W.2d at 767).

60. *Id.*

61. *Id.*

62. *Id.* at 310–12.

63. *Id.* at 311 (quoting *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998)).

64. *See id.*

65. *See id.* at 311–12.

66. *Id.* at 311 (citing *State v. Vance*, 734 N.W.2d 650, 654 (Minn. 2007)).

67. *See id.* (citing *Vance*, 734 N.W.2d at 657, 662–63).

68. *Id.* (citing *Vance*, 734 N.W.2d at 662–63).

both assault-fear and assault-harm were specific-intent crimes.<sup>69</sup> But the court explained that its “chief concern [in *Vance*] was that the erroneous jury instruction allowed the jury to find Vance guilty of an assault-harm offense even if they believed the victim’s injuries were the result of Vance’s nonvolitional act—accidentally falling on the victim.”<sup>70</sup> The outcome of *Vance* was therefore correct, even though the court relied on a faulty premise in arriving at the result.<sup>71</sup>

Because the court distinguished its analyses in *Edrozo* and *Vance* from its holding in *Fleck*, the court declined to specifically overrule either decision.<sup>72</sup> The court noted, however, that the confusion created by the past decisions “is regrettable”<sup>73</sup> and explicitly rejected the “erroneous discussion of specific-intent and general-intent crimes in *Vance*.”<sup>74</sup>

#### IV. PROBLEMATIC EFFECTS OF THE COURT’S RULING IN *FLECK*

On a positive note, the Minnesota Supreme Court’s decision in *Fleck* avoided the domestic-assault policy concerns that could have resulted if defendants charged with assault-harm were permitted to argue voluntary intoxication as a defense.<sup>75</sup> But in almost all other respects, the court’s opinion in *Fleck* is troubling in both theory and practice. First, the court’s statutory analysis of the definition of assault-harm did not address all of the language in the statute. Second, the court in effect made assault-harm a strict-liability crime by failing to impose a mens rea requirement for each element of the offense and by conflating the principles of general intent and volitional acts. In creating a strict-liability crime, the court essentially criminalized all physical acts that result in harm to

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69. *Id.* at 311–12.

70. *Id.* at 312.

71. *Id.*

72. *See id.* at 311–12.

73. *Id.* at 311 n.4.

74. *Id.* at 311.

75. In their amicus brief, the Minnesota Coalition for Battered Women, the Battered Women’s Legal Advocacy Project, and the Battered Women’s Justice Project cited research from the U.S. Department of Justice purporting that more than one-third of offenders incarcerated for violent crimes were using alcohol at the time of their arrest. *See* Brief for Minnesota Coalition for Battered Women et al., *supra* note 4, at 8. The amici argued that “[a] cultural tendency to trivialize domestic violence, especially when the abuser has been drinking, further suggests that juries will acquit many defendants accused of domestic assault who invoke the intoxication defense.” *Id.* at 10–11 (citation omitted).

another person, regardless of the intent or motivations of the actor. A third problem with *Fleck*, therefore, is that the court's broad definition of assault could have far-reaching effects on other areas of the law, such as civil suits for assault and battery, homicide cases, and administrative law procedures.

A. *Incomplete Statutory Interpretation*

*Fleck* presents an abbreviated analysis of Minnesota Statutes section 609.02, subdivision 10.<sup>76</sup> In finding that assault-harm constitutes a general-intent crime, the court simply states, "The forbidden conduct is a physical act, which results in bodily harm upon another."<sup>77</sup> But the language of section 609.02, subdivision 10(2), in fact states: "'Assault' is . . . the intentional infliction of . . . bodily harm upon another." The court's conclusion that "[t]he forbidden conduct is a *physical act*"<sup>78</sup> ignores the statute's plain language requiring a showing of "intentional infliction."<sup>79</sup>

First, given that the court found the legislature's use of "with intent to" in the assault-fear definition to mean that the legislature intended to make assault-fear a specific-intent crime,<sup>80</sup> it is unclear why the use of the word "intentional" did not do the same for assault-harm. Under Minnesota Statutes section 609.02, subdivision 9(1), the terms "with intent to" and "intentionally" are both indications that "criminal intent is an element of a crime." Both terms have almost identical definitions,<sup>81</sup> and the Minnesota Supreme Court has found that both "with intent to" and "intentionally" are references to specific intent.<sup>82</sup> The court in *Fleck* did not address the definition of "intentionally" set out in section 609.02, subdivision 9, nor did it explain why the adverb "intentionally" signifies a specific-intent requirement but the adjective form of "intentional" found in section 609.02, subdivision 10, does not.

Second, the word "inflict" is a transitive verb,<sup>83</sup> so it requires a

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76. See *Fleck*, 810 N.W.2d at 309–10.

77. *Id.* at 309.

78. *Id.* (emphasis added).

79. MINN. STAT. § 609.02, subdiv. 10(2) (2010).

80. See *Fleck*, 810 N.W.2d at 308–09, 308 n.3.

81. Compare MINN. STAT. § 609.02, subdiv. 9(3) (2012), with *id.* § 609.02, subdiv. 9(4); see also *Fleck*, 810 N.W.2d at 308 n.3.

82. See *State v. Mullen*, 577 N.W.2d 505, 510 (Minn. 1998) (citation omitted).

83. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 900 (5th ed. 2011).

direct object in order to complete its meaning—a person inflicts *something*. Therefore, “infliction” is not just “a physical act”; it is defined as “[t]he act or process of imposing or meting out something unpleasant.”<sup>84</sup> The assault definition provides the “something unpleasant” that is inflicted—bodily harm.<sup>85</sup> Therefore, the plain meaning of section 609.02, subdivision 10(2), is that an assault is the intentional act or process of imposing or meting out bodily harm upon another. And the conduct that is prohibited is *imposing bodily harm upon another*, not just *a physical act*.

Recognizing that section 609.02, subdivision 10(2), prohibits the act of imposing bodily harm, the question of whether assault-harm is a general- or specific-intent crime becomes more difficult. The court in *Fleck* cited definitions of “general intent” from several sources.<sup>86</sup> These definitions all state something a bit different, creating confusion about the meaning that the court was attributing to “general intent.” And the definition the court cited from LaFave’s seminal treatise on criminal law—that general intent requires only an “intention to make the bodily movement which constitutes the act which the crime requires”<sup>87</sup>—is the same principle that the court later cites as a requirement for both general and specific intent: that every crime requires a volitional act.<sup>88</sup>

*Fleck* concludes that “the definition of assault-harm requires the State to prove that the defendant intended to do the physical act.”<sup>89</sup> The physical act is the conduct forbidden by the plain language of the statute—imposing or meting out bodily harm upon another. So assault-harm requires the State to prove that the defendant intended to impose or mete out bodily harm to another. One could invoke LaFave’s broad definition of general intent and

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84. *Id.* at 900–01.

85. § 609.02, subdiv. 10(2). It would be either redundant or absurd to say that an assault is the intentional act of imposing something unpleasant that results in bodily harm. If the act is unpleasant because it results in pain, to add a bodily harm requirement is redundant. And it is absurd to think that unpleasantness associated with any other sensations (e.g., aural unpleasantness from a neighboring residence) could constitute assault.

86. *See Fleck*, 810 N.W.2d at 308.

87. *Id.* (quoting LAFAVE, *supra* note 41).

88. *Id.* at 309 (citing MCCARR & NORBY, *supra* note 39, § 44.5). In fact, LaFave’s own treatise uses the phrase quoted in *Fleck* when discussing the volitional requirement applicable to all crimes and two paragraphs later when discussing general intent. *See* LAFAVE, *supra* note 41.

89. *Fleck*, 810 N.W.2d at 309.

say that assault-harm is a general-intent crime that merely requires the intent to make the bodily movement underlying the imposition of bodily harm.<sup>90</sup> But the more obvious interpretation of the definition is its plain language—that assault-harm requires the State to prove that the defendant intended to impose or mete out bodily harm upon another. Requiring the State to show that the defendant intended to impose bodily harm makes assault-harm a specific-intent crime because the defendant must intend the result of his or her action.

*B. Assault-Harm as a Strict-Liability Crime*

Much of the difficulty in characterizing assault-harm as either a general- or specific-intent crime stems from the fact that, historically, those terms were used in different ways to mean different things and then repurposed to the point that the United States Supreme Court has called the distinction “ambiguous and elastic” and “[a] source of a good deal of confusion.”<sup>91</sup> In addition, some of the court’s difficulty is the result of its failure to recognize, as the Model Penal Code does, that mens rea should be required for every *element* of a crime.<sup>92</sup>

Assault-harm has two basic elements (in addition to the general principle of all crimes requiring a person to act volitionally): a conduct element and a result element. *Fleck* established a general-intent requirement with respect to the conduct element but did not impose any mens rea requirement as to the result element. Therefore, under *Fleck*, if a defendant performs a physical act of his own volition, his act constitutes an assault-harm if it results in harm to another person, regardless of whether the defendant had any desire to harm another. In other words, the court’s decision effectively made assault-harm a strict-liability crime.<sup>93</sup>

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90. See LAFAYE, *supra* note 41, § 5.2(e).

91. United States v. Bailey, 444 U.S. 394, 403–04 (1980).

92. See MODEL PENAL CODE § 2.02(1) (1985) (“[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”); see also Bailey, 444 U.S. at 406 (“[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.”) (quoting MODEL PENAL CODE § 2.02 cmt. 1)).

93. Some commentators argue that there is no distinction between general-intent and specific-intent crimes. See, e.g., MCCARR & NORDBY, *supra* note 39, § 44.5

A strict-liability crime is one that imposes criminal liability in the absence of mens rea.<sup>94</sup> As the Minnesota Supreme Court recently noted, “The Supreme Court of the United States has stated that ‘offenses that require no mens rea generally are disfavored.’”<sup>95</sup> Under an elemental approach to mens rea, the court in *Fleck* undoubtedly imposed strict liability on the result element of assault-harm. And although the court described the mens rea requirement for the conduct element as general intent, the low burden of proof *Fleck* placed upon the State is consistent with strict liability.

“Mens rea is the element of a crime that requires ‘the defendant know the facts that make his conduct illegal.’”<sup>96</sup> Because the supreme court in *Fleck* defined the prohibited conduct for assault-harm in terms of the *effect* that a physical act has on another person, the fact that makes the defendant’s conduct illegal is the harm suffered by the victim. Because any harm the defendant causes must necessarily follow after the defendant’s act, it is impossible for the defendant to know, at the time of the act, the facts that make his conduct illegal. Therefore, the supreme court’s definition of assault-harm in *Fleck* lacks a mens rea requirement.

The court’s conclusion that assault-harm requires general intent overlooks the fact that the only form of “intent” that the State must prove is that the defendant’s actions were not involuntary reflexes. That volitional element is not a mens rea requirement but the basic requirement that a crime include an act.<sup>97</sup> As the court itself stated in *Fleck*, “regardless of whether an offense is described as a specific- or general-intent crime, a defendant must voluntarily do an act or voluntarily fail to perform an act.”<sup>98</sup> But the court nonetheless went on to conflate the principle of general intent and the universal requirement of a

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(“[S]trict liability’ offenses are often merely ‘general intent’ crimes, since they assume that the act itself was done intentionally and consciously; otherwise it is likely to be defensible as mere accident, or as the result of mental illness.” (footnote omitted)). Regardless of the terminology employed, imposing liability in the absence of fault is generally disfavored. See *State v. Ndikum*, 815 N.W.2d 816, 818 (Minn. 2012) (citations omitted).

94. See *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994); see also LAFAVE, *supra* note 41, § 5.5.

95. *Ndikum*, 815 N.W.2d at 818 (quoting *Staples*, 511 U.S. at 606).

96. *Id.* (quoting *Staples*, 511 U.S. at 605).

97. See LAFAVE, *supra* note 41, §§ 5.2(e), 6.1.

98. *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012) (citations omitted) (internal quotation marks omitted).



volitional act, requiring only the latter but labeling it as the former. Assault-harm, under *Fleck*, therefore, requires no actual showing of mens rea and is thus a strict-liability crime.

### C. *The Void-for-Vagueness Doctrine*

Under *Fleck*, an assault-harm crime occurs when a defendant commits any physical act of the defendant's own volition that results in bodily harm to another person, regardless of the defendant's underlying desire, intent, or motive. That holding does not adequately define the conduct prohibited under Minnesota's assault statutes. The court stated, "The forbidden conduct is a *physical act*, which results in bodily harm upon another."<sup>99</sup> "[A] physical act" encompasses all conduct. Although some provisions among the assault statutes require more specific conduct—i.e., a past pattern of child abuse,<sup>100</sup> use of a deadly weapon,<sup>101</sup> the transfer of bodily fluids or feces<sup>102</sup>—others simply prohibit an "assault" as defined in section 609.02, subdivision 10.<sup>103</sup> Under *Fleck*, whether a person's conduct constitutes an assault depends solely upon its effect on others.<sup>104</sup> And because prohibition of "a physical act" covers such a broad range of conduct, a person cannot know for certain whether his conduct was prohibited until after he has acted and observed the effects of his conduct.

Uncertainty in criminal statutes can violate the "due process standards of definiteness under both the United States Constitution and the Minnesota Constitution."<sup>105</sup> Just prosecution requires fair notice to the offender that his conduct is forbidden by statute.<sup>106</sup> To ensure fair notice, criminal statutes may be challenged as unconstitutionally vague. The void-for-vagueness doctrine requires that criminal statutes define an offense (1) with sufficient clarity and certainty that a person of ordinary intelligence can understand what conduct is prohibited and (2) in a manner

99. *Id.* (emphasis added).

100. MINN. STAT. § 609.223, subdiv. 2 (2012).

101. *Id.* § 609.222.

102. *Id.* § 609.2231, subdiv. 3(2).

103. *See id.* §§ 609.221, subdiv. 1; .223, subdiv. 1; .224, subdiv. 1(2).

104. *Cf.* State v. Ott, 291 Minn. 72, 75, 189 N.W.2d 377, 379 (1971) (noting that, in the assault-fear statute, "the intent of the actor, as contrasted with the effect upon the victim, becomes the focal point for inquiry").

105. State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985).

106. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

that does not encourage arbitrary and discriminatory enforcement of the law.<sup>107</sup>

Under *Fleck*, it is questionable whether assault-harm crimes meet both prongs of the void-for-vagueness test. Because assault-harm is an act that results in bodily harm to another, a person cannot know whether his conduct is prohibited until he knows the effect of that conduct. And the potentially limitless spectrum of conduct encompassed within the court's definition of assault-harm in *Fleck* requires law enforcement to exercise a great deal of discretion, which could lead to arbitrary or varying degrees of enforcement.

Granted, in most circumstances, an individual can predict whether his or her act will inflict harm on another. Nevertheless, it is not hard to imagine factual scenarios in which a person's innocent actions result in bodily harm to another. For example, assume a defendant is walking through a crowded shopping mall and trying to pass a slower customer. The defendant pushes past the slower customer, who is caught off-balance and falls, breaking his or her leg. Had the customer not fallen, the defendant's conduct would have been lawful. But pursuant to *Fleck*, the defendant committed assault-harm; depending on the amount of harm the customer suffered, the defendant could be charged with first-, third-, or fifth-degree assault.<sup>108</sup> It is irrelevant whether the defendant intended to cause injury to the other customer; it may even be irrelevant whether the defendant intended to push the other customer, so long as the defendant was walking past the customer of his or her own volition.

#### D. *Potential Collateral Consequences of Fleck*

The example in the previous section highlights the absurd results that may stem from the lack of a mens rea requirement and the broad definition of assault-harm that the court announced in *Fleck*. This section illustrates the effect the court's decision could have in other areas of the law, including civil suits, felony-murder prosecutions, and administrative law provisions.

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107. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); accord *State v. Bussman*, 741 N.W.2d 79, 83 (Minn. 2007).

108. See §§ 609.221, subdiv. 1 (defining first-degree assault to require "great bodily harm"), .223, subdiv. 1 (defining third-degree assault to require "substantial bodily harm"), .224, subdiv. 1 (requiring only "bodily harm" for fifth-degree assault).

### 1. *Civil Suits for Tortious Assault*

The court's decision in *Fleck* will make it easier to convict a defendant of assault-harm because, beyond establishing that the defendant's conduct was volitional, the State does not need to address the defendant's mental state. That change could affect civil actions seeking damages from the defendant for assault and/or battery. The common law tort of assault does not involve physical contact between the parties; instead, assault is "an unlawful threat to do bodily harm to another with present ability to carry the threat into effect."<sup>109</sup> Common law battery, on the other hand, is an intentional, unpermitted, harmful, or offensive contact with another person.<sup>110</sup> In other words, the tort of assault is assault-fear as defined in Minnesota Statutes section 609.02, subdivision 10(1), and assault-harm under that statute is more akin to the common law tort of battery.<sup>111</sup>

In cases where a criminal defendant was convicted of a crime against a person and the victim or, in actions for wrongful death, the victim's family files suit for civil damages arising from the defendant's conduct, the plaintiff often moves for summary judgment or partial summary judgment on the issue of the defendant's liability. These motions are based on the legal theory of collateral estoppel, which "precludes the relitigation of issues which are both identical to those issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment."<sup>112</sup> "A criminal conviction can be used in a subsequent civil action to preclude argument by the convicted party on issues

109. *Dahlin v. Fraser*, 206 Minn. 476, 478, 288 N.W. 851, 852 (1939).

110. *See Johnson v. Morris*, 453 N.W.2d 31, 40 (Minn. 1990); 4A MINN. DIST. JUDGES ASS'N, COMM. ON CIVIL JURY INSTRUCTION GUIDES, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 60.25 (Michael K. Steenson & Peter B. Knapp reporters, 5th ed. 2012).

111. *See State v. Ott*, 291 Minn. 72, 75, 189 N.W.2d 377, 379 n.3 (1971) (noting that the assault statute "punishes without distinction both what the common law regarded as 'criminal assault' and what was known as 'civil assault'"). At common law, an assault was simply an attempted battery. *See Rollin M. Perkins, An Analysis of Assault and Attempts to Assault*, 47 MINN. L. REV. 71, 71 (1963); *see also Johnson v. Sampson*, 167 Minn. 203, 205, 208 N.W. 814, 815 (1926) ("An assault is an inchoate battery."). Consequently, the commission of a battery necessarily included a completed assault. Perkins, *supra*, at 73. Rather than charging defendants with assault and battery, many jurisdictions merged the two crimes together. *Id.* at 89.

112. *Ellis v. Minneapolis Comm'n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982).

conclusively proved in the criminal trial.”<sup>113</sup> Because collateral estoppel is an equitable doctrine, the court can use its discretion when deciding whether to apply collateral estoppel to any given case.<sup>114</sup> Courts generally invoke collateral estoppel when all of the following factors are present: (1) the issue to be decided is identical to one adjudicated in a prior action, (2) the prior action concluded with a final judgment on the merits, (3) the party to be estopped was a party to the prior adjudication, and (4) the party to be estopped had a full and fair opportunity to be heard on the issue at the prior proceeding.<sup>115</sup>

If a victim sues a defendant who was convicted of a crime involving assault-harm, the last three prerequisites for collateral estoppel will almost certainly be present. The defendant would have been a party in the criminal case against him and would have had an opportunity to dispute the charges at trial.<sup>116</sup> And the court would have entered judgment against the defendant at the time of his sentencing.<sup>117</sup> The question that will remain for the court is whether a crime involving assault-harm, as defined in *Fleck* and Minnesota Statutes section 609.02, subdivision 10(2), is sufficiently similar to the tort of battery to consider the matter already decided.

Pursuant to the Minnesota Supreme Court’s interpretation of assault-harm in *Fleck*, a defendant can be convicted of a crime involving assault-harm if the defendant committed a voluntary act that resulted in bodily harm upon another. As previously discussed, assault-harm does not require “proof that the defendant meant to violate the law or cause a particular result.”<sup>118</sup> On the civil

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113. *Fain v. Andersen*, 816 N.W.2d 696, 701 (Minn. Ct. App. 2012); *see also* Ill. Farmers Ins. Co. v. Reed, 662 N.W.2d 529, 532 (Minn. 2003); *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 552–53, 163 N.W.2d 289, 293 (1968); RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. e (1982) (“There are two basic patterns for applying issue preclusion in favor of a third party. . . . [One] situation is where the person harmed by the conduct that was criminally prosecuted then brings an action for civil redress against the wrongdoer for the consequences of the conduct. . . . Although the courts were somewhat slower in coming to apply issue preclusion in the latter situation than in the former, it is now settled that preclusion should apply in both.”).

114. *See Ill. Farmers Ins. Co.*, 662 N.W.2d at 532; *Green v. City of Coon Rapids*, 485 N.W.2d 712, 718 (Minn. Ct. App. 1992).

115. *See Fain*, 816 N.W.2d at 701.

116. *See id.* at 702.

117. *See id.* at 701 (citing *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007)) (“A judgment is final, for purposes of res judicata, when entered, notwithstanding a pending appeal.”).

118. *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012).

side, a defendant is liable for a battery if the defendant intentionally caused harmful or offensive contact with another.<sup>119</sup> With respect to intentional torts, the term “intent” means “that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”<sup>120</sup> Therefore, to be liable for battery, the defendant must intend to cause a harmful or offensive contact, or the circumstances must be such that the defendant’s intent can be inferred.<sup>121</sup> Because battery requires the plaintiff to prove intent to cause a result—an element not present in the definition of assault-harm under *Fleck*—a conviction for a crime involving assault-harm is not identical to civil liability for battery. For that reason, a defendant convicted of an assault-harm offense should not be precluded from arguing his innocence during a subsequent civil trial. Courts, therefore, will be more likely to deny summary judgment motions based on collateral estoppel, requiring the court and the parties to expend additional resources to relitigate the issue of the defendant’s liability.

## 2. Felony Murder

In addition to the possible civil consequences stemming from an assault conviction, the relaxed standards promulgated in *Fleck* could affect criminal charging practices and plea bargaining. As an example, it is not uncommon for prosecutors to either charge or submit a lesser-included instruction to the jury for felony murder when the defendant is charged with other felonies and first-degree murder. In that scenario, if the prosecution did not meet its burden of proof on the more severe charges, the felony-murder charge permits the jury to find the defendant guilty of murder on the basis of the defendant’s other felonious acts.

According to common law, “if one intends to do another felony, and undesignedly kills a man, this is also murder.”<sup>122</sup>

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119. 4A MINN. DIST. JUDGES ASS’N, COMM. ON CIVIL JURY INSTRUCTION GUIDES, *supra* note 110.

120. RESTATEMENT (SECOND) OF TORTS § 8A (1965); *accord* 4A MINN. DIST. JUDGES ASS’N, COMM. ON CIVIL JURY INSTRUCTION GUIDES, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 60.10 (Michael K. Steenson & Peter B. Knapp reporters, 5th ed. 2006).

121. *See, e.g.*, R.W. v. T.F., 528 N.W.2d 869, 872 (Minn. 1995) (explaining the intent element of a battery claim and noting that the defendant’s intent to cause a result was the relevant intent inquiry rather than the defendant’s intent to act).

122. *State v. Anderson*, 666 N.W.2d 696, 698 (Minn. 2003) (quoting Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763,

Minnesota codified that principle as second-degree felony murder. A defendant may be found guilty of second-degree felony murder if he or she “causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense.”<sup>123</sup> Second-degree felony murder has no intent requirement.<sup>124</sup> To find a defendant guilty of second-degree felony murder, the prosecution need only prove that (1) the defendant’s conduct caused the victim’s death and (2) at the time of causing the death, the defendant was committing, or attempting to commit, a proper predicate felony offense.<sup>125</sup>

The Minnesota Supreme Court has repeatedly held that assault is a proper predicate offense to second-degree felony murder.<sup>126</sup> Applying the court’s ruling in *Fleck* to a charge of second-degree felony murder while committing second-degree assault—the degree of assault charged in *Fleck*—the prosecution can convict a defendant upon proof of only five broad elements: (1) the defendant caused the victim’s death<sup>127</sup> (2) while committing second-degree assault,<sup>128</sup> which requires proof that (3) the defendant acted as a result of his or her free will<sup>129</sup> and (4) inflicted bodily harm upon another<sup>130</sup> (5) while using a dangerous weapon.<sup>131</sup> Pursuant to *Fleck*, the only mental state that the prosecution must prove is the defendant’s exercise of free will, which is lacking only in those rare instances of reflexive twitches

765 (1999) (quoting SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 947 (George Chase ed., 4th ed. 1938)).

123. MINN. STAT. § 609.19, subdiv. 2(1) (2012).

124. *State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996). The CRIMJIG for second-degree felony murder includes the following instruction to the jury: “It is not necessary for the State to prove the defendant had an intent to effect the death of [the victim], but it must prove that defendant committed or attempted to commit the underlying felony.” 10 MINN. DIST. JUDGES ASS’N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, *supra* note 22, at 11.30.

125. *See* 10 MINN. DIST. JUDGES ASS’N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, *supra* note 22.

126. *See, e.g., Cole*, 542 N.W.2d at 53; *State v. Mitjans*, 408 N.W.2d 824, 833–34 (Minn. 1987); *State v. Galvan*, 374 N.W.2d 269, 270 (Minn. 1985); *State v. Nurmi*, 336 N.W.2d 65, 67 (Minn. 1983).

127. *See* 10 MINN. DIST. JUDGES ASS’N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, *supra* note 22.

128. *See id.*

129. *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012).

130. 10 MINN. DIST. JUDGES ASS’N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, *supra* note 22, at 13.10.

131. *See id.*

and defective car brakes.<sup>132</sup>

The fact that *Fleck* has essentially transformed assault-harm into a strict-liability crime is particularly concerning in the context of felony murder because the offense of second-degree felony murder has no intent requirement.<sup>133</sup> Instead, the “felony murder rule” says that because the defendant committed a felony that posed a special danger to human life, the law will impute malice in the defendant’s conduct that unintentionally caused the victim’s death.<sup>134</sup> In other words, the felony murder rule “regards the commission of a felony as conclusive evidence of homicidal malice.”<sup>135</sup> But according to *Fleck*, a person whose volitional conduct causes bodily harm to another is guilty of assault-harm, even if the defendant’s actions were both legal and lacking any intent to harm the other person. It is illogical to reason that the commission of a benign, lawful act proves homicidal malice, particularly when the court has previously stated that “a person is deemed malicious when he does an act *intending to injure another*.”<sup>136</sup>

Returning to the example of the hasty shopper, assume the defendant volitionally pushed past the other customer, who fell and sustained a fatal head injury. Despite the fact that the defendant did not intend to inflict any harm upon the victim, the defendant could be charged with unintentional felony murder with a predicate offense of first-degree assault.<sup>137</sup> And from the single volitional act of pushing past the customer, the law presumes the defendant acted with homicidal malice.

132. *Fleck*, 810 N.W.2d at 309.

133. See *State v. Branson*, 487 N.W.2d 880, 882 (Minn. 1992) (“[F]elony murder remains an anomaly in the law of homicide. With the exception of involuntary manslaughter, . . . it is the only form of homicide not requiring proof of a specific mental element.”).

134. See *State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996) (citing *Branson*, 487 N.W.2d at 881). Note that imputing malice in the defendant’s conduct is distinct from the doctrine of transferred intent. In the latter, the intent requirement of Crime A serves as a substitute for the intent requirement of Crime B. But imputing malice presumes the existence of the mental state required for Crime B from the commission of Crime A. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 455–56 (1985).

135. Michael C. Gregerson, Note, *Criminal Law—Dangerous, Not Deadly: Possession of a Firearm Distinguished from Use Under the Felony-Murder Rule—State v. Anderson*, 31 WM. MITCHELL L. REV. 607, 611 (2004) (citing George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 415–16 (1980)).

136. *State v. Jankowitz*, 175 Minn. 409, 410, 221 N.W. 533, 533 (1928) (emphasis added).

137. See MINN. STAT. §§ 609.19, subdiv. 2(1), .221, subdiv. 1 (2012).

But precedential case law places a gloss on the statutory language of Minnesota Statutes section 609.19, subdivision 2(1), that may restrain absurd results from *Fleck*. The plain language of the second-degree felony murder statute appears to authorize all but three felonies as predicate offenses.<sup>138</sup> The Minnesota Supreme Court, however, has held that predicate crimes for felony murder must pose a “special danger to human life.”<sup>139</sup> When deciding whether a particular felony constitutes a special danger to human life, the court examines the crime from two perspectives: (1) the elements of the felony in the abstract and (2) the facts of that particular case and the circumstances surrounding the commission of the felony.<sup>140</sup> For example, in *State v. Anderson*, the supreme court distinguished between possession of a firearm by an ineligible person and actual use of a firearm.<sup>141</sup> Because the former “does not require an act of violence in carrying out the crime,” the court held that the offense of felon in possession of a firearm was not a predicate offense to second-degree felony murder.<sup>142</sup> Although assault-harm, as a crime against the person, will always contain elements indicative of a special danger to human life,<sup>143</sup> the court will apparently also consider the specific circumstances of the crime and the acts of the offender. That gloss may discourage more liberal and creative charging under section 609.19, subdivision 2(1), in the wake of *Fleck*.

Additionally, the fact that a defendant could be convicted of second-degree felony murder for acting without malice could affect the use of lesser-included offenses, such as manslaughter. “A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former.”<sup>144</sup> In Minnesota, every lesser degree of homicide is a lesser-included

138. Explicitly excluded from the possible predicate felonies for second-degree felony murder are those crimes that serve as predicates to first-degree felony murder—criminal sexual conduct in the first or second degree with force or violence, or a drive-by shooting. *See id.* §§ 609.19, subdiv. 2(1) (second-degree felony murder), .185(a) (first-degree felony murder).

139. *See State v. Back*, 341 N.W.2d 273, 277 (Minn. 1983); *accord State v. Anderson*, 666 N.W.2d 696, 700–01 (Minn. 2003).

140. *Anderson*, 666 N.W.2d at 701.

141. *Id.*

142. *Id.* (quoting with approval the district court’s order).

143. *See State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996) (“[A]ssault in the second degree itself forms a proper predicate felony to a felony murder conviction—assault is not a property crime, but a crime against the person.”).

144. *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986).



offense.<sup>145</sup> Specifically, first- and second-degree manslaughter and third-degree murder are lesser-included offenses of felony murder.<sup>146</sup> Theoretically, then, a person who committed second-degree felony murder must have also committed third-degree murder and first- and second-degree manslaughter. But unlike a charge of unintentional murder while committing an assault, most lesser-included offenses each have some requirement of a guilty mind, such as a depraved mind, the heat of passion, or negligence.<sup>147</sup> Therefore, a defendant charged with second-degree murder while committing an assault will have unusually limited opportunities for instructing the jury on lesser-included offenses.<sup>148</sup>

145. See MINN. STAT. § 609.04, subdiv. 1 (2012) (stating that a lesser-included offense may be a lesser degree of the same crime); *State v. Leinweber*, 303 Minn. 414, 421, 228 N.W.2d 120, 125 (1975); accord *Cole*, 542 N.W.2d at 50.

146. See, e.g., *State v. Grigsby*, 818 N.W.2d 511, 518–19 (Minn. 2012) (stating that second-degree manslaughter is a lesser-included offense of second-degree felony murder); *State v. Peou*, 579 N.W.2d 471, 476 (Minn. 1998) (“[T]here is no question that first-degree manslaughter is an included offense within the charge of felony murder. . .”).

147. See §§ 609.195(a), .20(1), .205(1), (3).

148. The Minnesota Court of Appeals faced a related and interesting problem in the recent case of *State v. Rubio-Segura*, No. A11-2246, 2012 WL 5381843 (Minn. Ct. App. Nov. 5, 2012). The appellant’s argument noted that the crimes of second-degree murder while committing a felony assault, Minn. Stat. § 609.19, subdiv. 2(1) (2008), and first-degree manslaughter while committing a misdemeanor assault, *id.* § 609.20(2), are identical. *Rubio-Segura*, 2012 WL 5381843, at \*2. Under both statutes, the State must prove that the defendant, in committing an assault—a volitional physical act that resulted in some degree of bodily harm—caused the death of another. See 10 MINN. DIST. JUDGES ASS’N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, *supra* note 22, at 11.29, 11.46. The only difference between the two crimes is the degree of bodily force inflicted—misdemeanor assault under Minnesota Statutes section 609.224, subdivision 1(2), requires the infliction of bodily harm, and felony assault under Minnesota Statutes section 609.221, subdivision 1, requires the infliction of great bodily harm. But, as the appellant in *Rubio-Segura* argued, the fact that the homicide and manslaughter charges require the assault to have caused the victim’s death, the degree of bodily harm inflicted must necessarily have been “great” as defined by statute. *Rubio-Segura*, 2012 WL 5381843, at \*2 (citing MINN. STAT. § 609.02, subdiv. 8 (2012)). The appellant further argued that “because first-degree assault is equivalent to fifth-degree assault when death results from the assault, the criminal statutes governing second-degree unintentional felony murder based on first-degree assault and first-degree misdemeanor manslaughter based on fifth-degree assault have the same elements but different penalties.” *Id.* The appellant therefore contended that the statutes conflicted and the manslaughter statute, being the more specific of the two, should control. *Id.* The court of appeals declined to address the appellant’s argument because it was raised for the first time on appeal. *Id.* at \*3.

### 3. *Other Collateral Consequences for Defendants*

Finally, in addition to the collateral consequences that accompany a quick conviction for assault, an individual may suffer consequences from the court's decision in *Fleck* without ever being charged or convicted. Several federal and state statutes and regulations impose legal consequences on individuals based on the mere commission of a crime or an arrest.<sup>149</sup> The most notable example is the Minnesota Department of Human Services ("DHS") Background Studies Act ("BSA").<sup>150</sup> The BSA requires anyone age thirteen years or older who works with or for licensed DHS facilities to undergo a background check for suitability and security.<sup>151</sup> Examples of professionals who must undergo this background check include nurses, personal care attendants, social workers,<sup>152</sup> and surgical technicians.<sup>153</sup> And if the individual seeks to provide DHS services from their household, all members of household must also undergo the background check.<sup>154</sup> During the background check, "if the commissioner has reasonable cause to believe the information is pertinent to the disqualification of an individual," the Commissioner may review "arrest and investigative information" from a variety of sources, including the Minnesota Bureau of Criminal Apprehension, county attorneys, county sheriffs, local police, the courts, and the FBI.<sup>155</sup> After reviewing this information, the DHS Commissioner *must* disqualify an individual if a preponderance of the evidence indicates that the individual has

149. For example, nonimmigrant visitors and tourists who commit any felony must be automatically deported. 8 C.F.R. § 214.1(g) (2012). And immigrants who are found to pose a danger to the community of the United States are ineligible for asylum. See 8 U.S.C. § 1158(b)(2)(A)(ii) (2012). In Minnesota, a person charged with a violent felony cannot be licensed as a school bus driver until that individual is found not guilty of the charge. MINN. R. 7414.0400, subpt. 3 (2012).

150. MINN. STAT. §§ 245C.01–.34.

151. See *id.* § 245C.03.

152. See *Thompson v. Comm'r of Health*, 778 N.W.2d 401, 404 (Minn. Ct. App. 2010) (discussing a social worker who was disqualified from jobs that involved any contact with facilities licensed by DHS because he was charged with a drug offense, but the charges were dropped after he completed a diversion program).

153. See *Awes v. Minn. Dep't of Health*, No. A05-220, 2005 WL 3111848 (Minn. Ct. App. Nov. 22, 2005) (reviewing denial of a request for reconsideration of a relator who had been employed at a hospital as a surgical technician for five years when his background check revealed a fifth-degree criminal sexual conduct charge in his juvenile record).

154. § 245C.03, subdiv. 1(a)(2), (5).

155. *Id.* § 245C.08, subdiv. 3.

committed certain enumerated crimes, regardless of whether the crime was a felony, gross misdemeanor, or misdemeanor.<sup>156</sup> Commission of an assault—regardless of whether an arrest or conviction followed—results in either a permanent or fifteen-year disqualification.<sup>157</sup> Under *Fleck*, a person who has done a volitional act that resulted in bodily harm to another person has committed an assault of some degree and will be disqualified from providing services requiring licensing from the DHS.

## V. SUGGESTED SOLUTIONS

### A. *Adopt the Model Penal Code Mental States and Impose a Purpose, Knowledge, or Recklessness Requirement for Assault-Harm Crimes*

The Minnesota Supreme Court's *Fleck* decision illuminates a significant problem with the criminal code's definitions of "mental state." Notwithstanding the legislature's intent to depart from the common law general/specific intent dichotomy in drafting Minnesota Statutes section 609.02, subdivision 9,<sup>158</sup> the definitions of mental states are imprecise enough that Minnesota courts still revert to the common law concepts in interpreting criminal statutes, such as the assault statute.<sup>159</sup>

Reliance on the common law general/specific intent dichotomy is problematic for a few reasons. First, these concepts have led to "confusion" and "consternation" among courts that have grappled with them,<sup>160</sup> including the United States Supreme Court.<sup>161</sup> In jurisdictions where this distinction persists, there is a

156. *Id.* § 245C.14, subdiv. 1(a)(2).

157. *Id.* §§ 245C.15, subdiv. 1(a) (imposing a permanent disqualification for first- and second-degree assault), 245C.15, subdiv. 2(a) (imposing a fifteen-year disqualification for assault in the third, fourth, or fifth degree).

158. *See* State v. Orsello, 554 N.W.2d 70, 72–73 (Minn. 1996), *superseded by statute*, MINN. STAT. § 609.749, subdiv. 1(a) (1997).

159. *See* State v. Fleck, 810 N.W.2d 303, 308 (Minn. 2012); *see also* State v. Edrozo, 578 N.W.2d 719, 723 (Minn. 1998); *Orsello*, 554 N.W.2d at 72; State v. Lindahl, 309 N.W.2d 763, 766 (Minn. 1981); State v. Cogger, 802 N.W.2d 407, 409–11 (Minn. Ct. App. 2011).

160. Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 356 (2001) (quoting *People v. Colantuono*, 865 P.2d 704, 710 (Cal. 1994)).

161. *See, e.g.*, Carter v. United States, 530 U.S. 255 (2000) (splitting 5–4 on question of whether federal bank robbery statute, 18 U.S.C. § 2113(a) (1994), required general or specific intent).

lack of consistency across appellate decisions.<sup>162</sup> Indeed, the Minnesota Supreme Court has been criticized for its inconsistent application of the concepts of specific and general intent.<sup>163</sup>

Second, the common law general/specific intent dichotomy provides ample room for judicial interpretation.<sup>164</sup> Where there is opportunity for interpretation about the mental state required for a crime, courts may simply apply their own policy ideas in assigning a particular mens rea requirement.<sup>165</sup> Some courts explicitly recognize that policy implications should be considered.<sup>166</sup> Other courts do not acknowledge the policy considerations underlying their decisions and instead purport to rely on purely legal analyses.<sup>167</sup> The danger with such practices, however, is that courts are crossing over into the exclusive legislative function of defining

162. See generally Batey, *supra* note 160, at 367–99.

163. See MCCARR & NORDBY, *supra* note 39, § 44.3 n.6 (observing that “[t]here is a lack of consistency” in Minnesota Supreme Court opinions addressing general and specific intent and that opinions “on occasion fail to cite important authorities and principles”).

164. Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 422–23 (1995).

165. Batey, *supra* note 160, at 344.

166. See *People v. Colantuono*, 865 P.2d 704, 708 (Cal. 1994) (citing *People v. Hood*, 462 P.2d 370 (Cal. 1969)) (noting that when “a conventional specific intent-general intent inquiry” failed to directly resolve question of whether intoxication defense applied to assault, the court resorted to policy considerations, which favored a finding of general intent, precluding intoxication defense).

167. Despite the strong brief submitted by the amici organizations advocating on behalf of domestic abuse victims, the Minnesota Supreme Court’s *Fleck* decision does not mention any policy considerations in concluding that assault is a general-intent crime to which the intoxication defense does not apply. This absence is unsurprising given the court’s recent declarations that it is reluctant to invade the policy-making function of the other branches of government. See, e.g., *In re Welfare of M.L.M.*, 813 N.W.2d 26, 35 (Minn. 2012) (“These statutes express the public policy judgments of the Legislature. It is not our role to second-guess these policy judgments.”); *State v. Randolph*, 800 N.W.2d 150, 164–65 (Minn. 2011) (Stras, J., concurring in part and dissenting in part) (“In my view, we create too much uncertainty for litigants when we ignore the clear direction provided by our rules of procedure in pursuit of the policy or spirit of a rule.”); *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 440 (Minn. 2009) (“[I]t is the role of the legislature, not the courts, to rewrite the statute . . . . The public policy arguments therefore should be advanced to the legislature, the body that crafted the language that compels the result here.”); *Morris v. State*, 765 N.W.2d 78, 85 (Minn. 2009) (“The development of a state policy on how the right to misdemeanor appellate counsel in the postconviction setting is vindicated involves public policy and funding issues that, in the first instance, are better left to the legislature.”). But see Batey, *supra* note 160, at 344–61 (identifying cases where courts’ policy judgments appeared to underlie determinations of whether particular offenses required specific or general intent).

crimes.<sup>168</sup>

Given these concerns, it would be appropriate for the Minnesota legislature to devise a statutory solution rather than relying on our state appellate courts to continue wrestling with the existing statutes, which are often interpreted by reference to the common law. First and foremost, the legislature should revise Minnesota Statutes section 609.02, subdivision 9, to modify the definitions of mental states and impose a mens rea requirement for each element of an offense.<sup>169</sup> Then, the legislature should take an offense-by-offense approach to clarifying the mental state required for specific crimes, including assault.

The drafters of the Model Penal Code (MPC), which originally inspired Minnesota Statutes section 609.02, subdivision 9,<sup>170</sup> specifically rejected the general/specific intent dichotomy.<sup>171</sup> The MPC sets forth four distinct mental states: purpose, knowledge, recklessness, and negligence.<sup>172</sup> In turn, most offenses included in

168. “[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” *United States v. Bass*, 404 U.S. 336, 348 (1971).

169. For a comprehensive discussion of adopting MPC mental states, see Ted Sampson-Jones, *Mens Rea in Minnesota and the Model Penal Code*, 39 WM. MITCHELL L. REV. 1457 (2013).

170. *State v. Orsello*, 554 N.W.2d 70, 72 (Minn. 1996), *superseded by statute*, MINN. STAT. § 609.749, subd. 1 (a) (1997).

171. See MODEL PENAL CODE §§ 2.02(2), 2.04(1)(a) (Official Draft & Revised Comments 1985).

172. The four mental states provided by the Model Penal Code are the following:

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

the MPC denote the mental state required.<sup>173</sup> Assault, under the MPC, is defined as the following:

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

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.
- (2) Aggravated Assault. A person is guilty of aggravated assault if he:
  - (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
  - (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.<sup>174</sup>

The foregoing definitions of assault have been adopted in many jurisdictions.<sup>175</sup> When read in conjunction with the MPC

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A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

*Id.* § 2.02(2).

173. *Id.* explanatory note. For those offenses that do not contain an explicit mens rea requirement, the MPC instructs how to read such a requirement into an offense. *See id.* §§ 2.02(1), (3), (4), (9).

174. *Id.* § 211.1.

175. *See, e.g.,* ALA. CODE § 13A-6-22 (West, Westlaw through 2012 Reg. Sess. and 1st Spec. Sess.); ALASKA STAT. § 11.41.230 (West, Westlaw through 2012 2d

definitions of the culpable mental states, the MPC's articulation of assault leaves little to no room for judicial interpretation or arbitrary enforcement. And by requiring more than a general intent—purpose, knowledge,<sup>176</sup> or recklessness—the MPC definition of assault resolves the chief problem created by the Minnesota Supreme Court's *Fleck* decision: the possibility that a volitional physical act, unaccompanied by intent to inflict harm, will create criminal liability. It also resolves another problem created by *Fleck*—the fact that Minnesota's existing assault statute sets forth one offense that contains two different intent requirements.

If, in the legislature's judgment, public policy supports making the defense of voluntary intoxication unavailable to individuals charged with assault, the MPC offers another appropriate solution. Under the MPC, voluntary intoxication, or "self-induced intoxication," is not a defense to offenses that contain the element of recklessness.<sup>177</sup> In the case of assault, as defined by the MPC,

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Reg. Sess. and 3rd Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-1203 (West, Westlaw through 2012 2d Reg. Sess.); COLO. REV. STAT. ANN. § 18-3-204 (West, Westlaw through 2012 2d Reg. Sess. and 1st Extraordinary Sess.); DEL. CODE ANN. tit. 11, § 611 (West, Westlaw through 78 Laws 2012, chs. 204–409); HAW. REV. STAT. § 707-712 (West, Westlaw through 2012 Reg. Sess.); KY. REV. STAT. ANN. § 508.030 (West, Westlaw through 2012 Reg. Sess. and 2012 1st Extraordinary Sess.); ME. REV. STAT. ANN. tit. 17-A, § 207 (West, Westlaw through 2012 legislation); MISS. CODE ANN. § 97-3-7 (West, Westlaw through 2012 Reg. Sess.); MO. REV. STAT. § 565.070 (West, Westlaw through 2012 2d Reg. Sess.); MONT. CODE ANN. § 45-5-201 (West, Westlaw through 2011 legislation); NEB. REV. STAT. ANN. § 28-310(1)(a) (West, Westlaw through 2012 2d Reg. Sess.); N.H. REV. STAT. ANN. § 631:1 (West, Westlaw through ch. 1, 2013 Reg. Sess.); OHIO REV. CODE ANN. §§ 2903.13(a), (b) (West, Westlaw through 2011 legislation); OR. REV. STAT. ANN. § 163.160 (West, Westlaw through 2012 Reg. Sess.); 18 PA. CONS. STAT. ANN. § 2701(a) (West, Westlaw through 2012 Reg. Sess.); S.D. CODIFIED LAWS § 22-18-1 (West, Westlaw through 2012 Reg. Sess.).

176. Case law exists that equates general intent and the MPC's knowledge requirement, but as LaFave explains in his definitive criminal law treatise, the MPC mental states require knowledge of the attendant circumstances and not just the absence of accidental conduct. *See* LAFAVE, *supra* note 41, § 5.2(b).

177. The Model Penal Code sets forth the following intoxication defense:

- (1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.
- (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.
- (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.
- (4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its

therefore, a defendant charged with assault cannot rely on voluntary intoxication to avoid liability.

*B. Encourage the Minnesota Legislature to Amend the Assault Statutes to More Clearly Define the Prohibited Conduct and Mens Rea Requirements*

If the legislature is unwilling to more explicitly adopt the mental states outlined in the MPC, the next best solution is for the legislature to amend the definition of assault within the existing framework. As previously discussed in Part IV, the two key problems created in *Fleck* are the lack of clarity about the conduct prohibited by the assault-harm statutes and the absence of any mens rea requirement. The simplest way to address both issues is to overrule the court's decision in *Fleck* and explicitly make assault-harm a specific-intent crime.<sup>178</sup> Requiring the defendant to have acted with the intent to inflict harm clarifies the prohibited conduct (any act performed with the intent to inflict harm) and guarantees that the defendant knew the facts that made his conduct illegal (he performed the act with the intent to inflict harm). When enacting this change, the legislature should use the phrase "with intent to" to clearly signal its intent to make assault-harm a specific-intent crime.<sup>179</sup> And, as previously mentioned, to

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criminality [wrongfulness] or to conform his conduct to the requirements of law.

(5) Definitions. In this Section unless a different meaning plainly is required:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "self-induced intoxication" means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

MODEL PENAL CODE § 2.08 (Official Draft & Revised Comments 1985).

178. Other states have concluded that assault is a specific-intent crime. *See, e.g., State v. Fountain*, 786 N.W.2d 260, 264–65 (Iowa 2010) (holding that assault is a specific-intent crime despite the Iowa legislature's attempt to make it a general-intent crime by introducing the assault statute with the phrase "[a]n assault as defined in this section is a general intent crime.>").

179. *See State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012) ("If the Legislature intended to require an additional, special mental element, it could have defined



prevent the public policy concerns that the amici in *Fleck* warned of, the legislature could simultaneously amend the voluntary intoxication statute to either limit or prohibit use of the defense in some (e.g., domestic assault) or all cases of assault.<sup>180</sup>

If the legislature is unwilling to overrule the court's decision in *Fleck* and definitively state that assault-harm is a specific-intent crime, then either the legislature or the courts should clarify the behavior prohibited under the assault statutes to give fair notice to citizens. The courts and legislature should look to other states' assault statutes for language that provides a greater description than "a physical act." For example, Utah defines an assault as an act "committed with unlawful force or violence,"<sup>181</sup> and aggravated assault requires an act that uses "other means or force likely to produce death or serious bodily injury."<sup>182</sup> Other states require contact that a reasonable person would regard as "extremely offensive or provocative."<sup>183</sup> And the Supreme Court of Tennessee has held that specific intent to injure is not necessary to constitute an assault if the defendant's conduct "exposes another to personal injury, and does in fact cause such injury."<sup>184</sup> All of these definitions more clearly state the types of physical acts that could constitute an assault and thereby put citizens on explicit notice as to what conduct is prohibited.

### C. Recognize Assault and Battery as Two Distinct Crimes

A third, less desirable option is to recognize assault and battery as two distinct crimes. Historically, assault and battery were different crimes. At common law, a battery, but not an assault,

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assault-harm as 'an act done with the intent to cause bodily harm to another.'").

180. See, e.g., FLA. STAT. ANN. § 775.051 (West, Westlaw through 2013 1st Reg. Sess.) (abolishing the voluntary intoxication defense); OHIO REV. CODE ANN. § 2901.21(C) (Westlaw) (abolishing the voluntary intoxication defense); *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (holding, in a plurality decision, that a defendant does not possess a constitutional right to present evidence of voluntary intoxication as a defense).

181. UTAH CODE ANN. § 76-5-102(1)(c) (West, Westlaw through 2012 4th Special Sess.).

182. *Id.* § 76-5-103(1)(b).

183. TENN. CODE ANN. § 39-13-101(a)(3) (West, Westlaw through 2012 2d Reg. Sess.); see also TEX. PENAL CODE ANN. § 22.01(a)(3) (West, Westlaw through 2011 Reg. Sess. and 1st Called Sess. of 82d Legislature) (defining assault as intentionally or knowingly causing physical contact that the person causing the contact knows or should know that the other will regard "as offensive or provocative").

184. *Saunders v. State*, 345 S.W.2d 899, 902 (Tenn. 1961) (citation omitted).

required physical contact in the form of an injury or offensive touching. An assault, on the other hand, was defined as an attempted battery or an intentional frightening.<sup>185</sup> Today, several jurisdictions continue to recognize assault and battery as distinct crimes,<sup>186</sup> while Minnesota and other states have labeled conduct that was traditionally considered a battery as the crime of assault.<sup>187</sup>

Minnesota's definition of "assault" criminalizes three acts in a single sentence: (1) assault-fear,<sup>188</sup> (2) assault-harm, and (3) attempted assault-harm.<sup>189</sup> At present, assault-fear and attempted assault-harm require specific intent, while assault-harm requires general intent.<sup>190</sup> To clean up the statute and establish continuity throughout the assault statute, the legislature could re-define assault-harm as battery. An "assault" would then be defined according to common law—as either an intentional frightening or an attempted battery. Although this change would not remedy the mental state problems the court introduced in *Fleck*, it would at least guarantee that assault—now confined to assault-fear and attempted assault-harm—is always a specific-intent crime. Additionally, because a common law battery requires "an offensive

185. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.1(a) (2d ed. 2003).

186. See, e.g., CAL. PENAL CODE §§ 240, 242 (West, Westlaw through 2012 Reg. Sess.); FLA. STAT. ANN. §§ 784.011(1), .03 (West, Westlaw through 2013 1st Reg. Sess.); GA. CODE ANN. §§ 16-5-20(a), 16-5-23(a) (West, Westlaw through 2012 Reg. Sess.); IDAHO CODE ANN. §§ 18-901, -903 (West, Westlaw through 2012 2d Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-1, 5/12-3 (West, Westlaw through P.A. 97-1144 of 2012 Reg. Sess.); KAN. STAT. ANN. §§ 21-5412(a), 21-5413(a) (West, Westlaw through 2012 Reg. Sess.); NEV. REV. STAT. ANN. §§ 200.471(1)(a), .481(1)(a) (West, Westlaw through 2011 Reg. Sess.); N.M. STAT. ANN. §§ 30-3-1, 30-3-4 (West, Westlaw through 2012 Reg. Sess.); OKLA. STAT. ANN. tit. 21 §§ 641, 642 (West, Westlaw through 2012 Reg. Sess.); W. VA. CODE ANN. §§ 61-2-9(b), (c) (West, Westlaw through 2012 1st Extraordinary Sess.); WYO. STAT. ANN. § 6-2-501(a), (b) (West, Westlaw through 2012 Budget Sess.).

187. See LAFAVE, *supra* note 185, § 16.3.

188. MINN. STAT. § 609.02, subdiv. 10(1) (2012) ("Assault" is . . . an act done with intent to cause fear in another of immediate bodily harm or death . . .").

189. *Id.* § 609.02, subdiv. 10(2) ("Assault" is . . . the intentional infliction of or attempt to inflict bodily harm upon another.").

190. The Minnesota Supreme Court declined to address whether an attempt to inflict bodily harm is a specific-intent crime. *State v. Fleck*, 810 N.W.2d 303, 312 n.5 (Minn. 2012). But it is axiomatic that attempt crimes require the specific intent to commit the underlying offense. See, e.g., LAFAVE, *supra* note 41 ("[C]riminal attempts require proof of an intent to bring about the consequences set forth in the crime attempted, and this is so even though no such intent is required for the completed crime").

touching,” lawful and benign contact between the alleged offender and victim could not form the basis of a criminal prosecution.<sup>191</sup>

#### IV. CONCLUSION

The Minnesota Supreme Court’s decision in *State v. Fleck* highlighted problems within the Minnesota Criminal Code regarding mental state requirements. In holding that assault-harm under Minnesota Statutes section 609.02, subdivision 10, constitutes a general-intent crime, the court in effect imposed strict liability for the commission of any volitional physical act that results in bodily harm to another person. Not only does the court’s decision conflict with firmly embedded principles of criminal jurisprudence, it also has the potential to impact several areas of criminal, civil, and administrative law. To resolve the issues created in *Fleck*, the Minnesota legislature should fully adopt the mental states articulated in the Model Penal Code and integrate those mental states with the substantive crimes in the Minnesota Criminal Code.

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191. See LAFAYE, *supra* note 185, § 16.2(a) (stating that most states’ statutes include a requirement that “the contact be ‘offensive,’ ‘insulting or provoking,’ or done ‘in a rude, insolent, or angry manner.’”).