Touch This! Over-Criminalization of Offensive Conduct

DAVID M. ZLOTNICK, ESQ:
CARLY BEAUVIS IAFRATE, ESQ:

David Zlotnick is an Associate Professor of Law at Roger Williams University School of Law. Carly Iafate is a law clerk to Chief Justice Frank J. Williams.

I. Introduction: three stories

The scene: a man is standing outside an apartment building in his neighborhood getting some air. His wife comes looking for him. As she approaches, another woman emerges from the building. The wife, believing that her husband has been having an affair with this woman and that he had been waiting for her to come out, begins to scream obscenities and moves towards her. The husband, motivated solely by a desire to stop his wife from creating an ugly public scene, takes his wife by the arms and tries to pull her away. Called by a neighbor, the police arrive and eventually arrest the husband for domestic battery for pulling his wife’s arms without permission.

In a school lunchroom, a thirteen-year-old boy tosses a forkful of ravioli at a younger boy. The younger boy charges and a brief scuffle ensues, although no blows are exchanged. The altercation, lasting no more than a minute, involves mostly name calling, and ends with the older boy holding his food-splattered victim in a loose headlock. The older boy is charged in family court with battery by ravioli.

At a busy airport, a passenger attempts to carry an oversize bag through the security station. The guard notices and blocks the passenger from passing through the metal detector. The passenger argues and tries to keep going. He bumps into the guard, momentarily shaking the frame of the detector, but without causing the guard any injury. With the entire incident on video, a debate ensues over whether the police should charge the airport-rage passenger, a well known public figure, with battery?

Under current Rhode Island law, all three of these individuals would be technically guilty of criminal battery and subject to arrest, prosecution, and a sentence of up to one year imprisonment? These trivial incidents would be considered criminal conduct because Rhode Island is one of a shrinking minority of states that make no distinction between civil and criminal battery. In these jurisdictions, any unconsented touching, no matter how minor, is sufficient to constitute both a criminal offense and a tort. Thus, even an unwanted forkful of ravioli that finds its mark is sufficient to constitute a criminal offense. This article contends this dual definition for battery should be abandoned because it over-criminalizes conduct which, although offensive, is not morally or physically harmful enough to warrant a criminal sanction. Instead, we advocate that either by statute or by court decision, Rhode Island adopt the majority rule set forth in the Model Penal Code (MPC), which requires bodily harm to support a criminal conviction for battery, while continuing to allow an offensive, unconsented touching battery to be pursued as a civil matter.

Our position is presented in three parts. Part II summarizes the common law roots of criminal battery and its doctrinal development in Rhode Island. This inquiry suggests that Rhode Island’s current battery law should be seen more as a historic relic than the product of a reflective policy determination by either the Supreme Court or the legislature. Part III sets forth the majority rule advocated in the MPC and discusses why this modern approach to battery is superior. Lastly, we address the argument that no change in the law is necessary because police and prosecutorial discretion is a sufficient barrier to trivial battery complaints. To the contrary, we argue that in the current zero tolerance environment that now holds sway over a variety of politicized offenses, ranging from domestic and school violence to assaults on police officers, Rhode Island’s law enforcement community and its misdemeanor prosecutors, primarily town solicitors and their “police prosecutors,” are too often unwilling to dismiss charges stemming from these trivial incidents.

II. Criminal battery in Rhode Island

In R.I. Gen. Laws § 11-5-3(a), the Rhode Island legislature codified two common law crimes in a single statute – assault and battery – but it did not further define the elements of either offense, most likely because both offenses had established definitions at common law. Battery, for example, was understood to have three elements: (1) an act or an omission by the defendant; (2) which produces a harmful result to the victim; and (3) is accompanied by the general intent to do the act or omission.

The Rhode Island Supreme Court has discussed the elements of criminal battery just twice in the last ten years:

In both cases, the Court stated that the second element of battery requires only “an offensive contact with or unconsented touching of [ ] the body of another…” The Court lifted this language from a...
“…Rhode Island’s current battery law should be seen more as a historic relic than as the product of a reflective policy determination by either the Supreme Court or the legislature.”

The critical question is whether the Rhode Island Supreme Court’s continued adherence to the common law definition of criminal battery is a product of a conscious choice or is merely a historic relic which should be re-examined. A review of the two modern criminal battery cases suggests the latter rather than the former, because in both cases the court’s recitation of the formal elements of battery was boilerplate that preceded the analysis of a distinct issue. For example, in State v. Messa, the defendant was convicted of second-degree sexual assault. At trial, he argued that there was no intent to initiate sexual conduct and therefore requested a lesser included offense instruction of simple assault. The trial court denied the request but Rhode Island Supreme Court reversed. The court used the case to explain the difference between assault, which requires an intent to injure, and battery, which does not. Nevertheless, although concluding the trial court had been misled by the request for an assault instruction (when the proper lesser included offense under these facts would have been battery), the Court felt that the defendant’s request was sufficient to alert the judge that there was an appropriate lesser included defense in the case.

In justifying its reversal for a new trial, the Messa opinion does discuss how the facts could conceivably have amounted to just an unwanted touching under the traditional battery standard. However, neither the defendant, who clearly wanted the jury to have the option to convict on a charge less than sexual assault, nor the prosecution, raised the broader issue of whether the standard for the actus rea of battery should be the same for criminal and civil battery. Similarly, in State v. McLaughlin, the Court’s reference to the elements of battery takes place as part of a brief discussion of whether the charge of involuntary manslaughter under a misdemeanor manslaughter theory was properly submitted to the jury. Because the defen-
admitted hitting the victim on the head (albeit to calm him down), the
court concluded that a jury could have
reasonably concluded that either a bat-
tery or assault had occurred. Here, the
broader issue of the degree of harm was
not raised because the head strike, what-
ever the defendant’s specific intent, had
dearly caused some injury. Thus, it can fairly be said that the current Rhode
Island rule that all unconsented touching
is punishable as criminal acts is more a
product of history than choice by the
modern Court to retain the common law
standard.

III. The “Bodily Harm” Rule of the Model Penal Code.

Unlike Rhode Island, the drafters of
the MPC explicitly considered the harm
element of battery and came to the con-
duction that criminal battery should be
limited to instances of physical injury,
limiting legal relief for offensive touching
to civil suits. The MPC defines physical
injury as “physical pain, illness, or any
impairment of physical condition.”
Thus, while eliminating purely emotional
or psychological trauma, a battery that
causes actual pain is still punishable
criminally, even if no mark or bruise
results. In addition, unwanted sexual
touchings, which were subsumed under
common law battery, are treated separa-
tely by the MPC.

Following the MPC’s lead, a majority
of states modified battery statutes to
require “physical injury,” “bodily injury,”
bodily harm,” “physical harm,” or “force
or violence upon the person.” These
jurisdictions have also made it clear that
the harmful result
lement of criminal
tort
battery are not the
same. For example,
in New York, the
criminal battery
statute requires that
the actor “inten[d]
to cause physical
injury to another
person, [and cause] physical injury to
such person or to a third person.”
Physical injury is defined in New York
court decisions as the “impairment of
physical condition or substantial pain.”
Thus, in New York “petty slaps, shoves,
kszicks and the like delivered out of hostili-
ty, meanness and similar motives, are not
within contemplation of [battery].”

The MPC majority rule reflects a
policy choice that a more serious result
should be necessary to sustain a criminal
charge of battery as opposed to an action
for damages. As the noted criminal law
commentator Joshua Dressler states, a
criminal conviction “is an expression of
the community’s moral outrage, directed
at the criminal actor for her act.” The
issue can be seen as a question of propor-
tionality. Having the same statutory
penalty for an injury-less touching as for
a physical attack that causes
actual pain or injury
trivializes the seri-
ousness of the vio-
lent version of the offense. Thus, it is not
a question of whether the law should
condone offensive touchings, but rather
whether these acts are severe enough

continued on page 24
Over-Criminalization
continued from page 9

transgressions that society needs to brand these actors as criminals. Several additional reasons suggest otherwise.
First, the consequences of a criminal prosecution, even a misdemeanor, should not be minimized. The stress and humiliation of an arrest is incomparable to the service of civil process. Moreover, while a monetary civil judgment might seem at first glance to be more onerous than a brief term of probation or the filing of a criminal charge, the social stigma of a criminal prosecution and the potential consequences of a plea or conviction, ranging from foreclosed employment options to incarceration (whether for the instant offense or as a result of a violation of probation) make a criminal prosecution a much more serious affair for an individual.

Second, the goals of specific and general deterrence are unlikely to be advanced by the prosecution of non-harmful batteries. In the first instance, the vast majority of the “victims” of this kind of battery are not interested in pursuing criminal charges. Many of these incidents take place between families and friends where there are often counter-vailing considerations that militate against filing charges. Thus, only a few offensive touching will ever be charged in the first place. When the likelihood of prosecution is low, so is the deterrence value of criminalizing the conduct. Moreover, it is unlikely there is a significant target population that needs to be specifically deterred from committing offensive touching batteries. Rather, in most of the incidents in which the only offense is an offensive touching, it is likely that the perpetrators are non-violent individuals who are not likely to re-offend. On the other hand, those persons who are prone to repeatedly committing this type of act are also likely to routinely resort to harmful physical contact and threats in their disputes. Such conduct would clearly violate the MPC’s harmful touching standard, as well as other existing statutes. In fact, most potentially harmful unconsented touching batteries, such as a violent punch which only grazes the victim, are already actionable as a criminal assault (whose definition we do not suggest changing). Thus, the “any touching” standard probably does little for deterrence.

Nevertheless, some might contend that rather than change the law of battery, we should rely on prosecutorial discretion to weed out the incidents that do not deserve a criminal sanction. However, both the unique features of misdemeanor prosecutions in Rhode Island and the increase of prosecutorial “no drop” policies for certain classes of cases suggest this filter is not working sufficiently to prevent either unnecessary arrests, or more troubling, unnecessary prosecutions, once the cases are presented to local prosecutors.

Like most states, the overwhelming majority of criminal cases in Rhode Island are resolved before trial. Rhode Island’s treatment of misdemeanors, however, is atypical in several respects. First, the vast majority of misdemeanors...
are resolved at arraignment before the retention or appointment of counsel. While many arrestees are shown a video that attempts to inform them of their rights, the subtleties of Rhode Island sentencing law such as the differences between a filing and probation and straight probation and a fine are usually lost on the target audience. Moreover, because the prosecution is usually represented at arraignment by a police officer, designated a "police prosecutor," rather than an actual attorney, the police reports for most misdemeanor cases, including offensive touching batteries, are never examined by any attorney, be it a prosecutor or a defense attorney, who might recognize the triviality of the offense. While the court must assess whether there is a factual basis for a plea, it is not the judge's role to determine whether the charge should be dismissed in the interest of justice as a de minimus offense. Moreover, district court judges vary widely on the degree of factual inquiry they make during pleas at arraignment. Post-arraignment, most misdemeanors are prosecuted in District Court by the originating town solicitor's office, not by the Attorney General. Here too, matters ranging from plea offers to allocation at sentencing are handled by many towns with "police prosecutors," rather than by an attorney. While many experienced police prosecutors are quite willing to dismiss trivial cases, some see their role as obtaining a favorable resolution, i.e., a plea, for every arrest. This attitude can result from an over-identification with the arresting officer, a desire to create favorable statistics, or simply too competitive an approach to the job. Regardless of the cause, this approach fails to take into account the prosecutor's duty to do justice and can result in the pursuit of trivial battery cases.

Even when town solicitors get involved earlier, there are sometimes countervailing pressures against dismissal of trivial cases. Generally, solicitors serve at the pleasure of the mayor who relies, in part, on the police department's satisfaction with the handling of criminal cases to evaluate a solicitor's performance. Given the prestige and/or lucrative nature of these contracts in many towns, part-time solicitors have an incentive to defer to police preferences to a degree not present for an elected district attorney or attorney general. In addition, city solicitors generally represent the municipality in civil matters. Particularly where an arrest may have been questionable, the specter of a civil suit is often a reason (whether stated explicitly or not) for insisting on some kind of plea or admission. This is especially true in petty assault and battery on a police officer and resisting arrest cases.¹¹

Second, the use of "no drop" policies by solicitors' offices in the areas of domestic and school violence also contributes to the failure of prosecutors to weed out non-harmful touching batteries. As noted by one Rhode Island Supreme Court justice, "zero tolerance has real problems" in the school setting, leading to harsh results as students are charged or disciplined for insignificant conduct. In the domestic violence arena, the consequences of no drop policies in battery cases is especially dire, particularly for the women who these policies were ostensibly designed to protect. Several studies suggest that in relationships with violence, women actually initiate physical contact at the same rate or even slightly more often than men. Despite striking first more often, these studies recognize that women are nevertheless much less likely to cause any injury to the man and, in fact, are often hurt badly in retaliation. One author

---

LEGAL DIALOGUES LUNCHEONS DESIGNED FOR NEW LAWYERS

Conceived and developed by the New Lawyers Division Steering Committee Chairperson Jeffrey L. Eger, Legal Dialogues are specifically designed to help new lawyers improve their understanding of the practice of law. Held once a month and featuring a knowledgeable, experienced Rhode Island Bar attorney, each Dialogue focuses on a particular area of practice.

Working in concert with the Bar's Continuing Legal Education program, Legal Dialogues supplement existing CLE seminars. These luncheons provide a comfortable, informal setting for attorneys, admitted to the Rhode Island Bar less than five years, to learn and ask questions.

All Legal Dialogues are held from 12:45 pm to 1:45 pm at the Rhode Island Bar Association. Space is limited and reservations are available only on a prepaid basis. Each session costs $10.00 (cash, check, VISA, MasterCard) to cover the cost of lunch and counts for 1.0 ethics credit. To reserve your space, contact Cynthia Boydhen by telephone: 401-421-5740 or email: cboyden@ribar.com.

<table>
<thead>
<tr>
<th>Date</th>
<th>Legal Dialogue</th>
<th>Moderator</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 16</td>
<td>District Court Practice Dialogue</td>
<td>Lynda L. Laing, Esq.</td>
</tr>
<tr>
<td>February 6</td>
<td>Superior Court Practice Dialogue</td>
<td>Thomas C. Plunkett, Esq.</td>
</tr>
<tr>
<td>April 10</td>
<td>Wills Drafting Dialogue</td>
<td>Leon C. Boghossian III, Esq.</td>
</tr>
<tr>
<td>May 15</td>
<td>Family Court Practice Dialogue</td>
<td>Deborah M. Tate, Esq.</td>
</tr>
</tbody>
</table>

Rhode Island Bar Journal | Jan/Feb 2002 | 25
suggests that women may commit these preemptive, but ultimately non-harmful batteries, out of fear of an imminent attack based upon their prior experience with their partner. Without an overt threat, however, such fears are generally deemed unreasonable and are not a defense to a charge of battery. Thus, in practice, when the police arrive on the scene and the woman either admits hitting first or the man makes this claim, both combatants (and sometimes just the woman) are arrested under the mandatory arrest law. When these cases come to court, the “no drop” policy for domestic violence cases then prevents prosecutors from voluntarily dismissing these cases.

Thus, Rhode Island’s district courts now too often present the bizarre scene of battered women being charged with battery by their abusers. Many take pleas without counsel and even those with attorneys must often request a trial date before the case is dismissed (usually because the complainant fails to appear or invokes his Fifth Amendment right, or the prosecutor finally realizes how weak the case would be at trial).”

Certainly, the problem of applying “no drop” policies to battered women accused by their abusers could be separately addressed by Rhode Island’s anti-domestic violence community. Nevertheless, the combination of the criminalization of non-harmful batteries and the mandatory arrest law will continue to result in battered women being arrested for non-harmful batteries. Rather than change the mandatory arrest, Rhode Island should address this issue by decriminalizing non-harmful batteries.

Conclusion

Cases in Rhode Island and in the other remaining “any touching” jurisdictions suggest that this standard criminalizes petty conduct that simply does not belong in the criminal courts. The food fight example in the Introduction is taken from an appellate opinion in Florida. After ruling that the statute required that the court uphold the battery finding below, the opinion notes, “we shudder to think of what would happen to the wheels of justice if every such child-

hood scuffle resulted in criminal prosecution.” Too often, this is precisely what is happening in Rhode Island’s district courts in non-harmful battery cases.

The simplest solution would be legislative. However, the prospects for decriminalizing anything in today’s climate seems unlikely. Nevertheless, there is ample precedent for judicial action. Over the past twenty years, the Rhode Island Supreme Court has abandoned the common law and adopted the MPC’s formula for a wide range of offenses. In fact, the Court has gone so far as to assume that in the absence of a specified intent language in a statute, the Court will adopt the MPC formulation of “purposely, knowingly, or recklessly.” Moreover, the Rhode Island Supreme Court clearly has shown the inclination to amend the ele-
ments of common law crimes and defenses when modern circumstances so dictate. For example, in State v. Gilman in adopting the MPC definition of entrapment, the court stated as a reason for the change that “it is time that we join the judicial mainstream.”

Therefore, whether by the natural course of the appellate process or by certified question, the authors suggest that the Rhode Island Supreme Court adopt the modern formulation of battery law set forth in the MPC. Removing non-harmful battery cases from the criminal justice system would help streamline the overcrowded misdemeanor docket and protect citizens from the need to defend against charges arising from petty incidents that involve offensive but not necessarily criminal conduct. Particularly in domestic violence cases, this change would benefit survivors of domestic violence who too often are being charged themselves with non-harmful batteries. Most importantly, removing these cases from the criminal system would reinforce the notion that the criminal law is for serious affronts to community standards and community order. While we might wish for a decline in rude and offensive behavior and a return to an idyllic (and probably illusory) past, that goal, like many others, cannot be achieved by assigning the task to the criminal justice system.

ENDNOTES
1 David Zitrinick, Harvard Law School, J.D. 1986, is an Associate Professor of Law at Roger Williams University School of Law. A former federal prosecutor in Washington, D.C., Professor Zitrinick was the Acting Director of the Roger Williams Criminal Defense Clinic, during the 1999-2000 academic year. 2 Carlye Infrate, a 2000 graduate of Roger Williams University School of Law where she served on the Law Review. Now a member of the Rhode Island Bar, she currently serves as law clerk to Chief Justice Frank J. Williams of the Rhode Island Supreme Court.

1 This vibetnote is based upon a case handled by the Roger Williams Defense Clinic. The defendant chose to accept a filing of the charge, because there was no imminent threat of an attack on the other woman by the wife, the husband would have had difficulty using defense of others as justification for his actions.


3 See Christopher Rockland, Woman Accuses