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Escape from the Twilight Zone: Minnesota's Definitions of "Substantial Bodily Harm" and "Great Bodily Harm" Leave Too Much Room for Injustice, and They Can Be Improved

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> What a frightening thing is the human, a mass of gauges and dials and registers, and we can only read a few and those perhaps not accurately.[2]

Part 1: Introduction

Charging someone with a felony-level assault is not akin to sticking a toe in the water; it is a dive from a significant height. A prosecutor's irrevocable decision to commence such a serious case against an individual will be the paramount, most consequential choice in its litigation. With that said, all but the most strident adversary would stipulate that, while considering whether to proceed with a criminal complaint, prosecutors are simultaneously "ministers of justice,"[3] lawyers, and human beings. In occupying these roles, prosecutors are guided and constrained by their best reading of the Criminal Code[4] and their principles of ethics[5] and subject to the creeping dynamics of culture. It should be no surprise then that, as a prosecutor sits down with a set of police reports to consider whether to charge a person with a violent crime, three questions inevitably spring to mind: "Did it happen? Can I prove it? How will others evaluate my decision?" These questions compel prosecutors to *decide*: to choose whether to produce a criminal complaint that, in addition to being the documentation of a crime, is a sort of script for a legal *Gesamtkuntswerk*, the generation of which is part mathematics, part divination, and part cultural expression. This article focuses on a problem that occasionally arises when considering the "mathematics" of charging felony-level assault cases in Minnesota.

Generating a complaint is "mathematical" in the straightforward sense that a prosecutor must identify alleged conduct that *adds up* to meet the elements of the charged offense(s).[6] It is "divination" in the sense that a prosecutor must judge that certain witnesses are telling the truth, that they would testify consistently at trial, and that a group of fair-minded jurors would believe

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[2] John Steinbeck, *The Winter of Our Discontent* (1961).

[3] *State v. Bradford*, 618 N.W.2d 782, 798 (Minn. 2000).

[4] *See* Minn. Stat. § 609.01 (2012) ("[Minn. Stat. ch. 609] shall be construed according to the fair import of its terms, to promote justice, and to effect its purposes which are declared to be . . . to protect the individual against the misuse of the criminal law by fairly defining the acts and omissions prohibited . . . .").

[5] *See generally, e.g.*, Minn. R. Pro. Conduct (2012).

[6] *See* Minn. R. Crim. P. 2.01 (The complaint is a written signed statement of the facts establishing probable cause to believe that the charged offense has been committed and that the defendant committed it . . . .").

them.[7] And it is inevitably "cultural expression," as charging decisions do not occur in a void, but rather inside several Matryoshka-doll-like communities that impart norms and shepherd natural human emotions, from a desire to enact justice and enforce the rights of the public to a prosecutor's fear of embarrassment, disrepute, and failure.

Usually, the mathematics of charging a case is the easiest aspect to consider because most of the elements of most crimes are objective and unambiguous. It is the part of the mental process that requires little emotion, like measuring the dimensions of a room. Indeed, that was a significant goal in the "element analysis" approach of the Model Penal Code ("MPC" hereafter),[8] which Minnesota largely adopted in 1963.[9] In a typical case, once a read-through of a set of police reports illuminates who did what when where and to whom, a prosecutor can consider whether the alleged conduct- abstracted from all other case dynamics- at least *fits* the elements of some potential charge and then move on to further, more "practical" considerations, where other aspects of a prosecutor's experience, passion, and idiosyncratic standards may play a role in the ultimate charging decision.

In Minnesota, however, the mathematical aspect of charging felony-level assault cases is complicated by a lack of clarity in how we define the crimes, specifically the definitions of two pertinent terms: "Substantial Bodily Harm" and "Great Bodily Harm," which are the distinguishing elements to the felony offenses of Assault in the Third Degree and Assault in the First Degree respectively. Because these terms lack clarity, the ships can become unmoored, and prosecutors tend to develop disparate, subjective "working definitions" of the terms, which can produce different charging thresholds, unequal treatment of similarly-situated suspects, and hence *injustice*.

It does not have to be this way. To reduce the potential for this type of injustice, the Minnesota legislature should refine the definitions of "Substantial Bodily Harm" and "Great Bodily Harm."[10] By refining these definitions, the legislature could make prosecutors' charging decisions in assault cases much more objective and consequently easier, fairer, and more just. This article proposes that the Minnesota legislature adopt the definition of "Substantial Bodily Harm" found in the Wisconsin Criminal Code and amend the definition of "Great Bodily Harm" to increase specificity to what types of injuries are covered by the term.

The article first will discuss the current assault-statute regime in Minnesota and its origin and development. Then, the article will identify appellate decisions that have examined the concepts

[7] Minn. R. Pro. Cond. 3.8(a) (2012) ("The prosecutor in criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").
http://lprb.mncourts.gov/rules/Documents/MN%20Rules%20of%20Professional%20Conduct.pdf
[8] *An Introduction to the Model Penal Code*, Paul H. Robinson and Markus Dirk Dubber, https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf, pg. 12, *last accessed* Dec. 13, 2012 (citing Paul H. Robinson & Jane A. Grall, "Element Analysis in Defining Criminal Liability," 35 Stanford Law Review 681 (1983).
[9] *Id.* at 8. *See also Section II.*
[10] *See* Minn. Stat. § 609.224 (2012). (defining Assault in the Fifth Degree); Minn. Stat. § 609.223 (2012). (defining Assault in the Third Degree; and Minn. Stat. § 609.221 (2012). (defining Assault in the First Degree).

of bodily harm, substantial bodily harm, and great bodily harm. Following this, the article will describe the Wisconsin assault-statute regime. Lastly, the article will propose how Minnesota should improve.

Part 2, Degrees of Assault, generally defined.

In Minnesota, a person commits an assault if he "intentional[ly] inflict[s] . . . bodily harm upon another."[11] There are five degrees of assault.[12] The degrees of assault at issue in this article are Assault in Fifth Degree, Assault in the Third Degree, and Assault in the First Degree; these are the degrees of assault that differ only in regard to the seriousness of the harm suffered by the victim.[13] The other two degrees of assault are not distinguishable by the seriousness of harm suffered by the victim.[14]

A quick glance at Assault in the Fifth, Third, and First Degrees illuminates that the differences between the three, most significantly the potential punishment upon conviction, are vast.

Assault in the Fifth Degree requires only that the victim suffer some "bodily harm,"[15] broadly defined as "physical pain or injury, illness, or any impairment of physical condition."[16] In almost all circumstances, Assault in the Fifth Degree is a misdemeanor offense,[17] punishable by up to 90 days in jail.[18]

Assault in the Third Degree requires that the victim suffer "substantial bodily harm,"[19] defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member."[20] The most significant feature of Assault in Third Degree, distinguishing it from Assault in the Fifth Degree, is that it is a felony offense, punishable up to five years in prison[21] and carrying all of the immediate and collateral

[11] Minn. Stat. § 609.02, subd. 10 (2012).
[12] *See* Minn. Stat. 609.21-224 (2012).
[13] *See* Minn. Stat. § 609.224 (2012). (defining Assault in the Fifth Degree); Minn. Stat. § 609.223 (2012). (defining Assault in the Third Degree; and Minn. Stat. § 609.221 (2012). (defining Assault in the First Degree).
[14] *See* Minn. Stat. § 609.2231 (2012). (defining types of Assault in the Fourth Degree primarily by the identity of the victim, e.g. police officers and ambulance drivers) and Minn. Stat. § 609.222 (2012) (defining Assault in the Second Degree as an assault with a dangerous weapon).
[15] Minn. Stat. § 609.224, subd. 1 (2012).
[16] Minn. Stat. § 609.02, subd. 7 (2012).
[17] Minn. Stat. § 609.224, subd. 1 (2012). If a defendant has one or more convictions or adjudications for "qualified domestic violence-related offense[s]," a prosecutor may be able to charge Assault in the Fifth Degree as a gross misdemeanor or felony, but neither enhancement would be based on the seriousness of the harm suffered by the victim. *See* Minn. Stat. § 609.224, subd. 2, 4 (2012).
[18] Minn. Stat. § 609.02, subd. 3 (2012). Please note that, throughout this article, the discussions "punishment" and "sentencing" refer only to periods of executed or stayed incarceration, not the imposition of fines.
[19] Minn. Stat. § 609.223, subd. 1 (2012).
[20] Minn. Stat. § 609.02, subd. 7a (2012).
[21] Minn. Stat. § 609.223, subd. 1 (2012).

consequences that a felony conviction entails.[22] If a defendant has no criminal history, the presumptive sentence in the case is a year and a day, execution of which is stayed,[23] and, upon conviction, a defendant typically receives a probationary sentence.[24] If a defendant has a criminal-history score of four, however, the presumptive sentence is an executed sentence of 24 months.[25]

Assault in the First Degree requires that the victim suffered "great bodily harm,"[26] defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."[27] Assault in the First Degree is a felony offense, punishable up to twenty years in prison.[28] If a defendant has no criminal history, the presumptive sentence in the case is an executed sentence of 86 months.[29] If a defendant has a criminal-history score of four, the presumptive sentence is an executed sentence of 134 months.[30]

Part 3, Development of Assault Statutes under the Criminal Code in Minnesota

3A. Model Penal Code

This article will delve into a discussion of the current Assault-offense regime in Part 4, but it is helpful to develop a historical perspective on its origins. After years of development, the American Law Institute promulgated the MPC in 1962. In the MPC, there was only a misdemeanor-level-assault offense titled "Simple Assault" and two felony-level-assault offenses titled "Aggravated Assault."[31] The misdemeanor offense was premised on the defendant causing mere "bodily injury to another."[32] The two felony offenses were premised on causing "serious bodily injury to another" and use of a "deadly weapon" respectively.[33]

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[22] *See, e.g., Sames v. State*, 805 N.W.2d 565, 567-70 (Minn. App. 2011) (discussing distinction between direct consequences and collateral consequences when determining whether a guilty plea is valid or invalid); *Minn. Const. Art. 7, §* 1 ("The following persons shall not be entitled or permitted to vote at any election in this case: . . . a person who has been convicted of treason or felony, unless restored of civil rights . . . . ").

[23] Minn. Sent. Guidelines § 2 (defining Assault in the Third Degree as a level IV felony).

[24] Minn. Sent. Guidelines § 2; Minn. Stat. 609.135.

[25] Minn. Sent. Guidelines § 2.

[26] Minn. Stat. § 609.221, subd. 1 (2012).

[27] Minn. Stat. § 609.02, subd.8 (2012).

[28] Minn. Stat. § 609.221, subd. 1 (2012).

[29] Minn. Sent. Guidelines § 2 (defining Assault in the First Degree as a level IX felony). *More specific footnote needed.*

[30] Minn. Sent. Guidelines § 2.

[31] MPC § 211.1 (1)-(2).

[32] MPC § 211.1 (1). It should be noted that the MPC also allows for a Simple Assault to be sentenced as a "petty misdemeanor" if the assault was committed "in a fight or scuffle entered into by mutual consent." *Id.*

[33] MPC § 211.1 (2). Interestingly, the MPC authors directly rejected enacting a statute analogous to Minnesota's Assault in the Fourth Degree, nothing "the Model Code departs from prior statutory law in dispensing with grading based on the status of the victim, for example, as a public official. MPC §211.1, comment 1(c), pg. 185. The authors held that "[s]pecial provision is unnecessary in view of the ample severity of penalties against murder and all serious attacks upon the person, regardless of the identity of the victim." *Id.*

One acquainted with Minnesota law would find the MPC's definitions of "bodily injury" and "serious bodily injury" quite familiar. The MPC defines "bodily injury" as "physical pain, illness or any impairment of physical condition."[34] The authors of the MPC explain that the definition of "bodily injury" was taken directly from the then-current Wisconsin statute, Wis. § 939.22(4), which defined "bodily harm" to mean "physical pain or injury, illness, or any impairment of physical condition." [35] The MPC's authors explain that defining "bodily injury" in this manner had two major benefits: First, it thus referred to more than the consequences of direct attack, which included "pain, illness, or physical impairment caused indirectly, as, for example, by exposing another to inclement weather or by non-therapeutic administration of a drug or narcotic." [36] Second, it excluded from liability under the assault offense "wrongs based solely upon insult or emotional trauma,"[37] which the authors felt could be punished under other penal rationales.[38]

As for "serious bodily injury," it was defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[39] Spread out categorically, the MPC's definition of "serious bodily injury" essentially is a of list three types of injuries:

1. Injury which creates a substantial risk of death;
2. Injury which causes serious permanent disfigurement;
3. Injury which causes protracted loss or impairment of the function of any bodily member or organ.

3B. Influence of Wisconsin Statutes

As for the origins of "Great Bodily Harm," the MPC's authors again indicate that they looked to the Wisconsin statutes,[40] which defined "great bodily harm" to mean "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protected loss or impairment of the function of any bodily member or organ or other serious bodily injury."[41] The authors indicate that they favored the Wisconsin language because it "emcompasse[d] the drastic harms covered under the common-law felony of mayhem and add[ed] a residual category of harm creating substantial risk of death." [42] The

[34] MPC § 210.0(2). It should be noted that, in providing the definitions of "bodily injury" and "serious bodily injury," the MPC adds the caveat "unless a different meaning plainly is required." MPC § 210.0.
[35] MPD § 211.1, Comment 3, page 187 (citing Wis. § 939.22(4) (1962)).
[36] MPD § 211.1, Comment 3, page 187
[37] MPD § 211.1, Comment 3, page 188
[38] MPD § 211.1, Comment 3, page 188. *See also* MPD § 211.1, Comment 1(c), page 185 (noting that certain types of "offense contact" should be punished, such as "indecent sexual advances," "unwanted erotic touching," "disorderly conduct," and "harassment," and did indeed develop offenses that addressed this conduct directly).
[39] MPC § 210.0(3).
[40] MPD § 211.1, Comment 3, page 188
[41] Wis. § 939.22(14).
[42] MPD § 211.1, Comment 3, page 188

language of the Wisconsin statute is quite similar to the ultimate MPC definitions except that, for reasons entirely unexplained in the MPC comments, the authors dropped the definition's catch-all class of harm called "other serious bodily harm."

3C. The Model Penal Code's Influence on Minnesota

Minnesota was one of the first states to adopt the MPC, enacting the Minnesota Criminal Code in 1963.[43] As a child of the MPC, it should be no surprise that 1963 Minnesota Code's three categories of assault have their origin in the MPC. At that time, following the MPC, the Minnesota legislature distinguished between only three types of assault.[44] The first type simply was called "Assault" under Minn. Stat. § 609.22 (1963), the definition of which was identical to the current definition of "assault"[45] and the punishment of which was identical to the current punishment of misdemeanor-level Assault in the Fifth Degree, up to 90 days of jail.[46] The other two types were felony offenses called "Aggravated Assault" under Minn. Stat. § 609.225 (1963). The second type of assault required that the victim suffered "great bodily harm," the definition of which is identical to how it currently is defined,[47] and was punishable up to ten years in prison.[48] The third type required that the defendant commit the assault "with a dangerous weapon,"[49] the forerunner to the current offense of Assault in the Second Degree,[50] and was punishable up to five years in prison. Of course, when it came to sentencing, in a time before the Minnesota Sentencing Guidelines and *Blakely*,[51] the district court had much more sentencing discretion that it does today. [52] Most notably in the 1963 Minnesota Criminal Code, there was no "intermediate" degree of assault, such as the current Assault in the Third Degree, to split the wide gulf between assaults that cause negligible bodily harm and those that *just about* kill the victim.

Juxtaposing the MPC's definition of "serious bodily injury" with the Minnesota Code's "great bodily harm" reveals that they are largely identical, with the differences being that the Minnesota Code replaces the phrase "substantial risk of death" with "high probability of death;" adds the adjective "permanent" to the phrase "protracted loss or impairment of the function;" and supplements the definition with a catch-all class of harm called "other serious bodily harm." Thus, spread out categorically, the Minnesota Code's definition of "Great Bodily Harm" is a list of *four* types of injuries:

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[43] Minn. Stat. ch. 609 (1963), Session Laws, available at https://www.revisor.mn.gov/data/revisor/law/1963/0/1963-753.pdf (last accessed Oct. 2, 2012).
[44] *Compare* MPC (1963) *and* Minn. Stat. ch. 609 (1963).
[45] *Compare* Minn. Stat. § 609.22 (1963) *and* Minn. Stat. § 609.02 subd. 10 (2012).
[46] *Compare* Minn. Stat. § 609.22 (1963) *and* Minn. Stat. § 609.224 subd. 1(2012).
[47] *Compare* Minn. Stat. § 609.02, subd. 8 (1963) *and* Minn. Stat. § 609.02, subd. 8(2012).
[48] Minn. Stat. §609.225, subd. 1(1963)
[49] Minn. Stat. § 609.225, subd. 2(1963)
[50] Minn. Stat. § 609.222 (2012).
[51] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).
[52] *See* Minn. Stat. § 609.10, § 609.135 (1963).

1. Injury which creates a high probability of death;
2. Injury which causes serious permanent disfigurement;
3. Injury which causes a permanent or protracted loss or impairment of the function of any bodily member or organ; and
4. Other serious bodily harm.

In other words, while largely adopting the MPC in 1963, when choosing the definitions of the severities of harm, Minnesota chose to adopt the *exact* wording of the Wisconsin statutes, rather than the MPC's innovations. Most notably, Minnesota chose to retain Wisconsin's catch-all "other serious bodily harm," while the MPC dropped it.

The MPC and the resulting 1963 Minnesota Code are extraordinary in many ways, but, to a practitioner who works within the current assault-offense regime, it can be surprising, perhaps quaint, that neither code contains a concept analogous to "Substantial Bodily Harm" or seems to address the "middle range" of bodily harm that often results from assaultive conduct. Indeed, to modern ears, it may seem strange, if not downright *unjust* to hear that, from 1963 to 1979, a defendant in Minnesota could break a victim's arm, knock him unconscious, or render him temporarily wheelchair-bound but receive only a *misdemeanor* conviction. When seeing these sorts of injuries, a contemporary prosecutor might say, "This defendant may not need to go to prison, but it *definitely* was felony-level conduct." Not so, a generation ago…

3D. Rationale of the MPC

The absence of "Substantial Bodily Harm" or any analogous concept from the MPC or Minnesota's 1963 Code may suggest that there was a large "donut hole" of bodily harms that were not addressed, or treated appropriately, by the Code's authors. However, the MPC's authors certainly were not oblivious to the need to address the wide variety of human experience and the "intermediate" types of bodily harm defined as "Substantial Bodily Harm." Indeed, as the authors explain in their notes, one of their primary concerns was to develop a system that properly graded the wide range and variety of assaultive conduct.[53] The authors stated that it was "necessary for the Model Code to deal separately with conduct ranging from the simple assault to the infliction of serious, permanent injury," [54] i.e. "bodily injury short of homicide."[55] It also is clear that, when the authors were referring to "dealing . . . with" the range of assaultive behavior, they were referring to the "grad[ing]" of assaultive conduct "ranging from a petty misdemeanor to a felony of the second degree." [56]

Indeed, in comment 1(c) to MPC § 211.1, the authors explain that a problem at common law that they sought to address through the Code was that "[a]ttacks resulting in injuries that fell short of

[53] MPD § 211, Introductory Note.
[54] MPD § 211. Introductory Note.
[55] MPD § 211. Introductory Note.
[56] MPD § 211. Introductory Note.

mayhem" were treated as "ordinary batteries,"[57] meaning low-level misdemeanors. The authors explained that the lack of defined intermediate *offenses* required common-law judges to exercise discretion in affixing proper punishment to more serious harms. [58] However, as "the practice developed" to limit the potential punishments for misdemeanors, legislatures were compelled to "respond[] by creating a series of intermediate offenses"[59] to bridge the gap between "trivial[ly] sanction[ed]" minor assaults and "drastic[ly] penal[ized] offenses such as murder and rape."[60] The MPC authors followed that trend, explaining that the adoption of a system of "laws that grade various manifestations of causing . . . injury" was a "necessary part of a penal code."[61] The MPC thus implemented the system previously described, explaining that their grading of assault offenses was "rationalized according to the gravity of harm intended or causes and the dangerousness of the mean used" and designed to provide commensurate penalties ranging from a "maximum term of only 30 days" to a "maximum of 10 years." [62]

Even with this attention on the need to grade assault offenses appropriately, when it came to establishing grades of physical harm, the MPC defined only *two*, and it is clear that the authors felt that two was enough and that, despite the existence of other model statutory regimes that contained *three*,[63] a regime that had only two grades, along with the flexibility of sentencing discretion, was "appropriate" and allowed for "very broad coverage."[64] In the MPC comments, the authors are wholly and curiously silent on whether a level of harm in between "bodily injury" and "serious bodily injury" was considered and, if so, why it was rejected.[65]

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[57] MPD § 211.1, Comment 1(c).
[58] MPD § 211.1, Comment 1(c).
[59] MPD § 211.1, Comment 1(c).
[60] *See* MPD § 211.1, Comment 1(c). For example, the authors noted that New York "created four levels of offenses: maiming (15 years); assault with a deadly weapon or a destructive or noxious thing (10 years); inflicting grievous bodily harm or assault with any weapon (five years); and simple assault or batter (one year.)." *Id.* (citing N.Y. §§240-245, 1400 (repealed 1967).
[61] MPD § 211.1, Comment 1(c).
[62] MPD § 211.1, Comment 1(c), page 184.
[63] *See* MPC § 211.1, Comment 2, page 185-86 (describing the "proposed federal criminal code . . . [which] intergrat[ed] all forms of assaultive behavior in a single provision . . . [and] define[d] separate offenses of maiming, aggravated battery, and battery.") *and* MPD § 211.1, Comment 1(c), pg. 181 (describing the then-current New York §§240-245 which defined separate levels of punishment for (1) maiming; (2) inflicting grievous bodily harm or assault; and (3) simple assault or battery).
[64] MPC § 211.1, Comment 2, page 185
[65] In addition to the authors' direct description of the MPC assault regime as "appropriate" and "very broad," the tenor of the comments indicate that the goal of the code was to promote enough flexibility to fairly address the variety of assaultive behavior. For example, the authors noted that some states had statutes distinguishing assaults on special types of victims, as Minnesota's current Assault in the Fourth Degree does. The authors then directly addressed that the MPC did not enact an assault offense related to the status of the victim, stating that "[s]pecial provision is unnecessary in view of the ample severity of penalties against murder and all serious attacks upon the person, regardless of the identity of the victim." MPC § 211.1, Comment 2, page 185. This comment suggests a degree of confidence that the MPC provided flexibility to assign an offense-name and an appropriate penalty to any assault. It's easy to cut the MPC authors a break, given their enormous feat of collecting, summarizing, and taking the best of the common law and various state statutes at the time to create the code. But it is apparent that the authors felt that, if there was any need for an "intermediate" crime, it was to fill the space between mere "simple assault" and homicide and that they did not see a need for and were not concerned with creating a crime that was

3E. Changes to Minnesota's Assault Statutes

After the enactment of the Minnesota Criminal Code, sixteen years passed without any changes to the assault-statute regime. In 1979, the Code was substantially amended to create a new four-degree regime,[66] evincing perhaps that the legislature found the need for an intermediate felony-level assault. What was formerly called "Aggravated Assault" and defined under Minn. Stat. § 609.225, subd. 1 (1963) was recast as "Assault in the First Degree" and moved to Minn. Stat. § 609.221 (1979). Its ten-year maximum penalty[67] and the definition of "great bodily harm" remained unchanged.[68]

The other type of felony-level assault, pertaining to an assault with a dangerous weapon under Minn. Stat. § 609.225, subd. 2 (1963), was recast "Assault in the Second Degree" and moved to Minn. Stat. § 609.222 (1979). Its penalty also remained the same.[69]

As for the misdemeanor-level assault found in the 1963 Code, which had simply been labeled "Assault" under Minn. Stat. § 609.22 (1963), it was recast as "Assault in the Fourth Degree" and relocated to Minn. Stat. § 609.224 (1979), but it otherwise remained the same.[70]

What was *new* in the 1979 was remarkable: the creation of a new felony offense that bridged the gulf between the former "Assault" and "Aggravated Assault," Assault in the Third Degree under Minn. Stat. § 609.223 (1979). Assault in the Third Degree was defined then as it is now, an assault that "inflicts substantial bodily harm."[71] "Substantial Bodily Harm" also was defined then as it is now."[72] As one might expect for this intermediate-level assault, the legislature set its maximum penalty at three years in prison.[73]

It is evident that the definition of "Substantial Bodily Harm," like "Great Bodily Harm," is just a sub-list of types of injuries. Spread out categorically, the Minnesota Code's definition of "Substantial Bodily Harm" is a list of *three* types of injuries:

1. Injury which involves a temporary but substantial disfigurement.
2. Injury which causes a temporary but substantial loss or impairment of the function of any bodily member or organ; and
3. Injury which causes a fracture of any bodily member.

"intermediate" to Assault and Aggravated Assault. Obviously, in 1963, the Minnesota legislature agreed with the MPC and passed its code.

[66] Minn. Stat. ch. 609 (1963), Session Laws, available at https://www.revisor.mn.gov/data/revisor/law/1979/0/1979-258.pdf.

[67] Minn. Stat. 609.221 (1979)

[68] *See* Minn. Stat. § 609.02, subd. 7 (1979).

[69] *See* Minn. Stat. 609.222 (1979)

[70] *See* Minn. Stat. 609.224 (1979)

[71] *See* Minn. Stat. 609.223 (1979).

[72] *See* Minn. Stat. 609.02, subd. 7a (1979).

[73] Minn. Stat. 609.223 (1979).

Beyond these words, however, the legislature provided no additional definitions to assist prosecutors in determining what *specific* injuries fall within these types. All further interpretation and elaboration had to be performed by prosecutors on an *ad hoc* basis and by the appellate courts on a *post hoc* basis.[74]

Part 4: Appellate elaboration on the levels of harm

When compelled by an appeal, the Minnesota appellate courts have interpreted, attempted to clarify, and attempted to delineate the three types of bodily harm. Almost exclusively, when addressing one of the types of bodily harm, the issue before the court is whether the evidence presented at a trial was sufficient to support the appellant's conviction. Some decisions have brought clarity, while other decisions tend to reveal why *statutory reform* may be a better mechanism to increase clarity than reliance on appellate courts reviewing sufficiency-of-the-evidence claims following jury verdicts.[75]

4A: Bodily Harm

The Minnesota appellate courts have not had to address "bodily harm" very often since 1963, and, when they have, they have kept their opinions simple and have not diverted from the basic philosophy of the MPC that some pain or injury must be present, as opposed to mere "offensive

[74] Since 1979, this three-tiered gradation in the assault-statute regime has remained wholly intact and unmodified by the legislature. That is not to say that the legislature has not amended the regime in a number of noteworthy ways, including recasting misdemeanor-level assault as "Assault in the Fifth Degree," Minn. Stat. § 609.224 (2012); creating what is now Assault in the Fourth Degree to protect police officers and other civil servants, Minn. Stat. § 609.2231 (2012) and Minn. Stat. § 609.221, subd. 2 (2012) (Providing a separate crime prohibiting use of deadly force against peace officers and corrections employees); creating other felony offenses under the "Assault in the Fourth Degree" title to punish assaults motivated by forms of racial and other bias, Minn. Stat. § 609.2231, subd. 4 (2012); creating the offense of Domestic Assault, Minn. Stat. § 609.2242 (2012); creating the concept of using a defendant's recidivism as a basis for enhancing misdemeanor-level assaults to gross-misdemeanor-level and felony-level offenses, Minn. Stat. § 609.2242, subd. 2, 4 (2012); and creating a second type of Assault in the Second Degree, Minn. Stat. § 609.22, subd. 2 (2012).

[75] An obvious limitation in obtaining new detail from the appellate courts is that it is not their role to *add* new detail in the first place. The canons of statutory interpretation dictate that "words and phrases are construed according to the rules of grammar and according to their common and approved usage," Minn. Stat. § 645.08 (2012), and the courts have held that, "when the language is clear and unambiguous, [they] apply the plain meaning of the statute and must not engage in any further statutory construction," *State v. Wukawitz*, 662 N.W.2d 517, 525 (Minn. 2003). It is hard for the courts to "gap-fill" statutes with this limitation.

Another limitation is that, when the courts have been asked to review the definitions of the types of bodily harm, the standard of review on a sufficiency-of-the-evidence claim does not easily allow the court to attempt to demarcate clear lines between the levels of harm. Review of these claims puts the courts in a posture which requires them to weigh all evidence in favor of the conviction and show extreme deference to the jury's verdict. *See State v. Chambers*, 589 N.W.2d 477, 477 (Minn. 1999).

Also, from a practitioner's point of view, relying on direction from appellate courts is a slow, inefficient way to learn what the legislature intends to criminalize. Metaphors abound: It's akin to learning whether the flag will fly by "running it up the flagpole." It's akin to testing the suspension of a car by driving off a cliff. And, when faced with the interpretative task of applying the reasoning in sufficiency-of-the-evidence decisions to a new set of facts, it's far too often akin to the ancient art of reading tea leaves.

contact." [76] As for specific physical pain or injury, the courts have not addressed a set of facts which resulted in distinguishing mere "offensive contact" from "bodily harm." But it is clear from cases such as *State v. Tsheu* that "only a minimal amount of physical pain or injury is necessary in order to satisfy the definition of 'bodily harm.'"[77] The courts have addressed several cases in which the claimed harm constitutes victim's mere description of pain or a bruise, which the courts have found to be sufficient evidence of bodily harm. For example, in *State v. Johnson*, the court concluded that there was sufficient evidence of bodily harm when the victim experienced pain from being struck."[78] "Physical pain or injury can be established when a victim subjectively feels pain, even if there are no actual signs of injury."[79] As for demonstrable physical injuries, even slight injuries qualify as bodily harm: In *State v. Mattson*, the court found sufficient evidence of physical injury based on evidence that the victim suffered a bruise,[80] and, in *State v. Slaughter*, scratches on a victim's neck constituted bodily harm.[81]

As for the other types of bodily harm, namely "illness" and "any impairment of physical condition," the appellate courts have been asked to interpret either category of harm in only one case, involving a defendant who drugged a victim.[82] It's clear from a review of appellate

[76] When designing MPC's assault-offense regime, the MPC authors took note that they sought to depart from prior law by "limiting assault to cases involving either the fact or prospect of physical injury." They explained that "[m]ere offensive contact was excluded" from the definition of assault. MPD § 211.1, Comment 2, page 185. Note, however, that the authors were well aware that certain types of "offense contact" should be punished, such as "indecent sexual advances," "unwanted erotic touching," "disorderly conduct," and "harassment," and did indeed develop offenses that addressed this conduct directly. *Id.*

[77] *State v. Tscheu*, 758 N.W.2d N.W.2d 849, 859 (Minn. 2008) (quoting *State v. Jarvis*, 665 N.W.2d 518, 522 (Minn. 2003).

[78] *State v. Johnson*, 277 Minn. 230, 237, 152 N.W.2d 768, 773 (1967). *See also State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1991) (holding that evidence that the victim suffered bodily harm after experiencing physical pain with sexual penetration and receiving an accompanying laceration that resulted in bleeding was sufficient to support a finding of bodily harm).

[79] *State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981).

[80] *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985); *State v. Nordstrum*, 385 N.W.2d 348, 351-52 (Minn. Ct. App. 1987) (same). *See also State v. Johnson*, 392 N.W.2d 357 (Minn. Ct. App. 1986) (holding that evidence that defendant struck victim in the face, knocking her down and causing her to sustain bruises to her harm and knee and a bloody knee was sufficient to support a conviction for assault in the fifth degree); *State v. O'Brien*, 352 N.W.2d 130 (Minn. App. 1984) (holding that evidence that appellant punched victim in the face, causing a cut, was sufficient to support a conviction for assault in the fifth degree).

[81] *State v. Slaughter*, 691 N.W.2d 70, 776 (Minn. 2005).

[82] *State v. Jarvis*, 665 N.W.2d 518, 521 (Minn. 2003). A review of appellate decisions did not reveal any cases which further defined or discussed "illness," and, prior to 2003, with the *Jarvis* decision, the courts "ha[d] not had occasion to address the type of evidence needed to support a finding of 'impairment of physical condition' as a type of bodily harm." *Id*. In *Jarvis*, there was evidence that the defendant provided pills to an unsuspecting female victim, claiming that they were "vitamins." *Id*. at 519. The pills, however, caused her side effects that were not anticipated by the victim, causing her to become "disoriented," "groggy," and unable to move her body without assistance. *Id*. at 522. Testimony from a forensic scientist revealed the presence of barbiturate drugs in the victim's system after the incident. Id. at 520. The court reviewed whether the evidence was sufficient to find that the victim suffered "bodily harm." *Id*. at 521-22. The court reviewed the Webster's definition of "impair" and held that "any impairment of physical condition in Minn. Stat. § 609.02, subd. 7, means any injury that weakens or damages an individual's physical condition." Id. at 522 (*citing Random House Webster's Unabridged Dictionary* 959 (Wendayln R. Nichols & Sheryl B. Stebbins eds., 2d ed. 2001)) (*emphasis added*). The court found that the

decisions that few appellants have sought reversal of conviction based on the lack of evidence of bodily harm, and there is very little related to this type of harm on which practitioners trifle.

4B "Substantial Bodily Harm"

Surprisingly, the appellate courts have not provided much more guidance on the definition of "substantial bodily harm." In fact, in 2003, the court of appeals conceded that "few Minnesota cases specifically define substantial bodily harm."[83] To review the decisions that do exist, it seems appropriate to look at each of the three categories of "substantial bodily harm" separately.

4B(1): Temporary but Substantial Disfigurement

The first category of injuries, those which would constitute "temporary but substantial disfigurement," has been discussed several times. In 1981, in *State v. Carlson*, the supreme court reviewed a case in which a ten-year-old victim was beaten by her father and suffered "two black eyes, facial bruises, bruises on her neck and head, and scratches on her arm."[84] With virtually no discussion and no elaboration on the concept of "temporary but substantial disfigurement," the court held that these injuries constituted "substantial bodily harm." Five years later, though, in 1986, the issue of whether an injury that involved a black eye constituted substantial bodily harm came up again, and the demarcation line became fuzzy. In *State v. Whaley*, the appellant was convicted of Assault in the Third Degree after punching the victim in the face, causing the victim to suffer a black eye, a swollen face, and a fractured left cheekbone.[85] In the prosecutor's closing argument, the prosecutor argued, "Let's look at the disfigurement, first of all. You saw the photos of the victim. This, ladies and gentlemen, is disfigurement. When you have *a black eye and your face is swollen, that is disfigurement.*"[86] Defense counsel objected to the prosecutor's argument, citing it as a misstatement of the law.[87] Without citing precedent, the court noted that, "under Minnesota law a black eye, in and of itself, does not equate to 'substantial bodily harm.'"[88] The inference prompted by the holding, of course, is that a black eye, in and of itself, is not "temporary but substantial disfigurement."[89] However, there has never been any discussion about why that or any black eye would never constitute substantial disfigurement.

The two cases compel the question: *Why* is a black eye with accompanying bruises and scratches sufficient evidence to prove substantial bodily harm when a black eye with accompanying facial

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evidence amply supported a finding that the victim's physical condition was "weakened or damaged by an involuntary ingestion of drugs." *Id*.

[83] *State v. Dunn*, 2003 WL 282454, at *3 (Minn. Ct. App. Feb. 11, 2003).

[84] *State v. Carlson*, 369 N.W.2d 326, 327 (Minn. App. 1985).

[85] *State v. Whaley*, 38 N.W.2d 919 (Minn. App. 1986). Note that the fractured cheekbone was a sufficient injury to sustain the conviction for Assault in the Third Degree. *Id.* at 927. This case is discussed here for the court's comment on the black eye.

[86] *Id.* at 926.

[87] *Id.*

[88] *Id.*

[89] The court nevertheless sustained the conviction, holding that the fractured cheek bone was a "fracture," which qualifies as substantial bodily harm. *Id.* at 927.

swelling is insufficient? The word "substantial" has been defined as "considerable size or amount,"[90] but no court has sought to demarcate why a black eye is distinguishable from other forms of disfigurement. Can one easily quantify these sorts of facial injuries? When reviewing a case involving injuries such as bruises, scratches, and swelling, practitioners essentially are left with the vague holdings of *Carlson* and *Whaley* and left to infer their penumbra and import in other cases. The situation seems unnecessarily arbitrary.[91]

Another common type of injury which is discussed under the concept of "temporary but substantial disfigurement" is a laceration which requires stitches. Unfortunately, though, the court of appeals has never addressed whether a laceration that requires stitches constitutes per se "temporary but substantial disfigurement." Moreover, in cases where the court of appeals has reviewed injuries requiring stitches, the court has chosen to not publish their opinions, offering no precedential guidance to practitioners.[92] For example, in *State v. Wines*, an unpublished case, the court recognized a "large deep cut" near the victim's right eyebrow, which was described as a 1.5-inch, L-shaped laceration that had to be sutured, as "temporary but substantial disfigurement.[93] In *State v. Smith*, an unpublished case, the court held that a "3-inch bleeding laceration on [the victim's] scalp requiring 10-15 staples, along with a concussion and accompanying amnesia at the time of the assault" established substantial bodily harm.[94] In *In re Welfare of A.B.R.*, an unpublished case, the court held that a laceration on a victim's forearm that was 2.5-inches long, was 1-1.5-centemeters deep, and required seven stitches to repair constituted temporary but substantial disfigurement.[95]

This series of unpublished cases may endow practitioners with some confidence in evaluating a laceration which requires stitches, but certainly there is no published case that holds that a laceration that is repaired with stitches or sutures constitutes substantial bodily harm. Also, these cases do not provide any sense that stitches or sutures would *be* required. Indeed, although stitches may be some sort of indicator that the laceration has "considerable size or amount," the court has never held that medical intervention or evidence is necessary.[96]

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[90] *E.g.*, *State v. Williams*; 451 N.W.2d 886, 890 (Minn. App. 1990);

[91] Anecdotally, one way that prosecutors have established that a black eye constitutes substantial bodily harm is to introduce evidence, when possible, that the injury to the eye caused temporary but substantial impairment to the victim's vision.

[92] *See* Minn. Stat. § 480A.08, subd. 3 (2012).

[93] *State v. Wimes*, 1992 WL 383419 at *1 (Minn. Ct. App. Dec. 29, 1992).

[94] *State v. Smith*, 1996 WL 380571, at * 2 (Minn. Ct. App. July 9, 1996),

[95] *In re Welfare of A.B.R.*, 2007 WL 4564151, at *10 (Minn. Ct. App. Dec. 31, 2007).

[96] *See State v. Dunn*, 2003 WL 282454, at *3 (Minn. Ct. App. Feb. 11, 2003). In *Dunn*, the court refused to overturn a jury's finding of substantial bodily harm when the only evidence of injury was a set of photographs of lacerations on the victim's face and head and evidence of bleeding at the crime scene. *Id*. Of course, Dunn remains an unpublished case with no precedential value, and the legal issue on appeal was sufficiency of the evidence, requiring the court to give high deference to the jury and review the evidence in the light most favorable to the conviction. *Id*. at 2-4. But, there it is, usable or unusable, perhaps an opinion on which no judgment, e.g. a charging decision, should rely.

4B(2): Temporary but Substantial Loss or Impairment of the Function of Any Bodily Member or Organ

The second category, "temporary but substantial loss or impairment of the function of any bodily member or organ," has been discussed infrequently by the appellate courts. Even as late as 2001, the court of appeals, in *State v. Larkin*, had not been asked to consider whether a loss of consciousness constituted "substantial bodily harm."[97] In short shrift, however, the court determined (1) rendering someone unconscious temporarily impairs "a function of the brain, that is, the ability to receive and interpret sensory impulses" and (2) because loss of consciousness is a "total" impairment of sensory brain function, it is thus "substantial."[98] Thus, the court concluded that "temporary loss of consciousness, on its own, is substantial bodily harm for the purposes of [Assault in the Third Degree.]"[99]

4B(3): Fracture of Any Bodily Member

The third category, "fracture of any bodily member," appears to be the most illuminated type of injury, by virtue of several straightforward statements in several published cases, e.g. in *State v. Stafford*,[100] when the victim's nose was broken; State *v. Wellman*, when the victim's nose was broken and two bones were broken;[101] *State v. Witucki*, when the victim suffered a broken finger;[102] *State v. Whaley*, when the victim suffered a fractured cheekbone;[103] or *State v. Waino*, when the victim's ribs were cracked.[104]

The aforementioned cases constitute essentially all of the appellate case law in Minnesota associated with interpreting the meaning of "substantial bodily harm." If a prosecutor reviews a case involving an injury not specifically discussed in the cases, such as a burn or a concussion, or an impairment not specifically discussed, such as the temporary loss of sight due to a black eye or difficulty chewing due to a sore jaw, then the prosecutor must simply teach the definition of "substantial bodily harm" to the jury and argue her cause. Many prosecutors may consider trying a case on a novel or uncharted theory to be a joyful way to spend one's workweek, but, from the perspective of a "minister of justice," on the mathematical issue of whether an injury should "*count*" as substantial bodily harm, many prosecutors simply want *more clarity* in the statute.

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[97] *State v. Larkin*, 620 N.W.2d 335, 337 (Minn. App. 2001). For the sake of nuance, it is noteworthy that the supreme court in 1983 opined without discussion, "Arguably, 'great bodily harm' is inflicted if one knocks someone out briefly . . . ." *State v. Stafford*, 340 N.W.2d 669, 670 (Minn. 1983) (citing *State v. Jones*, 266 N.W.2d 706 (Minn. 1978).

[98] *Id.*

[99] *Id.* A noteworthy omission in *Larkin* is that, although the victim also suffered a concussion, the court chose to not discuss whether a concussion on its own could be considered substantial bodily harm, a question that remains unanswered by the Minnesota appellate courts.

[100] *State v. Stafford*, 340 N.W.2d 670-71 (Minn. 1983).

[101] *State v. Wellman*, 341 N.W.2d 561 (Minn. 1983) (defendant convicted of three separate counts of Assault in the Third Degree for three assaults that occurred on separate occasions).

[102] *State v. Witucki*, 420 N.W.2d 217, 221 (Minn. Ct. App. 1988).

[103] *Whaley*, 38 N.W.2d at 927.

[104] *State v. Waino*, 611 N.W.2d 575 (Minn. Ct. App. 2000).

4C: "Great Bodily Harm"

In contrast to "bodily harm" and "substantial bodily harm," there is more appellate litigation on the various forms of "great bodily harm," although it is not clear that more case law has led to more clarity. In most cases, courts review each category of bodily harm separately, [105] and, in any given case, an injury may satisfy one category but not another. When dealing with cases involving great bodily harm, it is common to see a case in which a victim's injuries qualify under more than one of the four categories, e.g. when a permanently-disfiguring wound also causes a high-probability of death.[106] Sometimes, an appellate court will work deliberately through each category of great bodily harm;[107] other times, a court will appear to leave its holding purposely vague.[108] In many cases, it seems obvious that the court's goal is simply to decide the sufficiency-of-the-evidence issue in the case before it, not to impart any guidance to practitioners whatsoever. Yet, most practitioners still will try to rely on the case law that does exist for whatever guidance and grounding can be inferred.

4C(1): High Probability of Death

When looking at the first category of great bodily harm, "high probability of death," the appellate courts have focused on the fact that the injury itself must be life-threatening; the injury cannot simply be a "near-miss." The courts have noted that, because the distinguishing characteristic of Minnesota's assault statutes is the severity of the victim's injury, there will be times when a person who commits a "grievous assault" will escape serious assault charges simply "because the victim is fortunate enough to escape serious injury."[109] It's a constraint created "by the language of the statute."[110]

For example, in *State v. Gerald*, the court considered a half-inch laceration on the victim's ear which, according to medical testimony, was very close to a major vein and artery.[111] The state argued that, if the vein or artery had been cut, the victim could have bled to death. The appellant was convicted at trial. On appeal, however, the court reasoned that "[t]he fact that a lesser injury is located near a major organ or vessel and therefore could have been more serious is not

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[105] The supreme court has not always followed this practice. *See, e.g., State v. Peters*, 274 Minn. 309, 143 N.W.2d 832 (Minn. 1966) (holding that facial injuries suffered by a police officer in a pistol-whipping assault constituted great bodily harm without specifying in detail the officer's injuries or the category of great bodily harm the injuries satisfies); *State v. Johnson*, 322 N.W.2d 358, 359 (Minn. 1982) (holding that unspecified injuries that the victim received when the appellant beat him in the head multiple times with a two-foot-long pipe were sufficient to support the appellant's conviction of assault in the first degree).

[106] *See, e.g., State v. Felix*, 410 N.W.2d 398 (Minn. App. 1987) ("This case did not simply involve one of the factors defining 'great bodily harm;' it involved *all* of them.).

[107] *See, e.g., State v. Gerald*, 486 N.W.2d 799, 802-03 (Minn. App. 1992)

[108] *See, e.g., State v. Johnson*, 322 N.W.2d 358, 359 (Minn. 1982)

[109] *State v. Gerald*, 486 N.W.2d 799, 802-03 (Minn. App. 1992) ("Although we find it anomalous that an individual who commits a grievous assault on another may escape a first degree assault conviction because the victim is fortunate enough to escape serious injury, we are constrained by the language of the statute.").

[110] *State v. Gerald*, 486 N.W.2d 799, 803 (Minn. App. 1992)

[111] *State v. Gerald*, 486 N.W.2d 799, 801-02 (Minn. App. 1992).

sufficient to satisfy the statut[ory] definition of high probability of death."[112] Again, a "near-miss," under *Gerald*, will not constitute great bodily harm. The injury must be a "nearly-killed-him."

The court, in *State v. Anderson*, was far clearer about what they would deem to be a qualifying injury.[113] There, the victim suffered a laceration to his liver, and a physician testified at trial that the laceration was a "life-threatening" injury and testified that it was "a serious injury because if the bleeding does not stop or is not stopped, a person can bleed and die."[114]

Compared to the other categories of "great bodily harm," and thanks to the opinions in *Gerald* and *Anderson*, the concept of "high probability of death" probable is workable *as is*. With the assistance of medical expertise, it's quite possible for jurors to evaluate questions regarding "How close to death was the victim?" and "How urgent was the medical intervention?"

4C(2): Serious Permanent Disfigurement

When looking at the second category, serious permanent disfigurement, we again see a handful of published cases, and there are a few curious unpublished cases as well.

Most of the cases pertain to significant lacerations and their resulting permanent scars. In *State v. Anderson*, a case from 1985, the court held that a jury could find that a single scar running the length of the victim's upper body qualified as serious permanent disfigurement.[115] In *State v. Currie*, a 1987 case, the court held that numerous scars on the backs of child victims from being whipped with an extension cord supported the conclusion that the defendant inflicted great bodily harm.[116] So, as of 1987, a single long scar on the upper body or numerous scars on the back were deemed sufficient evidence of great bodily harm.

Moving forward to 1992, when the court was asked to review the two half-inch scars on the victim's neck and ear in *State v. Gerald*, the court held that they did not constitute "serious permanent disfigurement."[117] The court stated that the two scars were "relatively small and in areas where they are not particularly noticeable" and added "the scars are significantly less extensive and pronounced that those reviewed [in *Anderson* and *Currie*.]"[118] The case-comparison found in *Gerald* is somewhat helpful in identifying the demarcation line of "serious permanent disfigurement." As of 1992, one could accept that the scars in *Gerald* were not great bodily harm because they were smaller than those in *Anderson*, fewer than those in *Currie*, and were less noticeable, assuming that one does not take into account the victim's ability to cover scars with clothing.

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[112] *Id.* at 802.
[113] *See State v. Anderson*, 370 N.W.2d 703, 706 (Minn. App. 1985).
[114] *Id.*
[115] *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. App. 1985), *review denied* (Minn. Sept. 19, 1985).
[116] *State v. Currie*, 400 N.W.2d 361, 364, 366 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987).
[117] *State v. Gerald*, 486 N.W.2d 799, 802 (Minn. App. 1992).
[118] *Id.*

But then three years later, in *State v. McDaniel*, the court of appeals held that a scar on the victim's right center chest which was "two-thirds of an inch long" and a scar on his upper-right neck which was "six centimeters long" constituted "serious permanent disfigurement."[119] Contrasting the injuries with those in *Gerald*, the court said that the scars on the victim's body in *McDaniel* are "larger and prominently located."[120] It is unclear from the opinions why the court believed that a scar on one's chest or the "upper-right" of the neck is more "prominently" located than on one's ear or the back of one's neck. It's also unclear why the court felt that the 3/4 inch scar on the victim's chest in *McDaniel* was so profoundly larger than the two 1/2 inch scars on the victim in *Gerald.* Moreover, there is no indication in any of these cases, and no reason to believe, that the court ever had an opportunity to *see* the injuries in the other cases.

The court of appeals followed *McDaniels* three years later with an unpublished decision in *State v. Bernal*, which involved an assault with a beer bottle which caused a severe facial laceration and severed tragus of the ear, which required forty stitches to repair, and which left a prominent circular scar on the victim's face.[121] The court appeared to acknowledge the obvious, that the injuries were more severe than those present in *Gerald* but also acknowledged that the victim's injuries were not as severe as the victims in *Currie* or *Anderson*.[122] Then, with little analysis, the court stated that the injuries were "easily comparable" to the injuries in *McDaniels* and, on that basis, found sufficient evidence to support the jury verdict.[123] It is difficult, if not impossible, to take stock of *McDaniels* and *Bernal* and get a clear sense of why those injuries are so similar and why they both constitute serious permanent disfigurement. By 1998, then, the lines of demarcation in this category were getting fuzzier.

The fuzziness on this issue became even more obvious in 2003, when the court of appeals reviewed the victim's injuries in *State v. Demers* to see whether they were sufficient to sustain a first-degree assault conviction.[124] The court's opinion in *Demers* probably best reveals that there *is* no clear indication of what size or prominence a wound must be to be considered serious permanent disfigurement.

In *Demers*, the female victim was stabbed in the abdomen, leaving her with two permanent scars on her abdomen above her navel, below her rib cage.[125] "One scar is one-half to one inch in length; the other is three inches in length. [The victim] testified that because of these scars she is embarrassed to wear a two-piece bathing suit or expose her stomach."[126] The court cited *McDaniels*, *Anderson*, and *Gerald*, but there was no discussion of how the court compared the injuries to the victim in *Demers* to the injuries of the other victims. The court simply said,

[119] *State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. Ct. App. 1995)
[120] *Id.*
[121] *State v. Bernal*, 1998 WL 15905, *4 (Minn. App. Jan. 20, 1998).
[122] *Id.*
[123] *Id.* at *5.
[124] *State v. Demers*, 2003 WL 22952813, *1 (Minn. App. Dec. 16, 2003), *review denied* (Minn. Feb. 25, 2004).
[125] *Id.*
[126] *Id.*

"Depending on her attire, [the victim]'s scars are visible and fall within the range of those considered great bodily harm as discussed in case law. We therefore conclude that the district court did not clearly err in finding that [her] scars constitute great bodily harm."[127]

If there is an Exhibit #1 to prove why waiting for sufficiency-of-the-evidence appellate decisions is a poor way to clarify the assault statutes, *Demers* would be it. It strains credulity to believe that, somehow, the size and prominence of the respective injuries in *Gerald* and *Demers* should lead to amazingly different outcomes, considering the sentencing drop-off from a conviction for Assault in the First Degree to a conviction for Assault in the Third Degree.[128] The juxtaposition can cause a conscientious prosecutor to err on the side of caution and choose to *not* charge someone with Assault in the First Degree when the injury is somewhere in the *Gerald/Demers/McDaniels*-degree of injuries. One might call the prosecutor's caution "lenity" or "prudence," but, if a defendant is not being held accountable for an offense that *should* be-- or that the legislators or "the public" believe is-- a First-Degree-Assault-level harm, then the prosecutor's "caution" is another word for injustice. And it would be injustice created by the opacity of the statute.[129]

Leaving the difficulties of the laceration-and-scar cases aside, in *State v. Ali*, the court of appeals reviewed a case in which the appellate bit "nearly one inch off the tip of the victim's finger."[130] At trial, the victim's "treating physician referred to the injury as a 'partial amputation' of the

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[127] *Id.*

[128] Ironically, *Gerald* is still cited for the proposition that a scar's seriousness may depend on its size and location. *See, e.g, State v. Moua*, 2012 WL 2505744, *4 (Minn. App. July 2, 2012) (holding that the victim's facial scar was sufficient evidence of "serious permanent disfigurement" because it required a deep layer of sutures, was bite-shaped, was in a prominent location, and was noticeable when she testified).

[129] For the reader's benefit, it should be noted that the appellate courts have tried to clarify other, peripheral issues involving scars and "permanent disfigurement:" First, in *Anderson*, the appellant argued that the scar was not "permanent" because the victim could remove (and testified that she was considering removing) the scar by plastic surgery. *Anderson*, 370 N.W.2d at 706. The court curtly rejected that argument with no comment, *id*., perhaps implying that medical interventions that could cover the disfigurement should not be considered when evaluating the injury. Of course, the import of this is very unclear: For example, what about cases in which a victim's teeth are knocked out but then later re-inserted by a dentist? Is a prosecutor and juror supposed to ignore that the teeth are not gone? Or, does the dentist's replacing the teeth reduce a "permanent loss" to a mere "temporary loss," perhaps reduce the seriousness of an assault from an Assault in the First Degree to an Assault in the Third Degree?

Second, in *In re R.L.A.*, an unpublished case, the appellant successfully argued that expert medical testimony was needed to establish whether a facial laceration requiring over 200 stitches and resulting in extensive scarring constituted *permanent* disfigurement. *In re R.L.A.*, 1988 WL 56303, *1 (Minn. App. June 7, 1988). The court opined that, because the trial took place only six months since the incident, "[a]lthough easily observed, only an *expert* could knowledgeably ascertain the permanence of six-month old scars," refusing to believe that a lay person could conclude that such a scar would not go away. *Id*. (emphasis added).

Third, courts hold a defendant responsible for any permanent disfiguring injuries that result from medical intervention following an assault, e.g. surgical scars left during treatment of other injuries directly received in an assault. *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. App. 1995) (holding appellant responsible for causing the serious and permanently disfiguring surgical scar); *State v. Curry*, 2010 WL 175267 (Minn. App. May 4, 2010) (same).

[130] *State v. Ali*, 752 N.W.2d 98, 103 (Minn. App. 2008), *review denied* (May 27, 2009).

victim's finger starting just above the base of the fingernail."[131] The court concluded "the loss of the tip of a finger is "serious permanent disfigurement."[132]

4C(3): Serious Permanent or Protracted Loss or Impairment of the Function of Any Bodily Member or Organ

When looking at the third category, permanent or protracted loss or impairment of the function of any bodily member or organ, the appellate courts again have reviewed only a few notable cases. The infrequency of cases may be because half of the injuries covered in this category, "loss of . . . any bodily member or organ," are so *obvious* than no appellate attorney would dare raise a claim that the evidence would be insufficient. In other words, there likely could be little dispute than the loss of a body part such as an arm, ear, or kidney would not constitute great bodily harm. A notable baseline case did arise in 2008, however, when the court reviewed *State v. Ali*, in which the appellant bit off "nearly one inch off the tip of the victim's finger."[133] In a sign that the court will construe "bodily member" fairly broadly, even though the victim lost only the part of his finger "just above the base of the fingernail," the court held that this loss constituted permanent loss or impairment of the function of a bodily member.[134]

A more interesting type of injury discussed under this category relates to impairment of bodily functions due to nerve damage. One can look again to *State v. Gerald*, in which the state argued that the lacerations to the victim's face that caused him to experience a "tightening or sensation" when he yawned or chewed qualified as a permanent loss or impairment.[135] The court disagreed, holding that the evidence was insufficient to support such a finding.[136] In explaining its decision, the court noted that medical testimony revealed that the victim's "ability to perform bodily functions such as hear, chew, eat or breathe were not impaired by the injuries."[137] So, clearly, by 1992, it was clear that, to be a victim under this category of harm, a victim must experience more than merely a tightening in his jaw when yawning and eating.

By 2004, in the unpublished *State v. Jones* case, the court encountered more nerve damage.[138] The injuries suffered by the victim in *Jones* were similar to those found in *Gerald*, but the court found them sufficient to prove "protected and possibly permanent loss or impairment of his facial nerves" and thus great bodily harm.[139] In *Jones*, the victim was hit in the head with a

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[131] *Id.*
[132] *Id.* (holding that the injury is a "serious permanent disfigurement" or "permanent loss or impairment of the function" of a bodily member") (citing Minn. Stat. § 609.02, subd. 8).
[133] *State v. Ali*, 752 N.W.2d 98, 103 (Minn. App. 2008), *review denied* (May 27, 2009).
[134] *Id.* (holding that the injury is a "serious permanent disfigurement" or "permanent loss or impairment of the function" of a bodily member") (citing Minn. Stat. § 609.02, subd. 8). *See also State v. Stapek*, 315 N.W.2d 603 (Minn. 1982) (holding that "permanent damage to the [victim]s reproductive organs" constituted great bodily harm).
[135] *State v. Gerald*, 486 N.W.2d 799, 802 (Minn. Ct. App. 1992).
[136] *Id.*
[137] *Id.*
[138] *State v. Jones*, 2004 WL 1925052 at *3 (Minn. Ct. App. Aug. 31, 2004).
[139] *State v. Jones*, 2004 WL 1925052 at *3 (Minn. Ct. App. Aug. 31, 2004).

baseball bat.[140] Several weeks after the incident, the victim had "dysfunction of the left frontal branch of his facial nerves" and decreased sensation in his left anterior cheek.[141] Five months after the incident, when the trial took place, the victim still experienced numbness on the left side of his face, loss of sensation on his left cheek, and difficulty talking, and he could not raise his left eyebrow.[142] Medical testimony at trial indicated that the victim's injuries "could take up to two years to heal or may never heal."[143] Faced with this set of injuries, the court found that the victim's injuries satisfied the element of great bodily harm.[144]

Beyond nerve damage, the most interesting type of injury discussed under this category relates to the total loss of a tooth. Rather than treat tooth loss as a mere "fracture," the court stated in *State v. Bridgeforth* that evidence that a victim lost a tooth in an assault was sufficient to prove great bodily harm. [145] That is, rather than treat a tooth as simply a part of the skeletal system, the court surmised that, if a nose is a bodily member, as was concluded in *State v. Stafford*, then a tooth also must be a bodily member.[146] Indeed, the court then concluded in one sentence: "[T]he loss of a tooth is a permanent loss of the function of a bodily member." The *Bridgeforth* holding is interesting because it has been *the* precedent used by practitioners for years in drawing the conclusion that, if a defendant busts a victim's tooth out, he is guilty of Assault in the First Degree. Indeed, it is one of the most common injuries that can transform what appears to be a one-punch-misdemeanor-assault case to a full-blown prison-commit First-Degree-Assault felony trial.[147]

It must be noted, however, that, in 2005, in *State v. Moore*, the supreme court placed a giant asterisk on the *Bridgeforth* decision.[148] *Moore* was a case involving a first-degree-assault conviction arising from an assault in which the victim lost a tooth.[149] At trial, the district court followed *Bridgeforth* and instructed the jury that "the loss of a tooth is a permanent loss of the function of a bodily member."[150] On appeal, the supreme court overturned the conviction, citing an error in the jury instructions.[151] The supreme court stated that, by instructing the jury in that matter, it removed the question of whether the loss of a tooth is "great bodily harm" from the jury's consideration, which was reversible error.[152] The supreme court then clarified that

[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *State v. Bridgeforth*, 357 N.W.2d 393 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985).
[146] *Id.* (citing *State v. Stafford*, 340 N.W.2d 669, 671 (Minn. 1983).
[147] Anecdotally, prosecutors often do not charge assaults that cause tooth loss as First Degree Assaults because the presumptive sentence of the offense would far exceed the prosecutor's sense of what an appropriate disposition for the conduct would be.
[148] *State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

Bridgeforth only stands for the proposition that the loss of a tooth provides a *sufficient* evidence for a first-degree-assault conviction.[153] It does not mean that, as a matter of law, a loss of a tooth is great bodily harm. Leaving the fact-question/legal-question aside, the dilemma in *Moore* is another excellent example of why Minnesota should not be using sufficiency-of-the-evidence cases to clarify its assault statutes. Essentially, it leads practitioners to say, "The supreme court has decided that a loss of a tooth *is* great bodily harm, but it would be reversible error to *tell* jurors that it is. The parties will have to just argue about it and let the jurors decide that for themselves." It's an absurd conundrum, compounded by the thought of the unfortunate conversation that the prosecutor in *Moore* would have had with the victim when explaining why there would have to be a second trial.

4C(4): Other Serious Bodily Harm

When looking at the fourth category, "other serious bodily harm," the appellate courts have found that very disparate injuries (or, more accurately, *collections* of injuries) can satisfy the statute. The courts have relied on this category as a sort of "catch all" category that allows the affirmation of a conviction through a finding that "at the very least" a victim's injuries "fit within the phrase 'other serious bodily harm.'"[154] The courts emphasize that, even if an injury does not fit into the other categories of great bodily harm, for an injury to be considered "other serious bodily harm," it must be "in the same kind or class" as the other three categories of injuries stated with particularity in the statute.[155] There is little discussion on what the "same kind or case" would be because *what* the courts have ended up seeing on appeal typically has not been just a single injury to consider. Instead, the courts have been confronted with cases involving victims that suffered numerous injuries which, in themselves, would not be great bodily harm but, taken together, warrant the maximum prosecution of a First-Degree-Assault *charge* (and the presumptive prison-commit sentence that the assault deserves).

In *State v. Jones*, the court held that there was sufficient evidence of other serious bodily harm when the victim was found unconscious, was hospitalized for a week, and suffered numbness, dizziness, and headaches.[156] On its own, loss of consciousness is considered substantial bodily harm, but, when it is accompanied by all of the injuries the victim in *Jones* suffered, the court found the collection of injuries to be great bodily harm.

Similarly, in *State v. Anderson*, the court concluded that "a lacerated liver, a laceration on her head which required stitches, bruises, other head injuries which caused lapses of consciousness, and a long scar running the length of her upper body" would qualify as "other serious bodily harm." [157]

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[153] *Id.*
[154] *State v. Jones*, 266 N.W.2d 706, 710 (Minn. Ct. App. 1985).
[155] *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. Ct. App. 1985).
[156] *State v. Jones*, 266 N.W.2d 706, 710 (Minn. Ct. App. 1985).
[157] *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. Ct. App. 1985).

However, when reviewing the injuries to the victim in *Gerald*, which again were just two half-inch lacerations on the head, the court held that, even if stitches are required to repair the injuries, they would not constitute "great bodily harm."[158]

Following *Jones*, the court in *State v. Barner* reviewed an assault in which the victim the evidence revealed:

> Defendant in this case hit the victim so hard in the head that the victim's head swelled up, making it difficult for him to eat for three days; defendant inflicted multiple stab wounds, one 4 inches deep and the rest 2 inches deep, leaving multiple scars; and defendant injured the victim's hand in such a way as to affect the way the victim, an avid canoeist, paddles his canoe.[159]

Rather than proceed with a discussion of each category of great bodily harm, the court, quoting *Jones*, wrote "'[a]t the very least' . . . the injuries 'fit within the phrase 'other serious bodily harm.'"'[160]

This sort of cursory conclusion, of course, leaves a great deal on which to speculate, and curious prosecutors are left to wonder whether, on their own, injuries leading to difficulty with eating or paddling would be sufficient to proceed on a charge of First Degree Assault. However, in the least, one can see the benefit of the catch-all category when facing a case involving a complex multiple-injury assault. Rather than seeing a set or series of Fifth Degree or Third Degree Assaults, a prosecutor can charge a defendant with a single count of First Degree Assault. Perhaps, this is the singular justification for the category anyway.

Part 5: Wisconsin

Following a discussion of the Minnesota assault-statute regime, Wisconsin's regime should be familiar territory. Like Minnesota, Wisconsin's criminal code has three levels of assault which differ only in regard to three levels of injury suffered by the victim, and those levels of injury are called "bodily harm," "substantial bodily harm," and "great bodily harm."[161] Assaults causing bodily harm are misdemeanors, and assaults causing either substantial or great bodily harm are felonies.[162] Also, Minnesota and Wisconsin share identical definitions of "bodily harm" and

[158] *State v. Gerald*, 486 N.W.2d 799, 802 (Minn. Ct. App. 1992).
[159] *State v. Barner*, 510 N.W.2d 202, 202 (Minn. 1993).
[160] *Id. See also State v. Sconiers*, 1997 WL 11847, *2 (Minn. App. March 18, 1997) (citing *Barner* and noted that "courts have found 'other serious bodily harm' under the statute where a victim's injuries were extensive and severe").
[161] Wis. Stat. § 940.19 (2012). The only minor nuance is that, in cases in which a victim suffers great bodily harm, if the state can prove that the defendant *intended to cause great bodily harm*, then he will be punished more severely than if the state can prove only than he intended to cause mere bodily harm. *Compare id.* (4) *with id.* (5).
[162] *Id.*

"great bodily harm."[163] With all of this similarity, what is so special about our neighbors to the east? It's their definition of "substantial bodily harm," which gets rid of all of the tea-leaf reading and talk of "temporary but substantial" injuries.

5A: Wisconsin's "Substantial Bodily Harm"

In its definition of "substantial bodily harm," the Wisconsin legislature created a list of qualifying injuries that it wanted to be considered sufficient for a felony charge. In Wisconsin, "substantial bodily harm" means "bodily injury that causes a laceration which requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechial; a temporary loss of consciousness; sight or hearing; a concussion; or a loss or fracture of a tooth."[164]

Rather than using the "temporary but substantial" language found in Minnesota's definition of substantial bodily harm and asking prosecutors and jurors to figure out whether an injury fits under the statute, Wisconsin eliminates that interpretive step. By "cutting out the middle man," Wisconsin makes the mathematics easier and less subject to ambiguity and misinterpretation.

The benefits should be immediately obvious. Instead of fiddling with whether a particular laceration should qualify as "temporary but substantial disfigurement," the Wisconsin legislature simply lists that any laceration which requires stitches, staples, or a tissue adhesive is substantial bodily harm. In Minnesota, it is common for prosecutors to *believe* that a laceration which requires stitches is substantial bodily harm, to charge a case on that belief, and to proceed to trial with that belief. However, as the statute and case law stand, the prosecutor still must argue that such a laceration fits the words "temporary but substantial disfigurement," and a defense attorney still can argue that it is not. And any individual juror can decide on his or her own that the injury *is not substantial enough*, causing a hung jury or acquittal. There is no need for such looseness in the joints.[165] Wisconsin's statute fixes this problem.

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[163] *Compare* Wis. Stat. § 939.22 (4), (14) (2012) *with* Minn. Stat. § 609.02, subds. 7, 8 (2012). One particular case illustrates that the bar for "bodily harm" presumably as low as Minnesota's. In *State v. Higgs*, the defendant threw urine in the victim's eyes, causing a burning and stinging sensation. 601 N.W.2d 653, 660 (Wis. Ct. App. 1999). The court determined that the victim's description of the sensation she felt was "pain" and thus "bodily harm." *Id.*

[164] Wis. Stat. § 939.22 (38). It is noteworthy that the legislature specifically includes two disfiguring injuries not previously discussed in this article: burns and petechia. The addition of petechial hemorrhaging occurred only within the past decade. *See* 2007 WI Act 127, § 3 (effective April 4, 2008) (amending the statutory definition of "substantial bodily harm" in Wis. Sat. § 939.22 (38) to include a petechia).

[165] Anecdotally, in a Hennepin County District Court trial in the summer of 2012, a skilled and experienced colleague of mine tried an Assault-in-the-Third-Degree case in which the victim was whacked in the forehead with a skateboard and suffered a laceration which required several stitches to repair. In closing argument, and for the first time in the proceeding, defense counsel argued that the laceration was not "*substantial* disfigurement." In rebuttal, the prosecutor was left with little response beyond visually displaying displeasure at defense counsel's challenge to a belief that virtually all criminal-law practitioners in Minnesota ascribe. In terms of what was said to the jury, however, she was left to say only "Yes, it is!" and run through the definition of substantial bodily harm. There were no other pertinent elements of the offense at issue. After deliberation, the jury found the defendant not guilty. Obviously, despite the tea leaves left by the unpublished laceration cases cited above, there is nothing in statute or

Other benefits to Wisconsin's definition of substantial bodily harm are apparent. Instead of requiring a jury to figure out what "loss or impairment of the function of any bodily member or organ" means, the Wisconsin legislature *specifies* what the areas of concern are: loss of consciousness, sight, and hearing. Additionally, by specifically listing "concussion" as a form of substantial bodily harm, one may assume the legislature is referring to impairment of brain function, which is how concussions typically are defined and described.[166] The Wisconsin statute demystifies "substantial bodily harm" and makes the mathematics obvious and clinical, as it should be.

Another benefit is that, instead of using the term "fracture of any bodily member," the Wisconsin legislature uses several terms to clarify what it deems substantial injury: (1) fracture of a bone; (2) broken nose; (3) loss or fracture of a tooth. Bone fractures and broken noses are considered substantial bodily harm in Minnesota, but Wisconsin clears up the issue of teeth. The statute clarifies that Wisconsin refuses to distinguish between a fracture of a tooth and fracture of a bone, and it specifies that a loss of a tooth should not be considered great bodily harm. So, on the issue of tooth loss, Wisconsin diverges from Minnesota, perhaps appropriately, by treating the injury less seriously. But the statute brings clarity, and it avoids the legal-issue/fact-issue problem identified in the *Moore* decision previously discussed. Jurors in Wisconsin are not left having to play "*connect-the-dots,*" as they are in Minnesota.

5B: Wisconsin's "Great Bodily Harm"

Wisconsin has not modified its definition of "great bodily harm" to list specific injuries; it retains the same language embraced by the MPC over fifty years ago. Indeed, given the age of the statute, it should be no surprise that the hand-wringing over the concept of "great bodily harm" has taken place a few times since Wisconsin implemented its modern assault-statute regime in the 1950s.[167] Just like in Minnesota, the issue of what constitutes great bodily harm typically arises in Wisconsin on sufficiency-of-the-evidence claims, and, just like in Minnesota, the Wisconsin courts have struggled finding the demarcation line.[168] The Wisconsin court of appeals

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case law to help determine that an injury indeed should be considered substantial bodily harm or not. The jurors were left to work through what should be deemed "substantial" for themselves, which seems oddly subjective and arbitrary. Inviting a jury to evaluate credibility is one thing, and jurors do a marvelous job at it. But, why should they be asked to determine whether a laceration that requires stitches to repair should be ascribed the adjective "substantial?" Presumably, all parties, including the defendant, the court, defense counsel, the jury, and the prosecutor, would have preferred to see the issue resolved earlier in the process, most obviously via clearer, additional legislative guidance.

[166] *See State v. McKague*, 159 Wash. App. 489, 501-505, 246 P.3d 558, 563-566 (Wash. Div. 2. 2011) (discussing concussions and holding that a concussion on its own, absent loss of consciousness, rose to the level of substantial bodily harm under Washington law).

[167] *See State v. Bronston*, 7 Wis.2d 627, 631-32, 97 N.W.2d 504, 507 (Wis. 1959), *rehearing denied* (Wis. Oct. 6, 1959) (discussing changes in the aggravated battery statute, Wis. Stat. § 849.22).

[168] *See, e.g., State v. Bronston*, 7 Wis.2d 627, 629-30, 97 N.W.2d 504, 506-07 (Wis. 1959), *rehearing denied* (Wis. Oct. 6, 1959). Here, the court was asked to review the sufficiency of the evidence supporting an aggravated-battery (equivalent to First Degree Assault) conviction involving a victim who was struck on the head by the defendant with a wrench, causing a two-inch scalp laceration, causing her to be hospitalized for a few hours, and causing her

explicitly conceded that point in 1999, when it stated "it is not easy as a matter of law to draw the line of demarcation between 'great bodily harm' and other levels of bodily harm."[169] The court acknowledged that, given the current statutory definition of "great bodily harm," the issue of whether an injury constitutes great bodily harm must "fall into *the twilight zone*" of jury fact-finding and deliberation.[170] In other words, the court acknowledged that, as part of the judicial branch, it can only interpret the words of the statute; it cannot complete the purportedly mysterious fact-finding chore with which lay jurors are tasked.[171]

There is little value in running through more case law from Wisconsin to illustrate that its appellate courts have struggled with placing certain injuries on either side of the "great bodily harm" dividing line. They appear to have had the same problems with interpretation and inconsistency that Minnesota has had and should now try to avoid.

Fortunately, the examination of Wisconsin's assault-statute regime points to a proposal on how to improve the situation in Minnesota.

Part 6: Proposal

The discussion in Part 4 of this article supports the notion that, in Minnesota, there is a lack of clarity in the definitions of substantial bodily harm and great bodily harm. Given the lack of clarity, there is too great of a potential for confusion, arbitrary interpretation, unequal treatment of similarly-situated defendants, and for injustice. The discussion in Part 5 of the Wisconsin statutory regime points to a way to reduce the potential for confusion.

This article presents a simple proposal: In short, the Minnesota legislature should adopt either the explicit language used in Wisconsin's definition of "substantial bodily harm" or at least follow its approach in identifying the specific injuries that should be covered under the term. Doing so would clear up many of the confusions discussed in Part 4, and it would allow prosecutors to make easier and more consistent charging decisions. Certainly, this change is not intended to benefit just *prosecutors*. Doing so may save a *defendant* from even being charged with a felony offense. It also would save jurors from having to make the difficult evaluations of injuries in their deliberation rooms, which indeed should be less mysterious places than *The Twilight Zone.* Thus, there are multiple reasons why modifying the statute would be just and serve multiple beneficiaries.

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headaches and pain in the jaw for some time after the assault. Reviewing the testimony, the court observed that the victim testified that she no longer had pain. The court acknowledged that its state's new statute "is not concerned with the potentialities of the offender's act but only with its end result." It swiftly noted that, because the victim no longer felt pain, she did not suffer "permanent or protected loss or impairment of the function of any bodily member or organ." Thus, the victim did not suffer great bodily harm.

[169] *State v. Rodriguez*, 323 Wis.2d 821, 781 N.W.2d 550, 2010 WL 94032, *3 (Wis. App. Jan 12, 2010) (unpublished).

[170] *Id.* (quoting *State v. Flores*, 76 Wis.2d 50, 59, 250 N.W.2d 720, 724 (Wis. 1977)) (emphasis added).

[171] *See id.* at *2-*4.

The Minnesota legislature also should follow this approach in adopting a new definition of "great bodily harm." It is evident that this has not been done in Wisconsin to date, but the Minnesota legislature should not conclude that it would be impossible to craft a definition of great bodily harm that provided more clarity to practitioners. Indeed, even if the legislature broke down the definition in the form of a simpler list, the potential for confusion could be minimized. The list could begin with fairly non-controversial types of bodily injuries, including injuries which:

1. Create a high probability of death
2. Cause the permanent loss of any bodily member or organ.
3. Cause the permanent or protracted loss of the *function* of any bodily member of organ.

These are three categories which are fairly straightforward and which, according to the review of appellate decisions above, appear to have involved far fewer confusions and controversies.

The legislature would then need to determine how to clarify the concept of "serious permanent disfigurement." This article proposes the following language:

4. Prominent scarring or other permanent disfigurement of the skin.

The new term used in the proposed language, of course, is "prominent," which was selected because the Minnesota appellate courts have used the concept in this context in the past. The word "prominence" has a number of definitions, but it typically refers to items which stand out, which are easily seen, which are conspicuous, which are particularly noticeable, etc.[172] Looking at the cases cited in Part 3, it is clear that what the legislature is concerned about is disfigurement which tends to (1) cause victims to change their behavior to avoid exposure to others and/or (2) make victims feel considerable embarrassment or shame when their disfigurement is visible to others. The concept of "prominence" addresses both of these concerns. This language could assist prosecutors, jurors, and appellate courts in determining what types of scars should be counted as "great bodily harm." While this category still does not involve a cut-and-dry, explicit description of specific qualifying injuries, it is a more *workable* definition to apply to disparate factual scenarios involving scars.

Lastly, the Minnesota legislature should find a way to modify the catch-all category of "other serious bodily harm." This article proposes the following replacement:

5. Two separate and distinct injuries, each of which constitutes substantial bodily harm, arising from the same course of conduct.

[172] *See* Dictionary.com, "prominent," in *Dictionary.com Unabridged*. Source location: Random House, Inc. http://dictionary.reference.com/browse/prominent. Available: http://dictionary.reference.com. Accessed: December 14, 2012.

As the reader may recall, the review of the case law suggests that the category of "other serious bodily harm" is treated mainly as a repository for complex multi-injury assaults. There does not appear to be any specific case in which an individual injury was not covered by the other categories of great bodily harm but was deemed to fit exclusively in the category of "other serious bodily harm." In the cases which discussed "other serious bodily harm," there were victims who had received multiple injuries, more than one of which individually constitutes substantial bodily harm, and it seemed apparent that the *amount* of harm caused by the defendants in those cases justified charging and convicting them of an offense more serious than Assault in the Third Degree. The language chosen above would address that type of case.

The language chosen, while broad enough to cover complex assaults, is intended to provide two limitations. First, the two injuries must be significantly different. For example, it would not allow a prosecutor to charge First Degree Assault for an assault involving two fractured ribs received in the same assault. In such a case, two fractured ribs would not be distinct. Second, the two injuries would have to derive from one *assaultive incident*. For example, this category of harm would not allow a prosecutor to charge First Degree Assault if, on one day, the defendant fractured the victim's rib and, the next day, broke his nose. Such a situation would constitute two separate assaults. Also, it would not allow a prosecutor to charge First Degree Assault if a defendant punched a victim *once* in the face, knocking him unconscious and causing a laceration which required stitches to repair. Those two injuries, although distinct, are not separate from each other; they were caused by a single voluntary act.[173]

Taking account of these five proposed categories of great bodily harm, it appears that almost all of the injuries that currently are considered great bodily harm would remain covered. However, the new language would be clearer, more helpful, and more objective. Surely, there would be issues to resolve if this statutory regime would be adopted. However, the article's intent is not to present a complete piece of legislation or a complete defense of the proposal that has been sketched; it is to identify a problem and to point toward a potential solution.

Part 7: Conclusion

The task of making a charging decision in a felony assault case is not one that any ethical prosecutor takes lightly. One would hope that the charging decisions that prosecutors make would be easy and mathematical, but charging decisions rarely are, as not every aspect of a case is reducible to presenting an accurate map or solving a mathematical equation. Nevertheless, this article has looked at Minnesota's assault-statute regime and pointed to a problem which makes charging decisions potentially more subjective and arbitrary than they should or need to be. Specifically, the article has discussed the concepts of substantial bodily harm and great bodily harm, which are the defining, distinguishing concepts in Minnesota's felony assault statutes. There is little justification for why these concepts are as unclear as they are. This article presents

[173] Alternatively, if a suspect knocked a victim unconscious and *then* kicked the victim in the ribs, causing a fracture, the prosecutor would have the discretion to consider charging Assault in the First Degree.

the hope that, with a modest amount of legislative change, the charging of felony assaults can become a little bit more mathematical.

Ideally, evaluating whether an injury in a new case is tantamount to substantial bodily harm or great bodily harm would require only some sort of "box-checking." Instead, as this article reveals, the current definitions of these terms complicate and often prevent simple categorization of an injury. This article has presented reasons and examples intended to compel the reader to believe that the Minnesota legislature should improve and clarify the definitions of substantial bodily harm and great bodily harm.

The article has proposed modifying Minnesota's definition of substantial bodily harm by adopting Wisconsin's definition because Wisconsin clearly specifies a list of injuries. Adopting Wisconsin's definition would be helpful to all practitioners, jurors, and defendants, and it would make the criminal-justice system more just. This change also would continue to build on the element-analysis philosophy and goals of the MPC.

The article has proposed modifying Minnesota's definition of great bodily harm by trying to make a clearer and more explicit list of the types of injuries which should be included. The exact proposal in the article does not present a radical change to the current regime, except that it attempts to provide a clearer definition of the type of permanent disfigurement that should be considered great bodily harm. It also dispenses with the category of "other serious bodily harm" by creating a category that can be used when victims receive multiple substantial injuries in the same assaultive incident.

These statutory modifications should improve the ease and consistency in the charging of felony assault cases, and they have the potential for increasing justice and fairness for defendants and for the public. These changes are ones which hopefully all conscientious practitioners, legislators, and citizens would support.