Privatizing Violence: A Transformation in the Jurisprudence of Assault

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Assault is a commonplace crime with uncommon potential for shedding light on the American criminal justice system. It lives on the periphery of American legal historiography, and yet, because of the ubiquity of small-scale violence, it has for centuries been a perennial and pesky nuisance threatening to overwhelm courts everywhere. Perched between private and public, criminal and civil, and bound to questions of governance and the rule of law, assault can no longer be ignored. Because of its nature as both a civil action and criminal offense, assault presents an opportunity to capture the evolving meanings of "public" and "private." To what extent an assault was "criminal" hinged upon whether the "public" had an interest in the case, a criterion both amorphous and politically charged.[1] At the time of William Blackstone's writing in eighteenth-century

1. Bruce Smith in his review of English criminal justice historiography writes that "the relationship between criminal and civil remedies for offenses such as assault or trespass

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England, assault was criminal insofar as it constituted a breach of the public peace, an insult to the king, and a threat, by its "evil example," to the public at large. By the 1850s, much had changed. Two major figures in American criminal justice law, Joel Bishop and Francis Wharton, declared that assault's status as a crime no longer depended upon some ineffable public harm. Rather, it was the individual injury to a member of the public that constituted its chief criminal component. But this individuated logic also meant that, barring sufficiently severe or shocking injury, newly empowered members of the public could be entrusted to sort out matters on their own. This article contends that a changing view of criminal justice—an underlying "public" transformed from a paternalistically governed, impressionable populace to a group of independent persons—gave violence a much wider legal legitimacy.

The words "public" and "private" are loaded ones, especially so under the law. Private and public delineate the civil and criminal laws, respectively. However, beyond these formal categories, the more tangible, social meanings of private and public—the home and the street, for example—also have great relevance.[2] With respect to assault prosecution—the "privatization" of violence occurred in the overlapping domains of formal and informal public and private—first, assaults were pushed away from criminal law (either toward the civil arena or away from the law altogether) and second, assaults in public or against public officials mattered less as the injury to private individuals came to matter more. These concurrent developments meant that assaults were decreasingly a target of state scrutiny and more often left in the hands of citizens themselves, barring a truly severe abuse of violent power. The individual rather than the state—the private as opposed to the public entity—played the pivotal role in violence's relationship with the law.

In the decades following the American Revolution, jurists heralded this new privatized violence by embracing a more individual-centered concept of "public," one in which the state no longer stood opposite the individual in an adversarial relationship but was comprised of free men.[3] Whereas

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remains underexplored." This relationship serves as the fulcrum of this study of "public" and assault's evolving criminal nature. Bruce P. Smith, "Review Essay: English Criminal Justice Administration, 1650–1850: A Historiographic Essay," *Law and History Review* 25 (2007): 593–635.

2. Further complicating this is the fact that assaults *in public* or *in private*—a more topographical distinction—could be handled differently. Subsequently, an important case addresses this difference, but ultimately, the article's argument rests not on the private/public location of assaults.

3. The work of Laura Edwards is central in this project. Edwards, in her essay, "People's Sovereignty and the Law," examines criminal prosecutions of assault, among other

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English and colonial legal thinkers understood the "public" in terms of a paternal relationship between the subjects and the king, American jurists came to define the public as a self-governing group of rights-bearing individuals, who could, for the most part, be entrusted with violence. The new democratic regime obviated the older, oppositional public. A conservative group, legal scholars were slow to respond to this change. Based on their interpretations of courtroom results, American treatise writers eventually adopted what they saw as a new, individuated idea of "public," one based on a democratic idea of the public as a group of citizens.

The story of the privatization of violence is a Gordian knot of tangled social, political and cultural threads, not the foregone conclusion of an easily traceable or deliberate policy. It is not the story of conspirators working to consolidate their power over the benighted masses. Although anchored by cultural attitudes toward violence, the privatization of violence was just as much rooted in legal changes that had little or nothing to do with a tolerance of violence. A key principle contributing to violence's privatization, a broadened right to self-defense, came, paradoxically, from a desire to empower or deputize Americans to combat violence.

Many historians have tried to explain how a culture of violence emerged in America, most notably Richard Slotkin.[4] But only in the 1850s, long after this ethos had been established and embraced, did the law begin to

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developments, to show how "racial, gender and class differences [in the antebellum South] were not as fixed or polarized as historians now assume." She identified an important change in common law: "the public" had replaced the king, who after the Revolution was no longer relevant. Private injuries to individuals took upon greater importance because citizens became joint members of a governing public and their individual bodies comprised the body of the King at the center of English-style law. According to Edwards, private injuries to franchised men became inherently public ones, whereas injuries to dependents—blacks, women and children—would have to meet a higher threshold in order to be treated as criminal. See her recent work, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Raleigh, NC: UNC Press, 2009) for an in depth exploration of localities and the larger concept of the "peace" that permeated Carolina courts in the Early Republic, one that promoted and preserved white, patriarchal power. Stephanie Cole, Alison M. Parker, and Laura F. Edwards, *Beyond Black & White: Race, Ethnicity, and Gender in the U.S. South and Southwest.* (College Station, TX: Texas A&M University Press for the University of Texas at Arlington, 2004). Ruth Bloch, building on Edwards' work, traces the impact this distinction had on the legal treatment of wife beating. Bloch outlines how the increased significance of private injuries made assault more exclusively a criminal matter, leaving victims of domestic violence, whose injuries were not inherently public, in the lurch. Ruth H. Bloch, "The American Revolution, Wife Beating, and the Emergent Value of Privacy." *Early American Studies: An Interdisciplinary Journal* 5 (2007): 223–51.

4. Richard Slotkin. *Regeneration Through Violence: The Mythology of the American Frontier, 1600–1860.* (Tulsa: University of Oklahoma Press, 2000, reprint).

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haltingly acknowledge the legitimacy of what had heretofore been illegitimate violence. A tradition of self-reliant violence was instrumental to this change. Yet there were many other contributing factors: courtrooms had become overcrowded as a result of expanding populations and longer trials; the law was becoming a more rigorous enterprise giving rise to a professional class of lawyers; there was stricter delineation between civil and criminal actions; judges and juries faced a higher percentage of private property cases than ever before. Finally, the legal elite turned away from a more paternalistic, British model of criminal justice.[5] Bishop and Wharton illuminated America's new path.

The study of assault unveils a power vacuum created by the expansion and modernization of the criminal justice apparatus, which was no longer equipped or inclined to handle minor conflagrations of plebian violence. What was once public became private, as a state monopoly on violence gave way to a private army of thousands of white male "deputies" empowered to defend their realms. Leading this paradigm shift were the larger ideological fallout of the Revolution, the reality of crowded courts and limited resources, and the tenacity and trebled power of common attitudes toward violence.

Blackstone's Paternal Public

A paragon of Enlightenment confidence, William Blackstone boldly attempted to bring order to the labyrinthine common law of England. In his work, the common law was divided into rights and wrongs, public and private. Although courts had customarily recognized a blend of civil/criminal and public/private functions, this bifurcated organization of the law prevailed over the course of the eighteenth and nineteenth centuries. Increasingly specific courts handled either private actions between individuals or criminal ones in which the only aggrieved party was the state: one arbitrated personal redress, the other social order.

To Blackstone, assaults were intrinsically private matters under English common law. However, he thought that the state should prosecute assault more actively as a public injury, not because the individuals and their injuries themselves were of particular import, but because the state ought to

5. On professionalization of prosecution see Allen Steinberg, *The Transformation of Criminal Justice, Philadelphia, 1800–1880, Studies in Legal History* (Chapel Hill: University of North Carolina Press, 1989); on professionalization of defense attorneys, see Michael Jonathan Millender. "The Transformation of the American Criminal Trial, 1790–1875" (PhD diss., Princeton University, 1996).

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have a near-monopoly over violence and deter it when possible. Assault and battery, under this concept of "public," was worthy of prosecution as a breach of public peace, because prosecuting violence discouraged disorder.

A conduit between the English and American legal systems because of its widespread adoption in the new United States, *Blackstone's Commentaries* of 1765–1769 on English common law separated the discussion of assault into two sections: assault as a private and as a public wrong.[6] This private/public division hinged upon the difference between absolute and relative rights: one individual, one social.[7] Blackstone, in defining the realm of the criminal law, paid special attention to the concept of crime as "vice." In his introduction to his volume on public wrongs, he wrote that the criminal law existed to protect society from "the infirmities of the best among us, the vice and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth."[8] To Blackstone, criminal justice was a matter of larger social control, much more than a means of responding to individual concerns. A crime needed to be "considered . . . in its social aggregate capacity."[9]

Blackstone's conception of rights was predicated on a delicate balance between individual and social rights. This became particularly plain in his discussion of privacy. Although he felt it was elemental to natural law, he made clear that an absolute right to privacy demanded restraint. In short, absolute rights were anything but:

> Let a man therefore be ever so abandoned in his principles or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem to principally affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society, and therefore it is the business of laws to correct them.[10]

This passage at first seems irrelevant to physical violence, hardly a victimless offense. But it elucidates Blackstone's sense of how public and private segments of the law should operate. Namely, the public infraction stems

6. William Blackstone, *Blackstone's Commentaries on the Laws of England* (Yale Law School Avalon Project, 1765–1769): http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm.

7. Blackstone, *Commentaries*, Book III, ch. 8, 119.

8. Ibid., Book IV, ch.1, 2.

9. Ibid., Book IV, ch.1, 5.

10. Ibid., Book I, ch.1, 120.

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not from the sin itself but from its potential as a contagion. Society's interconnectedness precludes absolute privacy and makes even mundane misconduct a potential menace.

Assault, more perhaps than any other issue, brought to the forefront this large and somewhat tenuous overlap in the public/private separation of the law. In the civil action, the individual sought and recovered for a harm to his body, whereas in the criminal, it was the king who exacted justice, and it was the public order that necessitated his defense. Of the two spheres of civil law, contracts and torts, assault stood in the latter as an injury resulting from force or violence.[11] Blackstone's description of torts acknowledged that these violent infractions "savour something of the criminal kind, being always attended with some violation of the peace, for which in strictness of the law a fine ought to be paid to the king."[12] Here, Blackstone captured the essence of assault and battery in English common law: although the individual deserved an opportunity to recover damages as a victim, the state too had an interest in maintaining order. Blackstone argued that the fine against the perpetrator should come in addition to a reward paid to the individual wronged, and noted that such a combination of penalty and remedy was "frequent."[13] Before the era of more explicitly differentiated venues for civil and criminal justice, this was the way to satisfy both ends of the justice system.

A formless public surfaced in Blackstone's explication of how an impermanent injury to an ordinary individual constituted a public harm by undermining order. Unlike mayhem, assault and battery did not necessarily incapacitate a potential soldier in the king's army. Blackstone wrote, "Inferior offences or misdemeanors . . . assaults, batteries, wounding, false imprisonment, and kidnapping . . . taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also punishable with fine and imprisonment."[14] Even when Blackstone discussed the damage done to individuals by assault, he used the plural, "subjects," to imply that the offense was more threatening as an assault on the fabric of society than upon the body of any one person. Therefore, he disapproved of assault's typical handling in the courts, believing it should not merely be a private matter, dispatched with an informal plea bargain or a

11. Ibid., Book III, ch. 8, 116.
12. Ibid., Book III, ch. 8, 118.
13. Ibid., Book III, ch. 8, 121.
14. Ibid., Book IV, ch. 15, 217. The concept of "Affront to his government" suggests they understood the biggest danger in not prosecuting assault: loss of faith in the state, a factor that Randolph Roth argues is the most essential factor in explaining changes in homicide rates. Randolph Roth, *American Homicide* (Cambridge, MA: Harvard Press, 2009).

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nominal fine upon proof of personal redress.[15] He wrote, "prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice."[16] Blackstone would have been a firm "nay" vote against a New York act in 1798, which authorized and encouraged this means of handling assault.[17] For the English jurist, the importance of a well-ordered public necessitated the handling of violence as more than simply a private injury. This was especially true of assaults in plain view, potentially corrupting a vulnerable community. Returning to his concept of contagious corruption, Blackstone wrote, "for, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example."[18] Blackstone's conception of the public was based in the preservation of social order; the kingly state should have a monopoly over violence, a level of control unattainable in a society that treated assaults as private matters. The king and his proxies had to intervene not to protect the rights of assault victims per se but to make a symbolic statement asserting their control over violence.

Blackstone's sense that violence did not belong in civilized society surfaced in his discussion of self-defense as an almost atavistic right belonging to the realm of natural law: "For the law, in this case, respects the passions of the human mind. . . Self-defense, therefore, as it is justly called, [is] the primary law of nature."[19] Resignation, however, colored his discussion of justifiable violence and apprehension over the abuse of this natural

15. Based on the studies of Peter King, one could conclude that Blackstone's call to action yielded results (or at least that his wish was granted). A transformation in assault prosecution in England led to more frequent and severe punishment, including incarceration. Peter King, "Punishing Assault: The Transformation of Attitudes in the English Courts," *Journal of Interdisciplinary History* 27 (1996): 43–74. Peter King's latest work on English criminal justice demonstrates how in many ways local courts stood at the vanguard of legal change. It is, perhaps, an explanation for Blackstone's obsolescence on this point—only with the aid of hindsight and statistics was King able to trace these changes in assault prosecution. King suggests that in English justice, the local courts (if gradually) steered change and then developments radiated inward toward power. We find a similar story with assault and the meaning of "public" in the United States, and often find American treatise writers, like Blackstone, struggling to keep apace. Also see King, *Remaking Justice from the Margins* (Cambridge: Cambridge University Press, 2006). The historiography of the British Law has delved much more deeply into assault prosecution. In addition to King, see: Jennine Hurl–Eamon. *Gender and Petty Violence in London, 1680–1720, History of Crime and Criminal Justice* (Columbus: Ohio State University Press, 2005); and Greg T. Smith. "The State and the Culture of Violence in London, 1760–1840" (PhD diss., University of Toronto, National Library of Canada, 2000).

16. Blackstone, *Commentaries*, Book IV, ch. 27, 357.

17. Laws of the State of New York, Twelfth Session (Albany, 1798), 277.

18. Blackstone, *Commentaries*, Book IV, ch. 27, 357.

19. Ibid., Book III, ch. 1, 3–4.

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right lingered: "care must be taken that the resistance does not exceed the bounds of mere defense and prevention; for then the defender would himself become an aggressor."[20] Blackstone conceded that self-defense was a legal necessity, but sought to convey that the law insisted upon as much restraint as possible. Here, the most central tenet was the duty to retreat, and Blackstone was both sensitive to and dismissive of the sentiment that to flee from violence was dishonorable or cowardly:

> [A man using violence] in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects, the law countenances no such point of honor: because the king and his courts are the "vindices injuriarum", and will give to the party wronged all the satisfaction he deserves.[21]

Blackstone, in painting violent self-defense as a final resort, affirmed the public harm intrinsic to violence and the need for matters to be settled in a court; but he nevertheless conceded that, "the future process of law is by no means an adequate remedy for injuries accompanied with force."[22] What Blackstone meant here, was that people should not just let themselves or a dependent stand and take a beating with the expectation that they could pursue justice in court later. The subtext here is revelatory: that there is something inscrutable about physical force that makes courts an unsatisfying venue for the sorting out of violence. Whatever a court can do for victims of violence, by awarding them money in damages or punishing their assailants, cannot quite serve as a true counterpoint to the assault itself. It is this attack on human dignity, this momentary amnesia about the rules of civil conduct, that makes violence so unsavory to Blackstone. It both compels him to justify self-defense as a necessity and to push his agenda of a state that treats most if not all assaults as public matters.

Criminalizing assault was elemental to Blackstone's vision of a paternalistic public, a conceit with special emphasis on violence actually witnessed by the impressionable denizens of England. As a private harm, assault was to be mediated between victim and assailant. But viewed as a vice, it transformed into a breach of public peace, and to protect society authorities had to set an example to stanch further violence and the disorder it represented and encouraged.

20. Ibid., Book III, ch.1, 3–4.
21. Ibid., Book IV, ch. 14, 185.
22. Ibid., Book III, ch. 1, 3–4.

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American Law and the Anxiety of Blackstone's Influence

Virtuous yeomen farmers, the walking clichés celebrated in the mythology of American republicanism, mistrusted and even detested lawyers, according to the rhetoric of republican politicians. American law was too opaque and undemocratic; lawyers profited by monopolizing the knowledge and wherewithal to navigate the impenetrable system. More damningly, it was too English, when Americans wanted to establish their own national identity. The arcane scheme of pleas and writs central to the administration of English common law rendered justice inscrutable to laypeople and smelled of the aristocracy they thought they had toppled in the Revolutionary War. Republicans wanted to prevent lawyers from wielding too much power, fearing that the patrician members of the bar could become too formidable an antidemocratic force.

In an age when the justice system's most proximate and omnipresent representative was the justice of the peace, however, the republican rhetoric was perhaps overblown. Nevertheless, eager politicians parlayed this rhetoric into piles of legislation designed to prevent lawyers from exploiting their stranglehold over knowledge about the law's workings. Even so, the bar and the common law survived the populist clamor of the early republican era.[23]

Perhaps recognizing the precarious nature of their profession and its longstanding practices, the torchbearers of legal tradition understood the symbolic importance of Americanizing the English common law through new treatises, digests, and manuals. Under a sort of anxiety of influence, American jurists read William Blackstone's work on the principles of English common law as a legal Bible, while trying to find some distance between their new republic and the monarchy they had rejected.[24]

23. An excellent summary of this sentiment can be found in Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln*, (New York: Norton, 2005). It is known, however, that lawyers not only survived this era, but managed to expand their practices. The more sustained use of criminal defense counsel is a particularly noteworthy sign of the transformation of the law practice. Millender, "The Transformation of the American Trial."

24. Harold Bloom, *The Anxiety of Influence: A Theory of Poetry*, 2nd ed. (New York: Oxford University Press, 1997). It might be helpful to continue the metaphor and think of Blackstone as "Old Testament." The American Revolution brought about a new era and therefore needed its own gospel, but was nevertheless rooted in a tradition that could not be discarded. Tellingly, Thomas Jefferson thought that Blackstone's ambitious rendition of the common law was overly prim, and preferred the more straightforward, if less neat, treatises of Edward Coke. There was, indeed, a tug of war over the common law between Federalists and Republicans, with Federalists tending more toward the Blackstone camp. One cannot help but wonder if his paternalistic sense of "public" was part of a larger aristocratic air that offended Republicans. Markus Dubber, "'An Extraordinarily Beautiful

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Building off the English model of Blackstone's *Commentaries* and Burn's *Justice of the Peace*, their efforts ranged from republishing English works with United States-specific footnotes and amendments to drafting more original and ambitious treatments of American justice.[25] And almost invariably, they began their works assessing the need for a specifically American jurisprudence, engaging in a form of legal patricide. It is true that none of these jurists ever said outright: "in our effort to become more American and less British, we will do the most American thing we can think of and embrace the right to violent self-defense and 'justified' assaults."

In selling America, these scholars would find a responsive audience, as Americans took great pride in their American-ness. Treatise writers such as Wharton and Bishop ended up providing the legal support for something many Americans took special pride in: never shying away from a fight. There existed then among officials and ordinary people a kind of anti-litigious attitude, a disdain for turning to the legal system to handle one's private disputes. Allen Steinberg has shown that in the eyes of elite officials, many of the cases brought to courts by the poor were frivolous,[26] a sentiment echoed in reports by officials such as Charles Christian, a prominent reformer of New York policing who

Document': Jefferson's "Bill for Proportioning Crimes and Punishments" and the Challenge of Republican Punishment," in *Modern Histories of Crime and Punishment*, ed. Markus Dubber and Lindsay Farmer (Palo Alto, CA: Stanford Univrsity Press, 2007), 115–55.

25. The first American edition of Blackstone included several footnotes that aimed to highlight differences between English and American legal practices. St. George Tucker and William Blackstone, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia: With an Appendix to Each Volume, Containing Short Tracts Upon Such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia as a Member of the Federal Union* (Union, N.J.: Lawbook Exchange, 1996). Meanwhile, much more ambitious than Tucker's work, the earliest fully original treatise of American law, *A General Abridgment and Digest of American Law* (1823) by federalist lawyer Nathan Dane, claimed that "no law work in the English language has ever required so much labour, research, and revision; especially in deciding what law, in a monarchy once feudal, is in force in a free republic." And yet despite this promise, Dane deviated only slightly from Blackstone on the subjects of assault law and self-defense from Blackstone. Nathan Dane, *A General Abridgment and Digest of American Law, with Occasional Notes and Comments*, vol. 1 (Boston: Cummings, Hilliard & Co., 1823). For more on Dane, see Andrew Jay Johnson. *The Life and Constitutional Thought of Nathan Dane*, (PhD diss., University of Indiana, 1964; New York: *Garland Series of Outstanding Dissertations*, 1987).

26. Steinberg, *Transformation of Criminal Justice.*

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found assault prosecutions to be petty and abusive of the courts.[27] But even among ordinary Americans, there seemed to have been a broader sentiment that courts were not an honorable venue for handling interpersonal conflict, even ones that turned violent. President Andrew Jackson, himself proud of his common origins, was instructed by his mother never to take the ignominious and unmanly recourse of suing in court over assault.[28] I have found several examples from newspaper articles adopting a mocking tone toward assault cases deemed trivial: one 1820 article noted a $850 verdict in an assault between two men and compared it to the purse won by prominent prizefighters: "We call this costly sparring in these hard times; Belcher, Mendoza, Crib and Molyneaux never made as much at one of their real matches."[29] Another short piece in the same newspaper a few years earlier wisecracked about a husband and wife charging each other with assault. "On investigation it appeared the husband had pushed the door against the wife and the wife in turn pushed the door against her husband. A gentleman of the bar remarked that he could see no impropriety in a man and his wife a-dore-ing each other."[30] Court blotters too found assault cases to be uninteresting and unworthy of attention. One court log lackadaisically reported, "At this term, there were twenty-six persons convicted of assault and battery; but as there was nothing very aggravating in the case of any of them, it is deemed inexpedient to report their names."[31]

Critics wrote to newspapers to decry this laissez-faire, patriarchal attitude toward violence. But they were merely a vocal and often eloquent minority. One Philadelphia editorial reprinted in New York opined:

> It is no less true than strange that the violations of the law and disturbances of the peace, from [assault and battery] were never so frequent as at present and these breaches of decorum are not confined to the low and illiterate but they have reached a higher pitch. Men of wealth, of reputable connections, and respectable characters have of late been engaged in this summary, illegal and disgraceful mode of terminating their private disputes and difference or giving effect and operation to their rage, their passion, or to their prejudices. . .Nothing on earth is more disgraceful than a blow. . . When the community once regard [this] in an odious light, [the] punishment will be

27. Charles Christian, "To the Editors of the Respective Public Papers in This City," *Commercial Advertiser*, August 15, 1812, 2. Charles Christian, *New York Herald*, January 26, 1811, 3.

28. James Parton, *Life of Andrew Jackson* (New York: Mason Brothers, 1861).

29. "Mayor's Court," *Commercial Advertiser*, March 3, 1820, 12.

30. "Curious Assault and Battery," *Commercial Advertiser*, December 28, 1814, 3.

31. "Reported for the Commercial Advertiser," *New York Spectator*, September 21, 1821, 1.

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> heavy and correct his temper. In the meantime, examples will be made of those who set the law at defiance.[32]

The editorialist's call to action was not indicative of the majority; the author attacks the prevailing sentiment about ignored or accepted violence. In another notable example of this backlash, a letter-writer took issue with the sentencing in the trial of a man who had attacked the governor of New York. The assailant received a 6p fine and a $250 bond. The author of the letter to the editor offers his own money to pay for an opportunity to beat the governor.

> I have a strong arm and a good knack at managing the whip, and . . . with six pence and a few dollars I can buy the everlasting, sweet, self-commending heroic satisfaction and glory of boasting that I have publicly whipped, flogged, and drubbed the Governor of New York or the President of the United States. . . O the Times of the Moors in which violence, injury, and the contempt of laws were the protectors of man's liberty! You have again appeared in this free, truly free country. Welcome. Welcome! Sixpence, sixpence, sixpence, for a beating![33]

He is clearly frustrated by the court's blithe attitude toward violence, yet he misses an interesting subtext in the governor's trial: the governor probably could not have demanded too harsh a punishment lest he be accused of an effete, overly-legal response to being violently challenged. Moreover, his paternalistic attitudes, much like those of Blackstone before him, were by then becoming outdated, to be replaced by the more permissive attitudes toward violence that jurists such as Joel Bishop would later assert and legitimate.

An Individualized Public

By the mid nineteenth century in the antebellum era, criminal law had matured into a subject worthy of its own treatises, when Francis Wharton and Joel Prentiss Bishop, of Philadelphia and New York, respectively, tackled the topic. Each figure would contribute several editions on the subject to American legal scholarship targeting a readership consisting of students and practitioners of the law.[34] Both authors were willing to overhaul the older idea of a paternalistic public to accommodate the new reality of an individualized one. In an especially telling maneuver, they

32. "Assault and Battery." *New York Courier*, November 9, 1816, 2.

33. "To the Editors of the Commercial Advertiser," *New York Spectator*, June 23, 1818, 1.

34. On the legal publishing industry, see Michael Hoeflich. *Legal Publishing in Antebellum America* (Lawrence: University of Kansas Press, 2010).

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each reemphasized that an assault need not occur *in* public for it to be a crime. Both also saw in this new landscape a wider berth for self-defense and for the justification of individual acts of violence.

Francis Wharton nearly became an Episcopalian minister, but, steered onto a course of legal study by his father, he instead became the first American jurist to write a work expressly on criminal law.[35] Wharton, precisely 70 years after the Liberty Bell had tolled, brought up England in the first sentence of his work: "it is somewhat remarkable, that although in the text and administration of the criminal law, we have departed widely from the English system, there has as yet been no attempt to compile a general treatise or commentary upon that branch of the American jurisprudence."[36] The impetus behind Wharton's work was not purely patriotic, as there was surely a pragmatic necessity for 250 years of American law to be better digested (jurists such as Wharton understood that the American courts had not quite adopted English law wholesale).

Assault was one of many subjects that required a revised understanding. Calling attention to a move away from the prosecution of assault as a breach of public peace, Wharton twice cited an opinion in a Kentucky case known as *Commonwealth v. Simmons*, which de-emphasized the need for an act to occur in public. The decision asserted that assaults committed away from public view could still be criminal. "An assault, or an assault and battery, however private or secret, is an indictable offense … In an indictment it is not necessary to allege that the assault or battery was committed in public, or to the terror of any of the citizens in the commonwealth."[37]

The fact, however, that the defense was able to win on the local level with the argument that the assault occurred in private, is telling. Surely, a facile answer to what made assaults prosecutable as a breach of the public peace was the contagious and evil example of violence *in* public (the most tangible, topographic version). Bending the logic of "public," however, were demonstrably private assaults that forced prosecutors and juries to turn toward other, less concrete rationales. Expanding on Blackstone's idea of interconnectedness, the opinion declared that the harm was "a trespass which strikes at the personal security of every citizen."[38] Distinguishing ostensibly public crimes from an assault, the opinion asserted that affrays, riots, and routs demanded fine and imprisonment, whereas assault deserved

35. Janet A. Tighe, "Francis Wharton and the Nineteenth-Century Insanity Defense: The Origins of a Reform Tradition," *The American Journal of Legal History* 27 (1983): 223–53.

36. Wharton, Preface, Francis Wharton, *A Treatise on Criminal Law of the United States* (Philadelphia: James Kay, Jun., and Brother, 1846).

37. 6 J.J. Marsh. 614 Ky. 614, 1831 WL 2409 (Ky.).

38. Ibid.

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"fine only."[39] Was it the assault itself or a government failure to prosecute it that struck this blow to everyone's security? Neither the opinion nor Wharton's treatise offered much in the way of answers.

A Blackstonian "public" meant that acts in public had much more weight because their potential for setting an "evil example" was much greater. A new individualized sense of "public" made this distinction insignificant. Once a topographic concept of public had been more explicitly removed as a prerequisite to prosecution of private assaults, the individual injury was freed to assume its more central role. Wharton was not quite prepared to denounce the "evil example" at the center of Blackstone's "public," but in citing Simmons, paved the way for Bishop's more ardent acceptance of the individual injury.

Wharton's other crucial step in the direction of the individuated public came in his comprehensive examination of self-defense. In a move that would no doubt disappoint Blackstone, Wharton highlighted an expansion in the allowable response to aggression. Wharton's chapter on assault showcased this trend: an inching away from an older standard of restrained or proportionate responses to aggression toward a model of self-defense that allowed for slightly more severe violence than had been inflicted. The paternalistic view that violence should stay out of the hands of the people was eclipsed by one in which the specifics of the violence—whether it was justified, whether the injury was severe—became paramount.

Wharton first cited a case calling for a measured approach to self-defense, writing that it ought to be "proportioned to the nature of the injury offered, otherwise the defendant himself becomes the aggressor."[40] Moreover, in the event of a home intruder, an individual had to ask him to leave first and then was justified using only "so much force as is necessary to remove him."[41] Wharton, however, was certain to stipulate that this only applied to nonviolent intrusions. "But if the trespasser use force, then the owner may oppose force to force, and in such a case, if he be assaulted or beaten, he may justify even a wounding or a mayhem in self-defence."[42] In the face of actual violence, people could not be expected to be control themselves entirely; as long as their overreaction was not too severe, the law would be on their side. Wharton's examples demonstrated a pattern in self-defense: the victim was allowed one small step in the escalation

39. Ibid. This is something that was already changing by the time Wharton was writing; yet another example of the delay in legal change finding its way into treatises. Wharton, *Treatise*.

40. Wharton, *Treatise*, 313.

41. Ibid, 313–14.

42. Ibid.

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of violence against the aggressor. An assault could excuse a battery, a battery could excuse a mayhem, and a mayhem could excuse a homicide. Wharton's work sat near the starting point of a trajectory leading American law away from the English doctrine of a duty to retreat from violent confrontation when it was an option.[43] There is no indication of such a duty in Wharton's passage on assault.

His only reference to retreat came in his chapter on justifiable homicide and there, he manifested the wide berth given to self-defense:

> A man may repel force in the defense of his person, habitation, or property, against one or many who manifestly intend and endeavour by violence or surprise, to commit a known felony on either. In such a case, he is not obliged to retreat but may pursue his adversary till he find himself out of danger; and if in a conflict between them, he happeneth to kill, such a killing is justifiable. The right of self-defense in cases of this kind is founded upon the law of nature, and is not, nor can be, superseded by any law of society.[44]

The law gave an ever-increasing amount of authority to private individuals, who were endowed with a tool previously reserved for the state. In a republic, the state monopoly over violence perhaps meant less or was, in avoidance of cognitive dissonance, still considered intact when individuals, who now comprised the state, used violent means of self-defense. This does not by itself mean that the law had become more accepting of violence. In a society in which violence was omnipresent, this was a way of deputizing each citizen to combat it.[45] Although Wharton never quite says this, it could be considered a question of popular sovereignty: if a government of, by and for the people can act violently, than by transitivity its people might exercise that same right.[46] What was to be more feared? A small fine or a hard fist? Even as the most common criminal sentence became

43. Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* (New York: Oxford University Press, 1991). Garrett Epps. "Any Which Way but Loose: Interpretive Strategies and Attitudes toward Violence in the Evolution of the Anglo-American 'Retreat Rule'," *Law and Contemporary Problems,* 55 (1992): 303–31.

44. Wharton, *Treatise*, 254.

45. Bruce Smith aptly notes that "the extent to which self-defense or other forms of self-help may have served as either substitutes for (or adjuncts to) formal criminal prosecution remains largely terra incognita." Smith, "English Criminal Justice Administration," 621.

46. This can partially be read as a problem with sovereignty, a subject that hovers around the story of violence's privatization. Christopher Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York: Cambridge University Press, 2008). Notably, Christopher Tomlins demonstrates that this contested notion of sovereignty made the law the central front in a war over authority. Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge, New York: Cambridge University Press, 1993).

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a jail term, the likelihood of conviction was so small that the fist was still a more powerful deterrent. It was a somewhat paradoxical approach in a society that disdained violence enough to move away from state-sanctioned corporal punishment, much as the death penalty represents a response to capital murder. It was nevertheless a sign, however, that individuals were given more privacy (and power) in the realm of violence. And the police, as New York citizens would soon see, learned the very same lessons of deterrence.

Joel Bishop went much further down the path Wharton had laid out on these two crucial issues: assault's public nature and self-defense. As it had been for Wharton, law was a second calling for Bishop.[47] Having started a career in publishing, namely for abolitionists, Bishop's deteriorating health gave him an opportunity to lighten his workload and study law, where he quickly found success. With better health and a newly prosperous career, Bishop believed he could attract business by publishing books on the law, choosing subjects with the widest reach: family and criminal law. Following Wharton in one key respect, Bishop expressed an eagerness to distinguish American from English common law, peppering his work with references to uniquely American rulings, even going so far as to claim that "an American lawyer is even now quite superior to an English one."[48] Bishop, considered a progenitor of classical legal scholarship, sought science and logic in the chaos of the common law. More forceful than Wharton, Bishop saw tortured attempts to justify the criminal prosecution of assault under outdated language as both frustrating and indicative of larger problems that treatise writers had in staying current. According to scholar Stephen Siegel, "Bishop saw American law dissolving in a welter of contradictory decisions in multiplying jurisdictions... [he] combated these developments with his classical conception of the common law. In his view America's common inheritance was reason itself, a spark that had been dropped by the angel of light."[49]

"In law, many principles which really control the decisions of our courts lie for years or ages unknown even to the judges themselves who make these decisions," Bishop wrote.[50] To Bishop, the twisted logic of criminal

47. Bishop actually had to fight off charges of plagiarism for publishing a work on criminal justice so soon after.

48. Joel Prentiss Bishop, *Commentaries on the Criminal Law*, 2d ed. (Boston: Little, Brown and company, 1858). Bishop does not lavish such praise on the judiciate, however, claiming their positions were not won by merit but rather "in compensation for caucus services or popular harangues." I:42.

49. Stephen Siegel. "Joel Bishop's Orthodoxy," *Law and History Review* 13 (1995): 215–59.

50. Bishop, *Commentaries*, 24.

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assault law was an example of such tardy recognition. As if to say, "enough already," Bishop began in 1858, in the second edition of his *Commentaries on Criminal Law*, to openly question those in his field who continued to assert that assault could only be criminally prosecuted as a breach of the public peace. Bishop implored his readers to consider that assault and battery ought to be indicted as a crime against an individual. Calling adherence to the older notion of assault "human folly," Bishop saw a contradiction in prosecution for assault as a breach of the peace when judges "never inquire whether the act was committed under circumstances to raise public tumult."[51] Rather, Bishop argued that such a view was obsolete, lamenting the "tenacity of judges and text-writers in adhering to such ancient forms of expression as falling inadvertently from the lips of judges in the olden time. . ."[52] Bishop, like other treatise writers, valued congruity between the abstractions of common law and its practice and attempted to follow court decisions closely. Although others might have been satisfied with an expanded or convoluted idea of the breach of the peace, Bishop found it absurd.

Bishop saw a kind of civilizing process that had indelibly changed how assault was prosecuted.[53] He wrote: "The old common law, originating in an age of rough minds, iron sinews, and semi-barbarous manners, demanded less to fairness than is required by the superior culture and finer moral sentiment of the times."[54] Let this not confuse the contemporary reader: the superior culture Bishop envisaged was hardly free of violence. Indeed, Bishop's sense of "public" was a far cry from the paternalistic vision of Blackstone. It was not just liberal and individualized, it was also one in which individuals were allowed to settle their differences in a violent manner, although within boundaries. Bishop, in a manner that anticipated the rhetoric of Theodore Roosevelt, portrayed violence as a kind of cleansing for the human race, a sign of civilization's inexorable march, "In all ages and countries, the path of human improvement has been macadamized with bones and wet with blood. The strong trample down and tread out the feeble, and by ending them diminish the average weakness of the race; while the conflict, between those who survive, strengthens their bodies and minds, and the acquired vigor passes down to succeeding generations."[55]

51. Bishop, *Commentaries*, I:445–46.
52. Ibid., 446.
53. Norbert Elias. Edmund Jephcott, trans. *The Civilizing Process* (New York: Blackwell Publishing, 2000). As the reader will see momentarily, Bishop's idea of civility did not quite match Elias's.
54. Bishop, *Commentaries*, I:549–50.
55. Bishop, *Commentaries*, I:346.

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The 1850s, when Bishop was writing, were a heady time for abolitionists such as he, who could make the argument that violence was a necessity in the quest to abolish the peculiar institution.[56]

Bishop's concept of the public, an individualized one, meant assault prosecution hinged upon the specific circumstances of the case. Violence was not the public ill that Blackstone thought it was; as such, its harm to the larger public was of far less import than the breach of bodily security that severe or unjustified assaults inflicted. Violence should be, according to Bishop, punished based on the individual injury, not targeted like a vice to be shunned. Assaults were better left alone (if not encouraged) as a private contest unless and until it became iniquitous. Bishop explained:

> When two or more persons, engaged in the contest of life, stand on a fair ground toward one another, they interfere not with any public interest, as already intimated, however far they proceed; because though one may press unduly hard on the other, yet only good comes to the public at large from this. But when they cease to sustain this fair relation toward one another, the contest ceases to be a strengthening one, and becomes rather one of destruction. If therefore two or more persons undertake any of the controversies of life, and one of them assumes toward another or the rest unfair ground, the community interferes and punishes the wrong by a criminal prosecution.[57]

To Bishop, the principle of a level playing field applied perfectly to cases of violence. Believing that the concept of justified violence merited much more attention than it had previously been given, Bishop even authored an entire section entitled "the rights of persons to defend themselves, their property, and one another."[58] To Bishop, violence could often remain an entirely private (noncriminal) matter. Like other treatise writers before him, Bishop proclaimed "every man is bound to do all he safely can do to avoid taking human life" even when "the precise letter of the decided cases seems to justify the taking."[59] Nevertheless, while dissecting the various potentialities in which an individual could (and according to Bishop, should) respond with violence, Bishop assumed a position on extralegal violence far from Blackstone's restrained reluctance. He described the

56. On Bishop's opposition to slavery, see Siegel, *Bishop's Orthodoxy*, 18. On violence and slavery/antislavery, see H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War (Law, Society, and Politics in the Midwest)* (Columbus: Ohio State University Press. 2006); and Gautham Rao, "The Federal *Posse Comitatus* Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," *Law and History Review* 26 (2008): 1–57.

57. Bishop, *Commentaries*, I:442.

58. Ibid., I:349.

59. Ibid., I:351.

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"ascending steps" of violence that would appropriately match an impending threat and laid down the standards for a "perfect defense" (i.e., the killing of another) as a threat that "might probably endanger his life."[60] Words such as "might" and "probably" tell the story; along with Wharton, Bishop found that the law justified an escalation of violence.

If an assault was to be criminal, in Bishop's view, it would not be because of its infectiousness or because of the threat to the public, but because the individuals involved had demonstrated in some way that they had proven themselves unable to be trusted with violence. Bishop saw a shift in the burden from accused to accuser, wherein violence was no longer criminalized per se as a breach of public peace. It was part of a social evolution that Bishop extolled as a sign of strength, but one we might now see as a sort of legal underpinning of America's penchant for violence. Before Bishop, Wharton had pushed American lawyers to both accept that the individual injury (not the ostensible public harm) was at the center of an assault case and to understand the enhanced tolerance for self defense. It was Bishop, however, who finally and vehemently asserted the need to discard older, obsolete theories about violence and the law.

The New York Case Study

Bishop and Wharton intended to capture a trend that they believed had already taken hold. In the end, their jurisprudence of violence served as a kind of "lagging indicator" to what they saw happening in the courtrooms of America.[61] Although this study focuses on their writings and their legitimization of private violence, it is nevertheless helpful to examine data from New York's city courts, which made headlines around the country and which, in many ways, stood at the avante garde of the era's legal transformations. Suggesting that changes in the reality of assault prosecution preceded its jurisprudential makeover, New York's courts were more and more inclined to dismiss than to try or punish in assault cases in the period

60. Ibid., I, 360.

61. Invaluable research of the criminal justice system in Philadelphia by Allen Steinberg also uncovers a widespread apathy and antipathy toward the minor concerns of ordinary citizens in increasingly "modern" courts. Steinberg, *Transformation of Criminal Justice*. See William Francis Kuntz. *Criminal Sentencing in Three Nineteenth-Century Cities: Social History of Punishment in New York, Boston, and Philadelphia, 1830–1880*, Harvard Dissertations in American History and Political Science, (New York: Garland Pub., 1988).

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between 1800 and 1840.[62] Four major trends in the New York Court confirm a transformation in assault prosecution: a drop in the number of cases relative to the population, a major decline in the conviction rate, a stiffening of the penalty for assault, and an amplified severity of violence in assault cases.

The first step in assault prosecution in New York was generally the same: a victim would report the assault at the magistrate level (the Police Court after the turn of the nineteenth century).[63] The magistrate had three options, options which, because of assault's multifarious nature as both a civil and criminal matter, were not mutually exclusive.

1. Remand a case to the grand jury for potential indictment.
2. Treat the assault as a breach of the public peace, keeping it out of the criminal system altogether. In this case, the judge might issue a small fine or bond and/or surety for good behavior.
3. Handle the assault as a civil matter and, most often, negotiate a private settlement between the parties (rarely, this could go to a full blown civil trial).[64]

The second and third options are difficult to track in the New York records. One can infer that in many cases from the "dismissed" files a settlement was achieved; however, by the nineteenth century, state law allowed private settlement to render assault's criminal prosecution superfluous.[65] Once remanded by the magistrate, the case would go before the grand jury who would decide on indictment. And between remanding and trial, a case could disappear in several ways. Options 2 and 3 mentioned previously could be sought tardily, or the complainant could decide to drop the charges or fail to appear at arraignment.

If an indictment was issued, then the case might or might not go to trial. Depending upon the doggedness of a complainant's pursuit of justice, or the receptiveness of the courts, a case could fall off the docket at any

62. The City Hall Recorder gave easy access to lawyers and newspapers around the nation to the cases in the New York Courts.

63. The earlier decades during the colonial period had such an infrequently convened court that it barely makes sense to call it a part of the process. That is why most of the quantitative heft of this study tracks change between 1800 and 1840. Between 1760 and 1800, there was an inching toward the Court of General Sessions as the venue for crime, but little in the way of quantifiable change in conviction or sentencing of assault. The bond/surety and/or the nominal fine reigned.

64. Civil actions for assault could not be tracked because of the unavailability of records.

65. The cases in the dismissed files may have already been remanded to the grand jury by the Police Court, who might have later sought to negotiate this type of settlement; this explains the number of cases deemed "settled" even after appearing in the minutes of the Court of General Sessions.

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point. But if a trial was held, it would be held in front of a full jury. And if there was a trial, there would be a verdict; there were no hung juries or mistrials in the records here reviewed. Finally, if guilt was decided, it was at the judge's discretion to sentence and, even then, sentences were sometimes suspended or simply never recorded. Generally, he would assign a fine, until the 1830s and 1840s, when short terms in a city jail became the more typical punishment.

New York's legislature played a big role in setting the history of assault prosecution in motion, when in 1798 it passed, "An Act to prevent unnecessary public prosecutions when the parties injured have remedy by civil action," on February 24, 1798.[66] Operating on the assumption that violence was not an overarching public concern, lawmakers decided that assault should lie mainly on the private or civil side. The law covered assaults and misdemeanors, "not charged to have been done riotously, or with intent to commit a felony, (or not being an infamous crime, and for which there shall also be remedy by civil action)."[67] It declared in such cases, that if complainants were to "acknowledge to have received satisfaction for such injury and damage," magistrates were authorized to divert the case away from court and enter into a records a "nole prosequi." The Assembly issued a final caveat: "Provided always, that this act shall not extend to any assault and battery, or other misdemeanor, committed by, or on any [public official]."[68] The bill drew up three larger criteria for assaults that could not go unprosecuted publicly, and therefore created a standard of state-sanctioned violence. Riot, felonious intent and "infamy" constituted New York's three-pronged statutory guidelines for the criminal prosecution of assault. Other types of violence were fair game, in the sense that the state would not feel the need to prosecute it as a criminal matter. This attempted to preserve the traditional, less formal way of handling assaults, except for one key difference. Before the nineteenth century, the civil/criminal lines were blurred, so the state could have its cake and eat it too. It could, at one and the same time, be satisfied along with the victim, without having to pay for it. For many, this was an effective system of dispute resolution. Once the justice system became more clearly cleaved into civil and criminal matters, the state faced a choice: it could either take the stand that assault was by default a private issue until it involved a severe injury or it could decide that assault remained both a private and public offense and continue in its pursuit of public justice in spite of any civil action taken against the perpetrator of a violent assault. In

66. Laws of the State of New York, Twelfth Session (Albany, 1798), 276–77.
67. Ibid.
68. Ibid., 277.

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choosing the former approach, the state took a step to "privatize" violence by directing cases toward the civil realm. Because of the prevalence of "judgment proof" or largely asset-less assailants, this left little recourse for the victim when the state decided to shunt his or her case away from the criminal process, a predicament far less prevalent under the less clearly bifurcated system.

The results in New York were stark (see Figure 1). The conviction rate dropped from over fifteen percent to under four percent as a percentage of total cases (indicted and dismissed). The percentage of cases receiving indictment but never seeing a trial grew from 4.4 percent to 37.3 percent from 1810 to 1840.[69] By 1840, the likelihood of recrimination for interpersonal violence short of murder was infinitesimal, and only the most serious cases resulted in conviction (a fact that helps explain the harsher sentencing). Both of these are tracked in the following chart, which uses a decade-by-decade sample.[70] Having undergone a half-century of explosive growth and faced with the task of governing a diverse, often restive population, New York officials simply denied trials to most victims who sought one.[71]

69. "District Attorney Indictment Records," (New York: The County of New York, October–December, 1810, 1820, 1830, 1840). "Minutes," January–December, 1810, 1820, 1830; September–December, 1840. Unless otherwise noted, future mentions of statistics from the Court of General Sessions cover the same periods. Subsequent mentions will also simply refer to the District Attorney files as "Indictment Records."

70. The rising use of the Court of Special Sessions after 1829 surely had an impact on the number of cases brought into the system. It is not a large enough impact, however, to fully explain a decline that began well before then. With my best estimate, given the hazy numbers available on the Special Sessions, assault cases as a percentage of population at most leveled off at 1830 levels, just as the summary court was beginning to hear assault cases. The drop between 1830 and 1840 can perhaps be attributable to the increased popularity of the special sessions court. Bruce P. Smith, "Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City, 1790–1855" (PhD diss., Yale University, 1996).

71. New York County, "Minutes of the Court of General Sessions" (New York, NY: The County of New York, December, 1810, 1820, 1830; September–December, 1840). The minutes were tracked for a full year, with the exception of 1840, for which only records from September to December are available. For an overview of New York's tumultuous and rapid growth in the period, see Edwin G. Burrows and Mike Wallace. *Gotham: A History of New York City to 1898* (New York: Oxford University Press, 1999); Julius Goebel, Thomas Raymond Naughton, and Commonwealth Fund, *Legal Research Committee. Law Enforcement in Colonial New York; a Study in Criminal Procedure (1664–1776)* (New York: Commonwealth Fund, 1944); Douglas Greenberg. *Crime and Law Enforcement in the Colony of New York, 1691–1776* (Ithaca, N.Y.: Cornell University Press, 1976); and Sidney Irving Pomerantz. *New York, an American City, 1783–1803; a Study of Urban Life*. 2nd ed. (Port Washington, NY: I. J. Friedman, 1965). The book by Burrows and Wallace is especially enlightening on the problem of riots, which from the

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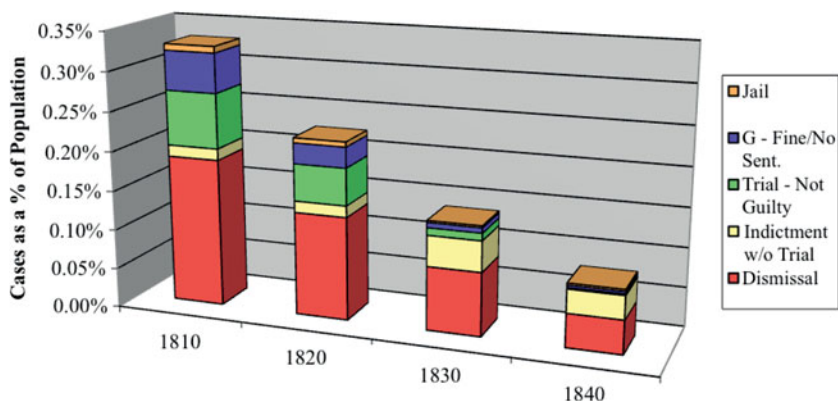

Figure 1. Prosecution at Various Levels of Court Process as a Percent of Population[72]

The level of violence present in New York City's court cases exploded between 1810 and 1840. In cases resulting in dismissal, the percentage of recognizances noting violence went from seven percent to ninety-three percent, whereas in cases leading to indictment, it lept from sixteen percent to ninety percent.[73] Meanwhile, the involvement of a weapon had quadrupled from five percent of cases to twenty-two percent from 1810 to 1840.[74] By 1840, a strong prejudice to dismiss existed, even as the cases brought to the court were much more serious, and victims had to convince authorities to indict, try, and convict. In a city and country where violence was widely tolerated, this had far-reaching consequences for victims of violence who had lost the best, if oft unreliable, recourses of criminal justice. They would, more and more, have to fend for themselves.

Revolution through the Civil War managed to threaten civic order and hasten reforms such as the standing and professional police force. On riots, see: Paul A. Gilje, *The Road to Mobocracy: Popular Disorder in New York City, 1763–1834*. (Chapel Hill: Published for the Institute of Early American History and Culture by the University of North Carolina Press, 1987). On the rise of the police, see James F. Richardson. *The New York Police, Colonial Times to 1901 (The Urban Life in America Series)* (New York: Oxford University Press, 1970).

72. Unless otherwise noted, future mentions of statistics from the Court of General Sessions cover the aforementioned periods. Also relevant to the study of assault prosecution is Kuntz, *Criminal Sentencing*.

73. New York County District Attorney Indictment Records, Police Court Dismissed Cases Records.

74. Ibid.

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New York is not an exact microcosm of the nation. But the structural changes that drove this transformation in New York's criminal justice system—the professionalization of the police force, the rise of public prosecution, the rapid growth of a diverse population, the mounting concern with property crime, the increased respect for procedural rights—and the spiraling costs that all these changes wrought were not merely local happenings.[75] More importantly, one quality that New York shared with the rest of the nation, a trait that would unite the American states in opposition to the nations across the Atlantic, was a penchant for murder. Randolph Roth and Eric Monkkonen have together outlined in depth the way in which American murder rates began to spiral upward in the nineteenth century, distinguishing America as Europe's bloodier, more violent relative. Monkkonen established that murder rates, although increasing, were met largely with apathy, whereas Roth connects political instability with changes in the homicide rate. To say that America had a problem with violence compared to its European counterparts is simply to restate this fact: its citizens killed one another with remarkable regularity.[76] Assault can be seen as a "gateway" crime on the path toward worse. Scholars ought to concentrate not only on the spectacular crime of murder, but also on the more mundane context of fisticuffs and brawls that breeds such extreme forms of violence.

75. In his study on the rise of public prosecution in Philadelphia, Allen Steinberg sees a similar decline in assault convictions as a sign of the triumph of public prosecutors over the frivolous, personal (more democratic) use of justice by ordinary citizens. Steinberg, *Transformation of Criminal Justice.* Also relevant to the study of assault prosecution is William Kuntz's study of sentencing in the antebellum and Civil War eras, which corroborates what I have found in our small overlap of periods. Several legal historians have portrayed an American legal system of the early republic attempting to accommodate entrepreneurship and capitalism, prioritizing legal issues involving property and helping to explain why assault convictions may have plummeted. See, for example: Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (New York: Oxford University Press, 1992); and William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Athens, GA: University of Georgia Press, 1994). Kuntz, as well, posited that sentencing showed a greater concern with the punishment of property crime. Between 1830 and 1845 in New York, he found that fifty-one percent of convictions involved property or currency, and showed that the penalties in these crimes were harsher than those involving other offenses.

76. Eric H. Monkkonen, *Murder in New York City* (Berkeley: University of California Press, 2001). See also Roth, *American Homicide*; and Roger Lane, *Murder in America: A History* (Columbus: Ohio State University Press, 1997).

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Conclusion

By the 1830 and 1840s, violence was thought to be a full-blown menace.[77] The rise of the police force was meant to counter this problem, but they often incited violence themselves through their own brutish, violent means.[78] The standing police force that violence itself had begotten spawned a desire to turn to vigilantism where no police existed, or when people believed the law had failed them.[79] And more than that, the methods of defense Americans employed as individuals and vigilantes became guiding principles for police who were quick to turn to violence to keep the peace. The standing police, new to American cities, needed a model to duplicate. They may have dressed like the Bobbies of London, but they operated more like American vigilantes. Such violent mechanisms of violence control put the wider berth given to self-defense in its proper, paradoxical context. Violence was no longer, prima facie, legally suspect; it could serve a positive end. In a society in which a life could be snuffed out over a simple insult and the perpetrator(s) faced far from certain consequences, extreme means were necessary.[80] There was no way that all violence was going to be eliminated; better for the society to focus its resources on the truly dangerous and let the rest of the population settle their own affairs. And better still that the larger population's fear of violent repercussion from their fellow citizens could keep the peace for free.

These citizens were members of a society much transformed in the decades after independence. Two scholars, Laura Edwards and Ruth Bloch, to their great credit, have examined assault law in making related points about the revamped meaning of "public" in a republic. Edwards convincingly shows how a rights-based approach to governance strengthened white male dominance, authority that Ruth Bloch argues translated into an augmented respect for privacy (and lenience in wife-beating trials).[81] Because individuals came to comprise the public, the king was no longer its

77. Gilje, *Mobocracy*.

78. On the rise of the police force, see James F. Richardson, *The New York Police, Colonial Times to 1901 (The Urban Life in America Series)* (New York: Oxford University Press, 1970).

79. What Pfieffer calls the "rough justice" of lynching emerged as a challenge to bourgeois reforms of capital punishment. Although his work focuses on the late nineteenth century, a backlash toward penal reform and the procedural obstacles of "enlightened" justice had been brewing since the Constitutional era, when the so-called bloody code emerged as a target of anti-monarchist ire. Michael Pfeiffer, *Rough Justice: Lynching and American Society 1874–1947* (Urbana: University of Illinois Press, 2006).

80. Monkkonen, *New York Homicide;* and Roth, *American Homicide*.

81. Edwards, *The People and Their Peace*; Bloch, "Wife-Beating and Privacy."

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apotheosis and attacks on individuals could all in theory be deemed public. But this same logic meant that citizens were little kings who could behave violently unless and until they did something egregious and had the rare misfortune of being charged and convicted.

This article, although indebted to both, goes further than Bloch and Edwards, by essentially arguing that the default mode of violence came to be private—whether or not it occurred within the bounds of hierarchy, honor, or household and with diminished regard to its impact on "the peace"—although these remained important. It was arguably the legal handling of assault that served as the foundation for the excusal and proliferation of much worse; violence could and often did escalate. Assault became a highly vulnerable target, as jurists grappled with the meaning of public and the principles of criminal justice. Once the law found its way to lenience in most assault cases, it created a legal culture of laxity in violence that took root.

Alhough several scholars have worked on various of the different components of criminal justice under examination here, this article represents the first attempt to examine the jurisprudence of assault prosecution in order to uncover a larger, vital development: the privatization of violence. Monkkonen posited that America's legal system—whether it was federalism or statutes or legal culture—was at least in part to blame for the country's violent proclivities.[82] He urged his fellow scholars to try to better understand America's legal response to violence in the hopes of ascertaining why murder here had become so sadly common. And paradoxically, American authorities, who saw violence getting out of hand in streets and in homes may have believed that the increased severity of sentences and the buttressed regime of self-defense might be a good way to respond. In effect, their efforts deputized Americans to combat and discourage violence through violent means.

Assault sits at the center of this history. The criminal nature of assault, one argued by Blackstone to be intrinsic and worthy of more vigorous public prosecution, was ultimately threatened by a new, individualized (one might say weakened) version of "public." The pendulum had swung so far that an appeals court found itself overturning an assault ruling that tried to protect an individual from being prosecuted for an assault that took place in secret. No longer viewed as a contagion that might infect the public at large, violence became a matter to judge case by case. At last, violence could assume the central, eminent role in American law that it had long held in the nation's customs and culture.

82. Eric Monkkonen, "The Problem of American Homicide," *American Historical Review* 3 (2006):76–95.

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