

The law of felonious assault in England, 1803-1861

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In the period 1803-1861 the English legislature created a hierarchy of offences against the person, which survives to the present day. The new laws were a response to growing fears about interpersonal violence in nineteenth-century England. Drawing upon an extensive range of contemporary trial reports, this article assesses the impact of this legislation in the assize courts. It argues that, despite the attempts that were made to rationalise and homogenise the application of the law in this period, trial practices continued to play a key role in shaping the content of the law. Judges, jurors, prosecutors and witnesses nullified and mitigated the law according to their own conceptions of the bounds of acceptable violence. This limited the extent to which the criminal law could be used as a means of advancing universal standards of conduct. It also suggests the need to reconsider the conventional notion that the repeal of the 'bloody code' in the 1830s marked the point of transition from an essentially personal, discretionary system of justice to one based on uniformity, certainty and proportionality.

This article explores the changing legal response to serious, non-fatal violence in the period 1803-1861 with the aim of casting new light on a key transitional phase in the history of English criminal justice. Prior to the nineteenth century, most incidents of non-lethal violence, if they were prosecuted at all, were tried before magistrates as misdemeanours. Lord Ellenborough's Act (1803) signalled a new approach by creating a new capital offence of attempted murder.¹ Over the next half century a

¹ 43 Geo. III, c.58.

series of acts built on this foundation culminating in the 1861 consolidating Act, which established the hierarchy of non-fatal offences against the person that is still in force today.²

The new law brought a much greater range of violent conduct within the purview of the assize courts but depended in large part for its effect on the willingness of judges, jurors and prosecutors to enforce the law in trials. Courtroom actors had their own views on the limits of acceptable conduct, which found room for expression through the sorts of discretionary practices that had mitigated the criminal laws for centuries. These practices became the subject of extensive criticism by nineteenth-century reformers concerned to make the criminal law a more efficient and reliable tool of social policy. A series of reforms in the 1830s removed the death penalty from most species of felony to facilitate a more certain, predictable application of criminal justice.

The first sixty years of the nineteenth century therefore witnessed attempts to reorient the law's focus towards violent crime and to transform the trial process. Yet historians of the nineteenth-century, unlike their eighteenth-century counterparts, have been reluctant to investigate trials or individual offences in detail. In contrast to the usual approach, Wiener's recent work draws heavily on trial reports to construct a cultural and legal history of male violence in the nineteenth century. It demonstrates the importance of courtroom interactions, particularly between judge and jury, in determining the scope and content of the law.³

² 24 & 25 Vict. c. 100.

³ M. Wiener, "Judges v Jurors: Courtroom Tensions in Murder Trials", 17 *Law and History Review*, (1999), 467-506; M. Wiener, *Men of Blood; Violence, Manliness, and Criminal Justice in Victorian England*, Cambridge, 2004 and below text at n. 27.

This article follows Wiener's approach in seeking to analyse legal development from within the courtroom but, whereas Wiener's focus is on homicide and its broader cultural significance, the focus here is on non-fatal violence and the impact of the reforms of the 1830s on trial practice. Law reports, newspaper reports and the Old Bailey Sessions Papers are used to evaluate the extent to which the authorities' objective of suppressing a greater range of violence with greater consistency was successfully achieved. The scope of the discussion is limited to the felonious assaults that were most commonly prosecuted under the legislation that followed Lord Ellenborough's Act. These prosecutions were initially confined to premeditated attempts to kill but were soon expanded, by statute and through the exercise of prosecutorial discretion, to include drunken or impassioned assaults.⁴ The discussion centres upon trials at the assizes rather than the treatment of common assault by magistrates because the penal reforms of the 1830s were directed towards securing a more certain felony process.

The article begins with a consideration of the cultural and legal context in which the trials took place, before examining the development of the law in the period 1803-1837, when the majority of serious assaults were capital offences. An Act of 1837 restructured the law relating to non-fatal offences and removed the death penalty from most forms of serious assault, although they continued to be defined as felonies.⁵ The remainder of the article considers the effect that these changes had on the practice

⁴ The focus on these typical assaults excludes property offences accompanied by violence and no attempt is made to survey the range of highly specific aggravated assaults that were created by statute in this period.

⁵ 1 Vict. c.85.

of the courts and the means by which the substantive law developed up until the 1861 Act.

I. VIOLENCE AND THE LAW

The eighteenth-century criminal law reflected what Beattie has referred to as the ‘high tolerance of violent behaviour’ in society.⁶ Violence was a widely recognised and accepted means of settling disputes. By the end of the eighteenth century, there were signs of change. King has noted a general trend in the period 1750-1820 towards a more severe treatment of assaults by magistrates.⁷ If this indicates a shift in attitudes, the options for pursuing a felony charge were extremely limited. Statute had created a handful of capital offences for serious assaults. The Coventry Act (1670) had made it a non-clergyable felony to maliciously ‘cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject’.⁸ The Black Act (1723) had contained amongst its numerous provisions, the capital offence of maliciously shooting at any person.⁹ Both statutes were occasionally used to prosecute violent offenders in the eighteenth century, but even if

⁶ J. Beattie, *Crime and the Courts in England, 1660-1800*, Oxford, 1986, 75.

⁷ P. King, “Punishing Assault: The Transformation of Attitudes in the English Courts”, 27 *Journal of Interdisciplinary History*, (1996-7), 43-74.

⁸ 22 & 23 Car 2, c.1, s.7. On the interpretation of the Coventry Act, see E. East, *Pleas of the Crown* London, 2 vols, 1803, vol. 1, 394-400 and *Old Bailey Proceedings Online*, (www.oldbaileyonline.org, 20 Oct. 2006), 30 April 1783, trial of John Mills (t17830430-70).

⁹ 9 Geo. 1, c. 22, s. 1.

there had been a greater willingness to use them, their narrow range and their restrictive interpretation by judges severely limited their effectiveness.¹⁰

The first half of the nineteenth century witnessed a key shift in attitudes towards crime and violence in England. At a time of rapid social change and unprecedented demographic growth, violence was a very visible indicator of the volatility of the new urban masses. The upper and middle classes sought to take measures, both to control and to distance themselves, from expressions of violence which had previously been tolerated. Wood has described the ‘invention’ of violence as a social issue in this period. He suggests that whilst concern about violence was not new, this was a time ‘when self-identified civilizing forces undertook a determined offensive against alternative, customary attitudes towards violence.’¹¹

This civilising offensive encompassed a wide range of activity directed towards shaping moral behaviour and conduct. Throughout the period under consideration moral activists were involved with various movements including anti-

¹⁰ In the period 1750-1803, there were approximately 75 prosecutions for felonious assaults under the Black Act or the Coventry Act at the Old Bailey. This figure is based on a search for the crime of assault in the *Old Bailey Proceedings Online*. Although it is not always clear which statute formed the basis of the prosecution, the majority of these prosecutions were for shooting offences under the Black Act. There were very few cases of stabbing. For an example of the difficulties of obtaining a conviction under the Coventry Act, see *OBP online*, 16 Feb. 1803, Nowland & Price (t18030216-38).

¹¹ J. Carter Wood, *Violence and Crime in nineteenth century England. The Shadow of our Refinement*, London, 2004, 14, 9.

slavery, temperance, prison reform and poor law reform.¹² The middling ranks perceived a need to uphold certain values at a time of moral and social dislocation. They linked violence with drunkenness, passion and a lack of self-control, vices which increasingly became the subject of moral censure as the century wore on. The condemnation of violence contributed to the formation of a ‘civilised’ middle class identity that contrasted with the ‘savagery’ of the lower classes.¹³

The law provided an important means of pursuing the civilising offensive. In addition to the new laws on non-fatal violence, the penalties for manslaughter were increased and tighter legal controls were imposed on other types of activity that could result in death or serious injury.¹⁴ More significantly, reformers demanded a change in methodology to make the criminal law a more effective means of combating violence in particular and crime generally. The State’s traditional response to rising crime and popular unrest was to execute some high profile offenders as a deterrent to others. The alarming rise in prosecutions for all offences at the beginning of the nineteenth century reflected growing fears about crime, but many middle class observers objected to the increased use of hanging as a means of addressing the problem.¹⁵ They argued that the open display of violence on the scaffold was

¹² For the growth of these interlinking reform activities, see: M. Roberts, *Making English Morals Voluntary Associations and Moral Reform in England 1787-1886*, Cambridge, 1994.

¹³ See Wood, *Violence and Crime* 27-46.

¹⁴ See Wiener, *Men of Blood*, 9-29 and M. Wiener, *Reconstructing the Criminal, Culture, Law and Policy in England 1830-1914*, Cambridge, 1990.

¹⁵ For the sharp rise in prosecutions in the nineteenth century, see below n. 35.

counterproductive. It was the State that appeared to be arbitrarily violent, hence sympathy was extended to the criminal and resentment directed at the law.¹⁶

In the first thirty years of the nineteenth century, as the legislature continued to create new capital offences and as the number of executions continued to rise, there were growing calls for the law to be mitigated.¹⁷ Reformers condemned the existing law as a ‘bloody code’ that had irretrievably alienated public opinion. In 1819 Sir Thomas Fowell Buxton, a prominent opponent of capital punishment, made the following declaration in the House of Commons: ‘Our whole system of criminal jurisprudence proceeds on the presumption that the law will be aided by the public ... we are arrived at this crisis: the public deny their assistance and are combined not for the law, but against it.’¹⁸ The mandatory death penalty was responsible for this stultification of the law. It resulted in judges adopting an excessively technical, narrow interpretation of the law and, most importantly, jurors, prosecutors and

¹⁶ See R. McGowen, ‘A Powerful Sympathy: Terror, the Prison and Humanitarian Reform in Early Nineteenth Century Britain’, 25 *Journal of British Studies*, (1986), 312-334; R. McGowen, ‘Punishing Violence, Sentencing Crime’ in N. Armstrong and L. Tennenhouse (eds), *The Violence of Representation. Literature and the History of Violence*, London, 1989, 140-156.

¹⁷ Gatrell argues that the noose was at its most active on the eve of the capital law repeals (V. Gatrell, *The Hanging Tree*, Oxford, 1994, 7).

¹⁸ *Parliamentary Debates*, series 1, vol. 39, cols.812-813, March 2, 1819 (House of Commons). Buxton is an excellent example of a criminal law reformer who was at the centre of a network of moral reform activity. For more details of his career and links between other moral reformers, see Roberts, *Making English Morals*, 119-32.

witnesses using their discretion to mitigate the law.¹⁹ The reforms that swept away the ‘bloody code’ in the 1830s were intended to eradicate these practices. According to Lord John Russell, the aim was to ‘make the law in accordance with the feelings of the public at large and with the opinions of the judges who were now charged with the administration of it.’²⁰ Offences could be defined and applied with certainty and punishment graded according to the magnitude of the offence. Trial participants would have no reluctance to enforce a substantially mitigated law in its full rigour. The goal, in the words of one leading historian, was to ‘rout the personal’ from the courtroom.²¹

The opponents of capital punishment presented their case in pragmatic terms: the law had to be mitigated to ensure an effective criminal justice system in the face of rising crime. More ambitiously, reformers argued that if it was made more certain the law could be used to shape behaviour. Sir James Mackintosh, the leader of the reform movement in the 1820s, stated that the law would become ‘the school of public discipline ... and [be] pure from every taint of passion or partiality.’²² Impersonal and predictable laws would provide people with clear moral guidance, teaching them that criminal behaviour would be detected, prosecuted and punished.

¹⁹ Prosecutors, who were usually the victims of the crime, and witnesses could nullify the law by refusing to proceed with a prosecution or failing to appear at the trial.

²⁰ *Parliamentary Debates*, series 3, vol. 38, cols.913-914, 19 May 1837 (House of Commons).

²¹ R. McGowen, “The Image of Justice and Reform in early Nineteenth-Century England”, 32 *Buffalo Law Review*, (1983), 89-125 at 116.

²² *Parliamentary Debates*, series 2, vol. 9, cols.418-419, 21 May 1823 (House of Commons).

At a time of social upheaval and rising crime, the law could be used to foster qualities of discipline and restraint amongst the populace.

These were the terms in which the reforms were presented. The subsequent collapse of the capital laws in the 1830s has been viewed as a triumph for the reformers' vision of justice, the point at which the old, discretionary model of justice finally gave way to a new system based on certainty and proportionality.²³ Beattie, for example, states that by the third decade of the nineteenth century:

A system of justice that had been intensely personal and concerned with the particular attributes of offenders and that had conceived of punishment as a means of deterring others by bloody example was giving way to a system of administration that came to emphasize equality and uniformity of treatment as ideals and that thought of punishment as reformative.²⁴

Historians have contended that this newly centralised, homogenised criminal justice system became an important tool of social policy in the Victorian period, a means of shaping moral character or establishing social control.²⁵ These interpretations have tended to focus on the reforms of policing and punishment but a similar

²³ See McGowen 'Image of Justice'.

²⁴ J. Beattie, *Crime and the Courts*, 636.

²⁵ See Wiener, *Reconstructing the Criminal*; M. Ignatieff, *A Just Measure of Pain. The Penitentiary in the Industrial Revolution 1750-1850*, London, 1978; V. Gatrell, "Crime Authority and the Policeman State", in F.M.L. Thompson (ed), *The Cambridge Social History of Britain 1750-1950*, 3 vols., Cambridge, 1990, vol. 3, 243-310.

transformation has been detected in the trial. Wiener asserts that in the first half of the nineteenth century, there was a ‘move from a series of expressive, semipersonal confrontations, personally directed by an involved judge and with highly variable results, to a more restrained, rule-governed, predictable, depersonalised process.’²⁶

Trials for felonious assault provide evidence that undermines the view that the form and function of the criminal law were transformed in the period 1803-1861. The trials involved exactly the sort of undisciplined and passionate conduct that reformers sought to control by means of a more certain process. If the law was to become an effective weapon in the civilising offensive, it had to suppress drunken violence or assaults committed in the ‘heat of blood’ with a new degree of uniformity. Yet the trials also provided space for the older, customary mentality towards violence to express itself. Jurors, prosecutors and witnesses continued to express the lenience that had characterised the eighteenth-century approach to non-fatal violence. Much depended on the extent to which judges were willing to expand legal definitions to control the juries’ discretion in deciding upon a verdict. Wiener suggests that nineteenth-century judges imposed increasingly strict controls on juries in murder trials and developed legal tests that narrowed the grounds of excuse. They targeted the defences of provocation and intoxication in their drive to inculcate restraint in ‘men of blood’ and use the criminal law to educate people on the virtues of self-discipline.²⁷ Some of the patterns and concerns that Wiener identifies in relation to homicide are evident in trials for serious assault, but the persistence of older discretionary forms of justice resulted in the emergence of a much more inconsistent picture.

²⁶ Wiener, *Reconstructing the Criminal*, 65.

²⁷ See Wiener, “Judges v Jurors”; Wiener, *Men of Blood*, passim.

II. LAW AND PRACTICE 1803-1837

The impetus for a change in approach towards non-fatal violence came from Ireland. Following the 1801 Act of Union, an Irish penal statute came up for renewal in the British Parliament that made the offence of ‘chalking’, the practice of cutting and stabbing with intent to murder, rob or maim, a capital felony.²⁸ When the bill reached the House of Lords, Lord Ellenborough questioned why it should not apply to England as well as Ireland and proposed to prepare a new bill that extended to the whole of the realm.²⁹ The bill that he introduced less than two weeks later contained a range of highly specific offences.³⁰ The most significant of these for present purposes was that which made it an offence to ‘unlawfully and maliciously shoot at’ or to ‘stab or cut’ any person with intent ‘to murder, or rob, or to maim, disfigure or disable’ or ‘to do some grievous bodily harm’. This was a capital felony but, in order to convict, the court had to be satisfied that had death ensued the crime would have amounted to murder.³¹ In the words of one judge, the Act aimed to catch offenders who were ‘morally guilty of murder’.³² The effect of the provision was to punish attempted

²⁸ 13 & 14 Geo. III, c. 45.

²⁹ *The Times*, 18 March 1803, 2 col. a.

³⁰ There was a brief debate on the bill, for which see: *The Parliamentary History of England, from the Earliest Period to the Year 1803* (Hansard, 1820) vol. 36, cols. 1245-7, 28 March 1803; *The Times*, 29 March 1803, 2 col.a. For the bill, see Parliamentary Papers (PP) 1802-1803, I., 373.

³¹ 43 Geo. III, c. 58. The Act also made poisoning with intent to murder or to procure a miscarriage a capital felony.

³² *The Times*, 7 Sep. 1827, 3 cols.a-b, trial of John Baldwin per Vaughan B.

murder but, as murder was defined much more broadly than it is today, the scope of the offence was potentially quite wide.³³

The judges praised the ‘wholesome act’³⁴, which immediately generated a steady stream of prosecutions, convictions and executions. The number of committals was small but rose gradually from an average of around 40 per year in the 1810s to just below 70 in the 1820s to around 120 in the 1830s. These increases were in line with the general rise in criminal prosecutions in this period.³⁵ The conviction rate was relatively low however: in the 1810s and the 1820s an average of 30% of those

³³ For the scope of murder, see below n. 62. The Act was passed soon after the recognition of a general common law offence of attempt in *Higgins* (1801) 2 East 5, 102. However, whilst recognised in principle, common law attempt liability did not develop until later in the century and was only a misdemeanour. See, K. Smith, *Lawyers, Legislators and Theorists, Developments in English Criminal Jurisprudence 1800-1957*, Oxford, 1998, 105-117.

³⁴ per Thompson B in *OBP online*, 30 Oct. 1805, John Leonard White and John Richardson, (t18051030-64).

³⁵ There was a sharp increase in the period following the Napoleonic wars and another marked increase in the late 1820s and early 1830s. For general patterns in criminal statistics, see C. Emsley, *Crime and Society in England*, 3rd ed, Harlow, 2005, 32-33; V. Gatrell and T. Hadden, “Nineteenth Century Criminal Statistics and their Interpretation”, in E Wrigley (ed) *Nineteenth Century Society: Essays in the use of quantitative methods for the study of social data*, Cambridge, 1972, 336-396.

committed were convicted, in the period 1830-1837 the figure was 40%.³⁶ The new Act claimed a steady stream of scaffold victims but the numbers executed annually were small, only reaching double figures in 1817 and 1829.³⁷

Serious assaults involving weapons, particularly knives, generated public unease at the beginning of the nineteenth century. Judicial statements to the grand jury at the start of sessions and in trials reflected these broader concerns. Initially the use of the knife was dismissed as a foreign innovation, alien to the fair-minded Englishman. As the century wore on, judges frequently remarked upon how the practice had spread to the natives. In 1819 Best J was ‘very sorry to say that a very unfortunate change had taken place in the manners of the lower classes. They too frequently made use of knives ... [t]his was a foreign introduction: formerly when a challenge was given, if either of the parties had a knife in his hand he threw it away’.³⁸ In the 1820s and 1830s, judges increasingly commented on the presence of crimes of stabbing or wounding in the assize calendar.³⁹

³⁶ The rate of convictions to committals across all recorded crime increased steadily “with only very minor variations” from 60% in 1805 to 78.5% in 1856. (Gatrell and Hadden, “Nineteenth Century Criminal Statistics”, 352.)

³⁷ The statistics in this paragraph are based on the parliamentary returns: *Select Committee on the Criminal Laws*, PP, 1819, VIII. Appendices; *Summary Statements* PP, 1826-7, XIX, 183ff.; *Summary Statements*, PP 1830-31 XII 495ff.; *Statements* PP, 1835 XLV. 21ff.. Attempted murder accounted for approximately 5% of executions in the period 1805-1832 (Gatrell, *The Hanging Tree*, 618.)

³⁸ *The Times*, 23 Sep. 1819, 3, col. e. See also, *The Times*, 19 Sep. 1814, 3 col.e, Augustine Antonia. There was a widespread belief that a true Englishman fought a ‘fair fight’. See Wood *Violence and Crime*, 70-94; M. Wiener, *Men of Blood*, 58-59.

These judicial statements were a longstanding feature of English criminal justice. Judges used their address to the grand jury or their sentencing speeches to reflect upon the state of crime in a particular locality. Non-fatal violence took its place alongside other crimes that occasionally needed to be suppressed. Yet, as with other crimes, these broad statements of concern were not matched by a determination to apply the law severely or uniformly. On the contrary, one of the reasons for the low conviction rate in cases of serious assault was the restrictive interpretation placed on Lord Ellenborough's Act by the judges. In line with contemporary practice they interpreted the Act literally and narrowly. A number of points had to be reserved for the consideration of the twelve judges, many of which concerned the kind of weapon that could be considered a cutting or stabbing instrument or the sort of wound that would suffice to found an indictment.

The judges drew fine distinctions and made little attempt to articulate principles that extended beyond the case before them. For example in the first few years of the Act's operation, the twelve judges decided, having examined the instrument in question, that a clothes iron, although not designed as a cutting instrument, was sharp enough to be capable of cutting.⁴⁰ They also determined that the claw part of a hammer was a cutting instrument for the purposes of the Act.⁴¹ In contrast, wounds inflicted with an iron bar or the blunt part of an adze were deemed

³⁹ For a typical example, see *The Times*, 11 April 1834, 3 col.e, John Carr.

⁴⁰ *R v Hayward* Russ. & Ry., 78, (1805).

⁴¹ *R v Atkinson* Russ. & Ry., 104 (1806).

not to fall within the statute.⁴² The judges insisted further that the stab or cut must have inflicted an incised wound. Thus Bayley J ruled that an assault with a cavalry sword that was in its scabbard, which inflicted a lacerated wound on the victim's head that bled considerably, did not fall within the statute.⁴³ The judges were also very strict in their construction of the indictment. In one case they overturned a conviction where the indictment charged the prisoner with 'cutting', but in evidence it appeared that the assault was more accurately characterised as 'stabbing'.⁴⁴

This approach reflected the judicial concern to interpret penal statutes as narrowly as possible in the context of a system containing over 200, highly specific, capital offences. The judges' entrenched attitude could sometimes defeat the intentions of Parliament. In 1828, Lord Lansdowne's Act sought to expand the scope of the offence under Lord Ellenborough's Act. Attempts to murder by drowning, suffocating or strangling were made capital offences; more significantly, the legislature introduced the word 'wound' in order to alleviate the difficulties experienced in interpreting the words 'stab' and 'cut'.⁴⁵ It was prompted to act by a

⁴² *Adams* (1807), Nbk 3, 277 in D. Bentley, *Select Cases from the Twelve Judges Notebooks*, London, 1997, 101; *OBP online*, 7 April 1825, Alfred Cooper, (t18250407-37).

⁴³ *R v John Whitfield* (1822) cited in Archbold, J. *A Summary of the Law relative to Pleading and Evidence in Criminal Cases* (2nd ed), London, 1825, 246.

⁴⁴ *R v M'Dermot Russ. & Ry.*, 356 (1818).

⁴⁵ 9 Geo. IV, c. 31, ss. 11, 12. Section 11 made it an offence to 'unlawfully and maliciously shoot, ... stab, cut or wound' any person with 'intent to commit murder'. It also made attempts to murder by poisoning, drowning, suffocating or strangling capital felonies. Section 12 made it an offence to 'unlawfully and maliciously shoot

recent Old Bailey case where an offender had committed a very serious assault on his victim using a bat. The Home Secretary, Robert Peel, spoke of the need to expand the offence to include assaults where a contused wound was inflicted with a blunt instrument.⁴⁶ Legal opinion was not convinced of the wisdom of the change. The *Law Magazine* thought the remedy worse than the disease and suggested that it exposed those caught up in affrays to prosecution on a capital charge.⁴⁷

Judges were also suspicious. Alderson B commented that '[t]he former enactments on this subject were confined to cutting instruments, and perhaps wisely, but now the matter is much more vague, and cases ought therefore to be watched carefully'.⁴⁸ In 1830, the twelve judges ruled that a particularly violent assault with an iron bar, which broke the victim's collarbone but did not break his skin, did not fall within the statute.⁴⁹ The fact that Parliament, when extending the offence to Ireland in

... stab, cut or wound' any person with intent 'to maim, disfigure or disable' or 'to do some other grievous bodily harm' provided that it would have been murder if death had ensued. The Act became known as Lord Lansdowne's Act because Lansdowne had been Home Secretary during the initial stages of the bill's passage through Parliament, but Peel was its chief architect.

⁴⁶ See, *OBP online*, 21 Feb. 1828, William Howard, (t18280221-45). Howard was convicted, but in parliament Peel referred to serious doubts over the propriety of the conviction. See *The Times*, 6 May 1828, 2 cols.b-d.

⁴⁷ Anon. 'Lord Lansdowne's Act' 1 *The Law Magazine* (1828-9), 129-141 at 131-32.

⁴⁸ *Howlett* 7 C&P 274, (1836).

⁴⁹ *R v. William Wood & James M'Mahon* 1 Mood, 277 (1830). Cf. the case of Peter Withers where an assault involving the throwing of a hammer that did break the skin was held to fall within the statute. (*R v Peter Withers* 1 Mood, 294, 1831).

1829, explicitly enacted that the wound could be contused and be inflicted by a blunt instrument is a further indication of the difficulties that the legislature and the courts had in co-ordinating an approach to this issue.⁵⁰

The judges' particularity with regard to the nature of the act and wound required for the offence of felonious assault contrasts sharply with their attitude towards the fault requirements for the crime. Judges were notoriously reluctant to articulate general principles of fault liability in the early nineteenth century. It was in this area that the jury employed its discretion to mitigate the law. According to the leading writer on evidence, the question of 'whether the act was done by the prisoner with the particular intention ... is, as in other cases of specific malice and intention, a question for the jury.' Its inference on this point should depend upon 'the situation of the parties, the conduct and declaration of the prisoner, and, above all, on the nature and extent of the violence and injurious means he has employed to effect his object.'⁵¹ The jurors could exercise their discretion by acquitting completely, or convicting on a reduced charge by finding that the offender only intended grievous bodily harm and not death.

Intention, either to kill, to disable or to cause grievous bodily harm, and malice were the two key requirements under Lords Ellenborough's and Lansdowne's Acts but they were not clearly defined or differentiated in this period. Foster's description of malice as 'a heart regardless of social duty and fatally bent upon mischief' served as a definition of sorts.⁵² When interpreting intention, as Smith

⁵⁰ 10 Geo. IV. c. 34, s. 15.

⁵¹ T. Starkie, *A Practical Treatise on the Law of Evidence*, 3 vols, London, 1824, vol. 2, 923-924.

⁵² M. Foster, *Crown Cases*, London, 1792, 256.

notes, judicial observations ‘demonstrated practically no inclination to move legal analysis beyond the specific circumstances in question.’⁵³ The concepts of malice and intention were sufficiently flexible to allow both judge and jury to shape outcomes according to their own view of the case. They worked together to delineate the bounds of acceptable conduct.

Premeditated, cold-blooded assaults were the most likely to result in a conviction. When Launcelot Boniface shot his landlord in the face at point blank range because of a pre-existing grievance, although the landlord survived, the intention to kill was clear and the judge directed the jury to convict.⁵⁴ Similarly, when David Owen silently set about attacking his brother-in-law’s family with a knife, having previously expressed a desire to kill them, he was convicted and sentenced to death.⁵⁵ In the case of Edward Fisher, who was found guilty of a premeditated stabbing, the judge warned that the courts ‘never overlooked cases like the present but always visited them with capital punishment.’⁵⁶

These cases of very deliberate attempts at murder clearly satisfied the requirements of malice and intention, but in other situations one or both were absent. Judges did not always insist on the evidential rule that a man was presumed to have intended the necessary consequences of his actions. In 1826, Thomas Mason was caught stealing from the prosecutor’s shed. In order to effect his escape, Mason stabbed the prosecutor. The indictment charged Mason under Lord Ellenborough’s Act, but Park J instructed the jury that if it thought that Mason’s only intention was to

⁵³ Smith, *Lawyers*, 85.

⁵⁴ *The Times*, 22 March 1817, 3 col.e.

⁵⁵ *The Times*, 6 April 1818, 3 col.e.

⁵⁶ *The Times*, 20 Aug. 1819, 3 cols.b-c.

commit the theft, it should acquit him of the stabbing offence under Ellenborough's Act, which it duly did.⁵⁷ In 1814, one judge stopped a case in which the prisoners had assaulted the members of a press gang with a cutlass, stating that despite the 'outrageous assault', there did not seem to be any 'serious intention to commit a felony.'⁵⁸ The judge seems to have used intention in a very vague sense to justify his view that the case was not serious enough to warrant a felony conviction.

The judges made little attempt in these cases to define intention with precision or to distinguish it from motive.⁵⁹ The jury exploited this ambiguity and often mitigated the law with a finding that there was not the felonious intent. Whilst the usual blank verdict masks the jury's reasons in the majority of cases, there are instances where the jury returned a detailed verdict. Joseph Whiteley was acquitted in 1829 when the jury returned a verdict of 'cutting and maiming but not with intent to kill'.⁶⁰ The verdict of guilty of the act, but not with the requisite intent, was quite common and, because it resulted in an acquittal, sometimes produced conflict between the judge and jury. Following one such verdict of guilty but not with the requisite intent, the judge expressed his disapproval, commenting that 'you find that

⁵⁷ *The Times*, 11 April 1826, 3 col.f. For a similar example, see *The Times*, 17 April 1830, 3 cols.b-c, William Randall. See also *Duffin Russ. & Ry.* 364, (1818); *The Times*, 3 April 1818, 3 col.e, William Marshall, Thomas Duffin; *Gillow 1 Mood*, 85, (1825); Smith, *Lawyers*, 86-7.

⁵⁸ *The Times*, 17 March 1814, 3 col.e, William May, William Stokes, Peter Dew.

⁵⁹ See the comments of the Royal Commission: "the term intention is not sufficiently distinguished from the motive or the object with which an act is done." 4th Report, PP (1839), XIX, pp. xiv-xv.

⁶⁰ *The Times*, 14 March 1829, 6 col.c.

the prisoner cut the prosecutor for his own amusement, for such is the effect of your verdict.’⁶¹ These cases seemed to have been determined by the jury’s moral evaluation of the prisoner’s motive in making the assault. There is some evidence of judicial dissatisfaction with the mitigating practices but there was no consistent effort by the judges to restrict the jury’s discretion. As a result, intention remained a very malleable concept.

Malice was the other key component of liability and it gave even greater scope for a discriminating application of the law. Until 1837, the link with murder meant that factors that would have reduced murder to manslaughter had the effect of excluding all liability for felonious assaults. Thus if, for example, a prisoner could demonstrate that there was provocation, he would escape liability. The boundary between murder and manslaughter was notoriously difficult to locate and the vagueness in the law of homicide transposed itself to the law of serious assaults.⁶² In 1823, Park J warned in his address to the grand jury that Lord Ellenborough’s Act was not to be used ‘whenever quarrels arose in the heat of the moment, as they were almost daily doing, amongst the inferior classes of the people.’ Park explained that the judge would put a stop to trials where malice was negated, but only in the clearest cases; otherwise the issue would be left to the jury.⁶³

⁶¹ *The Times*, 9 April 1825, 3 col.f, George Edwards. See also *The Times*, 14 Aug. 1816, 3 col.a, Louisa Wood.

⁶² Murder was distinguished from manslaughter by the presence of malice aforethought. Murder caught a much wider range of acts than it does today, mainly because of the felony-murder rule, which meant that any killing committed during the course of a felony would be murder.

⁶³ *The Times*, 30 Dec. 1823, 3 col.a.

The effect of this policy was to exclude from the ambit of the crime any assault that was committed in ‘the heat of blood’. For example, in 1826 Elizabeth Nash stabbed Elizabeth Cripps in the face several times inflicting severe wounds. Once it was established in evidence that there had been a quarrel and that both parties were ‘in a passion’, Burrough J ruled that the case should have been prosecuted as a common assault and directed an acquittal.⁶⁴ In Nottingham in 1829, John Ashwell, stabbed his victim 7 times in the arm and once over the eyebrow. The prisoner was drunk and had been making noise in the street; the prosecutor had unwisely asked him to desist. The judge considered that it would only have been manslaughter had death ensued on the grounds that the knife had been open in his hand when he received the provocation and he had acted as a result of momentary excitement.⁶⁵

Juries consistently acquitted prisoners who committed their assault during the course of a fight. It was very common for prisoners to allege that at the time that they were provoked they had been eating and had forgotten that they were holding a knife. There are sufficiently numerous examples of this description to suggest that it served as a convenient fiction for juries concerned to acquit.⁶⁶ In 1817, John Clifton’s defence on a charge of stabbing was that he had been holding a cheese knife and his

⁶⁴ *The Times*, 24 June 1826 3 col.f; *OBP online*, 22 June 1826, Elizabeth Nash, (t18260622-17).

⁶⁵ *The Times*, 26 March 1829, 3 col.d.

⁶⁶ See, for example, *OBP online*, 7 April 1813, Joseph Smith (t18130407-104); *OBP online*, 15 Sep. 1819, Daniel Mendoza, (t18190915-108); *OBP online*, 22 Oct. 1823, Matilda Thorn, (t18231022-7).

victim had run his head against it. The jury acquitted despite the fact that the alleged provocative act had taken place five minutes prior to the stabbing.⁶⁷

Judges were willing to allow juries to exploit the vagueness of the concept of malice to incorporate their own standards into the law and made little effort to refine the legal meaning of the term. The contrast between the jury's standards and those expressed in the formal law is particularly striking when considering the effect of intoxication on criminal liability. The conventional view amongst contemporary legal writers was that drunkenness was an aggravating rather than a mitigating factor.⁶⁸ This view did not reflect trial practice. Rabin has established that drunkenness was consistently used in the eighteenth century as a mitigating factor, whilst Wiener has demonstrated that in murder trials drunkenness operated broadly as an excuse until the Victorian judges came to narrow its scope.⁶⁹ In trials for serious assaults in the period 1803-1837, drunkenness operated as a mitigating factor, despite occasional judicial statements to the contrary. Juries were generally sympathetic to the excuse and the amorphous concept of malice allowed them to take it into account. Furthermore it relieved the judges from exploring the issue too deeply or from articulating a rationale for why drunkenness might excuse a prisoner.

If there were no clear rules defining the effect of drunkenness on criminal liability, there were certain working practices. One critical factor appears to have been the question of motive. In the absence of a motive, it was difficult to infer malice or intent. As one drunken defendant pleaded in 1804, 'I cannot see what intent I could

⁶⁷ *OBP online*, 17 Sep. 1817, John Clifton (t18170917-156).

⁶⁸ For a summary of legal writers' views, see Smith, *Lawyers*, 100-102, 240-241.

⁶⁹ D. Rabin "Drunkenness and Responsibility for Crime in the Eighteenth Century", 44 *Journal of British Studies* (2005), 457-477; Wiener, "Judges v Jurors", 490-497.

have in doing it'.⁷⁰ Drunkenness was closely linked to the questions of self-control and the 'heat of blood'. If it was demonstrated that a prisoner had been provoked and was intoxicated at the time, and there was no further evidence of malice, an acquittal was the most likely result. In 1826 an Old Bailey jury acquitted Henry Baker who had stabbed two people outside a pub whilst very drunk. Under cross-examination, neither victim was able to suggest any motive, one stating that he could have 'had no spite against me', the other commenting that the prisoner appeared to strike at random.⁷¹

Drunkenness was consistently put forward as an explanation for assaults. In the case of Edward Sweetham, accused of stabbing a policeman, the arresting officer claimed that the prisoner was sober when he was taken but subsequently feigned drunkenness in order to mitigate his offence. The prisoner's counsel suggested that the prisoner was drunk and his whole defence was that: 'If I did it, it was under the influence of drink - I was not aware that I had done it till I was told of it in the morning; I was drinking all that day.' In this case the defence was unsuccessful, but all the participants seemed to have accepted the fact that, if established, drunkenness would have diminished the offence.⁷²

⁷⁰ *OBP online*, 12 Sep. 1804, William Coleman, (t18040912-35).

⁷¹ *OBP online*, 11 May 1826, Henry Baker, (t18260511-175).

⁷² In the OBP he is referred to as Smeetham, in *The Times* as Sweetham. See *OBP online* 30 June, 1831, Edward Smeetham, (t18310630-12); *The Times* 4 July 1831, 4 col.c. For Sweetham's appeal papers, see NA, HO 17/36 Eq 34. His death sentence was commuted to transportation for life. For another example of a case where the defence of drunkenness was disputed on the grounds that the prisoner was not in fact drunk, see *OBP online*, 17 May 1832, James Pearce, (t18320517-18).

There is little indication that judges were very concerned to use the law to suppress drunkenness in this period. They appeared to make little attempt to prevent its use as a defence or to direct the jury to ignore it as a factor. Defence counsel routinely based entire defences around the plea of drunkenness.⁷³ Judges were, at the very least, tacitly complicit in allowing drunkenness to operate as a defence. The reasons why it was allowed to mitigate the offence varied. Occasionally it would demonstrate a lack of premeditation, sometimes a defendant would allege that his drunkenness had rendered him more excitable, hence more easily provoked, and in other cases, like Sweetham's, the prisoner alleged that his intoxicated state rendered him totally unaware of what he was doing. These developments and discussions came at a time when judges in reserved cases and treatise writers provided only a very rudimentary treatment of the effects of intoxication on criminal liability.⁷⁴ The trial practices were clearly recognisable and they often foreshadowed later developments in legal doctrine, but the vague concept of malice and the discretionary nature of the trial meant that they were not always followed and the principles were not articulated.

To summarise, trials for serious assaults in the period 1803-1837 were typical of the discretionary mode of justice characteristic of the 'bloody code' era. The severity of the law was mitigated by the narrow judicial statutory interpretation of the offence and the broad scope left to judge and jury to determine fault liability. The extent of this discretion rendered the law unpredictable, but certain patterns are evident. Premeditated assaults committed with dangerous weapons were likely to

⁷³ For examples, see: *Proceedings of the Central Criminal Court*, vol. 1, p. 739, case 719, trial of Mark Brady, 4 March 1835; *ibid*, p. 919, case 929, trial of George Cooper, 8 April 1835.

⁷⁴ See Smith, *Lawyers*, 100-101.

result in a conviction, whereas an acquittal was more likely in cases of assaults committed in the heat of blood, whilst drunk, or in circumstances where motive was deemed an exculpatory factor.

IV. REFORMING THE LAW

In the 1830s the legislature set about dismantling England's 'bloody code'. Piecemeal reform gave way to a series of sweeping measures that removed the death penalty from the vast majority of felonies. Lord John Russell introduced the Offences against the Person Bill in 1837 that, amongst other changes, redefined the law relating to serious assault. The bill was part of a wider package of measures that arose from the Royal Commission on the Criminal Law's Second Report in 1836 and which sought to reduce the number of capital offences.⁷⁵ Russell relied upon the practical difficulties experienced in the application of the law when presenting the bill to Parliament. He specifically criticised the requirement that an instrument of some kind be used and that it inflict an incised wound. He referred to an Old Bailey case where an offender who had bitten off the tip of a policeman's finger had his conviction quashed because he had not used an instrument and to a Somerset case in which a

⁷⁵ *Second Report of His Majesty's Commissioners on Criminal Law*, (Royal Commission) PP (1836), XXXVI. For the Commission's Report and the 1837 bills, see L. Radzinowicz, *A History of English Criminal Law from 1750*, 4 vols, London, 1948, vol. 4, 311-326.

brutal assault with a poker by a husband on his wife did not result in any incised wounds and hence fell outside the statute.⁷⁶

The Act that resulted wrought a fundamental change in the structure of the law relating to non-fatal offences against the person.⁷⁷ It divided the offences created by Lord Ellenborough's Act and modified in 1828 into three parts. Section 2 made it a capital offence to 'poison, ... stab, cut or wound or ... by any means whatsoever cause to any person any bodily injury dangerous to life with intent ... to commit murder'. Section 3 created an offence of attempting to 'poison', 'shoot', 'drown', 'suffocate' or 'strangle' any person with intent 'to commit murder' where no bodily injury was effected. Section 4 made it a felony to 'shoot', 'stab, cut or wound' any person with intent 'to maim, disfigure or disable' or 'to do grievous bodily harm'. The penalty for offences under sections 3 and 4 was transportation for at least 15 years or imprisonment for up to three years. Crucially, the Act omitted the proviso requiring liability for murder if death had ensued. Whilst sections 2 and 3 were still defined as attempted murder, under section 4 a defendant could be convicted of felonious assault in circumstances where he would not have been liable for murder if death had ensued. Section 2 aimed to expand the offence of attempted murder by making provision for assaults committed by 'any means', but section 4 retained the wording from Lord Lansdowne's Act.

⁷⁶ *Parliamentary Debates*, series 3, vol. 37, col. 723, 23 March 1837 (House of Commons). The Old Bailey case was that of John Stevens, *OBP online*, 10 April 1834, (t18340410-6). The point was reserved and the judges held by 7 to 6 that an instrument had to be used, see *R v Stevens* Exch. Ch, E. T. (1834) 1 M.C.C. 409.

⁷⁷ 1 Vict. c. 85.

The new Act fitted the reformers' objective of securing more certainty in the law through a clearer division of offences, with the death penalty being reserved for the offence of attempted murder defined in section 2. When introducing the bill, Lord John Russell noted that it was notorious that judges and juries were disposed to soften the application of the law in capital cases.⁷⁸ The objective of increasing the certainty of the law was undermined however by section 11 of the Act, which permitted the jury to convict the offender of a common assault if a felony charge for any of the offences against the person created by the Act was not made out. In that event the offender could be punished for up to three years in prison.⁷⁹ The reason for this section was entirely pragmatic. As the Royal Commission had noted, much inconvenience had resulted from the previous law, where a fresh prosecution for common assault had to be brought following an acquittal on the felony charge.⁸⁰ The result of the change was that juries gained a critical discretionary power. They were not afraid to use it and frequently returned partial verdicts in the 1840s and 1850s. Indeed, they employed this power so often that one judge directed a jury in 1850 that 'it was not because the statute allowed that course that it should always be adopted by a jury'.⁸¹

⁷⁸ *Parliamentary Debates*, series 3, vol. 37, col. 723, 23 March 1837 (House of Commons).

⁷⁹ 1 Vict. c. 85, s. 11.

⁸⁰ *Royal Commission*, 2nd Report, (1836), 18.

⁸¹ *The Times*, 25 July 1850, 8 col.b, William Shaw. It is difficult to estimate the percentage of cases that resulted in a partial verdict because they were not recorded in the official statistics and reports in the *The Times* and *Old Bailey Papers* do not distinguish between convictions for the felony and the misdemeanour consistently.

In 1851 Lord Campbell's Act interposed a new misdemeanour that was defined as the unlawful and malicious infliction of grievous bodily harm with or without any weapon, or the unlawful stabbing, cutting or wounding of any person. The Act specified that it was open to juries to convict of this misdemeanour, which became known as unlawful wounding, if they were not satisfied of the felony.⁸² In effect, the new offence supplanted common assault to catch offenders acquitted of felony and was punishable with a maximum of 3 years, with or without hard labour. A further Act of 1851 specifically repealed section 11 of the 1837 Act, which had allowed for the jury to convict on the reduced charge of common assault owing to the 'great difficulties' that had arisen from it.⁸³

The 1837 and 1851 Acts created a greater range of offences and prosecuting options. In practice the non-capital offence of stabbing, cutting or wounding with intent to cause grievous bodily harm was the most commonly prosecuted offence. In the period 1838-1861 the average number of prosecutions per year under section 2 was 18, under section 3 it was 16 and under section 4 it was 212.⁸⁴ The total number of prosecutions fluctuated in the period in patterns that reflected public concerns over

Partial verdicts were a well-established means of mitigating the law during the era of the 'bloody code', see, J. Beattie, *Crime and the Courts*, 419-430.

⁸² 14 & 15 Vict., c. 19, ss. 4-5.

⁸³ The Act also made provision for assaults which occasioned actual bodily harm, to be punished by hard labour in addition to the punishment of up to three years imprisonment reserved for common assaults. (14 & 15 Vict. 100, ss. 10, 29.)

⁸⁴ These figures do not include 1860. Sources: *Statements on the Criminal Law*, PP, 1837, XLVI, 127; *Tables showing the number of criminal offenders*, PP, 1839, XXXVIII, 243; *Annual Judicial Statistics*.

the problems of violence.⁸⁵ The conviction rate for the capital offence of attempted murder remained at an average of around 40%, which was about the same as in the period 1830-1837.⁸⁶ The conviction rate for offences under section 4 rose to around 60% in the period until 1861.⁸⁷ This rise can probably be explained by the fact that it was open to the jury, under the new law, to convict on the reduced charge of assault or, from 1851, unlawful wounding where previously it would have acquitted.

The number of executions dropped off dramatically. In the period before the death penalty for attempted murder was finally abolished in 1861, only five of those convicted were executed. In all of the five cases there was very clear evidence of premeditation and an intention to kill.⁸⁸ These were the only executions for felonies

⁸⁵ Thus there was a sharp rise in prosecutions in the period 1855-1857 when fears of street crime were rife. See R. Sindall, *Street Violence in the Nineteenth Century Media Panic or Real Danger*, Leicester, 1990, 44-50.

⁸⁶ The average conviction rate under s. 3 was also 40%.

⁸⁷ These figures are based on a comparison between all felonious assaults in the earlier period and s. 4 assaults in the latter period. For the sources, see above, nn. 37, 84.

⁸⁸ For the trials and executions of those hanged, see *The Times* 17 August 1838, 6 cols.c-d, 8 Sep. 1838, 7 col.c, George Maskeley; *The Times* 13 April 1839, 6 col.f, 15 April 1839, 6 cols.c-d, 3 May 1839, 6 col.e, Charles Daines; *The Times* 24 March 1841, 6 col.f, 5 April 1841, 5 col.f, Josiah Misters; *The Times* 7 March 1851, 6 col.f, 26 March 1851, 6 cols.d-e, Sarah Chesham; *The Times* 9 Aug. 1861, 9 col.b, 28 Aug. 1861, 10 col.d, Martin Doyle. The official statistics only show 4 executions for attempted murder.

other than murder after 1837, which suggests that attempted murder, most forms of which had not even been felonious before 1803, had come to be viewed as second only to murder in the hierarchy of felonies.⁸⁹ On the statute book at least, the criminal law's priorities shifted fundamentally in the 1830s. Violent offences came to be seen as a greater threat to society than property offences.

Fears that had been articulated in the first part of the nineteenth century about disorder, unruliness and violence and the dangers intrinsic in the large urban classes intensified in the Victorian period.⁹⁰ There is no doubt that judges shared the broader public concerns regarding the problem of non-fatal, violent crime in the 1840s and 1850s. It became more common for judges, in their addresses to grand juries, their summing-ups and their sentencing speeches, to comment on the rise in violent crime and in particular the increase in the number of stabbings amongst the inferior classes. Sentencing two offenders to 21 years' transportation in 1841, Coleridge J stated:

It is because the use of the knife has become so frequent that it is absolutely necessary to visit this offence with severe punishment. Now-a-days the instant a man finds that he has a little the worst of an encounter, out comes the knife and he plunges it into the body of his antagonist. I must make a severe

⁸⁹ Gatrell, *The Hanging Tree*, 618-619. The 1837 reforms left the death penalty attached to a number of felonies including robbery and burglary with violence and rape, but there were no more executions for these offences.

⁹⁰ See Wiener, *Men of Blood*, 27-28; V Gatrell, "The decline of theft and violence in Victorian and Edwardian England" in Gatrell, B. Lenman and G. Parker (eds) *Crime and the Law: The Social History of Crime in Western Europe since 1500*, London, 1980, 289-293.

example of both of you, in order to prevent other persons having recourse to the same deadly instrument.⁹¹

These frequent statements notwithstanding, judicial attitudes towards statutory interpretation and the fault requirements did not change quickly. Conditions were little better for judicial development of law in the 1840s and 1850s than they had been previously, despite the establishment of the Court for Crown Cases Reserved in 1848.⁹² This change merely placed the old informal proceedings in which the judges considered points reserved by the trial judge on an official footing. The new court had a very limited role; its caseload remained small throughout the nineteenth century and it did not form an effective court of review.⁹³

Many of the cases that came before the Court for Crown Cases Reserved continued to concern points relating to the nature of the wound or the mode in which it was inflicted, despite the fact that one of key aims of the 1837 statute, according to

⁹¹ *The Times*, 5 Aug. 1841, 7 cols. a-b, Joseph Jones, William Lewis. For more examples, see *The Times* 17 March 1841, 7 col.b, Alexander MacDonald; *The Times*, 2 Nov. 1843, 6 col.c, Raymond Lucesi. For an example of an address to the grand jury on the increase in stabbing, see *The Times*, 3 Jan. 1844, 6 col.a.

⁹² 11 & 12 Vict. c. 78.

⁹³ See R. Pattenden, *English Criminal Appeals 1844-1994*, Oxford, 1996, 8-10.

Pattenden suggests that the court heard on average only 8 cases per year. Bentley estimates the figure to be slightly higher, see Bentley, *Select Cases* Appendix 4, table b, p. 196.

Lord John Russell, was to prevent acquittals on such technical grounds.⁹⁴ The retention of the wording of the 1828 Act in section 4 of the 1837 Act meant that this aim was only imperfectly realised. The judges, after initially insisting on the need for a weapon, gradually relaxed this requirement in the 1840s and 1850s.⁹⁵ In other areas the judicial practice of construing the offence restrictively continued. The definition of a wound remained very narrow so as to include only those injuries in which the skin was broken.⁹⁶ Technical flaws in the indictment could also sometimes avail an offender. In one 1844 case where a defence counsel pointed out that it was not clear from the indictment whether the prisoner or the prosecutor was charged, the judge directed an acquittal as the case was ‘slight’.⁹⁷

V. LAW AND PRACTICE 1837-1861

⁹⁴ *Parliamentary Debates*, series 3, vol. 37, cols 722-3, 23 March 1837, (House of Commons).

⁹⁵ *Jennings* 2 Lew, 130, (1838); *Erle* 2 Lew 133 (1838); *R v Duffill* (1843) 1 Cox C.C. 49. The gradual judicial retreat from the requirement culminated in the conviction of James Cannon, the ‘Southwark Bull’, for the capital offence of attempted murder. His brutal assault on a policeman did not involve a weapon. See *The Times*, 28 Oct. 1852, 7 cols. c-d.

⁹⁶ A number of cases were reserved for the consideration of the 12 judges on the point. See W. Russell, *A Treatise on Crimes and Misdemeanours* 3 vols, 4th ed, London, 1865, vol. 1, 983-985.

⁹⁷ *The Times*, 1 Jan. 1844, 6 col.g, Adam Wilson.

The judges' continued disinclination to set out principles of fault liability in reserved cases meant that legal development continued to take place at the trial. The improved system of law reporting and the plethora of legal treatises that were established by the mid-nineteenth century, together with the increased presence of lawyers, improved the quality of legal discussion in the courtroom.⁹⁸ Nonetheless it would be misleading to focus on these factors at the expense of other features of the felony trial, which were of a much older pedigree. The jury remained at the centre of proceedings and, crucially, continued to mitigate the law by returning partial verdicts. Judges were unable and often unwilling to prevent juries from exercising their discretion, but they became concerned to limit it in certain areas. As a result the harmonious working relationship between judge and jury that had been such a feature of the 'bloody code' era came under strain.⁹⁹

The increased presence of defence counsel, who by this point had full rights to conduct the defence and address speeches to the jury, exacerbated this tension.¹⁰⁰

⁹⁸ For a discussion of the significance of treatises for the development of the criminal law, see Smith *Lawyers*, 67-72.

⁹⁹ For judge-jury relations in the eighteenth century, see: J. Beattie, *Crime and the Courts*, 406-410; T. Green, *Verdict According to Conscience. Perspectives on the English Criminal Trial Jury 1200-1800*, Chicago, 1985, 267-317.

¹⁰⁰ Defence counsel were admitted into felony trials by judges for the first time in the 1730s, but they only began to appear in significant numbers from the 1780s onwards. Their role was restricted until the 1836 Prisoner's Counsel Act (6 & 7, Will. IV, c.114) gave them the right to address speeches to the jury. See: J. Langbein *The Origins of the Adversary Criminal Trial* Oxford, 2003; D. Cairns *Advocacy and the Making of the Adversarial Criminal Trial* Oxford, 1998; J. Beattie "Scales of Justice:

They were more likely to seek to gain an acquittal or partial verdict by exploiting the jurors' sympathies than by using technical, legal arguments. Generally, jurors continued to be more sympathetic than judges to the plight of the accused and they were not afraid to defy the judge if necessary. In one of the first cases after the 1837 Act, Edward Mills was charged with stabbing with intent to cause grievous bodily harm. Lord Denman summed up in clear terms, stating that it would have been murder had death ensued and that if claims for money were always enforced with a 'butcher's steel the community would be continually in danger.' The jury ignored this direction and convicted Mills of a common assault only.¹⁰¹

Following the 1837 Act the focus of inquiry at trial became the prisoner's intention. In purely legal terms, the critical factor underlying the shift in focus was the omission of the proviso requiring the court to be satisfied that the prisoner would have been guilty of murder had death ensued.¹⁰² Factors that would have negated malice previously by reducing murder to manslaughter were no longer determinative. In 1843 Cresswell J told the jury that '[i]f the act was done unlawfully and maliciously, that is, without lawful excuse, and intentionally, it is enough. Maliciously does not mean with premeditated malice, as in murder; an intention to do the mischief

Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", 9 *Law and History Review* (1991), 239-263.

¹⁰¹ *The Times*, 1 Dec. 1837, 7 col.e.

¹⁰² There was some initial doubt as to whether the jury still had to be satisfied that it would have been murder in the event of death under section 4. See: *Hagan* 8 Car & P, 167, (1837); *Griffiths* 8 Car & P 248, (1837). The 12 judges held that it was no longer necessary in 1838, although Lord Denman and Littledale J 'doubted'. (*Anon.*, 2 Mood 39 1838).

unlawfully will satisfy the statute.’¹⁰³ The key issue in Cresswell’s formulation was intention. Theoretically this had the potential to widen the scope of the offence under section 4 of the 1837 Act because the jury only had to be satisfied that the offender had the requisite intent. Factors relevant to the question of malice did not disappear however; instead, their influence came to be measured solely with reference to the question of intention, which had important implications for legal development.

This process of development continued to be shaped by the interaction of judge, jury and, increasingly, prosecution and defence counsel. There was still a broad measure of agreement between the trial participants on what would constitute a felony, thus cold-blooded, premeditated assaults usually resulted in a conviction. Where injuries were inflicted in the course of a fight, judges and juries continued to mitigate the law in similar ways to before the 1837 Act. Both judge and jury viewed fighting as an acceptable mode of settling quarrels; the question of whether the conduct was criminal depended upon the degree of violence that had been used. In 1844, following a dispute in a pub, Leonard Aldis stabbed his opponent a number of times, inflicting relatively minor injuries to the victim’s face and hands. His defence counsel suggested that the incident was too trifling to warrant a felony conviction. The judge disagreed, commenting that the quarrel was not of a kind that required weapons beyond that which nature had provided. Nonetheless, the jury convicted Aldis on the reduced charge of common assault.¹⁰⁴ In contrast, following a similar dispute in 1851, Lord Campbell directed the jury to return a verdict for common assault. When sentencing he commented that a ‘little recreation was quite proper, and

¹⁰³ *Odgers 2 M & Rob*, 479 (1843), quoted in Russell, *Treatise* vol. 1, 994; *The Times*, March 30, 1843, 8 col.a.

¹⁰⁴ *The Times*, 20 Dec. 1844, 8 col.a.

perhaps a slight elevation was not to be found fault with, but persons must not have recourse to the knife.’¹⁰⁵

Defence counsel consistently argued that where there was evidence of provocation or passion the felonious intent could not be made out and juries consistently returned partial verdicts in such cases. Some judges appeared to share this view. In 1856, John Weavers stabbed his wife in the neck following an argument over money. Erle J told the jury not to assume that because the wound was in such a dangerous place the offender must have had the felonious intent, but to ‘consider whether or not it was impossible that the prisoner who was then eating his supper, being put much out of temper used the knife, without any precise intent in his mind at the moment he did so.’¹⁰⁶ He then suggested that the act was certainly unlawful and the jury took the hint, convicting on the reduced charge. In the case of Frederick Swan Todd in 1858, the heavily indebted prisoner went to the office of his solicitor who was one of his creditors and stabbed him four or five times in the head and the neck. Todd’s counsel argued that he was in too excited a state to form the requisite intent. Martin B directed the jury that if it believed the prisoner to have acted in a ‘moment of violent passion’ it should convict of unlawful wounding, which it duly did.¹⁰⁷

These cases suggest that intention continued to be associated with a coolly deliberate act on the part of the offender, and not something that was done rashly in the heat of blood. If the judges made little attempt to control the jury’s discretion in this area, they made more of an effort where intoxication was a factor. It continued to be used as a defence and juries routinely returned partial verdicts where it appeared

¹⁰⁵*The Times*, 17 July 1851, 7 col.d, James Gilbert.

¹⁰⁶ *The Times*, 12 Dec. 1856, 9 col.f.

¹⁰⁷ *The Times*, 2 Aug. 1858, 11 col.a.

that the offender was drunk.¹⁰⁸ In cases of drunken pub fights a felony conviction remained very unlikely. Indeed, in 1858 Pollock CB was moved to complain that too many such cases were being prosecuted as felonies. He stated that ‘all cases where the use of a knife had arisen in a mere drunken squabble and where there was clearly no intent upon the part of the prisoner (at the time most probably in a state of intoxication) to inflict ‘grievous bodily harm’ should be dealt with as misdemeanours.¹⁰⁹

In other contexts the judges increasingly articulated their disapproval of drunken behaviour and sought to limit its mitigating effect. They became particularly concerned with the problem of violence against women.¹¹⁰ When Nicholas Foster tried to cut his wife’s throat when she refused to cook eggs for him, his defence was that he had been drunk and must have wounded her accidentally. The jury acquitted him of assault with intent to murder but immediately convicted him of assault with intent to cause grievous bodily harm. Gurney B sentenced him to fifteen years’ transportation and commented that if ‘persons would pass a life of profligacy and spend their money in drink, when they committed such desperate crimes they must take the consequences. It was absolutely necessary in order to put an end to the use of the knife to visit such offences with serious punishment.’¹¹¹

¹⁰⁸ For a typical example see *The Times*, 28 July 1840, 7 col.c, William Jones.

¹⁰⁹ *The Times*, 17 Aug. 1858, 12 col.a, Thomas Lewis.

¹¹⁰ For this theme see Wiener, *Men of Blood*, passim. This concern prompted the 1853 Act for the Better Prevention of Aggravated Assault upon Women and Children, (16 & 17 Vict. c.30). See also below text at n. 123.

¹¹¹ *The Times*, 21 June 1842, 7 col.b.

The judges' concern with the problem of drunkenness sometimes brought them into conflict with the jury. In the case of Seth Rolfe, the prosecutor and prisoner had been drinking heavily at a gathering to celebrate the end of the lambing season. The prosecutor fell asleep but awoke to find the prisoner pummelling him. A fight ensued, following which the prosecutor found himself stabbed in his side. The defence counsel suggested to the jury that the prisoner was too drunk to form the felonious intent. Coleridge J thoroughly disapproved of this suggestion. He directed the jury to ignore it and commented that '[i]t ought to be universally known that drunkenness formed no excuse for the commission of crime. That which in drunkenness voluntarily brought on, a man committed, he must answer for when sober.' The jury returned a verdict of common assault, giving as its reason the fact that his drunkenness rendered it 'improbable' that he had in his mind the felonious intent charged in the indictment. Coleridge expressed his disapproval and imposed the relatively harsh sentence of 15 months' imprisonment with hard labour.¹¹²

Rolfe's case furnishes a very good example of the changing dynamic in the courtroom. The prisoner's lawyer exploited the jury's sympathy with the prisoner and the judge was unable to prevent intoxication operating as a mitigating factor. Moreover the jury expressed its reasoning in terms that were legally significant. It concluded, following the defence counsel's prompt, that the prisoner did not have any felonious intent because he was drunk. Prior to the 1837 Act, the precise effect of drunkenness on liability remained vague because of the requirement of malice. The removal of malice meant that the effect of drunkenness on intention had to be articulated. The judges were concerned to reduce its effect, but they could not ignore the fact that juries consistently returned partial verdicts on the basis that the offender

¹¹² *The Times*, 6 April 1843, 7 col.e.

lacked felonious intent. Prisoners' counsel routinely urged drunkenness as a defence. For example in the case of Charles Durden in February 1851, the prisoner's counsel suggested that the jury should reduce the charge to a common assault on the basis that the prisoner was 'too drunk to know what he was doing'.¹¹³

Ultimately the judiciary had little choice but to recognise the defence. In the leading case of *Cruse Patteson* J had acknowledged that a 'person may be so drunk as to be utterly unable to form any intention.'¹¹⁴ Alderson B stopped a felony prosecution in 1847 and directed a verdict of common assault when it was established that the prisoner was 'greatly intoxicated'. He commented that 'although intoxication could not be allowed as an excuse for an unlawful act yet it might well furnish a test of the intention by which that act was done.'¹¹⁵ This legal development was driven by trial practice, by jurors rather than judges. It did not arise out of a concern to develop clear legal doctrine, nor did it reflect a softening of judicial attitudes.¹¹⁶ The judges recognised an existing mitigating practice and articulated a rule of law to describe it.

Evidence from the trials in the period 1837-1861 suggests that discretion, and specifically the jury's discretion to return partial verdicts, continued to be highly influential, notwithstanding the practical abolition of the death penalty for felonious assault. The judges made some attempt to control this discretion, especially in the area of intoxication, but juries, often prompted by defence counsel, still routinely acquitted drunken or passionate offenders of the felony. The question arises then as to why the judges did not make a concerted attempt to narrow these grounds as Wiener has

¹¹³ *The Times*, 11 Feb. 1851, 7 cols.d-e.

¹¹⁴ 8 C & P, 546 (1838).

¹¹⁵ *The Times*, 26 July 1847, 7 cols.d-e, Joseph Matthews,.

¹¹⁶ For an argument that it did, see Smith, *Lawyers*, 240-241.

argued that they did in relation to the law of homicide and wife killing in particular. Wiener does not suggest that the judges had a sudden change of approach and accepts that, even at the end of the century, many acts of violence were treated leniently. Nonetheless, even if there was no consistent policy, he detects a ‘clear trend towards increasingly severe legal treatment’.¹¹⁷

Assaults were less serious than homicide in their consequences and judges had no desire to stop people fighting altogether, on the contrary they recognised it as a legitimate means of settling disputes provided it was done fairly; judges often shared the juries’ view that drunkenness or ‘heat of blood’ should mitigate the offence. But there is another, more fundamental, reason to explain the judicial reticence to develop new rules of law to control the jury’s discretion: where they did not share the jury’s view of a case, as long as the jury convicted of at least the minor offence, judges could reflect their own perspective in the sentence.

Judicial discretion as to sentence had been central to the debates over the ‘bloody code’ in the 1820s and 1830s but it survived the reforms that swept away the capital statutes.¹¹⁸ Judges could sentence offenders to anything from one day’s to three years’ imprisonment for the felony or the misdemeanour with the possibility of transportation for a minimum of 15 years and a maximum of life for the felony.¹¹⁹ The cases most likely to attract the most severe sentence of transportation were the cases of premeditated violence that judge and jury were likely to agree should result

¹¹⁷ Wiener *Men of Blood*, 270.

¹¹⁸ On the importance of judicial discretion to the question of criminal law reform, see McGowen, “The Image of Justice”, *passim*.

¹¹⁹ This sentencing discretion applied for the charges brought under sections 3 and 4 of the 1837 Act. See above n. 77.

in a felony conviction. In many of the cases involving heat of blood or intoxication, where judge and jury might disagree, the judge was unlikely to wish to sentence the offender to more than the three years' imprisonment allowed for the misdemeanour.

Judges acknowledged the effect of the sentencing discretion. In the case of David Orpe in 1858, the judge explicitly referred to his sentencing discretion as a reason for the prosecuting counsel not to pursue the felony charge.¹²⁰ In an 1844 case, Parke B commented that the jury had taken a merciful view by convicting on the reduced charge of common assault, but that the sentence of 6 months would probably have been the same in the event of a felony conviction.¹²¹ This sentencing flexibility meant that judges had little cause to distinguish sharply between the felony and the misdemeanour.

The flexibility and discretion also meant that there was very little consistency in judicial punishments. The lack of a court of review capable of adjusting sentences or setting down guidelines meant that the matter was entirely one for the judge. Such patterns as are discernible relate to the judges' overriding aim of deterrence. One judge, sentencing a boy of 16 to a two-year term of imprisonment for stabbing, said that 'if he had reason to believe that the practice was frequent in that neighbourhood he should certainly have sentenced the prisoner to transportation.'¹²²

Certain types of assault also drew heavy sentences. Clear cases of attempted murder, especially those involving female victims, were increasingly cracked down upon. Jeremiah Sullivan was sentenced to 20 years' transportation for assaulting his

¹²⁰ *The Times*, 22 July 1858, 12 col.d.

¹²¹ *The Times*, 9 March 1844, 8 col.a William Humphrys, Abel Phillips.

¹²² *The Times*, 13 March 1851, 7 col.e, John Taylor.

wife with intent to murder her.¹²³ Following a particularly violent assault on a woman in 1855, Martin B expressed surprise that the justices did not send more such ‘brutal outrages’ up before the judges as he ‘wished it to be well known that if convicted before the judges, they had come to the determination of passing the fullest sentence allowed them by law, in the hope by making an example to deter others from similar acts of brutality.’ He sentenced the offender to transportation for life.¹²⁴ The judges’ concern to suppress violence against women was not always shared by juries. In 1859 a jury returned a guilty verdict on the reduced charge of unlawful wounding on Francis Hopwood, despite the fact that he had attacked his wife with a knife and very deliberately attempted to cut her throat. Willes J commented on the leniency, and said that he would have been transported for life for the felony, and instead sentenced the offender to two years’ imprisonment with hard labour.¹²⁵

Judges did not always back up their condemnation of the use of a knife with harsh sentences. For example, James Chester was convicted of common assault in 1844, having inflicted some very serious stab wounds on his victim in the course of a street fight. Patteson J strongly condemned the use of the knife and suggested that the prisoner should have used an opportunity to get away. He only imposed a sentence of 6 months’ imprisonment however, the leniency of which created a ‘marked sensation’ in the court.¹²⁶ A few years earlier a leader comment in *The Times* had criticised

¹²³ *The Times*, 15 Sep. 1851, 7 col.a.

¹²⁴ *The Times*, 26 Oct. 1855, 9 col.e, George Mully.

¹²⁵ *The Times*, 1 Aug. 1859, 10 col.f, Francis Hopwood.

¹²⁶ *The Times*, 6 Dec. 1844, 7 col.g.

Patteson's erratic sentencing, comparing a 6-month sentence for an assault with a 10-year term for a theft that arose out of a 'drunken frolic'.¹²⁷

A felony conviction was no guarantee of a harsher penalty. Samuel Barlow was sentenced to just three months' imprisonment, despite the jury commenting on the dangerousness of the knife that he carried with him, a double-edged blade of continental manufacture. The judge, whilst acknowledging this, said that his sentence took account of the difficult circumstances in which the prisoner had been placed.¹²⁸ In 1843 John Woodberry was convicted of wounding with intent to cause grievous bodily harm. Coleridge J, having solemnly pronounced that he needed to make an example of Woodberry that would be talked about locally, attempted to sentence him to 10 years' transportation. He was reminded that the statutory minimum was 15 years' transportation and the unfortunate Woodberry had five years added to his sentence.¹²⁹

The inconsistent judicial approach to sentencing became the subject of contemporary criticism. Writing in the 1860s, William Reade identified two principal problems:

No person who studies the newspapers will have omitted to see the enormous disproportion between sentences in various courts... This is the first anomaly.

The second is that of the reprehensible leniency with which so many offences

¹²⁷ *The Times*, 23 Dec. 1840, 4 col.c.

¹²⁸ *The Times*, 7 April 1849, 7 col.c.

¹²⁹ *The Times* 17 Aug. 1841, 7 col.f.

against the person are punished, and the needless, and I might say absurd severity with which those against property are punished.¹³⁰

Gatrell's detailed statistical comparison of violent offences and property offences for the second half of the nineteenth century supports Reade's conclusion, showing that property offenders were much more likely than violent offenders to be transported or subject to penal servitude.¹³¹ Judges may have thought that hot-blooded violent offenders were less likely to be deterred by the threat of punishment than the calculating burglar, but contemporaries urged that the practice conveyed the wrong message to the populace. One magistrate counselled that '[w]e must teach the public to think that injury to the person is more serious than injury to the purse'.¹³²

Judges did not share this view of the possible educative function of the criminal law. The criticisms of sentencing made little impact in practice. The inconsistent and often lenient punishment of violent offenders is symptomatic of a more general judicial failure to make a concerted attempt to suppress serious assaults. So whilst judges shared the broader concerns being expressed within society about the problem of violence, they did not conceive the solution in terms of a regular, consistent application of the law. On the contrary they retained their faith in the

¹³⁰ W. Reade, "Punishment of Crimes of Violence", *The Law Magazine* 23, (1867), 95-103, at 96.

¹³¹ Gatrell, "The decline of theft and violence", 295-301, appendix B.

¹³² T. Baker, "What Better Measures can be Adopted to prevent crimes of violence against the person" (1867), in T. Baker, *War with Crime Papers on Crime Reformatories Etc*, London, 1889, facsimile of 1st ed., New York and London, 1984, 19.

virtues of discretionary punishment. The conviction amongst judges that each case had to be judged individually and that it was impossible to prescribe a detailed, graduated scale of punishments ensured that the system did not change. In light of their opposition to the abolition of the 'bloody code' and to the reformers' drive to create a certain and predictable criminal law, it is perhaps unsurprising that judges continued to view exemplary punishment as the best means of suppressing serious, non-fatal violence.¹³³ This judicial attitude cannot be dismissed as a stubbornly conservative approach; it represented a coherent philosophy. Judges did not concur with the reformers' assessment of the unreformed law as a 'bloody code'; on the contrary they saw it as being far more humane than a system in which there was no discretion to deal with individual cases. In Lord Lyndhurst's terms, the 'whole system of our Criminal Code was founded on discretion'.¹³⁴ Throughout the nineteenth century judges remained resistant to ideas of regulating and homogenising sentencing practice.¹³⁵

In the context of trials for serious, non-fatal assault, judges made a very limited effort to develop substantive principles of law, which would set a standard of behaviour that involved restraint and self-discipline. They persisted in their very particularistic attitude towards the criminal law, taking the view that each case and

¹³³ For a clear expression of these judicial views, see the individual letters submitted to the Home Secretary by all the judges in response to the abortive attempts to codify various aspects of the criminal law in 1853-4: *Copies of the Lord Chancellor's Letter to the Judges and of their Answers respecting the Criminal Law Bills of the Last Session*, PP, 1854, LIII, 389ff.

¹³⁴ *Parliamentary Debates*, series 3, vol.17, col. 1015, 7 May 1833 (House of Lords).

¹³⁵ See Radzinowicz, *History*, vol. 4, 741-778.

each offender had to be judged on individual merits. The attitude is well summed up by the attorney general, Sir Charles Wetherell, who commented in an 1828 parliamentary debate that ‘It was an excess of legislation to define a crime, which had better be defined by a jury *pro re nata*.’¹³⁶

In many ways the old exemplary model of justice was alive and well when the legislature consolidated the law relating to non-fatal offences against the person in 1861. The Act abolished the death penalty for all species of non-fatal assaults and consolidated the range of assaults that had been created over the previous sixty years. The most commonly prosecuted and significant offences were retained, albeit in an altered form. Section 4 of the 1837 Act was reproduced in section 18 of the 1861 Act. The terms stabbing and cutting did not appear in the new section, which specified that the wound or grievous bodily harm could be caused by ‘any means whatsoever’. This, according to the draftsman was so as to ensure that it corresponded with section 11, that was taken from section 2 of the 1837 Act.¹³⁷ Section 20 of the 1861 Act retained the misdemeanour that had been created in 1851 of inflicting grievous bodily harm by any means whatsoever.¹³⁸

The 1861 Act therefore preserved the key elements of the law as it had developed over the preceding 58 years with all its anomalies, and it has been criticised for this reason ever since. The law cannot be understood solely by reference to its chequered legislative history however; it was profoundly shaped by the attitudes of

¹³⁶ *The Times*, 6 May 1828, 2 col.d. Wetherell was a reactionary tory MP who vigorously opposed reform. (DNB).

¹³⁷ C. Greaves, *The Criminal Law Consolidation Acts*, 2nd ed. London, 1862, 52.

¹³⁸ 24 & 25 Vict. c. 100. Section 20 omitted the part of Lord Campbell’s Act that referred to stabbing, cutting or wounding.

judges, jurors and prosecutors in the courtroom. Notwithstanding the collapse of the 'bloody code' and the removal of the death penalty for most forms of serious assault in the 1830s, judges and jurors continued to employ many of the discretionary practices that had served them for centuries. The law that emerged from this process was the product of a wide range of inputs and views. This qualified the extent to which the substantive law of non-fatal offences against the person could be used instrumentally to establish universal standards of conduct. The law in 1861 remained a multi-use right, applied within a system that was as close to the old model of personal, discretionary justice that early nineteenth century reformers condemned, as the model of certain, proportionate justice that the reforms of the 1830s are supposed to have established.