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CRIMINAL INTENT IN NINETEENTH-CENTURY ENGLAND

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ABSTRACT. *This article examines how intention became key to criminal responsibility in nineteenth-century England. It focuses on trials where judges wrestled with defence counsel and juries for control over its determination. The most important rule that developed to support proof of intention was the presumption that a person intended the natural and probable consequences of their actions. The article charts the origins and functions of the presumption to offer a revised view of the nineteenth-century foundations of the modern law of criminal intention.*

KEYWORDS: legal history, criminal law, criminal intention, criminal responsibility, criminal fault.

I. INTRODUCTION

Criminal fault and responsibility came into sharper focus in nineteenth-century English felony trials. At the start of the century, fault was inextricably entwined with conduct and juries had a broad discretion to determine criminal responsibility for serious offences. They evaluated the defendant's actions to determine whether they showed the requisite criminality or malice to justify the imposition of capital punishment. As the century progressed, the juries' discretion was curtailed, and the focus of inquiry was narrowed. Questions of individual fault were disentangled from conduct requirements and intention became key to criminal responsibility. The first part of this article explores the conditions which made these shifts possible. It argues that the critical developments took place in trials where questions that were previously concealed behind the jury's blank verdict were slowly worked out to become the subject of courtroom discussion. This discussion was increasingly dominated by lawyers who probed the meaning of key fault terms and the boundaries of excuses. Watched by a critical professional and newspaper press, judges directed juries in more specific terms on what proof of fault was required. These directions were not always consistent, but they were gradually woven into the fabric of the common law.

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Detailed newspaper trial reports and an expanding body of professional law reports allow us to chart this process in depth. Historians of criminal law and responsibility have, until recently, made only limited use of trial reports to investigate fault. They have focused on attempts to codify the laws, on the growth in criminal jurisprudence, and on the emergence of choice or capacity-based models of responsibility.[1] Using these measures, the pace and extent of common law development seem limited: "[o]n many fundamental questions, the judicial articulation of fault concepts and policy proceeded at an exceedingly modest pace, and one substantially behind contemporary theorists."[2] English judges were notoriously unreceptive to theoretical, or what they deemed "speculative", arguments and they made little attempt to articulate general principles of responsibility in reserved and reported cases.[3] If questions about criminal fault were not answered in the general or principled terms demanded by jurists, they still had to be resolved in trials. Martin Wiener's study of Victorian homicide trials suggests that the judiciary's desire to control male violence produced important refinements in their understandings of criminal responsibility for killing.[4] Work on the history of insanity and intoxication in the nineteenth century has shown that significant shifts took place in trials that were only belatedly or imperfectly reflected in canonical sources of legal authority.[5]

The main part of the article examines the law of criminal intention from the perspective of trial participants. During the nineteenth century, intentional wrongdoing came to mark out the most serious offences, particularly those of violence. This was a result of legislative and judicial efforts to focus liability on intention, rather than on the more amorphous concept of malice. As intention became a discrete object for inquiry in the courtroom, judges wrested with defence counsel and juries for control over its determination. By far the most important rule that they developed for this purpose was the presumption that a person intended the natural and probable consequences of their actions. It emerged in the early decades of the nineteenth century in offences in which intention was difficult to prove. At the start of the Victorian period, the

[1] The most detailed treatment of doctrine and fault concepts is in K.J.M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957* (Oxford 1998). For wider ranging accounts, see L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford 2016); N. Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford 2016).

[2] K. Smith, "Criminal Law" in W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *The Oxford History of the Laws of England*, vol. 13 (Oxford 2010), Part 1, 227.

[3] See P. Handler, "Judges and the Criminal Law in England 1808–61" in P. Brand and J. Getzler (eds.), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge 2012), 138–56.

[4] See M.J. Wiener, "Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England" (1999) 17 Law and History Review 467; M.J. Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (Cambridge 2004).

[5] A. Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford 2012), 136–70; P. Handler, "Intoxication and Criminal Responsibility in England, 1819–1920" (2013) 33 O.J.L.S. 243.

presumption was established in treatises as a rule of evidence, but its application and the means of rebuttal varied according to the offence charged. By its end, some commentators thought it irrebuttable and as much a rule of law as one of evidence.[6] In the twentieth century, as subjectivist theory rose to prominence, it became the focal point for academic criticism and key decisions in the newly constituted criminal appellate courts.[7]

The presumption occupies a central and pivotal role in legal historical accounts of criminal fault. Some scholars have viewed it as a bar to legal development because it foreclosed investigation into states of mind and degrees of fault. Keith Smith, for example, argues that the presumption "frequently obscured, if not totally subsumed, positive proof of the substantive culpability requirement in any particular case".[8] In Nicola Lacey's nuanced view, it "provides a crucial bridge between the later, subjective, psychologised concept of *mens rea* with its paradigm of intention and the earlier confidence in 'recognising crime when one saw it'".[9] It referred to the "defendant's interior, mental world yet [removed] the need for any close investigation of its content".[10] At this high level of analysis, the presumption appears as a fixed feature of nineteenth-century criminal law and is understood with reference to its role in facilitating or obstructing the establishment of subjective models of fault.

A focus on the context in which the presumption developed, its contemporary significance and the practical functions it served in trials offers a different perspective. The presumption strengthened as the nineteenth century progressed, but it remained the subject of negotiation in courts and was applied selectively by judges. This article charts its origins and early use in forgery cases before examining its application to non-fatal offences against the person and its subsequent extension to the law of murder. It explores the increasingly detailed judicial directions which set out to juries when the presumption applied and when it could be rebutted. In the absence of legislative or appellate court guidance, these directions mapped out the territory for subsequent development. Before turning to their substance, it is necessary to explore the institutional shifts which encouraged more detailed scrutiny of fault requirements in trials.

[6] See C.S. Kenny, *Outlines of Criminal Law*, 3rd ed. (Cambridge 1907), 148.
[7] On the rise of subjective liability in the twentieth century, see Farmer, *Making the Modern Criminal Law*, 181–88. On twentieth-century academic criticism and key cases, see Section VI below.
[8] Smith, *Lawyers, Legislators and Theorists*, 166–71.
[9] N. Lacey, "Responsibility and Modernity in Criminal Law" (2001) 9 The Journal of Political Philosophy 249, 271. Lacey suggests that this shift occurred much later (in the twentieth century) than most legal scholars have recognised. See also M. Dyson, *Explaining Tort and Crime: Legal Development Across Laws and Legal Systems, 1850–2020* (Cambridge 2022), 37, 43–45; Farmer, *Making the Modern Criminal Law*, 181–88.
[10] N. Lacey, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory" (2001) 64 M.L.R. 350, 370.

II. Conditions for Development

Fault and conduct were not understood separately in eighteenth-century English law: the language of fault served to characterise the prohibited act. The large volume of statutory offences created in the eighteenth century set out conduct requirements in confusingly specific detail.[11] The fault elements, in contrast, were described in vague, undefined terms: acts were committed "maliciously", "feloniously" or "with felonious intent". According to Henry Dagge, in his 1772 criminal law tract, the purpose of these terms was to "specify the nature of the crime" and to indicate that juries were "to judge, not only of the act done, but of the inducement for doing such act, and to determine whether it be of criminal nature as set forth in the indictment".[12] They gave juries broad scope to evaluate conduct and criminal responsibility. The fact that most felonies were punishable with death focused inquiry on whether there were sufficient grounds for excuse.[13]

The detailed conduct requirements and complex statutory provisions invited highly technical problems of interpretation and created inconsistencies. These could produce reserved points of law for determination by the judges who adopted a strict and formalistic approach to statutory interpretation.[14] Fault terms seldom generated much separate legal discussion. The requirement of malice aforethought in murder was long established and a substantial body of case law explored the circumstances in which a killing might be justified or excused. It was not understood or defined as a state of mind. Sir Michael Foster's eighteenth-century description of "circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent upon mischief" served as a general and elastic definition.[15] Inquiry focused on the circumstances of the killing. It was sometimes expressed to require malicious and felonious intention, but there was no requirement to prove a specific intention to kill; wicked or malicious conduct which destroyed life was sufficient.

Some offences required proof of a specific form of intention. This typically occurred where the intention went beyond the conduct specified, for example uttering a forged instrument with intent to defraud or, in burglary, breaking and

[11] For examples of these statutory offences, see L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol. 1 (London 1948), 611ff.

[12] This "vested [the jury] with the power of judging of law, as well as fact": H. Dagge, *Considerations on Criminal Law* (London 1772), 128–29. Cf. M. Foster, *Crown Law* (Oxford 1762), 255.

[13] "By the late eighteenth century … the trial had evolved to a large degree into a sentencing process": T.A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (Chicago and London 1985), 383.

[14] See Radzinowicz, *History of English Criminal Law*, 83–106. On the practice of reserving cases, see J. Oldham, "Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries" (2011) 29 Law and History Review 181.

[15] Foster, *Crown Law*, 256.

entering with intent to commit a felony. The specific intention had to be averred in the indictment and proved, but even in these cases the focus remained on conduct.[16] The Coventry Act, for example, stipulated that it was a capital offence "if any person … on purpose and of malice forethought and by lying in wait shall unlawfully cut out, or disable the Tongue, put out an Eye, slit the Nose ... with intention in so doing to maim or disfigure".[17] The combination of fault terms was typical, as was the highly specific nature of the conduct and injuries required. "Lying in wait" was the requisite manifestation of intent and the focus of the few reported cases on the statute in which intention was discussed.[18]

The contrast between the detailed and specific prohibitions on conduct and the broad evaluative terms in which fault was described reflected a confidence that juries could be trusted to read criminality from conduct.[19] There was rarely any need for discrete consideration of fault and the speed of trials meant that judicial directions to juries, if given at all, were seldom detailed.[20] When legal points arose, they often focused on technical problems with the indictment, which were unlikely to lead to much doctrinal development.[21] The punishment of death encouraged judges to adopt a highly restrictive approach to the scope of conduct requirements and discouraged them from placing too many curbs on the jury's discretion in circumstances where it deemed the death penalty too severe.[22] Intoxication, for example, was an accepted excuse in eighteenth-century trials on the basis that it negated the requisite malice or felonious intention.[23]

Several changes in the late eighteenth and early nineteenth centuries made separate consideration of fault more likely in criminal trials. These can only be outlined here but, taken together, they transformed conditions for legal development. The most visible change was the repeal of the capital laws, which is often taken to signal the end of the "golden age" of discretion in English criminal justice and the start of a new era of more formal and regular processes.[24] Sir Robert Peel's legislative programme in the 1820s

[16] For a summary of these offences' requirements, see Radzinowicz, *History of English Criminal Law*, 634–36, 642–50. The discussion of these offences in East's treatise focuses principally on the conduct requirements, see E.H. East, *A Treatise of the Pleas of the Crown*, vol. 2 (London 1803), 481–523, 840–1004.

[17] 22 & 23 Car. 2, c. 1, s. 7 (1670).

[18] It was narrowly construed and confined to premeditated assaults: see E.H. East, *A Treatise of the Pleas of the Crown*, vol. 1 (London 1803), 398; *R. v Thomas Tickner* (1778) 168 E.R. 196.

[19] It could be said to conform to the pattern of "manifest criminality" that George Fletcher argues was prevalent in this period: see G.P. Fletcher, *Rethinking Criminal Law* (first published 1978, Oxford 2000), 115–234.

[20] On the eighteenth-century criminal trial, see J.M. Beattie, *Crime and the Courts in England 1660–1800* (Princeton 1986), 316–449.

[21] See J.H. Baker, "The Refinement of English Criminal Jurisprudence 1500–1848" in J.H. Baker (ed.), *Collected Papers on English Legal History*, vol. 2 (Cambridge 2013), 989, 991–97.

[22] On jury mitigation generally, see Green, *Verdict According to Conscience*, 267–317.

[23] D. Rabin, "Drunkenness and Responsibility for Crime in the Eighteenth Century" (2005) 44 Journal of British Studies 457, 466–76.

[24] P. King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford 2000), 1.

consolidated offences and the Whig Government's more radical reforms of the 1830s confined the death penalty to murder and attempted murder. The removal of the death penalty reduced the incentive for juries to nullify the law, but there was still space for discretionary trial practices. The legislation did not introduce a structure in which punishment was finely graded according to fault or any single conception of criminal responsibility.[25] This frustrated jurists and advocates of a criminal code who sought to embed a principled approach based on capacity or choice. The Royal Commission reports in the 1830s and 1840s, which included a detailed and sophisticated treatment of fault, could have formed the basis for such a code.[26] But the Government's legislative programmes of the 1840s and 1850s fell far short of these objectives.[27] Macaulay's Indian penal code, which cut through the common law's complexity to set fault requirements on a more rational basis, provided a model of what was possible.[28] The failure of English codification projects owed much to the entrenched opposition of judges, most of whom maintained that key questions of criminal responsibility had to be determined in courtrooms; answers could not all be prescribed in advance.[29] The legislation that passed gave judges wide sentencing discretion for the most serious offences, ranging from a few months' imprisonment to life terms.[30] In some areas, such as non-fatal offences against the person, offences were loosely organised into a hierarchy in which the fault requirements were more clearly differentiated.[31] The retention of existing fault terminology limited the scope of the reforms, but there was more clarity and a reduced tendency to use "maliciously" and "feloniously" as epithets. Conduct requirements were gradually loosened too and this, combined with the removal of the death penalty, slowly undermined the judges' punctilious approach to statutory interpretation.[32] Lord Ellenborough's Act 1803 was particularly significant because it introduced offences in which a specific form of intention was the principal fault requirement.[33]

[25] See Smith, "Criminal Law", 138–50.

[26] See L. Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45" (2000) 18 Law and History Review 397; M. Lobban, "How Benthamic Was the Criminal Law Commission?" (2000) 18 Law and History Review 427.

[27] By the 1850s, it had "become crab-like and retrograde", according to Andrew Amos, a former Royal Commissioner: A. Amos, *Ruins of Time Exemplified in Sir Matthew Hale's History of the Pleas of the Crown* (London 1856), xi, n. 1.

[28] See B. Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles" in W.C. Chan, B. Wright and S. Yeo (eds.), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Surrey 2011); N. Morgan, "The Fault Elements of Offences" in Chan, Wright and Yeo (eds.), *Codification, Macaulay and the Indian Penal Code*, ch. 3.

[29] See Handler, "Judges and the Criminal Law", 145–51.

[30] See L. Radzinowicz and R. Hood, "Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem" (1979) 127 University of Pennsylvania Law Review 1288.

[31] A series of statutes were passed, beginning with Lord Ellenborough's Act 1803 (43 Geo. 3, c. 58) and culminating in the Offences Against the Person Act 1861 (24 & 25 Vict., c. 100). See Section III below.

[32] For an overview of the legislative reforms, see Smith, "Criminal Law", 187–205.

[33] 43 Geo. 3, c. 58.

The trial process was transformed. Defence counsel, first admitted to felony trials in the 1730s, started to appear in increasing numbers from the 1770s onwards. Initially restricted to cross-examination, they gained the right to address the jury directly in 1836.[34] Lawyers wrought a shift to adversarial process and drove changes to the law of evidence which have been the subject of much scholarly attention.[35] The effects on the development of substantive criminal law doctrine have received less consideration but were marked. The increased production of evidence, including forensic evidence, raised more complex questions on which the jury required guidance.[36] Adversarial process magnified any uncertainty or doubt about whether the evidence supported the indictment. There was a sharper division between prosecution and defence; the onus lay with the prosecution to prove its case, but the presumption of innocence was qualified by the presumption of intended consequences. Defendants could not give sworn evidence until 1898.[37] Defence counsel often chose not to call witnesses because that gave the prosecution a right to reply and the last word to the jury.

This structure, particularly the bar on defendants giving sworn evidence, has led some historians to argue that the accused was largely silenced, as focus shifted to testing the prosecution evidence.[38] If the prosecution could establish the facts giving rise to the presumption of intended consequences, how could the defence produce evidence to rebut it?[39] The process encouraged defence counsel to focus on discrediting the prosecution evidence through cross-examination and addresses to the jury.[40] But, as we will discover, they used their cross-examinations and (from 1837) speeches to encourage juries to consider a broad range of excuses or mitigating circumstances when evaluating criminal responsibility. This included the defendant's subjective motivations. They urged that a prisoner's motive or previous good relations with the victim negated the requisite criminal fault. In cases where a specific intent had to be proved, the defence was that it was lacking or that some other circumstance could explain the defendant's actions. Attempts by prosecuting counsel and judges to counteract or modify these claims prompted new and detailed scrutiny of fault requirements.[41]

[34] Prisoners' Counsel Act 1836 (6 & 7 Will. 4, c. 114).
[35] The literature is extensive: see J.H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford 2003); A.N. May, *The Bar and the Old Bailey, 1750–1850* (Chapel Hill and London 2003).
[36] See the discussion in L. Farmer, "Criminal Responsibility and the Proof of Guilt" in M.D. Dubber and L. Farmer (eds.), *Modern Histories of Crime and Punishment* (Stanford 2007), 42–58.
[37] Criminal Evidence Act 1898 (61 & 62 Vict, c. 36). Prisoners were allowed to give unsworn statements, although, after the Prisoners' Counsel Act 1836, judges usually only allowed this for unrepresented prisoners: see D. Bentley, *English Criminal Justice in the Nineteenth Century* (London and Rio Grande 1998), 156–59, 176–82.
[38] See Langbein, *Origins*, passim.
[39] See Kenny, *Outlines*, 148; Smith, "Criminal Law", 418.
[40] See generally D.J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford 1998).
[41] See Wiener, "Judges v. Jurors", 470–76.

These developments were increasingly visible to lay and professional audiences. Reports of assize proceedings and trials at the Old Bailey were newspaper staples and contained details of legal discussion and judicial directions to juries.[42] The Law Reports increased in quantity and quality, providing reliable printed accounts of all reserved Crown cases and significant numbers of criminal trials.[43] The growth of legal literature, particularly the influence of criminal law treatises, meant that a wide range of professional knowledge and opinion was canvassed and readily accessible.[44] Judges were called upon to justify and explain their approaches both at the Old Bailey and on assize, where lawyers had better access to books of authority than previously. The quality of legal discussion improved and there was growing public scrutiny of proceedings from a critical newspaper press. Judges had to accommodate these audiences in their speeches, trial directions and sentencing remarks. The trial was the focal point of the criminal justice system. It was a platform from which judges could promote values and standards of behaviour and a forum in which their own actions were held to account.[45]

The public scrutiny of criminal trials took place against a backdrop of widespread fear about crime and social disorder. The period from the 1780s through until the 1850s and 1860s was marked by rising crime, social unrest, and a profound sense of anxiety and unease among the governing classes.[46] Crime was a highly visible manifestation of the threats presented by a dangerous and unruly populace; violent crime raised these issues most acutely. Intoxicated, passionate and violent behaviour betrayed the lack of individual responsibility that many argued was at the root of wider social unrest.[47] The remedy was moral reform; individual restraint and self-discipline became paramount. These values were promulgated across social and economic spheres and underpinned Victorian notions of respectability and good character. The criminal law was at the hard edge of this civilising offensive. Parliament increased the punishment for fatal and non-fatal violence, but the precise contours of individual fault and responsibility had

[42] See P. King, "Newspaper Reporting and Attitudes to Crime and Justice in Late-Eighteenth- and Early-Nineteenth-Century London" (2007) 22 Continuity and Change 73, 74. By the Victorian period, *The Times* covered almost every assize and Old Bailey session and carried reports of almost all murder trials: see Wiener, *Men of Blood*, xiii.

[43] See P. Polden, "The Legal Professions" in W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *The Oxford History*, vol. 11 (Oxford 2010), Part 4, 1211–22.

[44] L. Farmer, "Of Treatises and Textbooks: The Literature of the Criminal Law in Nineteenth-Century Britain" in A. Fernandez and M.D. Dubber (eds.), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford 2012), 145–64.

[45] Lindsay Farmer describes the late nineteenth century as the "age of the trial": see Farmer, "Criminal Responsibility and the Proof of Guilt", 57–58.

[46] On this theme generally, see B. Hilton, *A Mad, Bad, and Dangerous People? England 1783–1846* (Oxford 2006), 37–38, then passim. On criminal justice policy, see M.J. Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* (Cambridge 1990), 46–91.

[47] See J. Carter Wood, *Violence and Crime in Nineteenth-Century England: The Shadow of Our Refinement* (London and New York 2004), 27–46.

to be mapped in the courts.[48] Judge-jury clashes over the extent to which violent conduct should be punished or excused reflected wider cultural tensions.[49] Judges wanted to use the law to promulgate certain values which juries did not always share. Defence lawyers were quick to exploit such tensions, undermining the broadly harmonious judge-jury relations that characterised eighteenth-century trials. One of the ways in which judges could shape outcomes was to narrow the grounds upon which juries could make determinations of fault.

III. The Presumption of Intended Consequences

The presumption that a person intended the natural and probable consequences of their actions emerged from these conditions in the early nineteenth century. The authority for the presumption was conventionally traced to two cases. In *R. v William Farrington*, the defendant had set fire to a mill and was charged with arson under Lord Ellenborough's Act, which required a specific intent to injure or defraud. The jury convicted but, in the unusual absence of any evidence of ill will or bad feeling, the judge reserved the question of whether some proof of intent had to be found beyond the act of setting the mill on fire. The judges held the conviction to be right, ruling that a "party who does an act wilfully, necessarily intends that which must be the consequences of the act".[50] In *R. v John Dixon*, the defendant was convicted of supplying noxious bread to children in the Royal Military Asylum. When the case came before the King's Bench, Scarlett, the defence counsel, moved for a new trial partly on the basis that there was nothing in the indictment to show that the defendant intended to injure the children's health. This prompted Lord Ellenborough C.J. to speak in unusually general terms: "it was an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act".[51]

This statement of "universal" principle, stamped with Lord Ellenborough C.J.'s authority, eventually became a key reference point in treatises and case law.[52] On its face, the statement seemed to describe a presumption of law rather than evidence, leaving no room for rebuttal, and the use of the word "probable" rather than "necessary" indicated a potentially wider

[48] See Wiener, *Men of Blood*, 9–29.
[49] See Wiener, "Judges v. Jurors", 476–81.
[50] *R. v William Farrington* (1811) 168 E.R. 763, 764.
[51] *R. v John Dixon* (1814) 105 E.R. 516, 517.
[52] See *R. v D.W. Harvey and Chapman* (1823) 107 E.R. 379; *R. v Hicklin* (1868) L.R. 3 Q.B. 360, 375; *R. v Aspinall* (1876) 2 Q.B.D. 48, 65; "Law Maxims – of Criminal Intention" (1842) 27 The Law Magazine, *or* Quarterly Review of Jurisprudence, 370, 371. They appeared in leading treatises until the end of the century: see J. Pitt Taylor and G. Pitt-Lewis, *A Treatise on the Law of Evidence as Administered in England and Ireland; with Illustrations from Scotch, Indian, American and Other Legal Systems*, 9th ed., vol. 1 (London 1895), 80; see also the treatises cited in note 53 below.

reach than that set out in *Farrington*. In practice, it was not immediately or generally applied as a presumption of law when proof of intention was in issue and it was only in the 1830s that it appeared in treatises as generally applicable. Even then it was not always described using the same terms, with references to "immediate", "natural", "probable" or "necessary" consequences.[53] The presumption emerged as an exceptional measure in cases where intent was integral, difficult to prove, and judges had cause to provide more detailed direction to juries. It did not reflect a general practice in trials to discount individual motive or other circumstances when considering intention. *Farrington* was unusual because there was no evidence to explain the defendant's actions; *Dixon* was also out of the ordinary run of felonies and received exceptional levels of legal scrutiny in the Court of King's Bench. In most cases there was no need to refer to the presumption because juries could be trusted to infer intention from conduct. As the century progressed, there were more cases where they could not be so trusted and the presumption proved increasingly useful.

Forgery was a uniquely dangerous crime and more severely punished than any crime other than murder in the late eighteenth and early nineteenth centuries.[54] The legislature had created numerous capital forgery offences, many of which required an intent to defraud a specific individual or body. This produced some difficult points in cases involving complex financial transactions where it appeared unclear whom the accused intended to deceive. This, coupled with the fact that those accused were often drawn from a higher social class than other defendants and were able to afford counsel, prompted unusual levels of legal argument and public scrutiny.[55] Defence lawyers argued that the intent to deceive was absent or not directed at the individual or body named in the indictment. The twelve judges considered it in several reserved cases where they had to resolve the tension between their conventional approach of construing statutes narrowly to limit the scope of liability and the need to suppress the offence. By the end of the eighteenth century, they had widened the ambit of some forgery offences to allow convictions where a general intent to defraud could be proved.[56]

These cases prefigured the pattern for subsequent development. A steep rise in forgeries of Bank of England notes in the first two decades of the

[53] It was not until the second edition of Thomas Starkie's leading treatise on evidence in 1834 that it was noticed and described as a "universal principle of evidence": T. Starkie, *A Practical Treatise of the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings*, 2nd ed., vol. 2 (London 1833), 417. See also J. Jervis, *Archbold's Summary of the Law Relative to Pleading and Evidence in Criminal Cases: With Precedents of Indictments, &c. and the Evidence Necessary to Support Them*, 5th ed. (London 1834), 104.

[54] See R. McGowen, "The Punishment of Forgery in Eighteenth-Century England" (1992–93) 17 International Association for the History of Crime and Criminal Justice Bulletin 29.

[55] R. McGowen, "Forgery and the Twelve Judges in Eighteenth-Century England" (2011) 29 Law and History Review 221, 225–29.

[56] See *R. v Robert Powell* (1771) 168 E.R. 141; *R. v John Taylor* (1779) 168 E.R. 209; *R. v Parkes and Brown* (1796) 168 E.R. 488; East, *Treatise of the Pleas*, vol. 2, 853. See also ibid., at 255.

nineteenth century transformed the scale of the problem and brought greater public scrutiny of forgery prosecutions and executions.[57] Proving an intent to defraud was difficult where the transactions were complex or the defendant claimed not to have intended or even contemplated defrauding the person or body named in the indictment. In *R. v Sheppard*, the prosecutors, perhaps reluctant to see a capital conviction, gave sworn statements that the defendant had not intended to defraud them. In a direction approved by all twelve common law judges, the judge told the jury that there was sufficient evidence of intent to defraud the prosecutors if it was the necessary consequence and effect of the act.[58] In *R. v Mazagora*, a prosecution for uttering forged Bank of England notes, the judges were even more explicit. The jury stated that the defendant intended to defraud whoever might take the notes but that the intention of defrauding the bank, as averred in the indictment, "did not enter into her contemplation". Bayley J. doubted whether an intention ought to be inferred "where that intention was not likely to exist in fact in the prisoner's mind". He reserved the point and the conviction was affirmed; the judges unanimously held that the prisoner "must be taken to have intended to defraud the bank".[59]

These cases were unusual in their explicit recognition that the defendant's actual intention could be ignored. In the general run of forgery cases, such issues were either concealed behind the jury's verdict or circumvented by requiring only proof of a general intent to defraud. The discussion of the defendant's actual state of mind produced awkward questions for the judges, as Bayley J.'s doubts suggest. The cases illustrate the function of the presumption and the dynamic for development. Defence lawyers claimed a lack of intent to defraud and, in the face of public scrutiny and concern with the peculiar nature of the crime, judges felt the need to respond with specific directions to the jury about finding intention. The sharp reduction in Bank of England prosecutions after 1821 and the subsequent removal of the death penalty from all forgeries in the 1830s made forgery less frequent and prominent.[60] The consolidation of the forgery laws and, crucially, the fact that the reformed offences only required proof of a general intent to defraud helped resolve many cases, but judges used the presumption to direct juries to find intention where necessary.[61] In 1838, the prominent defence counsel Charles Phillips used his newly won right to address the jury directly to

[57] See R. McGowen, "Managing the Gallows: The Bank of England and the Death Penalty, 1797–1821" (2007) 25 Law and History Review 241; P. Handler, "Forgery and the End of the 'Bloody Code' in Early Nineteenth-Century England" (2005) 48 The Historical Journal 683.

[58] *R. v William Sheppard* (1810) 168 E.R. 742.

[59] *R. v Mary Mazagora* (1815) 168 E.R. 808, 808–09.

[60] See Handler, "Forgery", 691–94, 697–700.

[61] In 1874, Stephen remarked that, since the general intent to defraud had been allowed to be laid, "there ha[d] not in any single instance been any difficulty in working it": The House of Commons, *Special Report from the Select Committee on Homicide Law Amendment Bill; Together with the Proceedings of the Committee, Minutes of Evidence, and Appendix*, 315 (London 1874), 56.

argue that there had been no intent to defraud the person named in the indictment. This prompted a reserved case involving all 15 judges. They approved Baron Alderson's direction that it was enough for the jury to be satisfied that the person uttered the bill, knowing it to be forged: "A man must be taken to intend the consequences of his own acts, and must intend to defraud if he pays another a false note."[62] A small cluster of reported cases reaching similar outcomes, coming immediately after the Prisoners' Counsel Act 1836, suggests that the presumption had considerable practical usefulness for judges seeking to counteract defence counsel's speeches to juries.[63]

IV. Non-Fatal Offences against the Person

The pattern of development in forgery cases, in which judges provided more detailed directions on intention in response to defence counsel arguments or where juries might be inclined to acquit, was replicated in non-fatal assaults. These required proof of specific intention and, unlike forgery, judge-jury disagreements remained likely throughout the period. Legislation passed in 1803–61 created a hierarchy of non-fatal assaults in which intention was the differentiating factor. Lord Ellenborough's Act established assaults which were defined with reference to an ulterior intention to kill, maim or cause grievous bodily harm and were punishable with death. The offences contained specific conduct requirements of a stabbing or cutting and a proviso which required liability for murder if death had ensued, thus incorporating its requirement of malice aforethought.[64] This focus on conduct and incorporation of malice was typical of eighteenth-century legislation and, in the first few decades of the nineteenth century, the legal questions arising from the statute focused on the means used to commit the assault and the nature of the injuries.[65] When Lord Landsdowne's Act 1828 expanded the offence's scope by introducing the word "wound", Baron Alderson commented critically that this made the matter "much more vague".[66] The reluctance to expand the scope of the non-fatal assaults followed the judges' conservative and cautious approach to statutory interpretation in an era when so many offences were capital. The means used to commit an assault was the key manifestation of malice or intent; any attempt to loosen conduct requirements risked casting the net of liability too wide.[67]

[62] *R. v Hill* (1838) 173 E.R. 492, 493; *R. v Joseph Hill* (1838) 169 E.R. 12.
[63] *Hill* followed a similar ruling by Coleridge J. in *R. v. John Beard* (1837) 173 E.R. 434. See also *R. v Boardman* (1838) 174 E.R. 244.
[64] 43 Geo. 3, c. 58 (1803). For the history of non-fatal assaults in this period, see P. Handler, "The Law of Felonious Assault in England, 1803–61" (2007) 28 The Journal of Legal History 183.
[65] See *R. v Hayward* (1805) 168 E.R. 693; *R. v Peter Atkinson* (1806) 168 E.R. 706; *Adams* (1807), Nbk. 3, 277 in D.R. Bentley (ed.), *Select Cases from the Twelve Judges' Notebooks* (London 1997), 101.
[66] *R. v Howlett* (1836) 173 E.R. 121, 121.
[67] The Act was criticised in the Law Magazine for this reason: "Lord Lansdowne's Act" (1828–29) 1 The Law Magazine, *or* Quarterly Review of Jurisprudence, 129, 131–32.

Maintaining precise conduct requirements confined the grounds upon which juries could infer malice or intent. Their inferences rested upon "the situation of the parties, the conduct and declarations of the prisoner, and above all on the nature and extent of the violence and injurious means he has employed to effect his object".[68] The use of a weapon was the most important signifier: assaults with weapons which showed premeditation or in which there was evidence of expressed ill will or malice towards the victim were most likely to result in convictions. In contrast, assaults committed during a fight, while intoxicated or in hot blood were less likely to do so.[69] The link with murder in the statutory proviso meant that the law relating to provocation was incorporated. If the use of a deadly weapon could be explained (for example, if the prisoner grabbed a nearby instrument or used a knife that they had been eating with), the felonious intent and malice might be difficult to establish. The result was that, prior to 1837 at least, most convictions were for those "morally guilty"[70] of murder and the requirements of intention were not usually differentiated from those of malice.

There was an exception where the defendant caused injury to achieve some ulterior purpose. This filtered out the other complicating elements to produce a much tighter focus on intention. In *R. v Duffin and Marshall*, the prisoners were charged on separate counts of cutting with intent to kill, disable or cause grievous bodily harm. The prisoners were grave robbers who, on being disturbed by a sexton, cut him to make their escape. The jury found them guilty of cutting but only with intent to prevent their lawful apprehension. The 12 judges ruled that the conviction was wrong because that intent was not laid in the indictment and the jury's finding negatived the intents that were laid.[71] In *Thomas Mason*, the prisoner was caught stealing and stabbed the prosecutor to escape. He was found not guilty when Park J. instructed the jury to acquit if it thought that he only intended to steal.[72] The approach in these cases reflected a narrow conception of intention and a reluctance to interfere with the jury's discretion to determine the issue according to a potentially wide set of criteria, including its view of the defendant's motive or main objective. There was no attempt at this point, as there was in contemporaneous forgery cases, to instruct the jury either to find intention if it found that the injuries were committed wilfully or to apply the presumption of intended consequences.

[68] Starkie, *A Practical Treatise*, 500.
[69] See Handler, "Law of Felonious Assault", 191–95.
[70] *John Baldwin*, *The Times*, 7 September 1827, 3 (Vaughan B.).
[71] *R. v Thomas Duffin and William Marshall* (1818) 168 E.R. 847.
[72] *The Times*, 11 April 1826, 3. See also *R. v James Thomas Boyce* (1824) 168 E.R. 1172; *Wm. Randal*, *The Times*, 17 April 1830, 3. Cf. *R. v William Gillow* (1825) 168 E.R. 1195, where the jury found an intention to prevent apprehension and an intention to cause grievous bodily harm.

The situation changed markedly following the 1837 Act, which removed the death penalty for most non-fatal assaults (except where there was an intent to kill) and the proviso requiring proof of liability for murder if death had ensured. Under the Act, juries gained a discretionary power to convict of a common assault if they were not satisfied of the felony.[73] Defence counsel, newly armed with the right to address closing speeches to juries directly, urged them to convict on the minor charge only on the basis that there was no felonious intent. Juries proved very receptive to these pleas and regularly returned partial verdicts for the minor offence, causing frustration among judges and a search for new ways to control the jury.[74] They focused their efforts on intention, which was the distinguishing feature of the felonies. The means used to commit the assault and the nature of the injuries remained important but ceased to be determinative. In 1843, when William Burnham attempted to cut his wife's throat, the wounds were not serious, but Lord Denman C.J. instructed the jury that the question was "not what degree of injury the prosecutrix had actually sustained … but with what intent he drew the knife across her throat".[75] Most felonious assault prosecutions still involved weapons, but they were no longer required. Convictions for unarmed assaults, even for the most serious offence of assault with intent to kill, became possible.[76] This gradual loosening of the strict approach to construing conduct requirements widened the scope of the offence and cast more weight on intention. Judges started to deploy the presumption of intended consequences in cases of felonious assault in the 1830s and 1840s, as treatise writers began to describe the presumption as one of more general application.[77]

Judges took a stricter approach to cases in which the injury was inflicted to achieve an ulterior purpose. In *R. v Bowen*, a robber was charged with wounding with intent to cause grievous bodily harm. His defence counsel contended that his only intent was to rob and, ingeniously, sought to apply the presumption of intended consequences to argue that the result of the act of wounding was the robbery. Coleridge J. rejected this argument and instructed the jury that if the prisoner intended grievous bodily harm he ought to be convicted even if his ultimate object was to rob.[78] Coltman J. was more specific a couple of years later in a case where the defendant, during an attempt to rob a country house,

[73] 7 Will. 4 & 1 Vict., c. 85, s. 11.
[74] See *William Shaw*, *The Times*, 25 July 1850, 8. The "great difficulties" caused prompted Parliament to create a new offence of the unlawful and malicious infliction of grievous bodily harm ("with or without any weapon") in 1851. This replaced common assault as the alternative to a felony conviction and carried a higher maximum sentence of three years' imprisonment with hard labour: 14 & 15 Vict., c. 19, s. 4.
[75] *William Burnham*, *The Times*, 29 July 1843, 8.
[76] See *R. v Cruse and Mary His Wife* (1838) 173 E.R. 610; *James Cannon*, *The Times*, 28 October 1852, 7; *John Duggan*, *The Times*, 9 May 1867, 13.
[77] See note 53 above.
[78] *R. v Bowen* (1841) 174 E.R. 448, 449.

administered opium to a servant to stupefy her and was charged with feloniously administering poison with intent to kill. He instructed the jury that "if a noxious drug is administered which is likely to occasion death, and the party administering it is indifferent whether it occasion death or not, that party must be looked upon as contemplating the probable results of his own action".[79]

These reported cases demonstrate judges applying the presumption of intended consequences to secure convictions in cases where previously the issue might have been left to the jury to determine. The question of intention also came into sharper focus in the more common cases involving drunken or provoked violence. The removal of the proviso meant that factors, most notably provocation, that would have reduced murder to manslaughter were no longer decisive in most felonious assault cases.[80] Malice, in the sense that it was used in murder, was no longer required: the "intention to do the mischief unlawfully" was enough.[81] Intoxication and provocation remained accepted excuses, but their effect was now measured in relation to intention. Judges, increasingly preoccupied with the problem of intoxication and uncontrolled violence, sought to limit their excusatory effects.

In the case of attempted murder, the exclusion of malice had the potential to narrow the scope of liability. In one of the first reported cases after the 1837 Act, Thomas Cruse was charged with assaulting a seven-year-old child with intent to murder while intoxicated. Patteson J. instructed the jury that it had to be "satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child".[82] Unconvinced, the jury convicted for a common assault only. Patteson J. directed the jury to what Cruse "actually intended", which set a high threshold for proof of felonious intention and left scope for juries to mitigate the law as they had done prior to 1837. If a prisoner was provoked, drunk or of previously good character, juries were less likely to find a "positive intention". A few years later, Patteson J. himself recognised the difficulty in an attempted murder case and suggested a solution. If the jury was satisfied that it would have been a case of murder if death had ensued, that "would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts".[83] In the next few

[79] *R. v Dilworth and Smith* (1843) 174 E.R. 372, 373.
[80] The proviso was removed from the most commonly prosecuted offence (namely, assault with intention to cause grievous bodily harm) by the 1837 Offences against the Person Act (1 Vict., c. 85, s. 4). The judges confirmed that the link with murder was severed in 1838: *Anonymous* (1838) 169 E.R. 16. For discussion, see Handler, "Law of Felonious Assault", 195–96.
[81] *R. v Odgers* (1843) 174 E.R. 355, 356.
[82] *R. v Cruse* (1838) 173 E.R. 610, 612.
[83] *R. v Thomas Jones* (1840) 173 E.R. 826, 827.

decades, as juries' reluctance to convict on felony charges became clear, judges used these means to press juries to find intention.

Defence counsel routinely argued that, if a defendant was intoxicated or had been provoked to lose their temper, the defendant lacked the requisite intention for a felony conviction or even the general malice required for the minor offence. Early Victorian judges established that drunkenness and provocation were not excuses to the minor charges of common assault or (from 1851) unlawful wounding, which only required the assault to be malicious, not intentional.[84] This was very important practically because it ensured that a conviction of some kind could be secured for intoxicated or "heat of blood" violence. The relevance of the excuses to the specific intent required for the felony was recognised.[85] Judges used the presumption of intended consequences more regularly to support proof of intention. Cases that showed evidence of deliberation or premeditation remained the most likely to result in a felony conviction; the scope for intoxication to reduce the charge in such cases was restricted. In one such case, where the defendant shot his father at point blank range, Coleridge J. held that drunkenness could rebut the presumption of intended consequences but only where it took away the "power of forming any specific intention"[86] and only when it rendered the defendant "unable to know what he was about, or to form any conclusion as to the consequences of the act he was about to commit".[87] This ruling, much more restrictive than that suggested by Coleridge J.'s brother-in-law Patteson J. in *Cruse*, set an important precedent.

In the 1850s and 1860s, there was a greater focus on the effects of drunkenness on a defendant's capacity. Baron Bramwell reminded a jury in 1866 that, "although drunkenness was no excuse, still, as regarded the intent, it might be that he had no mind at all".[88] When judges wished to push juries to convict on the most serious charge, they insisted that the defendant had to be rendered incapable of forming a specific intention. Brett J. told a jury that drunkenness was not an excuse, unless it was satisfied that the defendant was "so drunk as to be incapable of knowing what he was doing".[89] If the defendant was deemed capable, the presumption of intended consequences applied. The focus on capacity shifted attention away from the defendant's individual circumstances and reduced the scope for drunkenness to rebut the presumption of intended

[84] *Joseph Matthews*, *The Times*, 26 July 1847, 7; *Christopher Allen and Caleb Adams*, *The Times*, 13 July 1852, 7. For the structure and treatment of these offences in trials, see Handler, "Law of Felonious Assault", 195–202.

[85] As Patteson J. put it, "although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention": *R. v Cruse* (1838) 173 E.R. 610, 612.

[86] *R. v. Monkhouse* (1849) 4 Cox C.C. 55, 56.

[87] *H.B. Monkhouse*, *The Daily News*, 20 December 1849, 7.

[88] *George Skeats*, *The Times*, 6 December 1866, 11.

[89] *R. v Stopford* (1870) 11 Cox C.C. 643, 644.

consequences. Capacity was understood in terms of the potential to act in a responsible and self-controlled way and it was assumed; there was no investigation of the defendant's subjective state of mind. This was consistent with the Victorian view of drunkenness as a moral failing and that every individual was capable of exercising restraint.[90]

As it became more difficult to rebut, judges could deploy the presumption of intended consequences to push for convictions in cases where they felt the need to set an example. When Henry Janes stabbed his wife in the throat a few hours after a quarrel, Stephen J. summed up in very clear terms: "in law, as in common sense, a man must be taken to have intended the natural consequences of his act, and here the act done was clearly calculated to produce death." When the jury found only an intent to cause grievous bodily harm and not to kill on the grounds of provocation, Stephen J. was unimpressed and imposed a severe sentence of 12 years' penal servitude.[91] When Henry Stratton stabbed his wife with a knife that he claimed was in his hand to cut bread, the judge directed the jury that "every man must be supposed to understand the natural and probable consequences of his act" and that the evidence showed deliberate intent.[92]

In other circumstances, judges allowed subjective considerations to be determinative. They applied the presumption selectively and allowed or even encouraged juries to mitigate the law in some cases. Even in the 1860s, if there was some explanation for a weapon being in or near to hand at the time of an otherwise fair fight, a felony conviction might be avoided.[93] Character and age continued to influence assessments of culpability. In 1839, a jury acquitted Sir John Millbank of stabbing a man in the neck when Baron Maule instructed that the key question was intention but that it should "first look to see what kind of man this was".[94] In 1867, when Joseph Inns, aged 10 or 11, shot a woman with the declaration, "I'll blow your … brains out", Shee J. invited the jury to consider whether he "only meant to frighten the woman, and the gun went off accidentally".[95] Even strict judges, such as Hawkins J., held a malleable view of intention. In 1885, he told the jury that circumstances "rather negatived the intents alleged" when Herbert Powell, a young man with an excellent character, shot his older brother after sustained provocation and abuse.[96]

[90] See Handler, "Intoxication and Criminal Responsibility", 248–54.
[91] *Henry Janes*, *The Times*, 23 July 1877, 11.
[92] *Henry Stratton*, *The Times*, 28 October 1875, 11 (Quain J.).
[93] See e.g. *William Bridges*, *The Times*, 6 March 1862, 10; *Frederick Hertzel*, *The Times*, 23 November 1866, 9; *George Skeats*, *The Times*, 6 December 1866, 11.
[94] *John Millbank*, *The Times*, 6 March 1839, 7.
[95] He was acquitted: *Joseph Inns*, *The Times*, 8 August 1867, 11.
[96] *Herbert George Powell*, *The Times*, 16 September 1885, 12. See also *Robert Charles Hotson*, *The Times*, 27 April 1885, 10.

The Victorian focus on individual responsibility was reflected in the judges' treatment of intention in non-fatal assaults. They used the presumption of intended consequences to hold individuals responsible for their actions, but not every individual. Judges continued to tailor their approach to individuals and circumstances. There were, nonetheless, important doctrinal developments. There was a refined focus on intention, rather than the more amorphous malice, and judges managed the effects of intoxication by distinguishing crimes requiring proof of specific intention and focusing on capacity. These changes were driven by concern with the problem of violence and, as a result, spread to the law of homicide.

V. Homicide

At the start of the nineteenth century, "malice aforethought" was the "chief characteristic, the grand criterion" of murder.[97] Its requirements were difficult to summarise. Treatises attempted to order cases with detailed expositions of the meaning of express and implied malice but the results were hardly coherent.[98] It was clear that causing death with intention to kill or to cause grievous bodily harm was sufficient, but much else was not certain. Two factors qualified any attempt to refine or sharply delineate the boundaries of the offence. First, the felony murder rule, in theory at least, meant that any killing committed during a felony would be murder because the felonious intent or malice required for the base offence would, without more, supply malice aforethought.[99] Secondly, the law presumed all killings to be malicious.[100] The onus then lay on the defendant to show circumstances of excuse or justification which negated the malice. This presumption, established well before the nineteenth century, merged with the presumption of intended consequences in its application to homicide.[101]

In the first part of the nineteenth century, the focus was on conduct and the use of a weapon was critical for establishing malice aforethought. In his study of killings at the Old Bailey, 1674–1834, Guyora Binder argues that murder "generally required an unprovoked and fatal attack with a weapon" and that the distinctions between murder, manslaughter, and other types of killing rested on conduct, not mental states.[102] In the

[97] W.O. Russell, *A Treatise on Crimes and Misdemeanors*, vol. 1 (London, 1819), 612.
[98] The law of provocation was particularly unwieldy and the subject of increasingly fine distinctions: see J.F. Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (London 1877), 147–51.
[99] See G. Binder, "The Origins of American Felony Murder Rules" (2004) 57 Stanford Law Review 59, 98–106.
[100] "All homicide is presumed to be malicious, until the contrary appeareth upon evidence": W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford 1769), 201. For nineteenth-century statements of the presumption, see *R. v James Greenacre and Sarah Gale* (1837) 173 E.R. 388; Stephen, *Digest*, 152, Article 230.
[101] See Smith, "Criminal Law", 416–20.
[102] G. Binder, "The Meaning of Killing" in Dubber and Farmer (eds.), *Modern Histories*, 88–114, 93.

absence of a weapon, a killing would only result in a murder conviction if there was clear express malice as manifested by explicit threats or evidence of planning.[103] Intention was not considered separately and judges and juries evaluated the prisoner's conduct holistically. Judicial directions were limited even in murder cases and focused on the quality of evidence and conduct of the accused. Judges were seldom moved to direct juries in abstract terms on the meaning of "malice aforethought", but they sometimes referred directly to Foster's definition.[104] Baron Vaughan warned a jury in 1829 that there was no need for the accused to be actuated by a "private grudge" for it to be murder so long as the circumstances showed "symptoms of a wicked and depraved mind, and of a heart regardless of social duty, and fatally bent upon mischief".[105] Judges exploited the elasticity of the law. When in 1832, following a pub quarrel, two men followed their victim to a field and stabbed him to death, Taunton J. suggested a manslaughter verdict would not be unjustified. He told the jury that the material question was whether the act was done "from malice before-conceived against the deceased, or in a sudden transport of passion and heat of blood". The jury took the hint.[106] When George Watson fatally stabbed William Brown during a scuffle involving a large number of men, Cresswell J. gave the jury Foster's definition and asked whether, "having the knife in his hand", it was "in the heat of passion only" that he struck.[107]

This flexible approach to the requirements of malice aforethought reflected a judicial willingness to leave questions of responsibility to the jury. Murder covered a potentially wide range of killings and the death penalty shadowed proceedings. As the nineteenth century progressed, there was a hardening of judicial attitudes towards certain types of fatal violence and a desire to delineate the boundaries of murder more clearly. There was no legislative intervention in homicide of the type that prompted the tighter focus on intention in non-fatal assaults after 1837, but the common law followed the same direction. The emphasis on conduct and the use of a weapon gradually gave way to one on the defendant's state of mind. Judges refined the meaning of malice aforethought to focus on intention to kill or cause grievous bodily harm. This allowed judges to use the presumption of intended consequences and apply the rules relating to intoxication to the law of homicide. They did this selectively and in ways that reflected shifts in contemporary understandings of the limits of acceptable violence.

[103] See Wiener, *Men of Blood*, 243.
[104] See note 15 above. Foster's definition continued to be cited in treatises: see e.g. W.O. Russell and S. Prentice, *A Treatise on Crimes and Misdemeanors*, 5th ed., vol. 1 (London 1877), 642.
[105] *William Angel*, *The Times*, 23 March 1829, 6.
[106] *Zacharias Williams and Benjamin Gerrance*, *The Times*, 13 August 1832, 6.
[107] *George Watson*, *The Times*, 19 December 1849, 7. For a similar direction by Shee J., see *Thomas Lockley*, *The Times*, 25 July 1864, 11.

The decline of duelling provides one visible early example. The practice had always been outlawed but there were relatively few prosecutions and, in those that reached court, the defence of provocation was deployed elastically to reduce murder to manslaughter.[108] As the practice became socially unacceptable, judges applied the law strictly and focused more directly on intention. Directing a jury that there were no grounds for finding manslaughter in a case arising out of a duel in 1830, Bayley J. told the jury that, "if a party wilfully and intentionally did an act likely in its result to produce death, and death actually ensued, the act so done by him was done with what the law called 'malice aforethought,' and the party was guilty of the crime of murder".[109] The jury acquitted but judicial attitudes had turned against the practice.[110] The emphasis on intention in Bayley J.'s summing up presaged wider changes in the meaning of malice aforethought.

Other types of killing attracted more condemnation. Wiener demonstrates growing judicial intolerance of "men of blood", particularly in cases involving fatal violence against women or vulnerable victims.[111] To treat these killings as murder required judges to confront juries' more forgiving attitudes towards male violence and to combat defence lawyers who urged juries to rely on their lay understanding of "malice aforethought". One counsel told a jury: "[m]urder, in the legal and popular acceptation of the term, they all knew was the diabolical and vindictive predetermination to destroy life, consummated by weapons suited for the purpose."[112] As defence counsel often had the last word to the jury, judges counteracted these statements with more detailed directions. When Mathias Kelly shot his mistress through jealousy in 1847, his counsel urged that his conduct "had no trace of that premeditation, that malice aforethought, as the law aptly expressed it – which was the characteristic of murder". Baron Rolfe responded, in a "very short and decisive charge", by telling the jury that the law presumed this to be murder and there was nothing in the evidence to reduce it to manslaughter.[113] A decade later, when Michael Crawley killed his wife with a hatchet, his defence counsel's attempt to characterise it as manslaughter "committed in the heat of quarrel and a moment of frenzy" drew short shrift from Williams J., who told the jury that the defence counsel had put the question of malice "upon a very

[108] See J. Horder, "The Duel and the English Law of Homicide" (1992) 12 O.J.L.S. 419, 419–27.
[109] *Richard William Lambrecht, Frederick Cox and Henry Bigley*, *The Times*, 3 April 1830, 5.
[110] The high-profile convictions of two seconds in a duel in 1838 marked a significant turning point: see *John Young and Henry Webber*, *The Times*, 22 September 1838, 6; *Old Bailey Proceedings Online*, available at www.oldbaileyonline.org, version 8.0, 20 December 2022, September 1838 (t18380917-2251) (last accessed 20 March 2024); Wiener, *Men of Blood*, 40, 43–46. By 1843, the judges had made the position clear: see *R. v Cuddy* (1843) 174 E.R. 779.
[111] See Wiener, *Men of Blood*, passim.
[112] *Alfred Thomas Jackson*, *The Times*, 15 December 1864, 12.
[113] *Mathias Kelly*, *The Times*, 10 August 1848, 8; *R. v Matthias Kelly* (1848) 175 E.R. 342.

false issue".[114] Juries did not always follow judicial directions and emphasising the popular notion of the term remained an effective underpinning for defences. But judges became increasingly intolerant. Following one such defence in 1862, Williams J. told a jury that the law considered every act of homicide to be malicious and that the term "malice aforethought" was "not at all to be regarded as in the ordinary sense".[115]

These exhortations were combined with directions which expanded the circumstances in which intention could be found. Prosecutions and convictions for murder became possible even in the absence of a weapon. In 1837, the year that Parliament legislated to allow non-fatal assaults to be committed by any means, the leading case of *Macklin* established a similar precedent for murder. When a group of men beat a constable to death without use of a deadly weapon, Baron Alderson instructed the jury that, "if the nature of the violence ... be such as that a rational man would conclude that death must follow ... then it is reasonable for a jury to infer that the party who did them intended to kill".[116] This expression of the presumption of intended consequences shifted attention away from the weapon to allow for a finding of intent based on the nature of the violence. Prosecutions for murder when there was no weapon in cases involving vulnerable victims became possible.

Judges and prosecuting counsel resisted defence arguments that malice aforethought required both an intention to kill and premeditation. In doing so, they built upon the felony murder rule and the law of non-fatal assaults against the person. The felony murder rule, in its widest expression, could have been applied to convert almost every non-accidental killing to murder. As expressed in books of authority, it would make a defendant who killed someone while attempting any other felony guilty of murder.[117] In practice, the rule was not applied in that way; one study found little evidence that it was applied at all until the nineteenth century.[118] Judges expressed misgivings as to its potential breadth in the nineteenth century, but found it useful in instances where death or serious injury was not the defendant's main aim.[119] More importantly, judges used it to buttress the view that an intention to cause grievous bodily harm was sufficient for murder. When Joseph Howes beat his wife to death, the prosecuting lawyer used the felony murder rule to

[114] *Michael Crawley*, *The Times*, 10 July 1857, 11.
[115] *Henry Brennen*, *The Times*, 22 August 1862, 9.
[116] *Macklin, Murphy, and Others' Case* (1838) 168 E.R. 1136, 1136.
[117] "*A*. shooteth at the poultry of *B*, and by accident killeth a man; if his intention was to steal the poultry ... it will be murder by reason of the felonious intent": Foster, *Crown Law*, 2nd ed. (London 1776), 258–59.
[118] See Binder, "Origins of American Felony Murder Rules", 88–106. For an illustration, see *John Hall*, *The Times*, 6 March 1862, 10.
[119] See *Michael Barrett*, *The Times*, 28 April 1868, 11. See also Stephen's discussion of the case before the 1874 Select Committee on Homicide Law Amendment Bill: The House of Commons, *Special Report*, 16.

construct a path to liability: "to wound with intent to do grievous bodily harm was a felony; so that if the prisoner had inflicted blows with intent only to do his wife serious injury … and they in the result caused her death, he would be guilty of murder." When the counsel for the defence insisted that murder "required premeditation and intent to kill" and told the jury to have "recourse to their common sense", Baron Channel strongly reaffirmed the prosecuting counsel's statement of law. An intention to kill was unnecessary and an intention to cause grievous bodily harm was enough: "[s]uch was the law upon the subject, and the jury would have to apply it."[120]

The non-fatal felonious assaults created in the nineteenth century were the most proximate offences to homicide. They provided a convenient means for judges to construct liability for murder by mapping the boundary between felonious and non-felonious assaults onto the boundary between murder and manslaughter. As Brett J. put it to one jury in a case of wife killing:

> [i]f an unlawful act was done – if violence was used – with intent to do serious injury and death ensued – even though not intended – it would be murder; but if the man quarrelled with his wife and used violence to her without any intent to do serious injury, then it would be manslaughter, as the death would then be caused by an unlawful act, but without a "felonious" intent.[121]

Judges did not always tell the jury to apply the felony murder rule: they could simply assert that intention to cause grievous bodily harm was sufficient. As the Attorney General put it in one high-profile case, murder was made out "if the prisoners intended to do him some grievous injury, though they might not have intended to do what would cause his death", they would be guilty of murder. The defendants were the captain and mates on a ship who caused the death of a seaman by sustained cruel treatment. The lack of a deadly weapon or expressed malice were potential obstacles, but the judge used the presumption of intended consequences in his directions, telling the jury to find murder "if, as reasonable men, the prisoners must have anticipated the death of the deceased".[122]

The focus on intention and the link with grievous bodily harm led judges to transfer their approach to mitigating the effects of intoxication in relation to non-fatal offences to homicide. In the first half of the nineteenth century, murder was not treated as a crime of specific intention because wicked or malicious conduct which destroyed life was sufficient.[123] In theory, this might have made it easier for judges to exclude the effects of intoxication. They could have insisted, as they did for non-fatal assaults, that intoxication could rebut the presumption for

[120] *Joseph Howes*, *The Times*, 6 August 1863, 8.
[121] *John Parker*, *The Times*, 24 February 1877, 11.
[122] *Henry Rogers, William Miles and Charles Edward Seymour*, *The Times*, 21 August 1857, 10. For the background, see Wiener, *Men of Blood*, 67–69.
[123] See text at note 15 above.

crimes of specific intent but not for those only requiring malice. In practice, this was not feasible because intoxication was already an established means of reducing murder to manslaughter.[124] Defence counsel urged intoxication as an alternative explanation for a killing: drunkenness did not manifest the malignity or wickedness required for malice. By focusing the requirements of malice aforethought on intention to kill or cause grievous bodily harm, judges narrowed the inquiry and instructed juries to measure the effects of intoxication with reference to intention.

Defence counsel urged that drunkenness nullified intention, arguing that it demonstrated a lack of premeditation. Judges rejected this argument and applied the rule articulated by Coleridge J. in *R. v Monkhouse* that only drunkenness which rendered the defendant incapable of forming intention could rebut the presumption of malice or intended consequences. When, in 1864, Richard Parker killed his mother following a drunken quarrel, his counsel urged that, "when the question was as to the intent of the prisoner it was most important to consider the state of his mind, and drunkenness might account for acts which might otherwise be the result of malice". Summing up, Blackburn J. told the jury that if the prisoner "intended to do grievous bodily harm … and death ensued" it was murder and that drunkenness was not sufficient to reduce it to manslaughter "unless the prisoner did not know what he was about".[125] Judges were not always able to persuade juries, but their persistent directions to focus on intention and capacity gradually restricted the scope of the excuse. By the last decades of the century, the approach to intoxication in murder was aligned with that in non-fatal offences. In 1887, the most eminent judicial authority on criminal law, Stephen J., stated that only drunkenness which prevented the defendant from forming intention to kill or cause grievous bodily harm could reduce the murder to manslaughter.[126] As a result, murder, despite not always requiring proof of a specific intent, was treated as such in many cases involving intoxication.[127]

By the late nineteenth century, intention was the central ingredient of malice aforethought. When Stephen set out its requirements in his 1877 *Digest*, three of the four states of mind that he enumerated required intention.[128] A year later, Mellor J. instructed the jury in a murder case

[124] See Rabin, "Drunkenness and Responsibility", 466–77; Handler, "Intoxication and Criminal Responsibility", 253–54.

[125] *Richard Thomas Parker*, *The Times*, 26 July 1864, 11.

[126] *R. v Doherty* (1887) 16 Cox C.C. 306, 308; *Daniel Francis Doherty*, *The Times*, 20 December 1887, 12; *Daniel Francis Doherty*, *The Times*, 21 December 1887, 7.

[127] Stephen J.'s statement in *R. v Doherty* (1887) 16 Cox C.C. 306, alongside Coleridge J.'s in *R. v Monkhouse* (1849) 4 Cox C.C. 55 decades earlier, became key reference points: see *R. v Meade* [1909] 1 K.B. 895, 898–99 (C.A.); *DPP* v *Beard* [1920] A.C. 479, 497–501 (H.L.).

[128] These were intention to kill or cause grievous bodily harm, intention to commit any felony (the felony murder rule) and intention to oppose by force any officer of justice. The other was knowledge that an act will probably cause death or grievous bodily harm, accompanied by indifference or a wish that it should not be caused. This was included to cover the situation in the Fenian case of Barrett: see note 119 above; Stephen, *Digest*, 144–47, Article 223.

that "malice in law was involved in the intent with which an act was done. If the man had done what he had done intentionally, that was sufficient to constitute malice".[129] The old presumption of malice had been largely subsumed by the presumption of intended consequences. The continued presence of the felony murder rule muddied the picture, but the pattern established in relation to forgery and non-fatal assaults became visible. Judges could not prevent individual circumstances from affecting outcomes and not all individuals were presumed to be capable of meeting the required standards of self-control. Nonetheless, by refining the meaning of malice aforethought to focus on intention and applying the presumption of intended consequences, there was much reduced scope for motive or drunkenness to negate intention.

VI. Conclusion

By the end of the nineteenth century, the presumption of intended consequences was firmly established. A leading treatise on evidence described it as "one of the most valuable presumptions known to the criminal law".[130] In his influential *Outlines of Criminal Law*, Professor Courtney Kenny thought that there was "such a great difficulty in obtaining any evidence to rebut this presumption, as to render it practically equivalent to a conclusive one".[131] This reflected its strengthening trajectory over the preceding century but, as we have seen, its application was not conclusive in trials. The Court of Criminal Appeal recognised this in one of its first cases, stating that the presumption could be rebutted "in the case of a sober man, in many ways" and in the case of a "man who is drunk, by [showing] … that he was incapable of knowing that what he was doing was dangerous".[132]

The establishment of an appellate system in criminal cases in 1907 offered the prospect of more planned and considered development, but there was no attempt to start anew.[133] The foundational structure for consideration of questions of fault remained that which had been laid in nineteenth-century trials. The presumption of intended consequences and its relationship to other key tenets of criminal law produced three landmark House of Lords criminal cases. *DPP v Beard* reviewed the circumstances in which drunkenness could rebut the presumption and set the framework for the modern law of intoxication.[134] In *Woolmington v*

[129] *James Caffyn*, *The Times*, 23 January 1878, 11. See also *George Baldwin*, *The Times*, 14 January 1884, 10: "Malice was wilfully and intentionally doing that which was a wrong act" (Hawkins J.).
[130] Pitt Taylor and Pitt-Lewis, *Treatise on the Law of Evidence*, 81.
[131] Kenny, *Outlines*, 148.
[132] *R. v Meade* [1909] 1 K.B. 895, 899 (Darling J.).
[133] See R. Pattenden, *English Criminal Appeals 1844–1994* (Oxford 1996), 27–33.
[134] *DPP v Beard* [1920] A.C. 479. See P. Handler, "*DPP v Beard* (1920)" in P. Handler, H. Mares and I. Williams (eds.), *Landmark Cases in Criminal Law* (Oxford 2017).

DPP, one its most celebrated decisions, the House reconciled the operation of the presumption of intended consequences with the presumption of innocence.[135] In *DPP v Smith*, one of its most notorious criminal law decisions, it used the presumption to apply an objective test for liability in murder based on what the ordinary person would "have contemplated as the natural and probable result" of their actions.[136] By the time that *Smith* was decided, the presumption appeared as a heresy to academic scholars arguing for a subjective basis for liability.[137] Glanville Williams argued that, if treated as a rule of law, the presumption contained a "serious threat to any rational theory of intention".[138] The new subjectivist orthodoxy was confirmed when, in 1967, the legislature gave the presumption its quietus.[139]

Nineteenth-century judges did not view the presumption as heretical or as an inhibition on common law development and few were much interested in constructing a rational theory of intention. As the institutional shifts of the late eighteenth and early nineteenth centuries produced a refined focus on fault in trials, judges sought new ways to control juries' discretion. Their use of the presumption was pragmatic: it supported proof of intention in problematic cases. As intention became the central element of more serious offences, particularly those involving violence, the presumption was deployed more widely and became the locus for determining the effects of excuses, most notably intoxication. Restricting the conditions in which it could be rebutted enabled judges to manage increasingly adversarial courtroom negotiations and exercise more control over determinations of fault. This trial-centred mode of development may not always have yielded consistent results or the clarity demanded by jurists, but it produced significant and durable doctrinal change.

[135] *Woolmington v DPP* [1935] A.C. 462. See L. Farmer, "Innocence, the Burden of Proof and Fairness in the Criminal Trial: Revisiting *Woolmington* v *DPP* (1935)" in J.D. Jackson and S.J. Summers (eds.), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (Oxford 2018); K. Crosby, "'Well, the Burden Never Shifts, but It Does': Celebrity, Property Offences and Judicial Innovation in *Woolmington v DPP*" (2023) 43 Legal Studies 104.
[136] *DPP v Smith* [1961] A.C. 290, 327 (Viscount Kilmuir L.C.).
[137] For criticism of *Smith*, see G. Williams, "Constructive Malice Revived" (1960) 23 M.L.R. 605; J.C. Smith, "Case and Comment: *DPP v Smith*" [1960] Crim. L.R. 765.
[138] G. Williams, *Criminal Law: The General Part*, 2nd ed. (London 1961), 89.
[139] Criminal Justice Act 1967, s. 8.