

Intoxication and Criminal Responsibility in England, 1819-1920

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Abstract

In the period 1819-1920 the ostensibly strict English common law rule that drunkenness was not an excuse to any criminal charge was modified. It was formally recognised that, at least for crimes requiring proof of a specific intention, intoxication could reduce liability. Legal historians have explained this course of development with reference to the establishment of a subjective pattern of criminal responsibility. Conceived as a mental condition excuse, intoxication could only be accommodated in legal doctrine once the defendant's state of mind became the focus for investigation. This article suggests reasons to revise this account. Drawing extensively on trial reports, it offers an interpretation that attends closely to the relationships between doctrine, policy and contemporary understandings of individual responsibility for drunken violence. It argues that, in an age of temperance, doctrinal development was

driven by judicial concern to narrow the scope of the excuse and it was only late in the nineteenth century, as drunkenness became mixed with insanity in legal doctrine, that there was a sustained focus on the defendant's state of mind. The article ends with a re-evaluation of *DPP v. Beard* [1920] AC 479 which is still cited as a foundational case for the modern doctrinal approach to the issue.

1. Introduction

At the start of the nineteenth century drunkenness was not recognised as an excuse to any criminal charge in English law.¹ This ostensibly strict common law rule was mitigated informally by judges and juries concerned to reduce the severity of England's 'bloody code'. Defendants drunk at the time of the offence were not deemed to be wholly responsible for their actions or, at least, not sufficiently culpable to be hanged.² The collapse of the capital laws and the apparent rise in drunkenness and violence in the 1820s and 1830s prompted judges to take action to control juries still inclined to make a forgiving assessment of intoxicated violence. The first reported case in which a judge explicitly addressed the question of how intoxication affected criminal liability came in 1819. Over the next century, judges and jurors in the higher criminal courts grappled with the issue without any clear legislative

¹ See W. Blackstone, *Commentaries on the Laws of England* (London 1769) vol 4 25; M. Hale, *A History of the Pleas of the Crown*, (G. Wilson, T. Dogherty eds, new edn, London, 1800) 31.

² D. Rabin, 'Drunkenness and Responsibility for Crime in the Eighteenth Century' (2005) 44 *Journal of British Studies* 457-477.

framework or authoritative guidance from a court of review until 1920, when the House of Lords finally addressed the issue in *DPP v. Beard*.³

In *Beard*, Lord Birkenhead surveyed the authorities over the previous century in some detail. He concluded that the strict common law rule had been formally qualified to the extent that evidence of intoxication might prevent the prosecution from establishing mens rea in offences requiring proof of a 'specific intent'. He was, however, unable to find any 'single or very intelligible principle' to which the course of development could be attributed.⁴ Less easily deterred, legal historians have linked the incorporation of the excuse of intoxication into formal legal doctrine to the emergence of a model of criminal responsibility founded upon an assessment of the defendant's subjective state of mind. This marked a shift away from a conception of responsibility based on an evaluation of whether the defendant's conduct manifested the necessary malice or criminality to justify the imposition of punishment.⁵ The subjective pattern of responsibility focused inquiry more narrowly on the choices and mental capacities of the accused and excluded or minimised the scope for juries to assess criminal fault with reference to non-legal criteria. For many legal scholars, this shift was an essential prerequisite for the development of rules regarding the effect of intoxication on criminal liability. Conceived as a mental condition excuse,

³ [1920] AC 479 (HL) 494-495.

⁴ Ibid 495.

⁵ The argument that there was a shift from a pattern of 'manifest criminality' to a 'subjective pattern' has been made most influentially by Fletcher, see G. Fletcher, *Rethinking Criminal Law* (Oxford University Press 1978, reprint 2000) 115-234.

intoxication could only be accommodated in legal doctrine once its effects on the defendant's cognitive and volitional capacity could be investigated and understood.⁶

The tendency to describe nineteenth-century legal developments in terms that emphasise the emergence, albeit in a gradual and halting manner, of a subjective, capacity-based model of responsibility has been challenged.⁷ The shallow historical roots of the model have been exposed: although subjectivist ideas came to prominence in early nineteenth-century intellectual thought, it was not until the mid-twentieth century that they assumed a dominant position in understandings of criminal law doctrine.⁸ Lacey has argued that the narrow focus on subjectivist ideas in legal historical scholarship has had the effect of excluding other conceptions of criminal responsibility from consideration and marginalising the importance of the political, cultural and socio-economic context for legal development in the eighteenth and nineteenth centuries.⁹ To understand these different conceptions and the broader

⁶ See S. Dimock, 'What are Intoxicated Offenders Responsible for? The "Intoxication Defence" Re-examined' (2011) 5 *Criminal Law and Philosophy* 1, 1; K. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (Oxford University Press 1998) 342; D. McCord, 'The English and American History of Voluntary Intoxication to Negate Mens Rea' (1990) 11 *Journal of Legal History* 372; R. Singh, 'History of the defence of drunkenness in English criminal law' (1933) 49 *Law Quarterly Review* 528.

⁷ See J. Horder, 'Two histories and four hidden principles of mens rea' (1997) 113 *Law Quarterly Review* 95; A. Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001).

⁸ See P. Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 *Modern Law Review* 29.

⁹ See N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 350, 367-371 and passim. See also N. Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 *Journal of Political Philosophy* 249; N.

context, there is a need to connect the history of criminal justice policy and process to that of legal doctrine.

Focusing on the law of intoxication provides a potentially valuable means of making this connection. When intoxication was raised in the courtroom, the issue of criminal responsibility was brought into sharp focus. If the strict common law rule that it was never an excuse could not be enforced without qualification, how were juries to be directed on the conditions in which intoxication could absolve defendants from liability? It will be argued that four key considerations shaped judicial responses to that question and the doctrine that resulted. The first was a shifting legal framework. The statutory and common law on violent offences, particularly non-fatal assaults, changed considerably in the period, affecting the scope for intoxication to limit liability. Secondly, throughout the period under consideration, drunkenness and drunken violence were important objects of social and legal policy. The extent to which such policies could take effect in the courtroom was mediated by a third influence: the dynamics of courtroom interaction. Negotiations in trials between judges, jurors and lawyers resulted in compromises which were ultimately reflected in doctrine. Loughnan suggests that judges and juries acted on a 'lay knowledge' of the effect that intoxication had on criminal responsibility, which was defined by contrast with a growing body of expert medical knowledge.¹⁰ This body of expert knowledge was a fourth major influence on doctrine, particularly in the second half of the period

Lacey, 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) 4 *Criminal Law and Philosophy* 109.

¹⁰ A. Loughnan, 'The Expertise of Non-Experts: Knowledges of Intoxication in Criminal Law' in J. Herring, C. Regan, D. Weinberg and P. Withington (eds) *Intoxication and Society: Problematic Pleasures of Drugs and Alcohol* (Routledge 2012).

as the line between insanity and intoxication became increasingly blurred in medical and legal discourse.

The interrelationship of these factors involves complex themes in the medical, legal, social and cultural history of the period that cannot be explored fully in this essay. My aim is to situate legal doctrine against the backdrop of general policy and shifting medical, legal and lay understandings of drunkenness and criminal responsibility. The focus is on how these broader concerns and understandings were reflected in judicial pronouncements in the higher criminal courts in decisions reported in the newspapers and law reports. It is not suggested that these judicial utterances set out a framework for dealing with drunken violence that was followed throughout the criminal justice system. They nonetheless illuminate the formative influences on legal doctrine in the period when the modern approach to intoxication and criminal responsibility was established.

Parts 2 and 3 of the essay focus on policy and doctrine in the period up until the 1870s, when drunken violence was seen as a particular threat to liberal values of self-discipline and restraint. Parts 4 and 5 focus on the relationship between insanity and intoxication, which assumed an increasingly prominent role in shaping policy and doctrine in the second half of the period. This rough division is a convenient one for analysis and serves to highlight some marked differences between the periods before and after the 1870s, especially with regard to criminal justice policy. There was no clear break however and a number of the themes identified persisted throughout the century under scrutiny.

2. Violence, Drunkenness and Legal Policy

Drunkenness and violence were scarcely new in early nineteenth-century English society, but they assumed forms that seemed to demand a new set of responses. Both became highly visible and alarming features of an increasingly urbanised society and, as a result, major social problems that required national solutions.¹¹ Official statistics, produced from the early part of the nineteenth century, seemed to indicate that both violent crime and consumption of alcoholic drinks were increasing.¹² In the post Napoleonic war period of social unrest and economic uncertainty, the problems assumed disturbing proportions and prompted extensive national debate.

Drunkenness was cited as the most significant single cause of crime. This was the conclusion of an 1834 parliamentary select committee appointed to inquire into drunkenness and it was repeated in subsequent parliamentary inquiries in the 1850s and 1870s.¹³ Commentators commonly estimated that it accounted for more than half

¹¹ See B. Harrison, *Drink and the Victorians The Temperance Question in England 1815-1872* (2nd edn, Keele University Press 1994); J. Greenaway, *Drink and British Politics since 1830 A Study in Policy Making* (Palgrave 2003) 1-28; J. Carter Wood, *Violence and crime in nineteenth-century England; The shadow of our refinement* (Routledge 2004).

¹² For a summary of nineteenth century crime statistics, see C. Emsley, *Crime and Society in England 1750-1950* (3rd edn, Longman 2005) 32-33. On the patterns of alcohol consumption and the influence of the confusing use of official statistics on middle class temperance opinion, see M. Roberts, *Making English Morals Voluntary Associations and Moral Reform in England 1787-1886* (Cambridge University Press 1994) 116-117.

¹³ The 1834 Committee attributed to drunkenness the 'spread of crime in every shape and form'. *Report from the Select Committee on Inquiry into Drunkenness* Parliamentary Papers, 1834 (559)VIII, vi. For the conclusions of subsequent parliamentary inquiries, see L. Radzinowicz and R. Hood, *The Emergence of Penal Policy in Victorian and Edwardian England; A History of English Criminal Law and its Administration from 1750 Volume 5* (Clarendon Press 1990) 61.

of all crime.¹⁴ In 1861 John Clay, the temperance reformer and chaplain of Preston jail, estimated that nine tenths of crime arose ‘from the *English sin*’.¹⁵ Judges also attributed a high proportion of crime to drunkenness and regularly made the connection in their addresses to grand juries and in their sentencing speeches. In 1848, Coleridge J. stated that ‘but for the cases where offences have been brought on by excessive use of intoxicating liquors, the Courts of Justice might be nearly shut up.’¹⁶ Drunkenness was particularly associated with violent crime and it was in relation to non-fatal assaults and homicides that many of the fears coalesced. In 1874, Keating J. estimated that ‘nineteen-twentieths of the acts of violence committed throughout England originated in the public house.’¹⁷

The social and legal responses to these threats were multi-faceted. From the 1830s through until the 1870s, temperance was one of the most prominent causes for social reform. In the 1830s and 1840s, the movement responded to fears concerning the moral degeneration of the working classes and drew strongly on religious,

¹⁴ See Radzinowicz and Hood, *The Emergence of Penal Policy* 61-64.

¹⁵ Quoted in W.L. Clay, *The Prison Chaplain: A Memoir of the Reverend John Clay* (London 1861) 554 as cited in M. Wiener, *Reconstructing the Criminal Culture, Law and Policy in England 1830-1914* (Cambridge University Press 1990) 79.

¹⁶ Quoted in W. Hoyle, *Crime in England and Wales in the nineteenth century: an historical and critical retrospect* (London 1876) 106. For an extensive selection of judicial pronouncements on the issue, see Hoyle, *Crime in England* 105-114.

¹⁷ Quoted in Hoyle, *Crime in England* 111. For the relationship between patterns of alcohol consumption and violent crime, see 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 University Press 1972) 369-371.

particularly evangelical, constituencies.¹⁸ The focus on individual moral reform gave way to some extent in the 1850s and 1860s as a significant portion of the movement demanded more legal regulation and prohibition.¹⁹ Temperance reformers in these decades had cause to believe the problem was growing. Consumption of alcoholic drinks apparently rose to a peak in the 1870s.²⁰ Prosecutions for public drunkenness also rose markedly to a high point in the 1870s and sentences were increasing too, with a term of imprisonment becoming much more likely.²¹

The widespread public awareness of the link between intoxication and crime did not prompt any legislative intervention on the effect that drunkenness had on liability generally. Indeed it inhibited legal reformers and legislators fearful of the adverse effects of giving official sanction to the idea that drunkenness could ever palliate an offence.²² The problem of violent crime drew regular and direct legislative intervention in the nineteenth century. It had been treated less seriously than many

¹⁸ N. Mason, “‘The Sovereign People are in a Beastly State’: The Beer Act of 1830 and Victorian Discourse on Working Class Drunkenness’ (2001) 29 *Victorian Literature and Culture* 109. The temperance movement drew in people from a wide range of backgrounds, see Roberts, *Making English Morals* 150-152.

¹⁹ See Harrison, *Drink and the Victorians* 21 and passim. See also L. Shiman, *Crusade against Drink in Victorian England* (Palgrave 1988); A. E. Dingle, *The Campaign for Prohibition in Victorian England* (Croom Helm 1980).

²⁰ It then entered into a steady decline until the 1910s. See A.E Dingle, ‘Drink and Working-Class Living Conditions in Britain, 1870-1914’ (1972) 25 *Economic History Review* 608, 608-610.

²¹ See Gatrell and Hadden, ‘Criminal Statistics’ 365, 370; Wiener, *Reconstructing the Criminal* 155.

²² An 1879 draft provision on drunkenness and liability was struck out by a Royal Commission on the grounds that reference ‘to the matter might suggest misunderstanding of a dangerous kind’. *Royal Commission to consider Law relating to Indictable Offences*, Parliamentary Papers, 1878-79, (2345) XX, 18.

species of property crime in the eighteenth century. Incidents of non-fatal violence, if prosecuted at all, would usually only have resulted in a charge of common assault.²³

The approach shifted in the nineteenth century and violent crime became the legislature's primary focus. A complex structure of non-fatal offences against the person was created by statute, which increased the level of criminalisation significantly.²⁴

There was therefore a sustained effort to suppress both violence and drunkenness in the first fifty years of the period under consideration. In Wiener's view, criminal justice policy in this period was directed towards inculcating controlled and disciplined habits in individuals. Violence, and drunken violence in particular, offended against the liberal values of self-discipline and restraint.²⁵ John Stuart Mill, the great champion of individual liberty, advocated harsher treatment of criminals who offended whilst drunk: 'The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others.'²⁶ The criminal law was an important means of pursuing efforts to reform the morals and character of the population but it had to be enforced in a process that depended on the co-operation of a variety of actors. Wiener has argued that in the courtroom, a new "sense of mission" amongst the officiating classes ran up against the values of the prosecutors

²³ Magistrates began to punish common assault more severely in the second half of the eighteenth century, see P. King, 'Punishing Assault: The Transformation of Attitudes in the English Courts' (1996-7) 27 *Journal of Interdisciplinary History* 43.

²⁴ See below, text at n. 42.

²⁵ See Wiener, *Reconstructing the Criminal* 46-91. See also Harrison, *Drink and the Victorians* 339-343 and *passim*.

²⁶ J.S. Mill, *On Liberty* (London 1859) 175.

and, in particular, jurors, who were such a vital part of the administration of justice.²⁷ Where there was disagreement, changing courtroom processes made doctrinal development a more likely outcome in the nineteenth century than it had been in the eighteenth. The trial became more adversarial, the judge often sought to control the defence counsel's attempts to exploit the jurors' sympathies to secure an acquittal or conviction on a lesser charge. This led to a considerably more detailed legal scrutiny of the meaning of key factors and terms, most notably intention and malice, that previously would have been left to the jury.²⁸

3. The Emergence of Doctrine

In the early decades of the nineteenth century, intoxication was something that was relevant in order to assess the character of an act and not the defendant's state of mind. An assault committed during a drunken fight in a pub might not appear malicious to a jury, especially if the prisoner was of good character and there was no evidence of any previous grievance against the victim. Intoxication supplied an explanation or motive for an action, which if committed by a sober defendant would be presumed malicious or intentional.²⁹ This did not disturb the established doctrine that intoxication was no defence to a criminal charge because the reason for acquittal

²⁷ M. Wiener, 'Judges v Jurors: Courtroom Tensions in Murder Trials' (1999) 17 *Law and History Review* 467.

²⁸ See P. Handler, 'Legal Development in Victorian Criminal Trials' in M. Dyson and D. Ibbetson (eds) *Law and Legal Process* (forthcoming).

²⁹ See P. Handler, 'The Law of Felonious Assault in England, 1803-1861,' (2007) 28 *Journal of Legal History* 183, 193-195, 201-202.

was that the prisoner had not acted maliciously or intentionally. It is clear, from the number of times that drunkenness was pleaded in the eighteenth and early nineteenth centuries, that it was a significant mitigating factor.³⁰ Prisoners openly offered, or even feigned, drunkenness as the explanation for their conduct, arguing that they had no malice or intent.³¹

This practice of mitigation was not incorporated into doctrine by judges who asserted, but did not enforce, the rule that drunkenness was never an excuse. Nor was it reflected in the limited but growing number of legal treatises. If the effects of intoxication were discussed at all, it was only where the drunkenness was involuntary in which case it would be treated as a species of insanity.³² There was no body of legal doctrine on intoxication separate from that on insanity. Voluntary drunkenness was not recognised as any sort of excuse: even in the 1840 edition of Blackstone's *Commentaries*, it was still referred to as an aggravation of an offence.³³

The assertions of the strict common law rule found in treatises were not based on decided cases, but on discussions in canonical texts such as Coke, Hale and Blackstone.³⁴ *Grindley* (1819) was the first case in which a judge explicitly directed a

³⁰ See Rabin, 'Drunkenness and Responsibility' 470-473.

³¹ See for example the case of Edward Smeetham: *OBP online* 30 June, 1831, Edward Smeetham [sic], (t18310630-12); *The Times* 4 July 1831, 4 col. c; Handler, 'Felonious Assault' 194.

³² See for example: J. Chitty, *A Practical Treatise on the Criminal Law* (London 1816) vol 3 725; J. Jervis, *Archbold's Summary of the law relative to pleading and evidence in criminal cases: precedents of indictments* (London 1834) 13-14.

³³ W. Blackstone, *Commentaries on the laws of England : in the order, and compiled from the text of Blackstone : and embracing the new statutes and alterations to the present time.* (London, 1840. *The Making of Modern Law.* Gale. 2011. Gale, Cengage Learning. 01 August 2011, III) 479.

³⁴ See, for example, W. Russell, *A Treatise on Crimes and Misdemeanours* (London 1819) 11.

jury on the effect of drunkenness that attracted the attention of a treatise writer.³⁵ It concerned the defence of provocation. Killings that were made on a sudden or in the 'heat of passion' were deemed by law to fall outside the scope of 'malice aforethought' and prisoners were convicted instead of manslaughter. The law had developed certain categories of act that could amount to provocation. In the nineteenth century, these categories were retained but the law's focus turned to whether the prisoner's conduct demonstrated a loss of self-control.³⁶ This made the prisoner's state of intoxication more relevant to the inquiry. Drunken prisoners were perceived to be more excitable, less able to control themselves and therefore more easily provoked. At the beginning of the nineteenth century, there was nothing to prevent drunkenness being considered by the jury when deciding whether the act was done on impulse or in a passion.

In *Grindley*, Holroyd J. ruled that on a murder charge, 'where the material question is whether the act was premeditated or done only from sudden impulse, drunkenness could be taken into consideration.'³⁷ The facts of the case were not reported, but it is likely that Holroyd's statement reflected the established practice of the courts. In the changed context of the 1830s, as the temperance movement gathered pace, the presence of this broad statement in one of the leading criminal law treatises and the reliance on it by defence counsel, began to appear problematic to judges. In *Carroll*, Littledale J. explicitly stated that it was not law on the basis that 'there would be no safety for human life if it were to be considered as law.'³⁸ The judges did not

³⁵ *R v Grindley*, (1819) Russell *Treatise* (2nd edn, 1826) vol 1 8n. The case was reported from a manuscript note from the judge and contains no report of the facts.

³⁶ See J. Horder, *Provocation and Responsibility* (Oxford University Press 1992) 72-110.

³⁷ *R v Grindley*, (1819) 8n.

³⁸ *R v Carroll* (1835) 7 Car & P 145, 173 ER 64, *The Times* 16 May 1835 7c.

seek to exclude drunkenness from the jury's consideration altogether, something which might have been difficult to achieve in view of the established understanding of it as a mitigating factor. They became careful however to specify that it was only relevant in situations where there had been sufficient provocation in law, then the jury could consider drunkenness as 'passion is more easily excitable in a person, when in a state of intoxication than when sober.'³⁹ In his study of Victorian homicide trials, Wiener argues that in the 1840s and 1850s, well before the standard was recognised in a leading reported decision, trial judges were using an objective standard to guide juries in their decision-making.⁴⁰ Judges directed juries that they had to be satisfied that the 'reasonable man' would have lost self-control in the prisoner's circumstances in an attempt to incorporate Victorian conceptions of good character, which excluded drunkenness, into the law.⁴¹

At around the same time that judges were beginning to measure the effect that intoxication could have in the context of provoked killings, they were also prompted by new legislation to consider its effect in the context of non-fatal assaults. This produced significant doctrinal development and the emergence of the category of crimes of specific intention. Legislation in 1803, 1828 and 1837 introduced a range of new felonies including attempted murder and assaults with intention to cause grievous bodily harm.⁴² Prosecutions for non-fatal assaults came before the higher criminal courts for the first time in significant volume. The new statutory offences required proof of intention to kill or to cause grievous bodily harm. Until 1837, most of the

³⁹ *R v Thomas* (1837) 7 Car & P 817, 173 ER 356.

⁴⁰ Wiener, 'Judges v. Jurors' 481-488. The first reported case in which the standard of a reasonable man was clearly recognised was *R. v. Welsh* (1869) 11 Cox CC 336.

⁴¹ Wiener, 'Judges v. Jurors'; Wiener *Men of Blood* 175-200 and passim.

⁴² 43 Geo III c.58; 9 Geo IV, c.31; 1 Vict. c. 85.

offences also contained a proviso requiring the jury to be satisfied that the defendant would have been guilty of murder if death had ensued.⁴³ This had the effect of incorporating the requirement of malice aforethought and all of its uncertainty into the offence. The law changed significantly in 1837 when the proviso was omitted and the death penalty removed for all but the most serious species of attempted murder. This change focused inquiry more narrowly on intention.

The question of whether a defendant had formed the requisite intention was usually determined by the rule of evidence that a person intended the natural or probable consequences of his actions. The rule was extremely difficult to rebut and had a pervasive influence.⁴⁴ It reflected a model of criminal responsibility that rested on confidence in the ability of judges and juries to read criminality from conduct. This caused few problems in contexts where judges and juries could agree on a particular interpretation of conduct. In the early Victorian period a significant divergence of opinion between judges and juries emerged on culpability for drunken non-fatal violence. I have argued elsewhere that in trials for felonious assault juries regularly sought to acquit or partially exonerate prisoners whose violence was attended with some mitigating circumstance. This did not always bring them into conflict with judges who often concurred with their verdict or were able to reflect their own view of the gravity of the offence in the sentence.⁴⁵ Where there was conflict, defence counsel, newly armed with the ability to address speeches to the jury directly, sought to use intoxication as a means of rebutting the presumption of intended consequences.

⁴³ See Handler, 'Felonious Assault' 195-197.

⁴⁴ See Smith, 'Criminal Law' 416-420. See also Lacey, *Responsible Subject* 370.

⁴⁵ See Handler, 'Felonious Assault' 203-206.

Judges initially admitted the possibility in quite open terms. In *Cruse* Patteson J. accepted that drunkenness was evidence capable of rebutting the presumption of intended consequences.⁴⁶ A decade later in *Monkhouse*, Coleridge J. made efforts to limit the circumstances in which it could do so. He declared that:

‘Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself... or to take away from him the power of forming any specific intention.’⁴⁷

Coleridge’s broad-ranging suggestion that drunkenness could palliate an offence if it prevented self-restraint was not subsequently taken up but the concept of a ‘specific intention’ became central to legal doctrine. Coleridge’s direction did not reflect a new understanding of intoxication and its effect on mens rea. Its aim was to restrict the scope for juries to take drunkenness into account as a mitigating factor in non-fatal assault prosecutions. Crimes of specific intention were the felonious species of assault and not common assault or unlawful wounding. The jury could be directed to convict of these lesser offences if not satisfied of the felony.⁴⁸ Crimes designated as requiring proof of a specific intention were the only ones in which drunkenness could supply evidence to rebut the presumption of intended consequences. This evidence was not

⁴⁶ *R v Cruse* (1838) 8 Car & P 541, 173 ER 610.

⁴⁷ *R v. Monkhouse* (1849) 4 Cox CC 55; *Old Bailey Online* Henry Monkhouse Dec 1849, t18491217-225; *The Daily News* 20 Dec 1849. For Coleridge J’s trial notes, see BL Add MSS 805519, ff. 172-177.

⁴⁸ 1 Vict. c. 85, s.11; 14 & 15 Vic., c. 19, ss. 4-5.

presented in terms which required the court to investigate the defendant's actual state of mind. The debate and negotiation in the trial centred upon an objective assessment of how the defendant's drunken conduct should be interpreted. The jury was not directed to consider whether the defendant had formed an intention as a matter of psychological fact.

Courtroom participants were engaged in a moral evaluation of events and this did not produce consistent outcomes. In the 1840s and 1850s, the potential for drunkenness to mitigate depended very much on context and the particular offence involved. Attempted suicide, for example, required an intention to take away one's own life and, as it was an offence likely to evoke sympathy, judges were willing to allow juries to consider drunkenness when deciding the question of intention.⁴⁹ In cases of non-fatal assault or homicide, the likelihood of a judge pressing for a conviction for felonious assault or murder depended on the circumstances surrounding the crime, in particular the means used to inflict the injury, the relationship between the parties, their respective characters and the actual injury sustained. Where assaults arose out of 'mere drunken squabbles', typically in pubs, judges were more lenient.⁵⁰ In contrast, cases where drunken husbands assaulted or murdered their wives drew considerably less sympathy and often prompted judges to direct a jury to convict or to

⁴⁹ As Jervis LCJ. put it: 'If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?' *R v Moore* 3 Car & K. 319, 175 ER 571. See also *R v Doody* (1854) 6 Cox CC 463.

⁵⁰ See C. Conley, *The Unwritten Law Criminal Justice in Victorian Kent* (Oxford University Press 1991) 44-67. In 1858 Lord Chief Baron Pollock complained that too many prosecutions that arose out of a 'mere drunken squabble' were appearing before the courts as felonies when they could have been more cheaply dealt with at the Sessions. (Thomas Lewis *The Times* 17 Aug, 1858.)

impose a harsh sentence.⁵¹ The character and social status of individual prisoners and their victims also continued to signify.⁵² Another critical factor was the means used to inflict the injury. Judges resisted suggestions from defence counsel that drunkenness could rebut the presumption that a prisoner intended the natural and probable consequences of his actions when a deadly weapon was used.⁵³ In addition to these individual factors, judges continued to be influenced by wider considerations. Drunkenness was perceived to be a particular problem in certain counties and cities where judges were much more likely to seek felony convictions or pass severe sentences.⁵⁴

The extent to which drunkenness could reduce criminal liability depended on a wide range of factors, many of which remained exclusively within the province of the jury. Developing more detailed doctrinal rules was one of the means available to judges for exerting more control over trial outcomes. The impetus provided by the 1837 legislation on non-fatal offences to focus on intention, spread to the law relating to murder where the question of drunkenness was involved. Malice aforethought

⁵¹ See for example: Nicholas Foster *The Times* 21 June, 1842; William Burnham *The Times* 29 July, 1843. On homicide see Wiener 'Judges v. Jurors' 490-497.

⁵² See Conley, *Unwritten Law* 53-60.

⁵³ See *R v Meakin* 7 C & P 297, 173 ER 131; Michael Hynes *The Times* 17 July, 1860 12f. For an argument that the use of a weapon was the key indicator of malice in Old Bailey homicide cases in the eighteenth and early nineteenth century, see G. Binder, 'The Meaning of Killing' in L. Farmer and M. Dubber (eds) *Modern Histories of Crime and Punishment* (Stanford University Press 2007) 88-114. See also Wiener, *Men of Blood* 242-255.

⁵⁴ There were substantial regional variations. In the period 1857-1892 rates of drunkenness in Lancashire 'were almost double those for England and Wales as a whole'. (Gatrell and Hadden, 'Criminal Statistics' 370, 391.) Sentencing a wife killer at Lancaster in 1858, Hill J. commented: 'drunkenness abounds in the face of day in this county'. (Reid *The Times*, 16 Dec. 1858, 10b).

retained much of its elasticity and uncertainty through the nineteenth century.⁵⁵ There was little doubt, however, that it included intention to kill or cause grievous bodily harm and when an accused claimed to have been drunk at the time of the offence, judges focused on this requirement.⁵⁶ As with non-fatal assaults this involved an explicit recognition that, as it was a form of specific intention, the presumption of intended consequences could be rebutted. By confining the question in this way, judges gained more control over the boundary line between murder and manslaughter in cases of drunken killings.

In the 1860s and 1870s judges became increasingly strict in their directions to juries on drunkenness even where the crime charged required proof of a specific intention. In *Hynes* a jury was unable to agree because of doubt over whether a drunken killing showed the necessary malice for murder. Keating J. directed that ‘in point of law ... excitement produced by intoxication or otherwise would not reduce it below the crime of murder’.⁵⁷ In a reported case in 1870, Brett J insisted that drunkenness was only an excuse to the specific intent crime of wounding if the jury was satisfied that the defendant was ‘so drunk as to be incapable of knowing what he was doing’.⁵⁸ The focus on capacity in these cases drew attention away from the defendant’s actual state of mind. Judges directed juries that, before they could take intoxication into account, they had to be satisfied that the accused was so drunk as to

⁵⁵ See K. Smith, ‘Criminal Law’ in W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden, K. Smith, *The Oxford History of the Laws of England, Volumes XI-XIII, 1820-1914* (Oxford University Press 2010) XIII, 410-416.

⁵⁶ The clearest statement of this position is in Stephen J’s judgement in *R v. Doherty* (16 Cox CC 306).

⁵⁷ *Hynes* *The Times* 17 July 1860 12f. See also Burke *The Times* 13 Mar 1865, 11c.

⁵⁸ *R v Stopford* (1870) 11 Cox CC 643, 644. A mistaken, drunken belief in the need for self defence could be relied upon, see John Price, *The Times*, 25 July, 1846; *R v Gamlen*, 1 F & F 90, 175 ER 639.

be rendered generally incapable of forming intention. Occasionally judges directed attention to the question of the defendant's actual state of mind. In one statement, exceptional for its clarity, the leading criminal law judge, Stephen J, insisted to a reluctant jury that the only question that they had to address was whether the defendant formed the intention to kill or cause grievous bodily harm. Drunkenness was only relevant if it prevented the defendant from doing so.⁵⁹ The statement did not reflect a settled understanding of the issue. Even so strong a judge as Stephen could do little if a jury chose to adopt a different interpretation of events.⁶⁰

To the extent that there was a coherent criminal justice policy directed towards making the laws more uniform and stringent in holding individuals responsible for their actions, it was substantially mediated in the courts where the law was applied. Defendants were not judged exclusively on their choice in getting drunk and held strictly accountable for any harm that resulted. Juries were not invited to focus narrowly on the defendant's subjective state of mind and continued to take into account conduct, character and the circumstances surrounding the crime to assess liability. Given the breadth of these criteria, it is not surprising that outcomes were highly variable. Judges recognised that they could not exclude these factors from consideration. Instead they sought to confine the relevance of drunkenness to crimes requiring proof of specific intention and then, within that category, to restrict the excuse to instances where the defendant was incapacitated by drink. By the 1870s and 1880s, this two-pronged strategy had gone some way towards reducing the scope for drunkenness to operate as an excuse, but there was no consistent effort, even by

⁵⁹ *The Times* 20 Dec. 1887, 12a; 21 Dec. 7e; *Daniel Doherty* OB online, 12 Dec 1887, t18871212-149; *R v. Doherty* 16 Cox CC 306.

⁶⁰ In *Doherty* the jury returned a verdict of manslaughter.

judges, to instil habits of sobriety and self-discipline in every defendant that came before them.⁶¹

4. Intoxication and Insanity

It has been argued that for the period up until the 1870s at least, the dominant creed of criminal justice policy was that responsibility for drunken violence rested with individuals. It has also been contended that, in practice, the courts took a range of circumstances into consideration when assessing criminal liability for drunken violence, and did not hold individual defendants invariably responsible for the consequences of their drunken actions. The remainder of this essay focuses on another theme, present throughout, but which became particularly prominent in the second half of the period under consideration, namely, the relationship between insanity and intoxication.

The nineteenth century witnessed a substantial growth in medical knowledge of mental function and the emergence of a body of expertise on criminal lunacy. Smith has charted how experts in this field made increasingly close connections between drunkenness and insanity in the middle decades of the century.⁶² The full extent and nature of this connection lie beyond the scope of this essay, but it is important to note Smith's point that although many medical experts connected the two and referred to both as physical diseases in the 1850s and 1860s, they also viewed them as self-caused. Thus there was nothing contradictory about these medical men

⁶¹ For correspondence between a magistrate and MP on the inconsistent judicial approach to the question of drunkenness, see *The Times* 5 Jan 1892, 6a.

⁶² R. Smith, *Trial by Medicine Insanity and Responsibility in Victorian Trials* (Edinburgh University Press 1981) 50-51 and passim.

joining the temperance movement because they 'shared the morality which attempted to bring about social reform at the level of individual habit.'⁶³

It has already been noted that insanity and intoxication were closely intertwined in nineteenth-century legal treatises.⁶⁴ In a similar way to other disorders, drunkenness could have the effect of rendering somebody incapable of reason or of distinguishing right from wrong. Voluntary drunkenness involved prior fault however, so the circumstances in which it could provide the basis for a defence of insanity were restricted. In the 1820s, judges laid down the rule that drunkenness 'is not insanity ... unless the derangement which it causes becomes fixed and continued, by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong.'⁶⁵ In instances where drunkenness led to a recognised disease, such as delirium tremens, it might be admitted as the basis for an insanity plea, but the scope was limited.⁶⁶

As the Victorian period progressed an alternative understanding established itself in medical opinion of drunkenness as a pathological disorder rather than a moral failing.⁶⁷ The view that particular underlying mental states could cause the desire for drink assumed prominence in the 1850s and 1860s and became firmly established in

⁶³ Smith, *Trial by Medicine* 51.

⁶⁴ See texts cited above n. 32. See also W. Russell, *A Treatise on Crimes and Misdemeanours* (5th edn S. Prentice ed, London 1877) vol 1 114-116; J. Stephen, *A General View of the Criminal Law of England* (2nd edn, London 1890) 81.

⁶⁵ *Rennie's Case* (1825) 1 Lewin 76, 168 ER 965. See also *Burrow's Case* (1823) 1 Lewin 75, 168 ER 965. In the eighteenth century defendants regularly combined evidence of lunacy with drunkenness, see Rabin, 'Drunkenness and Responsibility' 473-475.

⁶⁶ Smith, *Trial by Medicine* 85-87.

⁶⁷ See Harrison, *Drink and the Victorians* 21-22; Wiener, *Reconstructing the Criminal* 188-190.

the decades after 1870. The condition of the habitual drunkard was labelled as ‘dipsomania’ or ‘inebriety’.⁶⁸ By 1894, the leading proponent of the disease theory, Dr. Norman Kerr, was able to reflect that there had developed “a consensus of intelligent opinion, that habitual and periodic drunkenness is often either a symptom or a sequel of disease.”⁶⁹ In this analysis, the disease was not self-caused. It was frequently inherited and had the potential to lead to physical and mental degeneracy in the nation as a whole. Cure was needed before moral reform. This change in the prevailing medical views of drunkenness prompted shifts in policy. Kerr was a leading figure in the campaigns that led to the Habitual Drunkards Act 1879 and Inebriates Act 1898, which provided for the incarceration and treatment of ‘habitual drunkards’ in specialised institutions or reformatories.⁷⁰ As the view that individuals needed help with the problem of drunkenness established itself, more effort was devoted towards regulating the drink trade and its environment in order to reduce the temptation to drink.⁷¹

Medical experts were highly critical of the way in which the law dealt with drunkenness and mental illness throughout the nineteenth century. They criticised the M’Naghten rules’ exclusion of ‘irresistible impulse’ or ‘moral insanity’, both of which might be linked to extreme forms of drunkenness, from the ambit of the insanity defence.⁷² Yet gaining a consensus in order to widen the scope of the insanity

⁶⁸ See Radzinowicz and Hood, *The Emergence of Penal Policy* 288-294.

⁶⁹ N. S. Kerr, *Inebriety or Narcomania* (3rd edn, London 1894) vii, quoted in Radzinowicz and Hood, *The Emergence of Penal Policy* 292.

⁷⁰ See Radzinowicz and Hood, *The Emergence of Penal Policy* 288-315; Smith, ‘Criminal Law’ 174-175.

⁷¹ See Dingle, *The Campaign for Prohibition* passim; Greenaway, *Drink and British Politics* 7-52.

⁷² Smith, *Trial by Medicine* 96-123. *M’Naghten* (1843) 10 Cl & F 20, 8 ER 718.

defence proved impossible and members of the judiciary were prominent in their opposition to the medical profession's claims and to reforming schemes.⁷³ The distinction between voluntary drunkenness and insanity, which remained reasonably clear in legal discourse at least until the 1870s, became increasingly difficult to maintain. One commentator in the *Journal of Mental Science* complained in 1886 that the two were being treated virtually 'as if they were one and the same thing.'⁷⁴ In 1893 the Home Secretary Herbert Asquith stated: "I do not think it is possible from a logical point of view, or from the point of view of policy, to treat habitual inebriety ... as standing upon a different level from insanity itself".⁷⁵ In 1898, Dr J. Sutherland, a medical expert on lunacy, wrote in the *Juridical Review* that: 'Intoxication is insanity pure and simple; in fact there is no more complete picture of insanity to be met with in the wide and diversified range of lunacy.'⁷⁶

One reason why views emphasising the diminished responsibility of drunken offenders gained more purchase in policy debates in the late nineteenth and early twentieth centuries was that fears concerning violence and drunkenness were decreasing. Prosecutions for drunkenness and the consumption of alcohol peaked in

⁷³ Baron Bramwell was the most high profile opponent in the 1860s and 1870s. Stephen defended the M'Naghten rules' narrow scope in the 1850s, but then proposed to include irresistible impulse in his 1879 draft code. Its failure owed much to the opposition of other judges. See J. Stephen, 'On the policy of maintaining the limits at present imposed by law on the criminal responsibility of madmen' (1855) in *Papers Read before the Juridical Society: 1855-1858* (London 1858) 67-94; *Report of Select Committee on Homicide* 17-18, 67-68; Radzinowicz and Hood, *The Emergence of Penal Policy* 681-685.

⁷⁴ G. Savage, 'Drunkenness in Relation to Criminal Responsibility' (1886) 32 *Journal of Mental Science* 23-30, quoted in Wiener, *Reconstructing the Criminal* 297.

⁷⁵ *The Times* Dec 6, 1893, 3e, quoted in Radzinowicz and Hood, *The Emergence of Penal Policy* 303.

⁷⁶ J. F. Sutherland, 'The Jurisprudence of Intoxication' (1898) 10 *Juridical Review* 309, 310.

the 1870s before entering a steady decline. From the 1870s onwards, observers were confident that the battle against crime generally was being won, with the available evidence suggesting that most species of crime, including violent crime, were in decline.⁷⁷ According to Wiener, by the end of the nineteenth century the 'criminal law's civilising offensive was being wound down'. He suggests that the 1880s and 1890s formed a watershed in the effort against drink, as the drunkard came to be viewed as a patient.⁷⁸ Garland has argued that in the period 1895-1914 there was a critical shift in strategies towards 'penal welfarism'.⁷⁹ Whereas for much of the Victorian period, the doctrine of individual responsibility had ensured that individuals were presumed rational and treated equally, in this period offenders were classified and treated according to their particular characteristics as, for example, juveniles or inebriates. The Inebriates Act 1898 allowed courts not only to sentence for the offence committed, but also, if the offender was an habitual drunkard, to a reformatory on the basis of the 'offender's assumed condition of irresponsibility'.⁸⁰

Arguments that there was a transformation in criminal justice policy and of understandings of the relationship between drunkenness and criminal responsibility have potentially far reaching implications for our understanding of the context for doctrinal development, but they require qualification. The regimes of treatment and reform envisaged in the Habitual Drunkards Act 1879 and Inebriates Act 1898 were

⁷⁷ See Wiener, *Reconstructing the Criminal* 188; Radzinowicz and Hood, *The Emergence of Penal Policy* 113-124; 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* (Europa 1980) 238-370.

⁷⁸ Wiener, *Men of Blood* 289; Wiener, *Reconstructing the Criminal* 188-190.

⁷⁹ D. Garland, *Punishment and Welfare A History of Penal Strategies* (Gower 1985).

⁸⁰ Garland, *Punishment and Welfare* 217.

not enforced consistently and the reformatories often not set up at all by local authorities fearful of the cost.⁸¹ The legislation was enforced to target specific groups of habitual drunkards who had lost all sense of social responsibility.⁸² Johnstone has argued that the main aim of the reform was to moralise and that the philosophy underlying the legislation demonstrated important continuity with the liberal approach of the earlier Victorian period.⁸³ This continued urge to moralise co-existed with the desire to treat drunkards. The concerns expressed about inebriates formed part of a wider debate about how to manage the threat perceived to be posed by the ‘feeble-minded’ to the strength and vitality of the nation.⁸⁴ Valverde suggests that the condition of drunkenness was considered as a ‘hybrid condition’ or a ‘mixed medical-moral entity’ in this period.⁸⁵ The Inebriates Act did not institute a procedure for using medical testimony to identify inebriates; magistrates and juries were expected to be able to identify them.⁸⁶

This mixed conception of drunkenness did not nurture easy relations between or within the medical and legal professions. A variety of conditions of intoxication,

⁸¹ See Radzinowicz and Hood, *The Emergence of Penal Policy* 307-315.

⁸² In 1906 mothers charged with child neglect accounted for 80 per cent of those committed to reformatories under the provision in the 1898 Inebriates Act which allowed for habitual drunkards convicted of a criminal offence to be committed (Valverde, *Diseases of the Will* 77).

⁸³ G. Johnstone, ‘From vice to disease? The concepts of dipsomania and inebriety, 1860-1908’ (1996) 5 *Social and Legal Studies* 37; Cf. C. Harding and L. Wilkin, ‘The Dream of a Benevolent Mind’: The Late Victorian Response to the Problem of Inebriety’ (1988) 9 *Criminal Justice History* 189.

⁸⁴ The Mental Deficiency Act (1913) included inebriates amongst the class of ‘feeble-minded’ vulnerable to committal to mental deficiency institutions. See Radzinowicz and Hood, *The Emergence of Penal Policy* 313, 330-338.

⁸⁵ *Ibid* 62, 43.

⁸⁶ Valverde, *Diseases of the Will* 76-78.

including voluntary ones, had become closely linked with insanity in medical opinion. This presented a considerable practical problem for judges and home office officials charged with administering the law. They recognised clear limits on the degree to which it would be acceptable to the public, and indeed sustainable for the enforcement of criminal law, to allow responsibility for crime to be determined by purely medical criteria.⁸⁷ The ambiguity surrounding the relationships between drunkenness, insanity and criminality was reflected in trials, where medical evidence was admitted, but treated critically by judges and juries who retained broad scope to evaluate a prisoner's mental state according to non-medical criteria.⁸⁸ Loughnan has argued that the rise of the expert knowledge '*produced* a lay knowledge of intoxication' in that it cast the common knowledge acted upon by judges and jurors in a different light.⁸⁹ The tension between lay and expert perspectives was not conducive to the development of clear law in late nineteenth and early twentieth-century courtrooms.

5. Doctrine 1881-1920

Pleas of insanity based on drunkenness became markedly more frequent in the last two decades of the nineteenth century and early decades of the twentieth century.⁹⁰ In

⁸⁷ See Smith, *Trial by Medicine* 85-89.

⁸⁸ See J. Eigen, *Unconscious Crime Mental Absence and Criminal Responsibility in Victorian London* (John Hopkins University Press 2003) 162-163. See also A. Loughnan, 'Manifest Madness: Towards a New Understanding of the Insanity Defence' (2007) 70 *Modern Law Review* 379.

⁸⁹ See Loughnan, 'The Expertise of Non-Experts'.

⁹⁰ For figures, see N. Walker, *Crime and Insanity in England* (Edinburgh University Press 1968) 86-87; R. Chadwick, *Bureaucratic Mercy, the Home Office and the Treatment of Capital Cases in Victorian England* (PhD Dissertation, Rice University 1989) 477-478.

some cases there is evidence of an increased receptiveness on the part of judges and juries to such pleas.⁹¹ In *Davis* (1881), a case in which the prisoner suffered from delirium tremens, Stephen J. suggested that:

‘[I]f a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion the man is a madman, and is to be treated as such, although his madness is only temporary.’⁹²

This allowed for the possibility that even a temporary state of insanity produced by drunkenness could suffice if the prisoner was unable to control his conduct.⁹³ In 1886, Day J. expressed the rule in even more generous terms, that if a ‘man were in such a state of intoxication that he did not know the nature of his act, or that his act were wrongful, his conduct would be excusable.’⁹⁴

If some trial judges became more receptive to the idea of drunkenness as a disease, there were many who did not. When Robert Kershaw shot his daughter and

⁹¹ See Wiener, ‘Judges v. Jurors’ 497-504; Eigen, *Unconscious Crime* 160-161.

⁹² *R v Davis* 14 Cox CC 563.

⁹³ Stephen seemed to suggest that not being able to exercise self control was sufficient which fell short of the requirements for the insanity defence under the M’Naghten rules (*M’Naghten* (1843) 10 Cl & F 20, 8 ER 718). See Walker, *Crime and Insanity* 107.

⁹⁴ *R v Baines* reported in A. Taylor, *The principles and practice of Medical Jurisprudence* (London 1905) vol 1 910. Smith cites two ‘surprisingly liberal’ Irish decisions in the 1880s which made further allowance for drunkenness to be classed as a disease for the purposes of the defence of insanity. (Smith, ‘Criminal Law’ 262.)

pleaded that he was suffering from a temporary form of insanity known as 'acute alcoholic delirium or mania a potu', Bicknill J. warned the jury that they had to be satisfied the symptoms were not those of 'ordinary drunkenness':

‘Since he himself had first begun to study law a number of disorders, ranging in severity between *delirium tremens* and ordinary drunkenness had sprung into existence; but that as they were all either directly or indirectly the result of drink the jury should hesitate before they accept them as an excuse for crime.’⁹⁵

This attitude reflected broader suspicion amongst the judiciary of the use of medical testimony to establish insanity.⁹⁶

The increased regularity with which insanity and drunkenness were linked in defences, even if unsuccessfully, had an effect. As in other areas, judges were not consistent in their approach and, where other mitigating factors were present, they were more likely to be receptive to arguments based on insanity.⁹⁷ Significantly, it affected the language that they used in their summing ups in cases of drunkenness, even in instances where insanity was not pleaded. It focused inquiry more narrowly on the defendant’s state of mind insofar as the relationship between drunkenness and general mental function was put into issue. The issues converged on the question of the circumstances in which the presumption that a man intended the natural consequences of his actions could be rebutted. At the beginning of the twentieth

⁹⁵ Robert Kershaw *The Times* 15 May 1899, 8e.

⁹⁶ For a detailed discussion of the legal profession’s attitude towards medical testimony in the nineteenth century, see Smith, *Trial by Medicine* 67-81.

⁹⁷ Contrast Stephen's relatively lenient approach in *Davis* to his approach in the case of Thomas Brown, (*The Times*, 29 July 1881) discussed in Wiener, 'Judges v. Jurors' 501.

century, the emphasis on the requirement that the prisoner actually be incapable of forming a specific intent became mixed with a key test for insanity, namely whether the prisoner was capable of distinguishing right from wrong.⁹⁸

The extent to which drunkenness became intertwined with insanity can be illustrated by the case of *Meade* (1909).⁹⁹ The prisoner's defence to a murder charge was that he did not intend to cause death or grievous bodily harm because of his drunkenness. Insanity was not even pleaded, but Coleridge J. made specific reference to it in his summing up and told the jury that 'if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter.'¹⁰⁰ The newly created Court of Criminal Appeal dismissed an appeal against conviction, but in doing so Darling J. set out a rule that widened the circumstances in which the presumption of intended consequences could be rebutted to situations where a man was so drunk as to be 'incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury'.¹⁰¹ Darling's formulation avoided the explicit test for insanity, but nonetheless directed the jury's attention to the prisoner's state of awareness, rather than capacity to form intention. Its potential breadth was considerable, but the Court made no reference to any extension of the law and indeed seemed to be concerned primarily to prevent the words used by Coleridge from altering the state of the law. Coleridge's direction reflected confusion over the relationship between drunkenness and insanity, but Darling's judgement undermined

⁹⁸This test was contained in the *M'Naghten* rules: *M'Naghten* (1843) 10 Cl & F 20, 8 ER 718.

⁹⁹*R v Meade* [1909] 1 KB 895.

¹⁰⁰*R v Meade* 896.

¹⁰¹*R v. Meade* 899.

the Victorian judiciary's insistence that drunkenness must be such as to render the prisoner incapable of forming a specific intention.

A decade after *Meade*, the continued uncertainty surrounding the relationship between drunkenness and insanity led to an appeal to the House of Lords in the case of *Beard*.¹⁰² The trial judge had directed the jury that drunkenness could only reduce murder to manslaughter if the prisoner did not know what he was doing or did not know what he was doing was wrong. The Court of Criminal Appeal, bound by *Meade*, held that the direction was wrong and should have been in accordance with that set out by Darling in *Meade*. The House of Lords held that the trial judge had been wrong to apply the test of insanity, that the test in *Meade* was also inapplicable, but restored the conviction for murder on the basis that there had been no misdirection.

Lord Birkenhead's judgement re-affirmed a clear distinction between insanity and intoxication and adopted Stephen's dicta in *Davis* that drunkenness, if it became a disease even if only temporary, could form the basis for insanity plea. It also reaffirmed the requirement that, if insanity was not in issue, evidence that the accused was so drunk as to be incapable of forming the specific intent was a relevant consideration. Lord Birkenhead presented the question as one of general capacity. The question was whether the defendant could have formed the intent, not whether he did in fact form it.¹⁰³ Anything falling short of general incapacity would not rebut the presumption that a man intended the natural consequences of his act. If this went some way to resolving the confusion introduced through the mixture of the tests for

¹⁰² *DPP v Beard* [1920] AC 479. See also *R. v Galbraith (William Wallace)* (1913) 8 Cr App R 101; *R v Honeyands (James)* (1914) Cr App R 60.

¹⁰³ Cf. Stephen's judgement in *Doherty*, above n. 59.

insanity and drunkenness, further comments from Lord Birkenhead reflected continuing uncertainty over the meaning of ‘specific intention’. He seemed to suggest that the rule regarding drunkenness should not be confined to instances where specific intent had to be proved:

‘It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally ... a person cannot be convicted of a crime unless the mens was rea.’¹⁰⁴

As Stroud observed in the *Law Quarterly Review*, these comments suggested ‘an extension of the defence of drunkenness far beyond the limits which have hitherto been assigned to it.’¹⁰⁵ It implied that drunkenness could prevent the prosecution from proving any form of mens rea and thus threatened to undo the Victorian judges’ attempts to confine its influence to crimes requiring a specific intention.

6. Conclusion

The case of *Beard* is commonly cited in modern criminal law scholarship as a foundational case in the law’s ongoing struggle to reconcile the need to criminalise certain forms of drunken conduct with orthodox understandings of the requirements for proving mens rea. If the defendant was so drunk as to lack all advertence to the meaning and consequences of his or her actions how, as Lord Birkenhead put it in

¹⁰⁴ *DPP v. Beard* 504.

¹⁰⁵ D. Stroud, ‘Constructive Murder and Drunkenness’ (1920) 36 *Law Quarterly Review* 268, 270.

Beard, could it be said that the *mens* was *rea*? Judges in cases involving intoxication in the century preceding *Beard* spent little time on these considerations. They did not distinguish between subjective and objective fault and were far more concerned with the practical problem of controlling the extent to which intoxication could operate as an exculpatory factor in trials. The inquiry over which they presided in the courtroom was only obliquely concerned to investigate whether a defendant formed an intention or was aware of a particular risk. The lack of advertence to particular consequences was not a bar to the imposition of criminal liability.

Trial judges did not frame questions concerning the criminal responsibility of intoxicated offenders in narrow technical terms. Juries retained substantial discretion to make broad-ranging evaluations of character, conduct and circumstances. The doctrinal rules that developed to moderate these evaluations were not united by any single conception of criminal responsibility. The uneven contours of development reflect the fact that the law was not the product of a series of appellate court decisions or of any legislative scheme. It emerged in trials through the negotiated compromises struck by judges, jurors and lawyers and was conditioned by pragmatic considerations. As a result, the law remained open-ended: sensitive to policy shifts and to both lay and expert understandings of the scope of individual responsibility for drunken conduct.