

Griffith

Review

Law Theory Society

Volume 22 • Number 1

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Laura Petersen and
Marc Trabsky

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CURATING A MUSEUM OF LEGAL ACCIDENTS

*Jake Goldenfein, Laura Petersen and Marc Trabsky**

This piece introduces the symposium issue 'Law and Its Accidents'. The issue emerged from the Melbourne Doctoral Forum on Legal Theory, which took place at the Melbourne Law School on 15–16 December 2011. The theme of the symposium responded to two provocations: first, the anxieties to do with accidents of technology such as that surrounding the disaster at the Fukushima Daiichi nuclear power station in Japan in 2011; and second, Paul Virilio's writings on curating a 'museum of accidents', in which he urges us to make space in our museum of technological progress for an equally important museum of the accident. The essential theme of the symposium, which we asked all authors to contemplate, was: 'If law is a technology, then what are its accidents?' We asked this question because we believe that in law the accident never just happens: it is embedded in the techniques, institutions and places of law.

This symposium issue emerged from the Melbourne Doctoral Forum on Legal Theory, which took place at the Melbourne Law School on 15–16 December 2011. The theme of the issue sprang from two provocations. First, when organising the forum in early 2011, we found ourselves confounded by the anxiety surrounding the disaster at the Fukushima Daiichi nuclear power station in Japan. On the news, we witnessed the tsunami waters that drowned the facility, cutting power to the cooling systems and leading to a series of explosions and core meltdowns. The releases of nuclear radioactive material resulted in only the second ever incident to achieve a level 7 (the highest) on the International Nuclear Event Scale.

The first level 7 incident, the Chernobyl nuclear disaster of 1986, was 'resolved' with a colossal 'Object Shelter' containing the primary site of radioactive contamination. Yet this concrete sarcophagus currently requires significant restorative maintenance or replacement – a reminder that the temporal scale of nuclear decay extends far beyond anything humans construct to contain it. In the same way that the Chernobyl disaster still bubbles away under its crumbling concrete tomb, at the time of writing the Fukushima accident continues to generate significant radiological risks. In August 2013, TEPCO acknowledged that a significant quantity of

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THE POISONED APPLE OF MALICE

*Penny Crofts**

Contemporary criminal law tends to regard malice through the lens of act, intention and consequence. I argue that this modern reading of malice through contemporary patterns of blameworthiness is a misreading, and loses alternative (legal) ways of organising wickedness. Historical accounts of malice can and should be regarded as a (legal) resource by which to critique and enrich modern accounts of blameworthiness. To this end, I explore the construction of malice as a cogent, resonant concept of *legal* wickedness by treatise writers in the sixteenth to eighteenth centuries. Treatise writers aimed to ensure that malice was sufficiently broad and malleable so that wickedness would not escape the law. *Saunders' case* was integral to the construction of malice, and it was used by treatise writers to claim and demonstrate the malleability of malice. Saunders had malice because he caused the death of a subject of the Queen, with premeditation and through the uncanny act of poisoning. The slippage across modern patterns of blameworthiness should not be regarded as a failure to settle upon a pure definition of malice, but as integral to the function of malice to persuade that wickedness would not escape the law. Treatise writers also drew upon *Saunders' case* to express and excite fear and repugnance of wickedness and included an emotional account of wickedness. The poisoned apple provided an image to assist treatise writers to develop and clarify malice. I conclude by arguing that *Saunders' case* also highlighted the limits of law, its shaky foundations and the contingency of the construction of malice.

Case

John Saunders, the 20th day of September, in the 14th year of the reign of the present Queen ... being seduced by the instigation of the devil, feloniously gave and ministered to one Eleanor Saunders, his daughter, two pieces of a roasted apple mixed with poison called arsenick and roseacre, with an intent that she might die by the operation of the same poison; which said Eleanor, after the receipt of the same pieces of apple so mixed with poison aforesaid into her body, languished of the poison and the operation thereof ...on which said 22d day of September she died of the poison ...

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The said John Saunders had a wife whom he intended to kill, in order that he might marry another woman with whom he was in love, and he opened his design to the said Alexander Archer, and desired his assistance and advice in the execution of it, who advised him to put an end to her life by poison. With this intent, the said Archer bought the poison, viz. arsenick and roseacre, and delivered it to the said John Saunders to give it to his wife, who accordingly gave it to her, being sick, in a roasted apple, and she eat a small part of it, and gave the rest to the said Eleanor Saunders, an infant, about three years of age, who was the daughter of her and the said John Saunders her husband. And the said John Saunders seeing it, blamed his wife for it, and said that apples were not good for such infants; to which his wife replied that they were better for such infants than for herself: and the daughter eat the poisoned apple, and the said John Saunders, her father, saw her eat it, and did not offer to take it from her lest he should be suspected, and afterwards the wife recovered, and the daughter died of the said poison.¹

Introduction

From the sixteenth to eighteenth centuries, there was a stark difference between the capital punishment of culpable slayings with malice, and those other culpable slayings without malice that resulted in imprisonment of not more than a year. Despite the central role of malice in distinguishing between types of culpable slayings and consequent punishment, no statutory definition was provided. Treatise writers sought to explain in detail why a slaying with malice was more heinous than a slaying without malice. They aimed to construct malice as *legal* wickedness. This article explores how treatise writers constructed wickedness through the prism of malice. It is a reminder of alternative models of (legal) wickedness that have been forgotten and neglected in contemporary criminal law.

Modern writers tend to regard malice through the lens of contemporary structures of culpability, reducing malice to act, intention and consequence. However, I argue that this modern regard of malice through contemporary patterns of blameworthiness is a mis-reading, and loses alternative (legal) ways of organising wickedness. Malice was conceptualised broadly, motivated by a primary concern that wickedness would not escape or evade the law. *Saunders' case* was integral to the construction of malice. Saunders had malice because he caused the death of a subject of the Queen, and because he did this with premeditation and through the uncanny act of poisoning. Malice was sufficiently malleable and mutable that it reached across contemporary patterns of blameworthiness and extended to evaluate emotions and the absence of goodness. It expressed individual, social and transcendental conceptions of wickedness. Historically, malice was constructed in legal doctrine in broad and ambitious ways that extended beyond the limited contemporary accounts of blameworthiness.

¹ *R v Saunders & Archer* (1576) 75 English Reports 706, 706 (Warwick Assizes). Henceforth referred to as *Saunders' case*.

A developing theme highlighted in *Saunders' case* was the anxiety that malice would exceed, evade or beguile the law, thus undermining the basis of claims of jurisdiction. The underlying cause of this anxiety was that while malice was a legal creature, its creation and resonance were dependent upon external conceptual domains. Treatise writers believed that the law could be organised, reduced and structured as a closed, separate, independent system. In this process, they drew upon discourses both internal and external to the law to persuade a legal and non-legal audience that the law could and should accurately judge and punish. The organisation of malice during this time epitomises the unsteady balance of a concept claimed by treatise writers to be specifically *legal*, but which drew its resonance and distinction from discourses outside of the law.

Treatise writers were thus concerned that malice would exceed the legal boundaries imposed upon it. This anxiety was exacerbated by the attribution of guile to malice – the association of wickedness with trickery or shape-shifting. The image of the apparently delicious but poisoned apple thus presented the challenge for the law to distinguish between semblance and reality. Accordingly, treatise writers were anxious that the boundaries of malice might have been incorrectly drawn – or worse, might be used against the law by/in/through malice. The attractive and useful attributes of malice as malleable, mobile and wicked were precisely those that generated problems for the law. This article provides a history of the problems that are generated by the modern urge to foreclose the law, and demonstrates the complexity and depth of legal accounts of wickedness between the sixteenth and eighteenth centuries.

The Legal Context: Malice the ‘Grand Criterion’

The primary subject of analysis in this paper is Plowden’s report of *Saunders and Archer’s case* and its use and representation by the major treatise writers Coke,² Hale,³ Hawkins,⁴ Foster,⁵ Blackstone⁶ and East⁷ in the organisation of malice between the sixteenth and eighteenth centuries. These materials are drawn from a printed criminal law literature that developed as a consequence of the advent of printing in the 1470s⁸ and the recognition by enterprising printers of the needs of lawyers and those connected with the law.⁹

Saunders and Archer’s case was reported by Plowden.¹⁰ By the end of the sixteenth century, the anecdotal Year Books had largely disappeared as

² Coke (1628)

³ Hale (1678/1972).

⁴ Hawkins (1980).

⁵ Foster (1762/1982).

⁶ Blackstone (1769/1966).

⁷ East (1803/1972) vol 1.

⁸ Baker (2002), p 523.

⁹ Bennett (1969), p 76.

¹⁰ Plowden(1578/1761/1861).

standard vehicles for reporting,¹¹ to be replaced by case reports with (relatively) concise factual statements and legal conclusions in the case.¹² Plowden is regarded as the first ‘modern writer’ of case reports. His reports constituted the first set of reports prepared for publication during his lifetime, and Plowden’s own cases were being cited within a year of being printed.¹³ His commentaries are ‘regarded as the most accurate collection of its kind in the sixteenth and seventeenth centuries’.¹⁴

In medieval law, culpable homicide had consisted of a unitary category of felonious slayings. If an accused caused death *with* malice, he was culpable and thus subject to the death penalty. If the accused had caused death *without* malice, then he was not guilty. This ostensibly organised malice as a question of polarities, where an accused was either wicked and thus guilty, or innocent. However, medieval homicide law was more complex than this, and allowed for gradations of culpability.¹⁵ An accused who had slain another without malice was regarded as tainted, which required expunging through trial, sorrow, pardon and/or forfeiture of property.¹⁶ Nevertheless, it is largely correct to speak of medieval malice in oppositional terms, a question of innocence or guilt, of life or death.

In the sixteenth century, an intermediate category between murder and innocence developed of what we would now term ‘manslaughter’.¹⁷ The development of this new category came about due to changes in the punishment available for felonious slayings. Due to statutory limits imposed

¹¹ The Year Books recorded and transmitted the learning of a learned profession, and were regarded as an institution of the legal profession, referred to as *nos livres* or *notre livres*. Late Year Books contained explanatory and critical notes, queries, apologies, explanations, exhortations to study and fatherly advice. Simpson argues that these Year Books should be read as words of advice from a teacher to his pupils. Simpson (1987), p 84.

¹² Barnes (1894/2008). ‘Private’ reports began to appear that were anonymous; these have since been attributed to students and practitioners of the Inns of Court. Cunningham (2002), p 152; Simpson (1987).

¹³ Coke was also one of the first legal writers to oversee the publication of his own reports during his lifetime.

¹⁴ Cunningham (2002), p 152. Plowden’s commentaries continue to be cited today as authorities for legal principles, and the development of the internet may also result in a rediscovery of Plowden, as his reports are now freely available as a whole and in the English Reports.

¹⁵ Kaye (1967a).

¹⁶ Excusable homicides did not become firmly established until the thirteenth century. These slayings were divided into accidental killings and killings in self-defence. Excusable homicide did not lead to outright acquittal. Rather, the slayer was required to obtain a royal pardon, which absolved them of the liability to a royal suit, but left open the right of the victim’s kin to prosecute or appeal. Baker (2002), pp 531–32.

¹⁷ This would particularly include contemporary categories of manslaughter, of intentional slayings due to provocation and those by unlawful and dangerous acts.

on the benefit of clergy,¹⁸ two categories of culpable homicide emerged in the early sixteenth century: murder and (what came to be known as) manslaughter. Murder was not clergyable, while manslaughter was. The distinction depended upon whether or not the killing was committed with malice prepense:

Homicide *Voluntary* is either:
Ex malitia praecogitata, which is Murder.
Sine malitia, Manslaughter.¹⁹

A series of statutes, between 1496 and 1547 excluded the benefit of clergy from more serious forms of felonious homicides, referring to them as murder committed with malice aforethought or malice prepensed: ‘wilful prepensed murders’ ‘prepensedly murder’;²⁰ ‘murder upon malice prepensed’;²¹ and ‘wilful murder of malice prepensed’.²² Slayings with malice could be punished with death, while culpable slayings without malice were liable to no more than one year’s imprisonment and branding on the thumb.

Although malice was the ‘grand criterion, which distinguished murder from other killing’,²³ the statutes withdrawing the benefit of clergy from murder did not define malice.²⁴ Treatise writers responded to changes in punishment for slayings in accordance with the thesis that the law could and should be organised consistently with reason. The removal of the benefit of clergy was equated with the exclusion of superstition from the law, and a story of the development and progress of law organised according to reason.²⁵ They argued that because the law imposed different levels of punishment for types of slayings, there must be some substantive difference between the types of slayings, and that this difference was moral.²⁶ The

¹⁸ The benefit of clergy allowed members of the church to avoid trial by the courts of civil government. This meant that the clergy were exempted from capital punishment, as the ecclesiastical courts would not pass judgments of blood. Baker (2002), pp 529–31.

¹⁹ Hale (1678/1972) .

²⁰ 12 Hen VII, c 7, 1496.

²¹ 4 Hen VIII, c 2, 1512.

²² 23 Hen VIII, c 1, 1531. See also, 1 Edw VI, c 12 (1547) 4.

²³ Blackstone (1769), p 199.

²⁴ Earlier sixteenth-century definitions by influential lawyers did not clarify the distinction between murder and manslaughter: Kaye (1967b), p 574.

²⁵ Foster (1762/1982), p 305: ‘But Light and sound Sense have at Length, though by very Slow Degrees, made their Way to Us. We now consider the Benefit of Clergy, or rather the Benefit of the Statutes, as a Relaxation of the Rigour of the Law, a Condescension to the Infirmities of the Human Frame. And therefore in the Case of all Clergyable Felonies We now measure the Degree of Punishment by the real Enormity of the Offence; Not as the Ignorance and Superstition of Former Times suggested, by a Senseless Dream of Sacred Persons or Sacred Functions.’

²⁶ Blackstone (1769), p 18. ‘When men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt.’

worst punishment could only be imposed on the worst crimes, and those slayings were committed with malice. Treatise writers were thus committed to articulating why some slayings were worse, more heinous and deserving of more punishment than others. Definitions of malice underlay attempts to express the moral difference between murder and manslaughter, between the more and less wicked.²⁷ Treatise writers were central to the development of the law of homicide, and its chief concern, the nature of malice aforethought.²⁸

Treatise writers devoted many pages to organising, refining and expressing a concept that justified and explained the standard of malice as the worst type of killing. This urge to articulate the substance of malice was part of a broader ambition to articulate the general principles of law, to speak in and of the law. Treatise writers aimed to carve out a specifically legal sphere of authority and jurisdiction, a question of malice that was a question of law, explaining and justifying the differences in punishment in moral terms according to principles of reason.²⁹ Case reporters and treatise writers explicitly selected, incorporated and culled cases, choosing to enunciate some principles while disregarding and excluding others.³⁰ The treatise can be read as part of a great rhetorical project to construct a unified and rational account of the laws of crime.³¹ Treatise writers such as Coke, Blackstone, Hale, Foster and Hawkins referred primarily to other treatise writers,³² and

Foster (1762/1982), p 306: 'From this Period the Measure of Punishment hath, as I before hinted, been governed by the Degrees of real Guilt; not by an absurd Distinction between Subject and Subject, originally owing to downright Impudence on One Hand, and to meer Fanaticism or amazing Pusillanimity on the Other.'

²⁷ Blackstone (1769), p 190. 'But in this there are also degrees of guilt, which divide the offence into manslaughter and murder. The difference between which ... principally consists in this, that manslaughter arises from the sudden heat of the passions, and murder from the wickedness of the heart.'

²⁸ Kaye (1967a).

²⁹ This urge to explain and justify the substance of law can also be explained by a need to persuade legal subjects to assent to the jurisdiction of the courts. Procedural rules did not assume jurisdiction in the absence of a plea to the courts. Where an accused refused to plead, the court lacked jurisdiction. A jury would be empanelled to try whether the accused was mute of malice or mute by visitation of God. Hawkins (1980), p 327. If the accused was mute of malice, his contumacy was treated as equivalent to a conviction and the court would proceed forthwith to sentence. In 1827 the law was reformed, providing that henceforth an accused who on arraignment refused to plead was deemed thereby to have entered a plea of not guilty. *Peel's Criminal Law Act 1827*, ss 1 and 2. Bentley (1998), pp 137–38.

³⁰ This process of selection continues today in the writing of academic textbooks. From the many available cases, authors (myself included) will focus on only a small number of cases as authorities of general principles. In contemporary law, this process is much more guided by the courts, which themselves are involved in a process of selection.

³¹ Berman and Reid (1996); Postema (1987).

³² Fletcher refers to a count by a student of citations in Blackstone in Volume 4 of *Commentaries on English Law*. Blackstone cited 38 cases, 359 statutes and 1168 scholars. Fletcher (2007), p 91.

drew upon the few cases and statutes they could find and self-consciously developed, defined, organised and refined the criminal law. *Saunders' Case* was a significant resource in the construction of malice and enunciation of general principles of law. It was one of the few cases cited by all the treatise writers, and most of these writers also referred to the apple.

Poisoning and Modern Collective Images of Blameworthiness

What, then, did 'malice in a legal sense' denote?³³ The most influential definitions of malice during this time were proposed by Hawkins and Foster expressly equating malice with wickedness. For example, Hawkins stated:

any formed Design of doing Mischief may be called Malice; and therefore that not such Killing only as proceeds from premeditated Hatred or Revenge against the Person killed, but also in many other Cases, such as is accompanied with those Circumstances that shew the Heart to be perversely wicked, is adjudged to be Malice prepense, and consequence Murder.³⁴

Similarly, Foster proposed a definition of malice that asserted the normative aspect:

When the Law maketh use of the Term *Malice aforesought* as descriptive of the Crime of Murder, it is not to be understood in that Narrow Restrained Sense to which Modern Use of the Word *Malice* is apt to lead one, a *Principle of Malevolence to Particulars*. For the Law by the Term *Malice* in this Instance meaneth that the Fact hath been attended with such Circumstances as are the ordinary Symptoms of a Wicked, Depraved, Malignant Spirit.³⁵

Both Hawkins and Foster juxtapose a narrow cognitive definition of malice with commonsense or 'ordinary' notions of malice as wickedness, which included emotions of 'hatred' and 'revenge', a tainted 'heart'. Malice was used interchangeably with wickedness. But of what did wickedness consist?

When considering earlier models of liability, modern legal academics tend to read history backwards,³⁶ reducing the concept of malice to contemporary frameworks of culpability of act, intention or consequence – influentially described by George Fletcher in *Rethinking Criminal Law* as manifest criminality, subjective culpability and harmful consequences.³⁷ This approach is so dominant that I will briefly consider the relevance of act, intention and consequence to the repertoire of malice before considering other aspects of malice that have been disregarded.

³³ Russell (1826), p 422.

³⁴ Hawkins (1980), p 80 sect 18.

³⁵ Foster (1762/1982), p 256.

³⁶ Baker (2001).

³⁷ Fletcher (1978).

Ill-intent

Many modern writers interpret malice from the sixteenth century onwards as either 'ill-intent' or moving towards 'ill-intent'.³⁸ This provides a point of origin for the progress and development away from the primitive focus upon externals towards our contemporary concern with the state of mind of the accused. *Saunders' case* continues to be regarded and cited as an early authority (and even progenitor) of the doctrine of transferred malice.³⁹ This representation of the case attributes culpability based upon the state of mind of the accused. This was enunciated in *Saunders' case*:

If A intending to kill his wife gives her a poisoned apple, and she being ignorant of it gives it to a child against whom A never meant any harm, and against his will and persuasion, and the child eats it and dies, this is murder in A and a poisoning by him, but the wife, because ignorant, is not guilty.⁴⁰

This expresses the principle that a person could be found guilty of murder if, having the requisite *mens rea* with respect to the killing of X, by some mischance Y should be killed instead of X.

This interpretation of malice as 'ill-intent' is available from the language of the treatise writers and *Saunders' case*. Some treatise writers had settled ostensibly upon a literal definition of malice prepense as malice aforethought. This approach to malice was sufficiently widespread that treatise writers could utilise malice and intention interchangeably. For example, Hale stated: 'So that an unlawful act, without an ill intent, Manslaughter; with an ill intent, Murder.'⁴¹

Poisoning was seen as particularly wicked because it was 'an act of deliberation odious in law'.⁴² It demonstrated the firmness of the actor's resolve to kill and reason untainted by passion:

For, in the point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice.⁴³

Poisoning was categorised as express malice because it showed 'a direct and deliberate Intent to kill another'.⁴⁴ Treatise writers thus utilised poisoning as

³⁸ See, for example, Stephen (1883).

³⁹ See, for example, Bronitt and McSherry (2005), p 174. *Saunders' case* is cited as an authority for the principle: 'Where a person intends to commit the requisite physical element, he or she may still be convicted even where the victim is not the intended victim'.

⁴⁰ *R v Saunders & Archer* (1378-1865) 75 English Reports 706, 706-7 (Warwick Assizes).

⁴¹ Hale (1678/1972), p 32.

⁴² Hale (1678/1972), p 455.

⁴³ Blackstone (1769), p 193.

⁴⁴ Hawkins (1980), pp 80-1.

an exemplar of malice because it was an act of deliberate wrongdoing, based on thought untainted by passion.

However, it is clear from the literature of the time that treatise writers were more than aware that ‘cognitive/temporal culpability’ did not adequately capture wickedness. Treatise writers were clear that the distinction between hot and cold blood did not always accomplish the accurate identification of wickedness. On the one hand, the Statute of Stabbing was introduced to ensure that sudden, unpremeditated, deliberate killings would not escape culpability solely on the grounds that they were committed suddenly.⁴⁵ On the other hand, some killings, even if provoked and unplanned, would still be regarded as malice aforethought. There were certain kinds of sudden, unpremeditated killings that the courts steadfastly refused to bring within the new mitigation, without even the need for an intentment upon the evidence. This included poisoning:

He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder, the reason is, because it is an act of deliberation odious in law, and presumes malice.⁴⁶

Poisoning was always an act of malice, even if provoked and unplanned, its wickedness rested in more than just whether it was intended or planned. The temporal standard was part of the repertoire of malice, but did not always adequately resolve malice.

Thus, although authors like Blackstone proposed a cognitive/temporal definition of malice, such as ‘Express malice is when one, with a sedate deliberate mind and formed design, doth kill another’,⁴⁷ this definition was supplemented with a broad-ranging, rich, explicitly evaluative definition drawing explicitly on Hawkins and Foster’s concept of malice:

this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart.⁴⁸

These broad definitions expressed the idea that malice went *beyond* a cognitive and temporal account of wickedness. Malice was ‘not ... only’,⁴⁹ ‘not ... that narrow restrained sense’,⁵⁰ and ‘not so properly spite in particular’.⁵¹ Accordingly, modern attempts to reduce malice to cognition and temporality disregard and misrepresent the ways in which malice went

⁴⁵ Statute 1 Jac.I c.8. Blackstone (1769), p 193: ‘when one stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought.’

⁴⁶ Hale (1678/1972), p 455.

⁴⁷ Blackstone (1769), p 199.

⁴⁸ Blackstone (1769), p 199.

⁴⁹ Hawkins (1980), p 80 sect 18.

⁵⁰ Foster (1762/1982), p 256.

⁵¹ Blackstone (1769), p 199.

beyond these narrow contours. The focus on cognitive/temporal standards loses the rich concept of malice as legal wickedness articulated by treatise writers, and instead introduces the weaknesses and thinness of contemporary understandings.

Harmful Consequences

In addition to the pattern of subjective culpability, treatise writers expressed the notion that unnatural slayings were wicked because they caused death: 'For all homicide is presumed to be malicious, until the contrary appeareth upon evidence.'⁵² Malice was assumed because of a slayer's association with the evil of death.

Treatise writers expressed homicide as a transcendental harm, and drew upon religious notions to justify culpability and punishment. Killing was regarded as inherently wicked because it breached the sixth commandment and took away life, 'which is the immediate gift of the great creator'.⁵³ Religious sources not only contributed to the organisation of wickedness, they also justified and required punishment.⁵⁴ As a desecration of the natural order, killing required expiation, and a failure to do so could result in harm to the community.

Religious conceptions of the wickedness of unnatural slayings and the requirement of expiation threw a halo of moral sanctity over homicide law and claims of jurisdiction. The sovereign was regarded as God's representative, with a right and obligation to restore order where violations or breaches of the divine and natural order occurred. Thus in *Saunders' case* Plowden states at the beginning of the case report that 'the reign of the Lady Elizabeth, by the grace of God, of England, France, and Ireland Queen, defender of the faith, &c'.⁵⁵ The formulaic expression of the Queen ruling as a consequence of God, and defending the faith, justified the authority of the criminal law. The laws of crime sustained medieval notions of homicide as tainted and tainting, and consequently requiring expiation, expressed not only through capital punishment but the institutions of forfeiture. Deodands required the forfeiture to the Crown of all instruments of death until 1846.⁵⁶ All who caused unnatural death, including suicides, were required to forfeit all their worldly goods, including those later excused or pardoned on the grounds of accident or self-defence. Homicide law thus rested on the foundation of death conceived as an evil, resulting in the tainting of those involved. Malice was assumed as the slayer was tainted by the fact of death. The consistency of the common law with the laws of God contributed to resolving the question of jurisdiction, even while treatise writers claimed malice as a legal question.

⁵² Blackstone (1769), p 201.

⁵³ Blackstone (1769), p 177.

⁵⁴ Blackstone (1769), Ch 14, p 194.

⁵⁵ *R v Saunders & Archer* (1378–1865) 75 English Reports 706, 706 (Warwick Assizes).

⁵⁶ Finkelstein (1973); Fletcher (1978), p 343.

The pattern of liability extended beyond transcendental harm to include a collective assertion of harmful consequences. *Saunders' case* proceeds on the assumption that someone must be punished, because the 'Queen has lost a subject':

yet it shall be murder in him, for he was the original cause of the death, and if such death should not be punished in him, it would go unpunished ...⁵⁷

The case expressed a cause and effect argument: that the Queen has suffered harm because she has lost a subject, thus someone must be punished. Here, the Queen is conceptualised not only as a representative of God on earth, but as a representative of the interests of the community. This was expressed in the long-term notion of crime as a breach of the sovereign's peace, and stated in *Saunders' case* as being 'against the peace of the Queen'.⁵⁸ This was a formulaic expression of the Queen's interest in the order of society, and as a representative of the community.

Homicide was conceptualised as harming not only (or even particularly) an individual, but society as a whole.⁵⁹ Crime was organised as an infringement of public rights, with the public interest represented by the sovereign (hence the 'pleas of the Crown'). Accordingly, crimes – particularly homicides – were conceptualised as a social wrong and harm. This communicated a social account of wickedness, with crime a breach of the law established for the 'government and tranquillity of the whole'.⁶⁰

Poisoning and Manifest Criminality

The modern emphasis upon malice as 'ill-intent' inadequately encapsulates the focus by Plowden and the treatise writers upon the *method* of killing in *Saunders' case*. It was the use of poison that was regarded as particularly wicked. This aspect of malice draws on the third modern pattern of blameworthiness, culpable act or what Fletcher has influentially termed manifest criminality.⁶¹ Binder has persuasively argued that homicide law focused upon the *act* of killing, rather than the fact of death. In order to be regarded as an unnatural slaying, homicide law required a killing that had to be 'an act culturally recognised as a violent assault'.⁶² Binder frames this in part as a question of evidence. Given the tendency of men to be armed, the reliance upon violence to resolve disputes and poor medical treatment, death was common. The slaying had to be manifestly criminal to offend against the collectively agreed upon social order, in order to attract the attention of

⁵⁷ *R v Saunders & Archer* (1378–1865) 75 English Reports 706, 708 (Warwick Assizes).

⁵⁸ *R v Saunders & Archer* (1378–1865) 75 English Reports 707, 708 (Warwick Assizes).

⁵⁹ Blackstone (1769), p 6.

⁶⁰ Blackstone (1769), p 7.

⁶¹ Fletcher (1978), p 61.

⁶² Binder (2007), p 93.

royal officials by undermining the king's peace.⁶³ The quintessential act envisaged by homicide law was the mortal wound inflicted in a violent act – such as stabbings or violent assaults in a cruel, stealthy or dishonourable manner. Treatise writers outlined methods of killing, highlighting the requirement of a threat or offence against the order of community life.⁶⁴

The focus on the *act* of killing was demonstrated in the report and representations of *Saunders' case*. In the sentence summarising the facts of the case, Plowden uses the word 'poison' five times, and twice in that sentence states that the poison used was 'arsenick and roseacre'.⁶⁵ When representing the case, treatise writers also focused on the *act* of killing. They specifically stated that the accused had killed with *poison*, rather than simply enunciating principles from the case in general terms.

The consistent reference to poison by legal scholars drew upon community understandings and fears of wickedness. Poisoning was regarded as particularly abhorrent, not because it involved an act of deliberation but because of biblical and social repugnance regarding killings by stealth and dishonour. Dishonourable killings, acts of deliberate cruelty – particularly where there had been some disparity of strength or vantage ground between the killer and the victim – were still regarded as undeserving of any mitigation, whether they were premeditated or not.⁶⁶ Treatise writers drew upon and reflected this notion of dishonourable slayings as particularly abhorrent from legal history, and social and religious understandings.

In asserting that poisoning always expressed malice, treatise writers enunciated an abhorrence of the act. They expressed *and* excited emotional reactions of fear and disgust. This rhetorical expression and appeal to emotion did not occur only in Plowden's report of *Saunders' case*, but was particularly emphasised by Coke through a focus on the mechanics of poisoning:

Also the poysoning of any man, whereof he dieth within the year, implieth malice, and is adjudged wilfull murder of malice prepensed. One may be poysoned four manner of waies: Gustu, by taste, that is by eating or drinking, being infused into his meat or drink; Anhelitu, by taking in of breath, as by a poysonous perfume in a chamber or other room; Contactu, by touching; and lastly Supportu, as by a cypher or the like. Now for the better finding out of this horrible offence, there be divers kind of poysons, as the powder of Diamonds, the power of Spiders, lapis caresticus (the chief ingredient whereof is Soap), Cantbarides, Mercury sublimite, Arsenics, Roseacre, etc.⁶⁷

⁶³ Binder (2007), p 107.

⁶⁴ For example, under a category of 'Killing', Coke enunciated the various methods by which a person could be slain: Coke (1628), cap 7, 48.

⁶⁵ *R v Saunders & Archer* (1378-1865) 75 English Reports 706, 707 (Warwick Assizes).

⁶⁶ Binder (2007); Horder (1992).

⁶⁷ Coke (1628) cap 7, 52.

The dwelling upon the mechanics of poisoning reiterated and illuminated Coke's fear and abhorrence of this method of killing. The lack of citations for any cases where these methods were used suggests that Coke is drawing upon his fears to enunciate the myriad ways in which one may be poisoned (although the reference to arsenics and roseacre in the last sentence suggests he may have been thinking of *Saunders' case*).

Poisoning thus had particular resonance as a method of killing: it excited fear and horror, and it was fundamentally unnerving. Treatise writers emphasised *Saunders'* use of poison to draw upon notions of manifest criminality and assert legal interest and capacity in the identification of wickedness and appropriate punishment.

Contemporary models for organising and attributing blameworthiness – act, intention and consequence – contributed to the repertoire of malice. *Saunders' case*, and its use and representation by treatise writers, demonstrated a slippage between the different patterns to persuade that malice would not escape the law. Treatise writers constructed a broad conception of what it meant to be wicked. The modern tendency to regard malice during this time as 'ill-intent' captures only part of the rich concept of malice, but loses other ideas such as an unnatural slaying as wicked in and of itself, and especially fails to account for the consistent representation by treatise writers of *Saunders' case* as particularly abhorrent due to the use of poison.

Circumstances That Shew the Heart to be Perversely Wicked

What is missing from the modern division of criminal liability into act, intention and consequences is the relevance of emotion to the repertoire of malice. To a certain extent, an emotional account of wickedness can be incorporated into the taxonomy of criminal liability of act, intention and consequences. However, emotion intersected with and went beyond this taxonomy. Emotion should not be regarded solely as a compliment to act, intention and consequences, but as an integral part of the repertoire of malice and the effort to persuade of and justify jurisdiction.

Treatise writers developed an emotional account of wickedness, whereby emotions could and should be appraised and evaluated in attributions of culpability. The relevance of emotion to wickedness was demonstrated in the lexicon of malice. Thus Foster defined malice as 'the Heart regardless of Social Duty',⁶⁸ Hawkins as 'the Heart to be perversely wicked'⁶⁹ and 'the abandoned heart'; and Blackstone as 'the wickedness of the heart'⁷⁰ and 'a wicked, depraved, and malignant heart'.⁷¹

This emphasis upon emotion is consistent with what Midgley has labelled the classic or negative model of wickedness,⁷² and was expressed by

⁶⁸ Foster (1762/1972), pp 261–62.

⁶⁹ Hawkins (1980), 80 s18.

⁷⁰ Blackstone (1769), p 190.

⁷¹ Blackstone (1769), p 199.

⁷² Midgley (1984/2001).

Aristotle's philosophy of moral virtue, which emphasised that emotions are not instinctive but learned, and that virtue required that we could and should regulate our emotions.⁷³ Central to this account was Aristotle's doctrine of mean, whereby moral virtues are desire-regulating character traits which are at a mean between more extreme character traits or vices. The right amount of emotion and accompanying appropriate reactions would depend on the context. Here, rather than separating and opposing emotion and reason, emotion is seen as an indispensable part of practical reason that could and should be subject to moral and legal assessment. Treatise writers thus sought to impose a boundary between inappropriate and appropriate expressions of emotion.⁷⁴ This means that we can evaluate the failure to care or a lack of balance in emotions.

The relevance of emotion to attributions of malice was demonstrated in the lexicon of felony murder. Modern readers tend to regard the felony murder rule as imposing an objective standard,⁷⁵ however, the representations by treatise writers suggest that the imposition and assumption of a pure objective standard of wickedness is inaccurate. For example, Foster represented malice as:

where the Injury Intended against A proceeded from a Wicked, Murderous or Mischievous Motive, the Party is answerable for All the Consequences of the Action, if Death ensueth from it, though it had not its Effect upon the Person whom He intended to destroy. The *Malitia* I have already explained, the Heart regardless of Social Duty and Deliberately bent upon Mischief, and consequently the Guilt of the Party is just the same in the One Case as in the Other.⁷⁶

Foster attributes malice due to a failure to care about socially accepted values. The 'abandoned heart' is manifested through behaviour that demonstrates an absence of care or practical concern required by society. Here, malice is not solely about the failure to meet objective standards, but about the failure to care. Accordingly, an act that caused death in circumstances where the slayer had acted with a 'heart regardless of social duty' could be regarded as just as malicious as an intentional slaying.

Rather than separating the actions of a person from their state of mind, these early accounts of malice assume that our practical attitude is displayed by our actions. On the basis of this argument, a person who is utterly indifferent to cherished social values is as wicked or blameworthy as someone who has intended to harm those values: 'what I notice or attend to

⁷³ Aristotle (2004).

⁷⁴ This was demonstrated in the defence of provocation, where the loss of self-control was not sufficient to raise the defence. The slayer was only permitted to rely upon the defence in a limited set of circumstances, and express their anger within a specific timeframe.

⁷⁵ There is a developing literature in contemporary criminal law of attributions of subjective culpability in circumstances where an accused has failed to pay attention to social values, particularly in relation to non-advertent recklessness in sexual assault cases. See, for example, Bronitt (1992); Duff (1990); Wells (1982).

⁷⁶ Foster (1762/1982), pp 261–62.

reflects what I care about; and my failure to notice something can display my utter indifference to it'.⁷⁷ The inattention to social values – particularly the welfare of others – was so great or motivated by such trivial concerns or reprehensible aims that an accused was wicked. Behaviour manifesting this failure to care was not framed in objective terms of the reasonable or ordinary person, but in subjective terms such as callousness or wickedness.⁷⁸ It is this very lack of awareness and care that is wrong. This is consistent with the notion of wickedness as an absence of goodness – in this case, wickedness was due to a lack of care or balance for values that the society held dear.

Dishonourable and/or cruel actions were regarded by the community as manifestly wicked and informed treatise writers' constructions of malice. Persons who behaved in a manner that breached social norms would be judged wicked and punished because of the social meaning of the act, independently of whether or not the person had acted with any specific guilty intent.⁷⁹ The punishment of a person in this situation symbolised disapproval and condemnation. An emotional account of wickedness thus intersected with the pattern of blameworthiness of manifest criminality. In contemporary criminal law, manifest criminality tends to be regarded as an external and objective standard, as the focus is on the act. However, in the representations of treatise writers, the inclusion of an emotional evaluation gave depth to manifest criminality, and transcended the subjective and objective opposition assumed by contemporary criminal law. An accused was culpable not just because of an act breaching laws (that is, an objective standard), but because his or her act manifested a lack of *care* for these laws (that is, a subjective standard). On this account of malice, what was important was the failure to care for enshrined community values. It was this failure that was wicked.

Emotion intersected not only with the construction of the pattern of manifest criminality, but also with the pattern of subjective culpability. This is demonstrated in the development of the concept of heated blood as a basis for distinguishing between murder and manslaughter. If a slaying took place in hot blood, then this would provide the foundation for a rebuttal of the presumption that the killing took place out of malice aforethought. In his historical and contemporary analysis of the defence of provocation, Jeremy Horder framed the doctrine of provocation in terms of medieval ideas of (im)purity of will.⁸⁰ Horder asserts that during this time, if an action in self-defence was to be excusable, a slayer must have retreated as far as he could before striking. A defendant who only struck when his back was to the wall could be presumed to have acted without corrupt intention (or heart). It

⁷⁷ Duff (1990), pp 162–63.

⁷⁸ This was also demonstrated by Hawkins (1980), p 84 s 44.

⁷⁹ For example, Manwood CB gave it as his opinion in 1584 that 'if one strike a child in the street with his dagger whereof it dieth, it is Murther, and yet there is no known malice, but malice intendeth'. Cited by Kaye (1967b), p 591.

⁸⁰ Horder (1992), pp 16–22.

could be presumed that he acted either ‘with sorrow of heart’ or ‘from fear and instinctively’. Horder argues that if the key culpability question is whether a slayer had acted ‘instinctively’, then killing in anger upon provocation could equally have been included, alongside killing in fear; for angry actions may in a sense be no less ‘instinctive’ than actions out of fear. Accordingly, killing in anger, particularly upon grave provocation, was regarded as involving an instinctive action that was as worthy of the more lenient categorisation and treatment that killing out of understandable fear had received for centuries. On this account, instinctive slayings due to fear and anger were regarded as less culpable than those where reason was untainted by passion, where the accused had planned the slaying in cold blood.

While anger was organised as an understandable emotion, Horder asserts that this emotion was still evaluated in terms of its appropriateness. Accordingly, during this time there were strict rules for the occasions upon which an accused could claim provocation – seeing a wife committing adultery, a grossly insulting assault, or seeing a friend, kinsman or Englishman under attack.⁸¹ These rules thus expressed Aristotelian notions of virtue and vice, where the emotional responses to provocation and consequent actions could and should be evaluated.⁸² The law expressed a clear conception of the right grounds upon which a person could claim to have become very angry, and the right response of retribution. Horder’s analysis of the rules of provocation demonstrates that a cognitive/temporal account of culpability was insufficient, and was supplemented with an evaluation of the content, subject and expression of emotion.⁸³ It was not sufficient to argue immediate loss of self-control, but rather that the accused felt anger in response to appropriate stimuli, and expressed this anger in the right way at the right time.

The emotional account of malice should not be regarded solely as a supplement to modern patterns of blameworthiness. Rather, emotion was integral to the persuasive project of treatise writers. It provided context and motive.⁸⁴ It framed the event, and it is one of the reasons why *Saunders’ case* is remembered.

Saunders’ case can be read as a story of love. Plowden reported that ‘John Saunders had a wife whom he intended to kill, in order that he might marry another woman with whom he was in love’.⁸⁵ The emotional account of wickedness stresses that there are no wholly negative or positive

⁸¹ Horder (1992).

⁸² Kahan and Nussbaum (1996); Huigens (1995).

⁸³ Horder’s arguments that the loss of this Aristotelian foundation has led to the loss of the moral basis for the contemporary defence of provocation are highly persuasive. It is arguable that much of contemporary provocation law is concerned with whether or not the accused lost self-control, rather than why the accused lost self-control.

⁸⁴ See Binder for a fascinating history of the vexed relationship of the law with motive. Binder (2002–03).

⁸⁵ *R v Saunders & Archer* (1378–1865) 75 English Reports 706, 707 (Warwick Assizes).

emotions, but rather that it is a lack of balance, or excess, that is wicked.⁸⁶ Thus, although love generally is not regarded as a negative emotion, it was Saunders' *excess* of love, for an inappropriate subject, and his *lack* of love for his wife, that provided the motive for his actions. Interestingly, treatise writers referred to Saunders' desire to kill his wife without reference to his love for another woman. This implies that a motive to kill a wife may be understandable without further explanation.

Moreover, it was Saunders' love for his daughter that generated the problem of malice for the law. Plowden reported that

he had no intent to poison his daughter, nor had he any malice against her, but on the contrary, he had great affection for her.

Here malice is distinguished from intention, and placed in opposition to affection: it is a negative emotion. This representation of malice is consistent with the grammar of malice – we *feel* malice towards others. Could Saunders be culpable despite his lack of malice toward the actual victim of his poisoning?

and the daughter eat the poisoned apple, and the said John Saunders, her father, saw her eat it, and did not offer to take it from her lest he should be suspected ... and the daughter died of said poison.⁸⁷

The case was thus a story not only of love for another woman and his daughter, but also of self-love. While defences such as self-defence, duress and necessity are constructed around a notion of self-love or self-preservation,⁸⁸ the law places limits on the extent to which this self-love can excuse prohibited acts. In *Saunders' case*, his failure to warn his daughter of the poisoned apple was constructed as wicked because of his original unlawful act of poisoning. Saunders was held responsible for all the consequences of this original unlawful act, despite their unforeseen nature.

What is missing from the case report and treatise writers' accounts is the emotional response by the mother to accidentally killing her daughter and finding out her husband had tried to kill her. Arguably her emotional response is irrelevant once her lack of guilt is established. Moreover, her response is not part of the calculus of Saunders' responsibility, because he did not intend to use her as an innocent agent. This can be seen as part of a project to carve out a separate sphere of criminal law. Treatise writers in the sixteenth to eighteenth centuries were focused on the criminal event itself. Despite this, Plowden was very clear, as were the treatise writers, that it was the mother who unwittingly caused the death of her child. This relationship

⁸⁶ Midgley (1984/2001).

⁸⁷ *R v Saunders & Archer* (1378–1865) 75 English Reports 706, 707 (Warwick Assizes).

⁸⁸ Hobbes (1651/1991), p 101: '[I]f a man by terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation. And supposing such a Law were obligatory; yet a man would reason thus, If I doe it not, I die presently; if I doe it, I die afterwards; therefore by doing it, there is time of life gained; Nature therefore compells him to the fact.'

is one of the reasons for resonance of this case – the horror of a mother unknowingly being the instrument of the death of her child.

The Apple

The intersections of act, intention, consequence and emotion do not exhaust the repertoire of malice. Central to the representation of *Saunders' case* was the apple. In this section, I explore the ways in which the treatise writers extended beyond the modern division of culpability into act, intention and consequence in the construction of a resonant concept of malice as legal wickedness through the image of the apple. Treatise writers used the apple to clarify, organise and produce legal notions of wickedness, emphasising some aspects of malice while hiding others. It evoked religious conceptions of wickedness, but also illuminated the treatise writers' conceptions of malice as substantive, bounded and malleable.

Saunders' case was cited by treatise writers as an exemplar of malice. The case could be, and was, represented without reference to Saunders' use of an apple.⁸⁹ However, most referred to Saunders' use of an apple as an instrument and expression of malice:

So if A gives a poisoned apple to B ...⁹⁰
 ... and such was the Case of the Husband who gave a poisoned Apple
 to his Wife ...⁹¹
 ... if A. give a poisoned apple to B ...⁹²

Treatise writers had endless choices in the way that the case could have been represented, if at all, yet the majority chose to include the apple.

The role of the apple in the Fall and temptation lies at the centre of the Christian story. In Judeo-Christian mythology, the apple is the forbidden fruit of the tree of knowledge, which gave Adam and Eve their knowledge of good and evil.⁹³ Adam and Eve ate the forbidden fruit, and as a consequence they were banished from the Garden of Eden and forced to survive through agriculture. The Bible does not state what kind of fruit the tree of knowledge bore; however, in Western Christian art the apple traditionally has been depicted as the fruit of the tree of knowledge of good and evil.⁹⁴ This

⁸⁹ See for example, Coke (1628), p 50. Coke did, however, focus in great lingering detail upon the mechanics of poisoning. His concern was thus upon the act of poisoning, rather than the use of the apple.

⁹⁰ East (1803), vol 1, 230.

⁹¹ Hawkins (1980), p 84 s 42.

⁹² Hale (1678/1972), p 466.

⁹³ *Genesis* 2: 9–17. King James Version of the Bible: 'And out of the ground made the Lord God to grow every tree that is pleasant to the sight, and good for food; the tree of life also in the midst of the garden, and the tree of knowledge of good and evil ... And the Lord God commanded man, saying, Of every tree of the garden thou mayest freely eat. But of the tree of knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof those shalt surely die.'

⁹⁴ Other regions have represented the fruit as a fig or pomegranate.

apparently lay in a Latin pun: by eating the *malus* (apple), Eve contracted *malum* (evil). The apple was a popular culture icon for the forbidden fruit at the time that treatise writers were constructing malice. Thus, in the late seventeenth century, Milton represented the forbidden fruit as an apple:

... him by fraud I have seduced
From his creator; and the more to increase
Your wonder, with an apple...⁹⁵

The apple was represented as the forbidden fruit in sixteenth century art such as Titian's *Adam and Eve* (c. 1550), Albrecht Durer's *Eve Offers Adam the Forbidden Fruit* (1504) and *Adam and Eve Share the Forbidden Fruit* (1504), and Tintoretto's *Eve Offers the Fruit to Adam* (c. 1550).

The apple thus evoked what could well be regarded as the first crime – Adam and Eve's contravention of a direct command by God, a breach of divine law. The story represented a strict causal relationship between wrongdoing and punishment, a relationship that the criminal law sought to claim and replicate. Violations of law, just as violations of God's commands, required and justified punishment. The reference to the apple provided a template for a causal relationship between crime and punishment, embossing religious sanctity to the identification, judgment and punishment of malice. The criminal law could be portrayed as dealing with the effects of original sin.⁹⁶ All of us are potentially victims or perpetrators as a consequence of this original contamination by the actions of Adam and Eve. Thus the apple conjured religious reverberations of good and evil.

Treatise writers used the apple not only to draw upon Christian concepts of good and evil, sin and punishment, but also to develop and reiterate the attributes of malice. Just as an apple is a substantive thing, so too did treatise writers seek to understand and represent malice in substantive terms – as a thing that could be considered in terms of space, boundaries and movement – and thus could be quantified, categorised and seen.

Malice was expressed in spatial terms as a foundation, base or well-spring. This approach was demonstrated in the legislation withdrawing the benefit of clergy in cases of murder: 'murder upon malice prepensed',⁹⁷ 'wilful murder of malice prepensed',⁹⁸ and 'of and upon malice prepensed

⁹⁵ Milton *Paradise Lost*, X, 48587.

⁹⁶ See, for example, Blackstone (1769), p 2: '... no rank or elevation of life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best amongst us, the vices and virtues of ungovernable passions in others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us... that to know with precision the laws of our country and the deplorable consequences to which wilful disobedience may expose us, is a matter of universal concern.'

⁹⁷ 4 Henry VIII, c 2 1512.

⁹⁸ 23 Hen VIII, c1 1531.

robbe or murder'.⁹⁹ The word 'of' denotes derivation from a source or a starting point of emotion, action, motive, cause, ground, or reason. This idea of malice as providing a foundation or source was also represented by treatise writers. Foster wrote of murder as 'founded in malice',¹⁰⁰ Hawkins of 'fought on Malice'¹⁰¹ and 'upon Malice conceived',¹⁰² of 'combat upon malice'.¹⁰³

The image of the apple modelled a desire to represent malice as an entity with boundaries. Just as an apple had edges, so too did treatise writers seek to impose and assert boundaries upon malice, to construct a specifically legal concept of wickedness. This can be regarded as part of a jurisdictional gambit – an attempt to carve off a space that would be the site of legal judgment alone. This was demonstrated in attempts to assert a distinction between legal and religious notions of wickedness. Plowden's case report asserted that Saunders was 'seduced by the instigation of the devil'.¹⁰⁴ However, none of the treatise writers made any reference to the devil in their representations of *Saunders' case*.

The notion of malice as a bounded entity was also sustained in an emphasis upon its visibility – an idea that malice could be seen, just like an apple. The lexicon of treatise writers emphasised visibility: Coke stated, 'first let us see what this malice is'.¹⁰⁵ This reiterated the idea that malice could be, and was, identifiable and quantifiable at law. This implied a comforting capacity of the law to discern malice that was particularly consistent with the pattern of manifest criminality. However, as I argue in the next section, with the idea that malice could be seen emerged an accompanying fear that it could be hidden.

The apple also conjured theological and cultural associations of wickedness with malleability and mutability. The apple moved from Saunders to his wife to their daughter. While the apple incorporated Saunders' malice, the case expressed the mutability of malice – as desire and intention to kill, the act of poisoning, of giving the apple and then failing to stop his child from eating it. The case highlighted the repertoire of malice, particularly its capacity to mutate and shift. As demonstrated in the previous sections, malice changed, exchanged and transmuted across intersecting patterns of blameworthiness. Malice was conceptualised as broad, almost free-floating; it could be based upon action, mere presence, intention, desire, character or spirit. Consequently, malice could be ascertained through spatial indicators, actions, things and persons. It could be attributed to different legal actors – the accused, the victim and representatives of the state.

⁹⁹ Kaye (1967a).

¹⁰⁰ Foster (1762/1982), p 255.

¹⁰¹ Hawkins (1980), p 82 s 30.

¹⁰² Hawkins (1980), p 88 s 4.

¹⁰³ Hale (1678/1972), p 50.

¹⁰⁴ *R v Saunders & Archer* (1378-1865) 75 English Reports 706 (Warwick Assizes).

¹⁰⁵ Coke (1628), p 51.

Malleability and mutability were integral to legal constructions of malice because they were conceived as attributes of wickedness: ‘in the Christian heaven, nothing is mutable, whereas in hell, everything combines and recombines in terrible amalgams, compounds, breeding hybrids, monsters – and mutants’.¹⁰⁶ Evil was endlessly fertile, tricky and deceptive. In the Garden of Eden, the devil used trickery and disguise to appear as a serpent to persuade Eve into accepting a harmful apple, which she then passed to another victim. In the case, Saunders was seduced by a devil who was a woman in disguise. Saunders used trickery to give his wife the poisoned apple. This fluidity was consistent with the historical construction of wickedness as lack or absence – whether an absence of God, grace or balance.¹⁰⁷ According to this conception, wickedness lacked an essence – it was simply an absence of goodness. Consequently, malice needed to be fluid, unsettled and shifting in order to accurately identify and capture wickedness. Treatise writers attributed to malice characteristics of wickedness so that it could fulfil its function. The apple was a graphic reminder of the mutability of malice.

The Worm in the Apple

A central argument of this article is that treatise writers sought to construct a persuasive and cogent concept of malice as *legal* wickedness. This contributed to jurisdictional claims that the law was capable of accurately identifying and punishing wickedness. The process of constructing malice involved two potentially conflicting approaches. On the one hand, treatise writers sought to claim a specifically legal domain of interest and expertise that was distinct from other conceptual domains. Treatise writers attempted to impose legal boundaries upon malice, to claim malice as a specifically legal subject, to achieve closure. On the other hand, treatise writers drew upon resources external to the law to provide depth, credibility and resonance. They drew upon, acquired and differentiated attributes of malice from conceptual domains that were external to the law to persuade legal and non-legal audiences that *legal* conceptions of wickedness were correct and accurate, and to borrow from existing understandings of wrong and punishment. Accordingly, malice was a creature that was both inside and outside of the law – just as the poison came from outside but was now inside the apple. While malice was constructed as a subject of law, it drew its attributes, resonance, depth and rhetorical force from conceptions of wickedness external to law. Malice expressed an inherent paradox. Even while treatise writers attempted to impose and assert closure, there was

¹⁰⁶ Warner (2004), p 36.

¹⁰⁷ In his history of Satan, Delbanco also highlights this theme of fluidity: ‘He is the torturer and the flatterer, the usurer and the bearer of bribes, the satyrlike angle with the giant and multiple phallus, who knows the wantonness of women; but he can also transform himself into a lascivious temptress with silken skin. He is, in effect, a dark counterpart to Christ: an embodied contradiction: a spirit who chooses at will, the form of his incarnation.’ Delbanco (1995), p 27.

always something other than law in the concept of malice, something essential outside of the law.¹⁰⁸

Saunders' case demonstrates themes of the anxieties of malice during this time. I explore the anxiety that the boundaries of malice were incorrectly drawn and that malice would use the law against itself to escape judgment. The biblical proverb 'Like apples of gold in settings of silver is a word fitly spoken'¹⁰⁹ is sometimes translated as a legal 'ruling rightly given'. A poisoned apple then becomes a symbol of the corruption of law and language.

Boundaries Incorrectly Drawn

A pure concept of malice and/or wickedness did not exist. Conceptions of malice communicated by treatise writers were contingent, as demonstrated by disagreements about the contours of malice – at times even within a treatise. As I argue below, a central fear communicated by treatise writers was that the boundaries of malice were incorrectly drawn, that malice had been fallaciously foreclosed. They were not concerned that the innocent would be wrongly convicted, but primarily with the possibility of the wicked escaping.

The women in *Saunders' case* highlight the anxiety that malice would escape the law. In the case report, the wife and the lover remain unnamed; instead, they were represented in archetypal roles as Seductress and Disobedient Wife. Neither woman was subject to prosecution; however their presence in the case raised and demonstrated a fear that wickedness was escaping the law. The lover or love interest of Saunders was represented in the case report:

The said John Saunders had a wife whom he intended to kill, in order that he might marry another woman with whom he was in love ...¹¹⁰

Elsewhere in the case report, she is explicitly demonised: 'being seduced by the instigation of the devil'.¹¹¹ Her representation as the devil is a reminder of the perverted metamorphic capacities of wickedness, its lack of identity and integrity. It also reverberates with the myth of original sin – and its themes of seduction and temptation. The lover amalgamates the wickedness of Satan and Eve. Satan took the form of a snake in order to flatter and seduce Eve to eat the forbidden fruit. The lover appears to be the original tempter of Saunders. She is also Eve, encouraging Adam to do wrong so that he is not alone. In Milton's *Paradise Lost*, Eve is blamed for the Fall because she was tempted by Satan and in turn tempted Adam. She was susceptible to Satan's trickery because of her vanity and greed. Eve was both the instigator and victim of wickedness. In *Saunders' case*, the lover is

¹⁰⁸ Davies (2001), p 213.

¹⁰⁹ *Proverbs* 25:11, King James Version of the Bible.

¹¹⁰ *R v Saunders & Archer* (1378–1865) 75 English Reports 706, (Warwick Assizes).

¹¹¹ *R v Saunders & Archer* (1378–1865) 75 English Reports 707, (Warwick Assizes).

labelled wicked – she is the devil. Yet her precise role and responsibility are unclear. It is unclear whether this was because she had any role in the murder plans, or simply because of her role as temptress. The lack of any charges suggests the latter. Even here, her role is unclear. It is not certain whether or not Saunders’ feelings for her were reciprocated, or whether her existence and potential to undermine the sanctity of marriage vows attracted the ire of Plowden. In either situation, she was beyond the law’s jurisdiction to the extent that treatise writers did not mention her role at all. Her devilish wiles thus existed beyond the law.

In contrast, the role and responsibility of the wife in *Saunders’ case* was explicitly considered by treatise writers. She was unnamed in the case report, and was instead denoted as ‘his wife’. The victim, Eleanor, is primarily identified as ‘his daughter’, but ‘was the daughter of her and her husband’.¹¹² The innocence of the wife was not assumed, but was the subject of debate by the judges. Her responsibility was dismissed but regarded as needing explanation:

For here the wife, who gave the poisoned apple to her daughter, cannot be guilty of any offence, because she was ignorant of any poison contained in it, and she innocently gave it to the infant by way of necessary food, and therefore it is reasonable to adjudge her innocent in this case ...¹¹³

The case summary described her role as such:

If A intending to kill his wife gives her a poisoned apple, and she being ignorant of it gives it to a child against whom A never meant any harm, and against his will and persuasion, and the child eats it and dies, this is murder in A and a poisoning by him, but the wife, because ignorant, is not guilty.¹¹⁴

A central issue was the wife’s disobedience of her husband. She had acted against the ‘will and persuasion’ of her husband, thus her actions were not fully innocent. Saunders gave the apple to his wife, who:

gave the rest to the said Eleanor Saunders, an infant, about three years of age, who was the daughter of her and the said John Saunders her husband. And the said John Saunders seeing it, blamed his wife for it, and said that apples were not good for such infants; to which his wife replied that they were better for such infants than for herself: and the daughter eat the poisoned apple, and the said John Saunders, her father, saw her eat it, and did not offer to take it from her lest he should be suspected, and afterwards the wife recovered, and the daughter died of the said poison.¹¹⁵

¹¹² *R v Saunders & Archer* (1378–1865) 75 English Reports 706 (Warwick Assizes).

¹¹³ *R v Saunders & Archer* (1378–1865) 75 English Reports 708 (Warwick Assizes).

¹¹⁴ *R v Saunders & Archer* (1378–1865) 75 English Reports 706–7 (Warwick Assizes).

¹¹⁵ *R v Saunders & Archer* (1378–1865) 75 English Reports 707 (Warwick Assizes).

The court considered and dismissed her responsibility for the death of the child.

Yet the wife's failure to obey Saunders raised a concern that wickedness may escape the law. She breached private and domestic hierarchies enshrined in the law. A husband and wife were considered one person in law, and that person was the husband.¹¹⁶ A woman who killed her husband had been guilty of *petit treason*. She was a 'traitress' because she betrayed a person to whom she owed her faith and obedience, this was regarded as murder in 'its most odious degree'.¹¹⁷ Treatise writers recorded the wife's disobedience: she gave the apple to their child 'against the Husband's Will and Perswasion'.¹¹⁸ East removes the matrimonial relationship but sustains the gendered nature of the offence:

So if A give a poisoned apple to B, intending to poison her, and B ignorant of it, give it to child, who takes it and dies; this is murder in A, but no offence in B; and this, though A who was present at the time endeavoured to dissuade B from giving it to the child.¹¹⁹

This almost has the element of a parable – a woman disobeyed a man or her husband, and thus caused the death of the child. Her failure to obey her husband raised difficulties for the law. If she had just obeyed her husband then this would not have been a difficult case of murder for the law, there would have been no need to create the doctrine/s of transferred malice or felony murder. The recording of her failure to obey her husband is a reminder that wickedness has escaped the law.

The lover and the wife epitomise an ongoing and recurrent fear in criminal law that women commit more crimes than the law is aware or cognisant of – they are the dark figure of crime.¹²⁰ It was, and is, feared that women's wicked behaviour went beyond the criminal law – either because the boundaries of the law were incorrectly drawn (demonstrated by the failure of the wife to be held responsible for her disobedience) or because of women's inherent deceit and cunning and thus capacity to evade the criminal law.¹²¹

¹¹⁶ The notion that a wife and husband were one person was the doctrine of coverture. The defence of marital coercion assumed that a wife who had committed a crime in the presence of her husband was not responsible because his presence raised a presumption that she was acting under his coercion rather than of her own free will. This defence has been abolished in most Australian jurisdictions: Yeo (1992).

¹¹⁷ Blackstone (1769) vol 2, p 156.

¹¹⁸ Hawkins (1980), p 84.

¹¹⁹ East (1803/1972), p 230.

¹²⁰ This was represented by Pollak (1950). Lombroso and Ferrero (1893/2004) argued in 1893 that women were basically immoral, and that 'to demonstrate that lying is habitual and almost physiological in women would be superfluous, since it is confirmed even by popular sayings': p 77. It was feared that women were committing more crime than was detected, which they hid by virtue of their natural abilities to dissemble.

¹²¹ Jackson (1996). There has been research presented that there were high rates of female crime in the seventeenth and eighteenth centuries, and that these levels declined towards the end of the nineteenth century: Feeley (1994); Feeley and Little (1981). This has led

The fear that women were wicked and escaping punishment can be seen in archetypal associations of females with wickedness. *Saunders' case* is presented as a story. The original case report stated in brackets 'as I was credibly informed, for I was not present, and therefore what I here report is upon the relation of the said Justices of Assize, and of the clerk of assize'.¹²² The facts of the case are then reported in various permutations by the treatise writers. As I have argued, this case had such resonance because of its immediate links with original sin due to the use of the apple. For modern readers too, the use of the apple reminds us of another fable of wickedness, Snow White. In *Saunders' case*, gender roles differ from these fables. In the Garden of Eden, it is Eve who commits the original wicked act by choosing to eat the apple. It is the wicked stepmother who gives the poisoned apple to Snow White due to jealousy and vanity. Thus, in both these archetypal stories of wickedness, females hold the central role of instigator and perpetrator. Yet in *Saunders' case*, Saunders is the perpetrator of the crime and women are the victims. The disjunction of these archetypal representations and associations of women and wickedness with the cases that come to the attention of the law raises the spectre that the law is missing or neglecting the malice of women, that the boundaries of malice have been incorrectly foreclosed.

Malleability and Mutability

This anxiety that wickedness may escape the law is exacerbated by the attributes of malice. In the quest to ensure that malice accurately identified and encapsulated wickedness, legal treatise writers gave malice characteristics of wickedness. Malice as a legal subject was almost, yet not quite, wickedness. The notion of wickedness as dissembling, sly, tricky, seductive and paradoxical was also ascribed to malice. Given the endless ways of being wicked, malice had to be equally malleable and mutable. But it was this mutability that caused anxiety for the law.

Saunders' case demonstrated the fear that malice could and would use trickery to evade law. Saunders attempted to use the narrow definition of malice to assert a lack of culpability because 'he had no malice against the daughter, nor any inclination to do her any harm'.¹²³ While Saunders was held responsible, his arguments utilising the fledgling legal standard of malice contributed to the anxiety about the trickery of wickedness.

This anxiety that malice would escape the law was exemplified by a theme of semblance and reality. This theme was central to *Saunders' case*, where the efficacy of the poisoned apple depended on it appearing to be

Lacey to juxtapose the high proportion of women prosecuted at the Old Bailey in the late seventeenth and early eighteenth centuries, with representations in literary sources and historical data about women's changing social position: Lacey (2008). Women continue to be associated with the dark figure of crime in contemporary criminology, but primarily as victims of unreported crime. See, for example, Clare and Morgan (2009).

¹²² *R v Saunders & Archer* (1378–1865) 75 English Reports 706, 707 (Warwick Assizes).

¹²³ *R v Saunders & Archer* (1378–1865) 75 English Reports 706, 707 (Warwick Assizes).

healthy. The horror of Saunders' actions was his parodic inversion of the good things – fruit and nourishment. This disjunction between appearances and reality was essential to the efficacy of malice. In *Show White*, the wicked stepmother relies on a series of disguises, hiding the poison in an apple and herself in a disguise.¹²⁴ Mutability was also represented in *Saunders' case* by the devil in the form of the lover, reiterating the myth of origin, with Satan as the snake.¹²⁵ Mutability and malleability were traits of wickedness that contributed to its capacity and its horror. It is the absence of identity and essence, its capacity for mutability, which is wicked *and* assists in the accomplishment of wickedness.

The theme of appearances versus reality had implications for the jurisdiction of the law. The law was portrayed by treatise writers in terms of its capacity to *see* wickedness: 'the Law watcheth with a jealous Eye over *their* Conduct'¹²⁶ and 'the Law watcheth over the Publick Tranquillity'.¹²⁷ Malice was represented as an entity that could be seen. Claims of jurisdiction rested on the capacity to discern wickedness accurately. However, a developing theme was that malice could be hidden, covered or disguised, as demonstrated by statements such as 'There must be no Malice coloured under Pretence of Necessity';¹²⁸ 'Neither shall a Man in any Case justify the killing another by a Pretence of Necessity';¹²⁹ 'for he shall not elude the Justice of the Law by such a Pretence to cover his malice';¹³⁰ 'he might execute the wicked purpose of his heart with some colour of excuse' and 'a cloak for pre-existing malice';¹³¹ and 'the Assailant, to give himself some colour for putting in Execution the wicked Purposes of his Heart retreateth and then turneth and killeth'.¹³² The attributes of mutability and malleability, so essential to the capacity of malice to identify wickedness, were the same attributes that now generated a fear that malice would evade the law.

Saunders' case epitomised these anxieties of the limits of the law. Treatise writers used the act of poisoning as a quintessential act of malice,

¹²⁴ Grimm (1882), p 219.

¹²⁵ Milton Book 8:

'Of these the vigilance
I dread, and to elude, thus wrapt in mist
Of midnight vapor glide obscure, and prie
In every Bush and Brake, where hap my finde
The Serpent sleeping, in whose mazie foulds
To hide me, and the dark intent I bring.'

¹²⁶ Foster (1762/1982), p 320.

¹²⁷ Foster (1762/1982), p 321.

¹²⁸ Hawkins (1980), p 69.

¹²⁹ Hawkins (1980), p 72.

¹³⁰ Hawkins (1980), p 81.

¹³¹ East (1803/1982), vol 1, 241.

¹³² Foster (1762/1982), p 277.

drawing upon the uncanny image of the poisoner and the belief that malice in these circumstances was objectively discernible. They drew on the collective image of blameworthiness of manifest criminality, and the belief that malice could be seen. However, to be effective, the poisoner required an appearance of normality. Saunders' act of giving his wife the apple appeared as loving and nourishing as the wife's act of giving Eleanor the apple. The efficacy of poisoning as a weapon, and the reason why it was so abhorrent, was that it could not be discerned until too late, if at all. Poisoning was heinous and deserving of punishment because it was stealthy. But it was this aspect that highlighted a blind spot of the law – literally, the limits of the law. The act of mixing and giving poison would look the same as an innocent act of cooking and giving food. Poisoning, and thus malice, may escape the law completely through deception and inversion. How many other sly poisoners had escaped the law, causing deaths that appeared natural?

Conclusion

In the sixteenth to eighteenth centuries, treatise writers constructed a cogent, resonant concept of malice as *legal* wickedness. Their primary ambition was to persuade that malice was sufficiently broad and malleable that wickedness would not escape the law. They aimed to enunciate general principles of malice that could be applicable across time and place, and explained according to reason. The malleability of malice was demonstrated by its capacity and tendency to morph across the modern patterns of blameworthiness. Malice could be the harmful consequence of an unnatural slaying, intentional wrongdoing and/or a manifestly criminal act.

Saunders' case was integral to the construction of malice. It was used by treatise writers to claim and demonstrate the malleability of malice. Saunders had malice because he caused the death of a subject of the Queen, with premeditation and through the uncanny act of poisoning. The slippage across modern patterns of blameworthiness should not be regarded as a failure to settle upon a pure definition of malice, but as integral to the function of malice to persuade that wickedness would not escape the law. Treatise writers did not settle in the sense that they did not compromise the function of malice by proposing one definition, as they were aware that there were myriad ways of being wicked. They also extended beyond these three patterns of blameworthiness to imbue malice with emotion. The treatise writers expressed and excited fear and repugnance of wickedness, and also included an emotional account of wickedness – whereby emotions could and should be evaluated. The broad and malleable construction of malice during this time is a reminder that the contemporary legal focus upon act, intention and consequence in attributions of blameworthiness is restrictive and limited, and may not capture the myriad ways of being wicked. The historical construction of malice can and should be regarded as a (legal) resource by which to critique and enrich modern accounts of blameworthiness.

The use of the apple in *Saunders' case* assisted treatise writers to develop and clarify ideas of malice. The apple drew upon Christian myths of origins and exemplified a structure of wrong and punishment. The apple

expressed the notion of malice as a legal concept that was bounded and substantive. Even while drawing upon external notions of wickedness, treatise writers attempted to foreclose and differentiate the legal concept of malice from discourses external to the law, such as religion and morality. The apple also illustrated the notion that malice could be seen and accurately discerned by the law.

The attributes that were essential to the function of malice of accurately identifying wickedness were the same attributes that generated an anxiety that malice would evade the law. *Saunders' case* highlighted the limits of the law, its shaky foundations and the contingency of the construction of malice. It illustrated the anxiety that the boundaries of malice may be incorrectly drawn, or that the malleability or mutability of malice may enable it to escape or evade the law, or to use the law against itself. The poisoned apple in *Saunders' case* exemplified the hopes and fears of malice of the era.

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