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CRIMINAL LAW AND THE SCOTTISH MORAL TRADITION

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A thesis presented for the degree of PhD in Law

The University of Edinburgh

2013
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Declaration

As per Regulation 23 of the Postgraduate Assessment Regulations for Research Degrees I acknowledge that portions of this thesis have appeared in published form in C Kennedy, “Criminal Law and Religion in Post Reformation Scotland” (2012) 16(2) *Edinburgh Law Review* 178-197.

As per Regulation 25 of the Postgraduate Assessment Regulations for Research Degrees I acknowledge that Chapters Three and Five build on work which was undertaken for a dissertation which formed part of an LLM degree and so there are limited portions of text which are identical to that earlier work.

As per Regulation 26 of the Postgraduate Assessment Regulations for Research Degrees I confirm:

- That this thesis was composed by me
- That it is my own work
- That it has not been submitted for any other degree or professional qualification (subject to the qualification above)
This thesis presents an account of the development of Scots criminal law which concentrates on the influence of the Scottish moral tradition, as epitomised by Calvinist theological doctrine and Scottish Enlightenment moral philosophy. It argues that there are several crucial but seldom-acknowledged points of similarity between the Calvinist aim of creating a holy community and key tenets of eighteenth century Scottish moral thought, which rest upon community-oriented conceptions of the nature of morality and society. Both these shared conceptions and the particular ways they are expressed in Calvinist creed and Enlightenment philosophy are shown to have had a bearing on the way that Scots criminal law changed over time.

The areas in which this influence is demonstrated are: the scope and principles of the law, i.e. the type of conduct that was punishable and the arguments that were put forward to justify its prohibition; the attribution of criminal responsibility (and non-responsibility); and the importance of mental state. It is argued that in each of these discrete areas changing perspectives on the nature of morality and human agency had a palpable impact on both legal doctrine and practice. When these different areas of the law are viewed as a whole and in historical perspective, the formative force of the Scottish moral tradition becomes clear and its influence can be seen to have extended into the contemporary law.

The thesis therefore provides an original interpretation of the history of Scots criminal law by considering its sources and institutions from hitherto unexplored theological and moral perspectives, whilst simultaneously enhancing scholarly appreciation of certain aspects of the contemporary law that appear unusually moralistic. It also makes a broader contribution to socio-historic scholarship and strengthens its position as a recognised and worthwhile discipline by illustrating, using a concrete legal system, how legal history can enhance debates within criminal law theory and vice versa.
# List of Abbreviations

<table>
<thead>
<tr>
<th>Author, Title</th>
<th>Description</th>
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<tbody>
<tr>
<td>Mackenzie, <em>Matters Criminal</em></td>
<td>G Mackenzie, <em>Laws and Customs of Scotland in Matters Criminal: wherein it is to be shown how the civil law, and the laws and customs of other nations do agree with, and supply ours</em>, with new introduction by J Chalmers et al (2005 reprint, originally published in 1678)</td>
</tr>
</tbody>
</table>
Chapter One: Introduction

1.1 The subject of the thesis

This thesis examines the ways in which Scots criminal law has been shaped by the influence of Calvinist Presbyterianism, which was the theological orthodoxy in Scotland for several centuries and, connectedly, by Scottish moral philosophical thought. It considers several areas of legal doctrine and practice and shows how the law’s implicit beliefs about the nature of morality and human agency have evolved over time and in accordance with the changing moral and theological climate. The possibility of links between the criminal law and theological and philosophical thought is suggested by the various conceptual affinities that tie each discipline together. For example, criminal law, religious creed and moral philosophy all necessarily rely on theories of free will and responsibility, and there is clear overlap between the scope of criminal offences and behaviour that is considered by theologians to be sinful and by moral philosophers to be wrongful. Despite these points of similarity, there is very little research on the way that religious and moral philosophical ideas relate to one another in the context of their associations with the criminal law. While the connections between religion and law\(^1\) and religion and penology\(^2\) have been explored at a general level, and while scholars have reflected on the connection between Enlightenment moral philosophy and the law,\(^3\) there has

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been no attempt to investigate the impact of religious dogma or moral philosophy on the criminal law as a composite system.

This thesis is the result of such an investigation into the nature of Scots criminal law. The main research questions which the thesis seeks to answer are: first, whether there are any links between the religious and moral culture of Scotland and the development of Scot criminal law and, second, whether these potential links can explain features of contemporary Scots criminal law which appear to be idiosyncratic of the Scottish legal tradition.

The methodology and sources used to address these questions are discussed in more detail in sections 1.2 and 1.4 but, generally speaking, the approach taken in selecting which cases and materials to analyse was purposive sampling. Every stage of the research process was informed by the overarching questions the thesis aims to answer. This was equally the case investigating the early modern law as it was when analysing the contemporary law. Of course, adopting such an approach brought with it the risk of making assertions on the basis of anachronistic evidence. However, as is discussed in greater depth in section 1.4, the materials and examples selected to illustrate the similarities between the early modern and the contemporary law are always presented in full recognition of the fact that they are drawn from very different social and cultural contexts. There is therefore no suggestion that evidence derived from an eighteenth century trial report, for example, can lend direct support to a claim made about a feature of contemporary Scots law.

With that caveat firmly established, this thesis argues first that there are important but unacknowledged connections between the Calvinist view of morality, society and human agency, which was prevalent at the beginning of the time period examined, and Enlightenment beliefs on the same matters, which emerged during the eighteenth century and whose influence can still be felt. Second, it argues that

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4 Namely, from the Protestant Reformation of 1560 onwards.
there are traces of these two different perspectives, and the connections between them, within the modern criminal law and that these signs of influence had a continuing effect on the scope and structure of the law and its administration.

These traces of Calvinist and Enlightenment thought explain both the law’s development and the endurance of features of the modern law which are, at least at face value, unusually moralistic. For example, the power of the High Court of Justiciary to declare conduct immoral and therefore punishable (the declaratory power) and the sustained use of normative conceptions of responsibility and guilt, as evidenced by the ongoing relevance of dole (a general form of culpability, defined as a corrupt and malignant disposition) and the mentes reae of “evil intent”, “wicked intention” and “wicked recklessness”. These aspects of the law defy the broad shift within the Western legal tradition towards descriptive, morally-neutral criminal law terms and so represent a distinctively Scottish commitment to an evaluative and morally-charged criminal law. This thesis puts forward an original, historicised understanding of these legal characteristics, which ties them to the moral culture of Scotland.

One reason why Scots criminal law has been chosen for examination is that religion has held a singularly prominent place within the Scottish public consciousness. The Church of Scotland, or the Kirk as it is colloquially known, has played an important role in forging and maintaining a sense of national identity, particularly as it was one of the key institutions (along with the legal system) that remained uniquely Scottish following the union with England in 1707. The argument in this thesis is that the cultural significance of the Kirk extended further than this and had a bearing on the structure, scope and operation of the criminal law.

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5 See Chapter Four.
6 See Chapter Eight.
8 A MacIntyre, Whose Justice? Which Rationality? (1988) 220. The union was effected by the Union with England Act 1707 and the Union with Scotland Act 1706. Articles XXV and XIX of these Acts protected the Scottish Church and courts from amendment.
In support of this point is the fact that following the Scottish Reformation of 1560\(^9\), Calvinist Presbyterianism (a form of Protestantism) became the established religion of Scotland. One of the Calvinist Kirk’s primary aims was to create and maintain a holy community, which it pursued by promoting a strict moral code that was enforced by its network of disciplinary tribunals. As a consequence, the post-Reformation Church held many of the same objectives as the criminal law: both aimed to promote social cohesion and both aimed to punish ‘wrongful’ acts.

Even as the post-Reformation period came to an end and the authority of hard-line Calvinism started to wane, similar concerns of upholding civic society and understanding the nature of morality continued to occupy Scottish clerics and intelligentsia.\(^{10}\) Indeed, many of the most prominent theories posited by philosophers of the Scottish Enlightenment were forged in direct response to newly-perceived flaws in the religious modes of moral thought and, as such, both challenged and were shaped by the intellectual tradition they had inherited.\(^{11}\) There was therefore an essential continuity between the aims and focus of the early Calvinist reformers and their enlightened philosophical successors, which ensured an ongoing association with the criminal law. In the following chapter previously unappreciated parallels are drawn between Calvinist and Scottish Enlightenment thought, which reveal shared concerns over social cohesion and the nature of morality. The remaining chapters then demonstrate that these two concerns permeated and shaped the criminal law in a distinctive way, and that their presence can still be detected in the contemporary law.

1.2 Historical background and source materials

A natural starting point in contemplating the development of Scottish religious and moral thought is the Reformation, which was a significant milestone in the history of Scotland. At this time the nation became officially Protestant and Calvinism was

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\(^9\) The Scottish Reformation was part of the wider European Protestant Reformation and is generally accepted as having occurred in 1560 (H J Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003) 6).


accepted as the Kirk’s orthodox doctrine.\textsuperscript{12} The implications of this change were that for the majority of its post-Reformation existence, the Church of Scotland adopted a Presbyterian form of governance, which led to a strong sense of community and a democratic sense of religiosity.\textsuperscript{13} In addition, the Reformation marked the beginning of a strict moral agenda which was driven by the Calvinist dictate that there should be “ecclesiastical discipline uprightly ministred, as Gods Word prescribeth, whereby vice is repressed, and vertue nourished”.\textsuperscript{14} As is explored in Chapters Three and Five, this disciplinary regime had an impact on the scope of the criminal law and the way it was administered, so the transition to Calvinism marks an important turning point in the history of the connection between religion and Scots criminal law. For this reason the sixteenth century is the point at which this thesis begins tracing the law’s development.

The legal resources for this time period which are available and readily accessible are limited to trial compilations and legal treatises. Although Justiciary Court\textsuperscript{15} cases have been recorded in the Books of Adjournal since 1524, there are several interruptions to these records in the sixteenth century and some of the reports are inaccessible due to age. In addition to these records, there are also a number of Sheriff Court reports, but the cases examined in this thesis are restricted to those emanating from the Justiciary Court because that is where the most legally significant points\textsuperscript{16} were debated and determined. The main trial compilations to deal with Scots criminal law during this period are Pitcairn’s \textit{Criminal Trials in Scotland, from A.D. 1488 – A.D. 1624, Embracing the Entire Reigns of James IV, and V, Mary Queen of Scots, and James VI}, \textsuperscript{17} Arnot’s \textit{A Collection and Abridgement of

\begin{footnotesize}
\begin{enumerate}
\item The Confession of Faith Ratification Act 1560 A.P.S., II, 526 c.1. Acts were also passed to abolish Papal jurisdiction (Papal Jurisdiction Act 1560 A.P.S., II, 535 c.2) and to criminalise various Roman Catholic practices, for example the Abolition of Mass Act 1560 A.P.S., II, 535 c.4.
\item These two points are explored further in Chapter Two.
\item J Knox, \textit{The historie of the reformation of the Church of Scotland containing five books : together with some treatises conducing to the history} (1644) 226. The Scots Confession of Faith (Chapter XVIII) and the First Booke of Discipline contain similar provisions (Church of Scotland, \textit{The first and second booke of discipline together with some acts of the Generall Assemblies, clearing and confirming the same: and an act of Parliament} (1621) 54).
\item The High Court of Justiciary is Scotland’s highest criminal court.
\item Including appeals since the passing of the Criminal Appeal Scotland Act 1926 (16 & 17 Geo. V).
\item R Pitcairn, \textit{Criminal Trials in Scotland, from A.D. 1488 – A.D. 1624, Embracing the Entire Reigns of James IV, and V, Mary Queen of Scots, and James VI} (vols 1-3) (1833).
\end{enumerate}
\end{footnotesize}
Celebrated Criminal Trials in Scotland from AD 1536 to 1784\textsuperscript{18} and Maclaurin’s Arguments and decisions in remarkable cases, before the High Court of Justiciary, and other supreme courts, in Scotland.\textsuperscript{19}

These volumes are informative but of limited value since they are incomplete and tend to focus on trials that were sensational or notorious rather than those of great legal importance. Due to these deficiencies in the compilations, the main sources used in analysing the post-Reformation era are Balfour’s Practicks and Mackenzie’s Matters Criminal. Although these texts do not present a comprehensive overview of the administration of criminal justice, they were the most appropriate sources to use due to the constraints of time, space and availability of other materials. Despite their limitations, these legal treatises nevertheless hold significance for the criminal law as a whole. Each claims to offer a genuinely representative account of the law as it was observed by the author and, whether or not these claims were justified, generations of lawyers have relied upon them since their publication. In effect, therefore, although these juristic writings cannot convey the way that individual justice was experienced they provide insight into how some of the foremost authoritative legal jurists of the time perceived the law. Furthermore, their repeated consultation by practising lawyers means they have contributed in real terms to the development of the law.\textsuperscript{20} Even assuming that the treatises merely present an idealised rather than completely accurate account of the law, this in itself provides crucial information for the scholar of the history of ideas. The particular ideals that animate the different texts speak to the cultural and intellectual environment of the time at which they were written.

\textsuperscript{18} H Arnot, A Collection and Abridgement of Celebrated Criminal Trials in Scotland from AD 1536 to 1784 (1812).

\textsuperscript{19} J Maclaurin, Arguments and decisions in remarkable cases, before the High Court of Justiciary, and other supreme courts, in Scotland (1774).

\textsuperscript{20} Balfour’s Practicks are described as representing a statement of the customary law prevailing in Scotland in the mid-sixteenth century and being of such authority as to be relied upon when the law was restated. Subsequent writers copied the Practicks copiously and though their authority in the present day is less than it was, the Practicks have often been quoted and recognised as authoritative (Balfour, Practicks lxiv). The influence of Mackenzie’s Matters Criminal on subsequent criminal law texts has been held to be “considerable” and the text continues to inform both modern day case law and academic writing (see the biographical introduction to Matters Criminal (xviii-xxiii) for more detail on the influence of the work).
Following the early section of this study, which is centred on Scotland’s adoption of the Calvinist disciplinary regime, the next section, chronologically speaking, focuses on the disruption of this regime and the impact this had on the criminal law and its administration. In the latter portion of the seventeenth century there were many prominent and politically charged disputes over Kirk governance between Episcopalians, who were largely royalists, and Presbyterian lay dissidents who rejected the imposition of Episcopacy. These disputes were so intense that the era was subsequently designated the ‘Killing Times’ but, following the ‘Glorious Revolution’ of 1688, the Claim of Right established Presbyterianism as the Kirk’s form of governance and Calvinism was declared its theological orthodoxy. The effect of this change was that the Church’s structure and doctrine were both guaranteed to remain unchanged for as long as these Acts remained in force. However, at the turn of the century, and in the first quarter of the following century a number of changes occurred both within the Kirk and in wider attitudes to religion which diluted the influence of Calvinism and its associated system of discipline.

First of all, the re-establishment of Presbyterianism damaged relations between the Kirk and the upper classes, as many of the aristocracy had Episcopalian sympathies. Perhaps more surprisingly, many Presbyterians also felt aggrieved, due to several pieces of legislation which threatened to undermine the supremacy of Presbyterianism. On top of this disgruntlement, a new party – the Moderate party – began to grow within the Kirk from the 1690s onwards. The Moderates were a group of ministers committed to overturning the stereotype of the bigoted, narrow-minded fanatical Presbyterian and their ascendancy was a major contributor to the

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22 1689 A.P.S., IX, 38 c.28.
23 Confession of Faith Ratification Act 1690 A.P.S., IX, 133 c.7.
25 The Toleration Act 1711 (also known as the Occasional Conformity Act) (10, Anne, c.6) and the Scottish Episcopalians Act 1711 (10, Anne, c.10) lifted the restrictions against Episcopalian practices that had been in place and resuscitated the risk of Episcopalian domination. In 1712 the Church Patronage Act (10, Anne, c.12) was passed which re-instated the patronage system, which was a method of ministerial appointment in direct contradiction to the Presbyterian method (Church of Scotland, The first and second booke of discipline together with some acts of the Generall Assemblies, clearing and confirming the same: and an act of Parliament (1621) 27-28). For a discussion of the riots which were sparked by the issue of lay patronage see K J Logue, Popular Disturbances in Scotland 1780-1815 (1979) chapter 7.
decline of hard-line Calvinism and the spread of Enlightenment ideas within Scotland.\textsuperscript{27} Outside the Church deism and atheism presented a growing threat\textsuperscript{28} which the Kirk attempted to meet with legislation,\textsuperscript{29} official proclamations,\textsuperscript{30} and harsh prosecutions.\textsuperscript{31} Despite these measures, the flow of new ideas continued and eventually even renowned individuals began to publicly challenge the accepted religion of Scotland.\textsuperscript{32} In short, people were beginning to question how the moral discipline that was so central to Reformation theology fitted with the new political liberty and religious toleration of the post-Revolutionary age.\textsuperscript{33} As is explained in the following chapters, these factors reduced the influence of hard-line Calvinism and paved the way for the growth of Enlightenment philosophy, and had repercussions for many aspects of the criminal law at the time.

In considering these consequences for the criminal law the main sources used were authoritative legal treatises, including Baron Hume’s \textit{Commentaries}, Professor Forbes’ \textit{The Institutes of the Law of Scotland} and Professor Bayne’s \textit{Institutions of the Criminal Law of Scotland}. In addition to these, trial records from the Books of

\textsuperscript{27} In their efforts to promote religious tolerance and enlightened thinking, the Moderates had to contend with criticisms that they were failing to preach the Confession of Faith, which was still the Kirk’s orthodoxy, and for taking a mild view of sins of the flesh. John Witherspoon’s famous \textit{Ecclesiastical Characteristics} gives a good indication of the other criticisms that were levelled at the Moderates. His satirical ‘maxims’ of the Moderate preacher include: sneer at the Confession of Faith; hold men suspected of heresy in high esteem; confine their subjects to social duties which are recommended only from rational considerations without any regard for the future state; draw their authority from heathen writers and as little as possible from Scripture; preach about the moral virtues rather than grace and be very unacceptable to the common people, whom they despise (R B Sher, \textit{Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh} (1985) 9-15, 56, 75).

\textsuperscript{28} A L Drummond & J Bulloch, \textit{The Scottish Church 1688-1843} (1973) 13.

\textsuperscript{29} The General Assembly enacted the ‘Act against the Atheistical Opinions of the Deists, and for establishing the Confession of Faith’ (XXI. Sess. 18, January 4, 1696) and prevented any minister or member of the Church from publishing or preaching material that was inconsistent with the Confession of Faith on pain of Church censure.

\textsuperscript{30} In 1735 the General Assembly issued a declaration that “deism, infidelity, Popery, and other gross errors, appear to be very prevalent and threatening in this island at this day” and that it was the “duty of this Church to do all in her power, under Divine direction, for suppressing the same, and preventing the growth thereof” (Act and Recommendation for Preserving Unity, and Preventing Error within this Church VII. Sess. 11, May 19, 1735).

\textsuperscript{31} In 1697 Thomas Aitkenhead, an eighteen year old Edinburgh student, was tried and hanged for supposedly rejecting the Christian faith and appearing to endorse pantheism (A L Drummond & J Bulloch, \textit{The Scottish Church 1688-1843} (1973) 14).


\textsuperscript{33} \textit{Ibid} at 84. The Revolution in question was the ‘Glorious Revolution’ of 1688-1689, which ended the reign of King James II, who was replaced by his Protestant daughter Mary II and her Dutch husband William III.
Adjournal help bridge the gap between the publication of Hume’s *Commentaries* at the end of the eighteenth century and the advent of regular case reporting in the nineteenth century. The eighteenth century is described as almost completely devoid of any reports of criminal case rulings, so the Books of Adjournal that cover this era are particularly useful. They also provide a broader view of the law in action and the kinds of arguments and challenges that practitioners of the time relied upon.

Due to the emergence of regular, published case reports in the nineteenth century, the portion of this thesis which examines that time through to the present day relies primarily on individual judicial decisions as well as academic textbooks – most notably Gordon’s seminal *The Criminal Law of Scotland*. In terms of the development of moral ideas, because the twin focuses of the thesis are Calvinist and Scottish Enlightenment thought, no sustained consideration has been given to the history of the Church of Scotland beyond the growth of the Moderate party and the decline of the Calvinist regime. After this point, the growth of Enlightenment philosophy is the primary focus and its influence on the law is traced through to the present day.

1.3 Outline of the Study

Excluding the first two chapters, which set out the structure of the thesis and its unifying themes, this thesis is divided into three parts. Part One, which consists of Chapters Three and Four, deals with the scope and principles of the law and thus takes account of the type of conduct that was punishable and the arguments that were put forward to justify its prohibition. Chapter Three shows that during the post-Reformation era the range of offences that attracted secular punishment and the rationales offered in support of their censure very clearly reflected Calvinist theology. As support for Calvinism declined over time, the scope of criminal offences and the principles on which they were based varied accordingly. Chapter Four also considers the scope and principles of the law but focuses on the declaratory power of the High

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Court of Justiciary, which appeared as a *sui generis* doctrine at the end of the eighteenth century. The purpose of focussing on the declaratory power is to show how the types of justifications that were offered for punishing previously-unpunishable behaviour between the nineteenth and twenty-first centuries represent a distinctively Scottish way of characterising the Common Law tradition, which in itself embodies a Scottish Enlightenment world view.

Part Two of the thesis, which consists of Chapters Five and Six, concerns the attribution of criminal responsibility and non-responsibility. In Chapter Five it is argued that during the post-Reformation period, the criminal courts and Church tribunals used local knowledge of the accused and his or her character in a comparable way, often in co-operation, which suggests a similar attitude to attributing responsibility. The remainder of the chapter traces the move away from character responsibility towards a more impartial form of criminal responsibility, highlighting the roles of the demise of Church discipline and the centralisation of the criminal courts in this process. Chapter Six tracks the development of certain mental state defences, including insanity and to a lesser extent diminished responsibility and provocation, and shows how the growth of psychiatry as an established discipline led to greater concern with offenders’ capacity. Unlike other interpretations of these defences, Chapter Six reveals how crucial changing conceptions of moral agency were in forging the contours of these defences in Scotland, and in ensuring that the transformation from character to capacity attribution was merely partial.

Part Three of the thesis, which consists of Chapters Seven and Eight, considers the importance of mental state in the criminal law’s conception of culpability. The central argument in Chapter Seven is that the early portion of the law’s development is characterised by the paradigm of manifest criminality, and that during the eighteenth century the law underwent a partial shift towards subjectivism. Manifest criminality is a model of criminal law in which a crime is thought to be an

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36 Provocation is discussed in Chapter Five on the basis that loss of self-control can be considered akin to a mental state (S Yannoulidis, “Excusing Fleeting Mental States: Provocation, Involuntariness and Normative Practice” (2005) 12 *Psychiatry, Psychology and Law* 23). However, characterising provocation as a defence based on mental state is somewhat problematic for, as the Law Commission has observed, loss of self-control (in the legal context) is an ambiguous, judicially invented concept which lacks sharpness or a clear foundation in psychology (Law Commission Report on *Partial Defences to Murder* (LC290, 2004) paras 3.26-3.30).
act which any objective observer would recognise as being criminal, despite knowing nothing about the actor’s mental state. In contrast, subjective criminality places much more emphasis on a culpable state of mind, so the shift from one model to the other is tightly bound to the importance attached to mental state.\footnote{G Fletcher, \textit{Rethinking Criminal Law} (1978) 115-117.} In Scots law this move is exhibited in the growth of differentiated, crime-specific \textit{mentes reae} throughout the course of the eighteenth century. It is argued that changes in religious and moral thought contributed to this move, with the robust moral code of the Calvinist reformers facilitating adherence to manifest criminality and the emergence of Enlightenment theories introducing a new concern with the individual’s ‘inner world’. In the final substantive chapter of the thesis, Chapter Eight, the discussion of mental state is brought up to the present day by concentrating on the continued use of morally evaluative \textit{mens rea} terminology within the offences of murder and assault. These two offences, which retain the phrases ‘wicked’ and ‘evil’ in their definitions, best represent the tenacity of the pre-\textit{mens rea} conception of culpability, which was most pronounced during the law’s manifest criminality stage. After an assessment of the import of these morally evaluative terms, it is argued that their principal bearing on the contemporary law is in the way that they influence the structure of murder and assault, both of which incorporate certain exculpatory factors in the offence definition.

Overall, this thesis aims to provide a coherent analysis of the various ways in which changes in the prominent religious and moral ideology of Scotland exercised formative power over the shape of the criminal law, the way it was administered and its underpinning theory of culpability. Doing so contributes to received understandings of the law’s history by considering its sources and institutions from hitherto unexplored theological and moral perspectives. Furthermore, it enhances scholarly appreciation of certain aspects of the contemporary law that remain ostensibly moralistic. Finally, it makes a contribution to socio-historic scholarship more generally and strengthens its position as a recognised and worthwhile discipline by demonstrating, using a concrete legal system, how legal history can enhance debates within legal theory and vice versa.
1.4 Methodology

The nature of the claims that are made in this thesis, which were summarised in the previous section, means that it is essential to devote some attention to methodology. A large part of this thesis consists of applying a theoretical framework\(^{38}\) to the substance of Scots criminal law. The methodological issues involved in attempting this sort of analysis, which marries a theoretical perspective with legal practice and doctrine, are considerable and will be considered in due course. However, these issues are somewhat compounded by the historical dimension of the thesis and the fact that it attempts to connect legal practice and doctrine with theoretical arguments whilst simultaneously providing an interpretation of how these connections changed over time. The difficulties of engaging in this particular form of scholarly enterprise are captured well by Smith’s account of the intellectual legal historian’s task:

Attempting to account for the conceptual evolution of any area of law demands not only identification of contemporary potentially formative forces, but the construction of plausible hypotheses causally linking them with legal developments. Both of these stages of the intellectual historian’s task carry their own peculiar challenges and pitfalls... Still more demanding and elusive is the forging of intellectually convincing linkages between theoretical debate and judicial or legislative action.\(^{39}\)

Focussing first on the challenge of forging links between theoretical debate and legislative or judicial action, one of the major criticisms of these sorts of associations is that they are too ambitious. Indeed according Tadros, who holds this view, it is even less tenable to try to link theory and practice with changing intellectual and socio-political conditions.\(^{40}\) In making this judgment Tadros is critiquing Lacey’s claim that the development of criminal responsibility in English law can be linked to the prevailing socio-political environment, but his comments are applicable to other projects that adopt similar approaches. According to Tadros, the problem with this methodology is that it ignores the likelihood that the law has never adopted a coherent theory of criminal responsibility and thus cannot be said to reflect any such

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\(^{38}\) Which includes different forms of criminal responsibility and Fletcher’s models of criminality (explained in further detail in the introductions to Parts One and Two).


theory. Even if this were not the case, he doubts that there is any association between theories of responsibility and the rules which dictate pragmatic matters such as conditions of proof.\footnote{Ibid.}

Tadros’ doubtfulness certainly has some foundation but, however much credence it holds, it does not preclude the type of ‘ambitious’ claims which he finds problematic. The reason for this is simply that Tadros’ claim – that doctrinal arrangements cannot be treated as manifestations of principles and theories – could be levelled at any form of theoretical criminal law research which attempts to draw on legal rules and practices. Thus, if Tadros’ criticism is fatal for socio-historical research then it is also fatal for all research that attempts go beyond merely describing or restating doctrinal rules. For even if it is argued, as Tadros contends in the context of his argument, that the law is a “badly articulated and badly defended set of rules many of which couldn’t be explained from any coherent theoretical perspective”,\footnote{Ibid at 264.} that in itself is a statement about the underlying theoretical basis of the law. To argue that the principles underlying the law are shambolic (or even non-existent) is to make an epistemological claim about the law’s theoretical underpinnings. In order for this type of claim to succeed, the legal rules and doctrines on which it is based must be treated as manifestations of what lies beneath. To the extent that any research concerning the connection between legal practice and legal theory is considered valid, these criticisms need not be fatal to an historical account of the development of the criminal law.

Notwithstanding this defence of the specific task of connecting theory, social context and legal practice, there are some further methodological concerns that apply to this thesis as a result of its historical nature. The first point to note is that although one of the central claims made in the following chapters is that various features of the law can be interpreted as modern embodiments of the influence of the Scottish moral tradition, this claim is neither essentialist nor teleological. Unlike, for example, the Hegelian notion of history as a dialectical unfolding towards a pre-determined end point,\footnote{W Jaeschke, “World History and the History of the Absolute Spirit” in R L Perkins (ed), History and System: Hegel’s Philosophy of History (1984) 101.} the arguments in this thesis recognise the contingency of the law’s development. There is no suggestion that the law is unfolding or has unfolded to arrive at a certain and inevitable conclusion. Indeed, one of the aims of the following chapters is to develop an account of the law’s evolution that includes elements of historical change as well as continuity.
Similarly, this thesis does not suggest that the influence of the Scottish moral tradition is the explanation for the way that Scots criminal law has developed. It is important to make this point clearly because in the wake of Weber’s *The Protestant Ethic and the Spirit of Capitalism* it could be assumed that any historical interpretation that relies on the influence of religious and moral thought must at the same time aim to exclude other materialist explanations. While it is true that Weber’s work pitches cultural and ideational forces against economic structures and institutions, this should not imply that every historical explanation that is rooted in cultural and ideational influences seeks to do the same. That is certainly not the intention of this thesis. Although the only source of influence that is considered in the following chapters is the Scottish moral tradition, it is accepted that there are undoubtedly many alternative interpretations which could explain the changing scope of the criminal law, the decline of character responsibility and the rise of subjectivism. The reason that other structural factors have been omitted is simply to better identify the influence of the one factor that has been chosen for examination. By artificially isolating the Scottish moral tradition, its influence can be seen more clearly albeit at the expense of other potentially explanatory factors. These factors are no doubt essential to a full explanation of the law’s development, but that is not what this thesis aims to provide.

Having explained what this thesis does not attempt to argue, it is now possible to explain in more positive terms the methodological aims that it does try to achieve. In many respects the broad ambitions of this work are allied with the model of historical research advocated by Skinner. According to Skinner, historical research ought to assist in understanding the present social world. As was made clear in section 1.1, one motivation for interrogating the philosophical and religious bases of Scots criminal law is to provide a deeper understanding of features of the contemporary law which appear anomalous or anachronistic. A further purpose of historical research that Skinner promotes is to reveal the hereditary nature of modern normative concepts. This function is described by Skinner as an “exorcism”, the aim of which is to destroy the myth there is only one (the current) way of thinking about

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44 It is mistaken to describe Weber’s work as arguing that Calvinism was the cause of the development of modern capitalism, though some critics have made this claim (M Weber, *The Protestant Ethic and the Spirit of Capitalism* (trans T Parsons, introduction by A Giddens) (2001) xxi).

45 Weber was openly critical of Marxist theory, but was clear that his work was not an account of the origins of modern capitalism; it was an attempt to ascertain the way in which religious forces have been expressed in the formation of capitalist motivation (J Barbalet, *Weber, Passion and Profits: 'The Protestant Ethic and the Spirit of Capitalism' in Context* (2008) 1-4; M Weber, *The Protestant Ethic and the Spirit of Capitalism* (trans T Parsons, introduction by A Giddens) (2001) xvii).

Chapter Eight, which considers the normative terms ‘wicked’ and ‘evil’ in the context of evaluative *mentes reae*, seeks to fulfil this second function by exposing the different ways that these terms have been used over time and by revealing their structural implications for the modern criminal law.

Attempting to pursue these particular ends has entailed rejecting what Skinner describes as the ‘cult of the fact’. The ‘cult of the fact’ teaches that history is solely the province of facts, with the only form of extrapolation allowed being a purportedly neutral description of the consequences or causes of these facts. In contrast to the ‘cult of the fact’, Skinner regards more interpretive historical narratives as both viable and worthwhile. He therefore considers that abstract movements such as ideas and belief systems can be the subject of historical investigation. The subject matter and wide chronological scope of this thesis mean that it is avowedly an interpretive account, which in turn holds certain methodological implications. Two of the main potential pitfalls of adopting the interpretive perspective are: failing to interpret written texts in their own terms and applying terms and ideas in an anachronistic way.

The first pitfall, of failing to interpret written texts in their own terms, can lead to the error of inferring a false sense of coherence between different texts on the basis of a few scattered remarks. It can also lead to the ‘mythology of prolepsis’, which is the tendency to focus on the retrospective significance of an episode rather than its contemporaneous meaning. Being mindful of these issues, when historical texts are discussed in the following chapters there is an attempt to reflect on the aims of each writer, either as he declared them or as can be inferred from the situational context. For example, when Balfour’s *Practicks* are considered in Chapter Three his express objectives, political affiliations and the socio-political context in which he was writing are all taken into account. The same reflective approach is applied to Hume’s *Commentaries* and Mackenzie’s *Matters Criminal* though, in recognition of the single focus of this thesis, there has been no attempt to appraise every socio-political factor that would potentially be relevant in interpreting each text.

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47 Ibid.
48 Ibid 10.
49 Ibid 60.
50 Ibid 73.
51 ‘He’ is the correct pronoun here, as all of the historical materials examined were written by men. In the rest of this thesis when ‘he’ is used instead of a gender-neutral pronoun or both ‘he’ and ‘she’, it is usually because the author whose work is being considered wrote in such terms.
A further important point about the interpretation of historical texts is the meaning of the term ‘influence’. In some scholarship the term ‘influence’ might be used to suggest that a person has been exposed to or studied an influential text or idea and that this exposure is the only explanation for the alleged influence of that text or idea on that person.\textsuperscript{52} This is not the meaning of ‘influence’ that is employed in this thesis. Of course, at certain points in the thesis individual jurists are scrutinised with regard to the ideas and writers with which they were likely to have been familiar. Similarly, certain works are argued to have been extraordinarily influential in the development of areas of the law, such as Thomas Reid’s theory of the active powers (in Chapter Six). However, for the most part this thesis is concerned with the influence of ideas and themes on the somewhat abstract entity of ‘the criminal law’ and therefore the claims of influence rest on the correlation between doctrines and theories and doctrines and practices.

The final methodological issue to be considered relates to the second pitfall of the interpretive methodology, which is applying terms and concepts anachronistically. Such a practice might create the impression that a particular concept was foreshadowed in an earlier writing or has re-emerged in later writings when, in fact, the timings are such that the alleged augury or resurgence is merely illusory.\textsuperscript{53} In order to avoid this difficulty it has been made clear, wherever possible,\textsuperscript{54} that the themes which are identified at different stages in the law’s development are not simply instances of the same concepts reappearing over time. The recurring themes are instead submitted in support of the argument that there is a sense of consistency that permeates the Scottish moral tradition, which is expressed within the criminal law at different periods in time. This sense of consistency and its manifestation within the criminal law is the subject of the next chapter.

\textsuperscript{53} Ibid.
\textsuperscript{54} In Chapters Two and Four, for example.
Chapter Two: Calvinist Presbyterianism and Scottish Enlightenment Philosophy

2. Introduction

One of the central arguments of this thesis is that Calvinist Presbyterianism and key strands of Scottish Enlightenment thought share several central but generally unacknowledged commonalities. This claim is important because it challenges the assumption that the Enlightenment represented a complete rupture in traditional Scottish moral thinking. In contrast to this assumption, this chapter posits an alternative thesis, which is that Calvinist Presbyterian doctrine and Scottish moral thought of the eighteenth century adopted very similar perspectives on the nature of society and morality. Both endorsed a collectivist form of social theory, both have an affinity with moral realism, and both hold that morality is universally accessible to each and every person of sound reason. Each of these areas of overlap is set out in more detail in the following sections and the way they find expression in the criminal law is also explored.

The purpose of arguing that there are hitherto unappreciated similarities between the Calvinist and Scottish Enlightenment perspectives of morality and society is not to deny that vital changes in moral and social thinking occurred over time, nor is it to imply a form of teleological development. The purpose of drawing out the associations between Calvinist and Enlightenment ways of thinking is

55 Berry describes two different approaches to asserting the ‘Scottishness’ of the Scottish Enlightenment: one emphasises the novelty of the Enlightenment, especially its “social revolution” which aimed to promote progress in Scottish society and the other shows how it was underpinned by the Scots’ native intellect (C J Berry, The Social Theory of the Scottish Enlightenment (1997) 188-194). Although scholars who adopt the latter approach have shown the institutional and intellectual continuities of the Scottish Enlightenment, in the realm of moral theory the Enlightenment is most often considered a major turning point. More specifically, changes in moral thought are usually taken to represent the rejection of pre-Enlightenment religious beliefs about morality (see section 2.2 for more detail). There are some writers who have drawn attention to the importance of the theological background to the Scottish Enlightenment (for example, D Allan, Virtue, Learning and the Scottish Enlightenment (1993) and R H Campbell & A S Skinner (eds), The Origins and Nature of the Scottish Enlightenment (1982)) but the connections between the Calvinist and Enlightenment views of society and morality that are put forward in this chapter are original.

56 There was no unified Scottish Enlightenment view on these issues. The aspects of Scottish Enlightenment moral thought that are discussed in this chapter are simply those that are most relevant to the argument. For an account of various Scottish Enlightenment philosophers and the way their theories differed see K Haakonssen, Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment (1996).
primarily to show that such connections exist, since to do so is to advance an original 
interpretation of Scottish theology and moral philosophy. Secondly, the points of 
continuity in Scottish moral thought which are identified in the following sections 
arguably help to explain why the features of Scots criminal law that are examined in 
the remainder of this thesis have abided over such a long period of time. 
Demonstrating this illuminates the extent to which the Scottish moral tradition has 
contributed to the apparent unity of the Scottish legal tradition as it is expressed 
within the criminal law.

A further reason for asserting the similarities between Calvinist and 
Enlightenment attitudes to society and morality is to make clear that where similar 
themes, arguments and doctrines are identified throughout the rest of the thesis this 
does not suggest that the same cultural influences were in force at different stages of 
the law’s development. Instead, the argument presented is that the recurrence of 
these themes reveals something previously undisclosed about the Scottish moral 
tradition: that even in its stark contrasts it is defined by many of the same notions of 
morality and society. This revelation is reflected within the criminal law in the 
occasions when these motifs appear over the course of the law’s development; the 
fact that they also underpin certain aspects of the modern law shows the lasting 
impact of these modes of thought.

2.2 The Calvinist and Scottish Enlightenment ‘world views’

Before setting out the arguments which support the claim that there are previously 
unexplored similarities between Calvinist theology and Scottish Enlightenment 
philosophy, it is first necessary to identify some of the rudimentary features of these 
two intellectual movements. This is essential in order to fully appreciate and evaluate 
the argument that there is a shared understanding of morality and society between 
these two movements.
To start with Calvinism, one of its so-called ‘five points’ is the doctrine of total depravity, which teaches that man’s fall from grace – which was brought on by original sin – rendered him unremittingly sinful and fundamentally unable to do good. One consequence of this conception of human nature is that Church discipline is an essential part of the Calvinistic view of society. By punishing immoral behaviour, the Kirk sought to repress vice and encourage virtue both at an individual level and in order to achieve its wider aim of creating a Godly community. One of the foundational tenets of Calvinism was therefore the idea that a single, divine notion of morality ought to be imposed on the whole of society on pain of punishment and public humiliation.

In spite of the doctrine of total depravity, which holds that human beings are intrinsically corrupt and flawed, Calvinism also teaches that man retains an inherent impression of civil society and an inbuilt understanding of human laws, which mean that he is naturally inclined to maintain public order. This feature of Calvinist belief might suggest that moral laws, both human and divine, are of limited importance. If man is naturally inclined to maintain public order then rules to enforce this would appear to be unnecessary. This suggestion that moral laws are unimportant is supported by one of the other pillars of Calvinism: unconditional election. Unconditional election is sometimes referred to as the doctrine of double predestination because it stipulates that some individuals are predestined for salvation and others for damnation. Crucially, nothing that the individual does will alter his or her fate. Taken together, the belief that mankind bears an impression of civil society and the doctrine of unconditional election imply that written laws are superfluous. If every person is inclined to maintain public order then written laws are not needed, and if one’s actions have no bearing on one’s ultimate destiny then there is no apparent benefit in observing laws at all.

57 The five points of Calvinism are: total inability or total depravity, unconditional election, particular redemption or limited atonement, the efficacious call of the spirit or irresistible grace and perseverance of the saints (D N Steele & C C Thomas, *The Five Points of Calvinism: Defined, Defended, Documented* (1963) 16-18).
59 Church discipline is discussed further in Chapter Five.
However, in reality Calvinist reformers were keen to emphasise the importance of written laws, especially secular laws that were based upon God’s law. The first reason that such laws were considered crucial was that they would discourage people from sinning and would therefore help maintain community harmony. Even though mankind was thought to hold an innate sense of civil society, the doctrine of total depravity meant that some written guidelines were essential in order to overcome man’s corrupt reason and to make these rules clear. The second reason written laws were seen as necessary was that they helped to remind each individual of his or her inherent sinfulness and to seek God’s grace accordingly. The third reason was to provide guidance on how to please God, which seems strange at first given that the doctrine of predestination rendered good works essentially meaningless. This incongruity disappears once it is understood that one of the fundamental features of unconditional election was that each person was completely oblivious to his or her status and, furthermore, would always remain so. Only God knew who were the elect and who were the damned. There was therefore always a possibility that one might be a member of the elect. This possibility meant it was important to know how to please God for although good works were not the basis of salvation they were invaluably edifying.

The key point about total depravity and unconditional election is that, according to Calvinism, written laws were essential in creating and maintaining a moral and stable community, and when those laws were man-made it was imperative that they should be based upon God’s laws. This latter point was central to Protestantism generally, and was expressed in Calvin’s writing in his insistence that the secular law by which civil magistrates adjudicated should be inspired by God’s natural law. To summarise the Calvinist principles most relevant to this chapter: society was conceived of as being based on a common set of moral rules that were

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64 F Wendel (trans P Mairet), Calvin: The Origins and Development of his Religious Thought (1965) 207. The impact of this point on the substance of the criminal law is considered in Chapter Three.
enforced by Church discipline and these moral rules were thought to be derived directly from God.

At first, the changes to moral and social thinking that occurred during the Scottish Enlightenment make it difficult to see how there could be any similarities between the two movements. Although it is acknowledged that many Enlightenment thinkers were influenced by their Christian upbringings, the task in which these thinkers were engaged was essentially to arrive at an empirical understanding of God, the external world and the self. One reason this task was thought to be pressing was that morality had come to be regarded as distinct from theological, legal and aesthetic rules of conduct. This change meant there was a need to consider alternative ways of justifying morality; since it was now divorced from its traditional justificatory bases a new basis had to be conceived. Likewise, with faltering beliefs in a divine order in which social roles were clear, it was imperative to construct a fresh explanation for the existence of society and for individuals’ places in the social order.

For many of the philosophers who are traditionally associated with the Scottish Enlightenment, this new conception of morality was linked to their particular view of society. The so-called father of the Scottish Enlightenment, Frances Hutcheson, had an integrated view of society and morality that drew on the work of the English philosopher, Lord Shaftesbury. Hutcheson argued that people are naturally inclined to live together because they are endowed with a number of natural affections. In many ways Hutcheson’s philosophy is a bridge between the old, pre-Enlightenment view of society and morality and the views of his philosophical successors, most notably Adam Smith and David Hume. Although Hutcheson’s

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69 Ibid 213.
account of society marks a radical break with the Calvinist idea of total depravity because it rests on the assumption that human beings are naturally benevolent, rather than inherently wicked and sinful. This benevolence was still thought to be instilled by God. In other words, a theological element was still present in Hutcheson’s social order; indeed, man’s duties to God were central to his theory. It is true that Hutcheson’s view of society was based upon human intersubjectivity but, unlike Smith’s version of intersubjectivity, God was a crucial part of Hutcheson’s understanding of social order. The same dependence on God extended to Hutcheson’s view of morality, in which there was no moral standard independent of the divine standard.

As the eighteenth century proceeded, philosophy was increasingly regarded as the mechanism for evaluating and justifying the fundamental principles of morality and society; often at the expense of theology. This is not to say that philosophy and religion were considered completely separate entities. In fact, one of the key roles of moral philosophers during the Enlightenment was to provide theories that could support the values of Scottish theology. However, there was a notable break between Hutcheson’s writings and those of Smith and Hume. As is explored further in sections 2.3.1 and 2.4, both Hume and Smith based their accounts of society and morality on intersubjective consensus so that, rather than being derived from God, sociability and morality were derived from the community itself. The basic argument was that every person, either by his or her reason or moral sense, could perceive the dictates of morality and that when the perceptions of the community coalesced around certain principles, those principles were to be treated as

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72 See section 2.3.1 for more detail. See also A Broadie, A History of Scottish Philosophy (2010) 140.
73 Hutcheson and Smith’s forms of intersubjectivity are discussed below in section 2.3.1.
74 Smith’s rejection of God in his theory of human morality is controversial but is asserted in C Fricke & D Føllesdal (eds), Intersubjectivity and Objectivity in Adam Smith and Edmund Husserl: A collection of essays (2012) 6.
76 Ibid 247-257. For example, to become professor of moral philosophy Smith had to sign the Westminster Confessions, the standard doctrine of the reformed Church of Scotland, and to undertake to lead the students in prayer every morning (A Broadie, A History of Scottish Philosophy (2010) 197).
77 As is noted in n74, the issue of whether Smith relies on God in his account of morality is controversial. On the other hand, Hume’s account of morality is deeply incompatible with the traditional Scottish view that theology provides the most adequate understanding of morality (A MacIntyre, Whose Justice? Which Rationality? (1988) 322).
78 These different ways of perceiving morality are discussed in section 2.4.2.
the standards which ought to apply in moral judgment. The crucial difference between the Calvinist and Scottish Enlightenment views of society and morality was therefore that the theological basis for explaining the existence of society and the nature of morality had all but disappeared and been replaced by a different set of ideals, which rested on the intersubjective agreement of individuals. Having established these points, it is now possible to examine the Calvinist and Scottish Enlightenment accounts of society and morality in greater detail and to set out the argument that there are several points of similarity between them.

2.3 The nature of society

Despite their differing stances, both Calvinist Presbyterianism and Scottish Enlightenment philosophy conceive of social order in a similar way. The similarity lies in the fact that both give priority to a form of society that has been termed ‘collectivism’ in this thesis. The term ‘collectivism’ has been used instead of the somewhat similar concept of ‘communitarianism’ in order to express a form of social arrangement in which collective opinions and interests are given special standing over those of the individual.79 ‘Communitarianism’ does not adequately capture this arrangement because although the term usually describes, or advocates, societies in which overriding importance is attached to society as a whole rather than the discrete interests of individuals,80 the particular values that a society holds might not prioritise society itself or its collective mores. To take an example from criminal law theory, Duff’s account of punishment as communication marries a strong role for the community in holding offenders to account and reverence for personal autonomy, which is traditionally a liberal concern.81 Even though the community plays a pivotal role in punishing the offender, individual responsibility is conceived of in liberal and autonomy-preserving terms. This contemporary version of communitarianism, which

gives overall priority to individual liberty, can therefore be regarded as a variant of liberal political theory.

The distinction between collectivism and contemporary communitarianism is explained well in Taylor’s account of the growth of modern social imaginaries. ‘Social imaginaries’ are essentially the way that people imagine their social existence and their fit with other individuals. Social imaginaries are both factual and normative in that they reflect both the sense of how things are and also how they ought to be. By Taylor’s account, older forms of social imaginaries were hierarchical and the hierarchy itself was regarded as desirable because every group and person had a place in the normative order. By contrast, modern social imaginaries aim to secure certain elementary goals of the individual such as life, liberty and a sense of self. The normative value of modern social imaginaries is therefore the individual and his or her interests, rather than the proper arrangement of the wider social group.

A further distinction between older and more modern social imaginaries is in the underpinning moral order. The moral order of a social imaginary is not merely the specific norms of a given society; it also includes an ontic component, which identifies the factors that make those norms realisable. Taylor characterises the ontic element of older moral orders as being God or the cosmos and distinguishes it from the ontic element of modern moral orders, which rests on human beings. This distinction very closely resembles the change that occurred in Scottish moral thought between the Reformation and the Enlightenment, when human intersubjectivity replaced the idea of a divine moral order as the normative and descriptive explanation for society.

The loss of this transcendental foundation of the social order is defined by Taylor as a process of secularisation. Secularisation in this sense does not simply mean the absence of God or religion in public life. Taylor’s version of secularity has a much more literal significance, namely ‘of the age’, which means that the social order is considered to be rooted in contemporary common action rather than something which transcends this, such as religion or an eternal law. According to

83 Ibid 12-16.
84 Ibid 10.
Taylor, this move towards secularity occurred in the late eighteenth century; although elites had developed secular theories of society before this time, they had not yet permeated the social imaginary. The description of secularisation offered by Taylor very clearly describes the changes that occurred in Scottish society during the eighteenth century. As has already been mentioned, the Scottish Enlightenment view of society was largely based upon human beings and their communal action, whether driven by mutual benevolence or founded on intersubjective consensus. Taylor’s account of changing social imaginaries is therefore a useful grounding for the discussion in this chapter, which aims to explain the Calvinist and Scottish Enlightenment views of society and morality and to argue for a new interpretation that recognises their similarities.

Taylor also makes clear that the move from older to modern social imaginaries and moral orders does not necessarily chart the rise of individualism, which is how the change is often portrayed in other writings. Although the aim and ontic of the different forms of social imaginary suggest a greater role for the individual in modern times, there is a persisting concern with community and sociality. This realisation has informed the arguments in this thesis, for although one of its narratives is the growth of the individual and the decline of tightly-knit communities, it is not argued that these changes represent the rise of atomism. The theories that emerged during the Scottish Enlightenment paid greater heed to the individual but were nevertheless concerned with explaining the sociality of human life, and therefore still had to account for the relations between individuals and their community.

In the following section it is argued that both Calvinist theology and Scottish Enlightenment philosophy entailed social imaginaries that were predominantly collectivist. The chief argument put forward in support of this claim is that both Calvinism and Scottish Enlightenment philosophy were based on a vision of society in which collective judgment and community-derived norms were paramount. By prioritising the norms of the community and by scrutinising individuals’ behaviour according to the evaluation of that community, both Calvinist theology and Scottish

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85 Ibid 93-110.
86 Ibid 17.
Enlightenment philosophy embodied a collectivist form of social imaginary which, it is further argued in subsequent sections, had a bearing on the shape and operation of the criminal law.

2.3.1 Calvinist and Enlightenment collectivism

The place of collectivism within the Calvinist framework of belief is relatively clear, due in large part to its mission of creating a holy community. In aiming to unite parishioners under a single, incontestable moral code, the normative aim of the Calvinist reformers was completely compatible with a collectivist social ethic. Indeed, this collectivist ethic was the reality in post-Reformation Scottish societies since the congregational ethos of Calvinist communities involved the whole community in a collective commitment to fulfilling God’s laws. An essential part of fulfilling God’s laws was upholding the Kirk’s code of morality, which required that the individual should be punished and humiliated in the interests of the community’s (imposed) normative rules.87

The role of collectivism within Scottish Enlightenment philosophy hinges on the importance that the movement placed on understanding the nature of society, a point which is demonstrated by the fact that one of its chief aims was to understand how to build a civic society composed of model citizens.88 As was discussed in section 2.2, the need to try to meet this aim was linked to the secularisation of the moral order. Since the divine order of society and morality was being subject to scrutiny, it was increasingly necessary to devise an alternative explanation of human society and sociability. For significant Enlightenment figures the answer to this question was based on the notion of a community in which individuals’ interactions with each other, as individuals and as a collective, were crucial. For example,

Hutcheson’s view of the ideal society is based on a concurrence of sentiments, out of which arises a shared conception of the good community.  

Many of the rest of the Scottish Enlightenment literati developed their own perspectives of society that were based on Hutcheson’s account of intersubjectivity. So, for Smith all human feeling was the product of socialisation and each individual was deeply interwoven with his or her society. A further feature of Smith’s account, which is discussed in the following sections, is that the nature of society was intrinsically bound to the nature of morality; indeed, according to Smith, the process of socialisation was essential for moral development. The same was true of Hume’s philosophy, according to which there could be neither morality nor social order without the reciprocity and harmony of shared evaluative judgments. A unified sense of morality therefore held a comparatively central place in the Enlightenment view of cohesive society as it had within the Calvinist communities that emerged out of the Reformation. The nature of this morality is a further source of continuity between Calvinist and eighteenth century Scottish moral theory which, along with its ramifications for the law, is given detailed consideration below.

The implications for the criminal law of adhering to a collectivist social order, as it is argued both Calvinism and Scottish Enlightenment philosophy do, are most obvious in the way that criminal responsibility is conceived of and in the range of conduct that is punishable as a crime. At a theoretical level there is a potential link between collectivist social orders and criminal responsibility, which is suggested by the collectivist approach to making judgments and engaging in causal reasoning.

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90 Ibid at 27.
92 S Fleischacker, ‘Adam Smith’s Moral and Political Philosophy’ in Stanford Encyclopedia of Philosophy (Spring 2013) (available at: http://plato.stanford.edu/entries smith-moral-political/). Importantly, Broadie has shown that Smith’s impartial spectator, on which Smith built his theories of society and morality, is not solely the representative of established social attitudes and can therefore speak out against these (A Broadie, A History of Scottish Philosophy (2010) 213-216). However, as Haakonssen explains, morality itself, though not merely a reflection of social opinion, inevitably develops from social opinion (K Haakonssen, The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith (1981) 57).
94 See section 2.4.
According to Oyserman and his co-authors, a collectivist approach to engaging in causal reasoning and in making judgment regards the social roles of individuals and the wider context of their interactions as decisive in evaluating their conduct.\textsuperscript{95} These features of the collectivist account of judging and causal reasoning mean that it closely resembles ‘non-cautious’ character responsibility. This model for attributing criminal responsibility is elaborated in more detail in Part Two but, briefly summarised, it holds a person’s social standing and reputation to be important in determining culpability. In Chapter Five ‘non-cautious’ character responsibility is shown to have underpinned the criminal law in sixteenth and seventeenth century Scotland, and it is suggested that the collectivist nature of Calvinist social arrangements contributed to this situation.

In terms of the conduct that was criminalised, a collectivist approach implies that the decision of which offences should attract criminal punishment ought to be based upon, and justified by, the community’s shared sense of right and wrong. In fact, such collectivist-based appeals appear at various junctures in the development of Scots criminal law. Furthermore, the different forms that these appeals took reflect the secularisation of the Scottish moral order that occurred between the Reformation and the Enlightenment, which is described in section 2.3. In the early, Post-Reformation period, the law was based upon, and justified by, appeals to God’s law,\textsuperscript{96} which of course was the basis of Calvinist collectivism. During the later Enlightenment and post-Enlightenment periods of the law’s development, when the social and moral order had been substantially secularised, recourse was frequently made to ‘common sense’ right and wrong and community standards.\textsuperscript{97} This, it is argued, reflects the new secularised version of collectivism that was developed during the Enlightenment and which bases the social order upon the intersubjective consensus of members of society.

\textsuperscript{96} See Chapter Three.
\textsuperscript{97} See Chapter Four.
2.4 The nature of morality

In the preceding section it was argued that collectivism was the ideal form of society within Calvinist Presbyterianism and that it occupied a similarly critical position in Scottish Enlightenment thought. In both cases community relations played an important role in the way that civic society was conceived of and in both cases society was thought to rest on a shared conception of morality. In the case of Calvinism, the unification of society and morality was based on the Kirk’s aim of creating and maintaining a holy community by way of an enforceable code of conduct. For their part, Enlightenment philosophers regarded society and morality as explicable only on the basis of shared, intersubjective values. In fact, this close association between society and morality provides the clearest demonstration of collectivism within Scottish Enlightenment thought, and the elaboration of the idea of morality-derived-from-community reveals a further parallel between eighteenth century philosophical thought and Calvinist Presbyterianism.

2.4.1 Objective moral realism

Both Calvinism and Scottish Enlightenment philosophy portray morality as a matter of objective fact. One consequence of the Calvinist agenda for moral discipline is that there was a widely-known and firm set of moral dictates that provided a clear, objective standard against which actions could be measured and, when found wanting, condemned. As is more fully argued in Chapters Three and Five, this arrangement meant that during the sixteenth and seventeenth centuries, Scots law adhered to a form of criminality akin to Fletcher’s manifest criminality. This had various outcomes for the range of offences that were punished and the way in which criminal responsibility was attributed.\(^98\) To summarise these, the objective and well-enforced Calvinist moral code facilitated punishment on the basis that proscribed conduct was *prima facie* wrongful and that this fact was evident to all members of the community. This in itself has an affinity with Calvinist theology in that one of the tenets of the Protestant Reformation was rejection of the Catholic notion of mediated

\(^{98}\) Also discussed in Chapters Three and Five.
worship, and its replacement with a radically individualised form of worship that was based on the supreme authority of the Bible. This new canon of individual revelation meant that any person, regardless of his or her status or ability, was regarded as capable of accessing the rules of morality, as enshrined in God’s word. So, the Calvinist position was that a set of well-promulgated moral laws, rigorously upheld by the Church courts, provided ordinary people with an unambiguous understanding of society’s moral standards, the availability of which was accentuated by the fact that every individual was taken to have unmediated knowledge of God’s word via the Bible.

Two distinguishing features of this account stand out: one is that the content of moral laws is treated as objective and unchallengeable and the second is that these moral laws are considered to be accessible to all, regardless of status or ability. In a similar way, Scottish Enlightenment philosophy, particularly the Common Sense school of thought, regarded morality as something that was real and perceptible. Unlike the sentimentalist Common Sense philosophers who believed that morality was the product of subjective experience, the moral realists, who included Thomas Reid and David Hume, believed that what they called ‘common sense’ provided the means by which individuals could have knowledge of moral facts. To be sure, both the moral realists and the sentimentalists shared the view that morality was perceived via the moral sense, a point which is discussed in the following section, but the difference between them was that the realists believed morality to be an objective part of the external world.

Equally important is the fact that Common Sense philosophy taught that moral sense was held by all, and therefore that moral knowledge was available to all. Hutcheson was one of the first in Scotland to put forward this perspective when he said that every man had the capacity to make moral distinctions and so weighing up

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moral virtue was also within the competence of every man.\textsuperscript{101} Following Hutcheson, Hume frequently appealed to popular authority in his attempts to combat moral skepticism, relying on “common experience”, a “common sense of interest”, “common instinct”, “common observation” and the “common point of view” in doing so.\textsuperscript{102} These Enlightenment incarnations of the principles of accessible, objective morality are evident within the criminal law in the many instances where special status is afforded to common sense and community mores, particularly in respect of the declaratory power.\textsuperscript{103} A further upshot of the importance of lay knowledge of moral facts within the Common Sense school of thought is that whenever there was a conflict between the common sense view of morality and the conclusions of theorists on the issue it was thought that common sense ought to prevail.\textsuperscript{104} To both Hume and Reid, the opinion of the common man carried extraordinary authority, to the point of being described as infallible.\textsuperscript{105} The legal manifestation of this way of thinking can be seen in the notably high regard in which jury discretion is held within the Scottish legal tradition, particularly in the matter of the accused’s sanity, and in the unwillingness of courts to define legal concepts such as ‘wicked recklessness’ and ‘evil intent’.\textsuperscript{106}

To recapitulate, the Calvinist social agenda and its view of unmediated worship generate a perspective in which morality is objective, clear and accessible to all. This, it is argued, maps on to the way that offences were deemed punishable on the basis of their external wrongfulness. It also meant that the community’s assessment of an accused person and his or her conduct was afforded great significance because every person, regardless of background or intellect, could be

\textsuperscript{103} See Chapter Four.
\textsuperscript{105} Hume described it thus (D F Norton, “Hume’s Common Sense Morality” (1975) 5(4) \textit{Canadian Journal of Philosophy} 523 at 536). Reid believed that regard was due to human testimony in matters of fact, and even to human authority in matters of opinion (N Wolterstorff, “Reid on Common Sense” in T Cuneo & R van Woudenberg (eds), \textit{The Cambridge Companion to Thomas Reid} (2004) 77 at 78). Cf Hutcheson, who held moral perception and hence moral judgment to be inherently fallible (K Haakonssen, \textit{Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment} (1996) 75).
\textsuperscript{106} See Chapters Six and Eight.
trusted to recognise wrongdoing when they saw it. As counterparts to these aspects of Calvinism, prominent philosophers of the Common Sense school of thought also considered morality to be objective, incontestable and discernible to all, with ordinary people’s opinions being regarded the best source of moral knowledge. These similarities are borne out in the criminal law’s continued reliance on community standards for justification and in the belief that recognising criminality is simply a matter of common sense.\textsuperscript{107} Such sentiments are especially pronounced in the judiciary’s attempts to legitimise the declaratory power and in the considerable discretion afforded to jurors in determining the sanity of the accused.\textsuperscript{108}

\subsection*{2.4.2 The source of morality and means of perception}

The final connection between Calvinist and Scottish Enlightenment beliefs about morality is in fact a point of distinction, which relates to the accepted source of morality and the way it was thought to be perceived. It is clear that for Calvinism the source of moral knowledge was definitively the law of God. According to Calvin’s teachings, all humans were endowed with intrinsic knowledge of God’s law, which rendered them inexcusable in their iniquity.\textsuperscript{109} However, the doctrine of total depravity entailed that the flawless sense of reason and will to persevere which would be necessary to follow this God-given moral knowledge was in every instance either corrupt or missing.\textsuperscript{110} For this reason, God provided a written expression of the Moral Law in the form of the Ten Commandments, which could serve to reveal his will to those who were unable to discern and act upon it unassisted and to remind those who were able to do so of its importance.\textsuperscript{111} The source of morality was therefore a divinely-inspired list of commands and these were perceived in part by an intrinsic, God-given knowledge and in part by reference to God’s laws as expressed in Mosaic Law.

\textsuperscript{107} Cf N J Finkel, \textit{Commonsense Justice: Jurors’ Notions of the Law} (1995), who argues that this can be discerned by empirical research. 
\textsuperscript{108} See Chapters Four and Six. 
\textsuperscript{109} J Calvin, \textit{Institutes of the Christian Religion} (Book 2) (1599), Chapter 2.22. 
\textsuperscript{110} J Calvin, \textit{Institutes of the Christian Religion} (Book 1) (1599), Chapter 15.8; J Calvin, \textit{Institutes of the Christian Religion} (Book 2) (1599), Chapters 2.24 – 2.25.
\textsuperscript{111} J Calvin, \textit{Institutes of the Christian Religion} (Book 2) (1599), Chapter 7.
One of the major innovations of Scottish Enlightenment thinkers was that they advocated an alternative, secular basis for morality that did not necessarily rely upon revelation or God’s word.\(^{112}\) The idea that people were sinful creatures who needed God’s help to guide them was becoming outdated and unpopular,\(^{113}\) and at the same time new ideas emerged that were based on optimistic beliefs about human nature and the power of reason. Theories based on these ideas were developed by key philosophers of the age who argued for utilitarian systems of ethics and sentimental theories of morality based upon benevolence and duty.\(^{114}\) In contrast, several renowned rationalist philosophers such as Reid, Oswald, Beattie and Stewart developed theories of morality based on reason.\(^{115}\) Despite their differences, these theories were united in that, beginning with the work of Lord Shaftesbury, they all epitomised a shift which relocated the source of morality from an external providential order to the individual’s internal constitution. So significant was this shift that it has been described as a full-scale re-evaluation of human nature, which took for granted mankind’s talents and virtues rather than its impotence and corruption.\(^{116}\)

In Scotland, Hutcheson built on Shaftesbury’s work and promulgated the idea that sociability and morality stemmed from mankind’s natural benevolence, which was instilled by God.\(^{117}\) He was also the first to introduce the term ‘moral sense’, which signified the universal innate faculty that allows humans to have an immediate perception of right and wrong and to judge the morality of actions on that basis.\(^{118}\)

Moral sense was therefore set out as the means by which knowledge of standards and

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\(^{112}\) Hume is perhaps the best known Scottish Enlightenment philosopher to clash with the Kirk, who led a campaign for his censure in 1755-1756 (R B Sher, *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh* (1985) 65-66).

\(^{113}\) J M Reid, *Kirk and Nation* (1960) 111.


rules could be gained, but it was also thought to provide the means by which these rules and standards could be justified. These points were taken up and elaborated upon by both Hume and Smith.119 For Hume, the feelings of approbation or disapprobation that accompany actions were signs by which a genuine moral distinction could be known, and when others shared the same feelings this indicated a general standard by which characters and manners could be approved.120 Indeed, for Hume morally judgmental terms such as ‘vicious’ or ‘depraved’ required the person using these terms to “depart from his private and particular situation” and to “choose a point of view, common to him with others”.121 Similarly, Smith’s now famous theory of intersubjectivity was based on the idea that morality was “from us” rather than being reducible to any set of natural or divine laws, or utilitarian consequentialism.122 Moral norms and the judgments by which persons guide themselves were accordingly derived from the processes by which individuals, as a society, try to achieve mutual sympathy.123

These new philosophical ideas about morality and the nature of mankind, which located the source and means of knowing moral norms in humanity’s inherent dispositions and intersubjective sentiments, contradicted what had been the prevailing Scottish theology. Furthermore, they also had a bearing on the relative importance of a person’s mental state in assessing the nature of his or her conduct. Once it had been suggested that one’s ability to make morally ‘right’ decisions and take morally ‘right’ actions was based upon certain internal inclinations rather than the observance of external rules, it became pertinent to examine each individual’s desires and sentiments in attempting to discern the moral worth of his or her

119 Reid also took up the idea of moral sense and used it to develop a theory of moral judgment, which included an affective element (A Broadie, A History of Scottish Philosophy (2010) 270).
121 D Hume, An Enquiry Concerning the Principles of Morals (1751) 177-178.
122 M Salber Phillips, “Adam Smith, Belletrist” in K Haakonssen (ed), The Cambridge Companion to Adam Smith (2006) 57. Although most commentators agree that Smith’s theory of moral rules does not rely on a theological framework, there are some who disagree and the issue of which interpretation is more plausible is a live one (A Broadie, A History of Scottish Philosophy (2010) 218).
decisions and actions. In Part Three it is argued that this change in thinking about moral judgment can be observed in the criminal law in the increasingly important role of mental state in determining culpability. The increasing importance of mental state is evident in the growth of individuated *mens rea* from throughout the eighteenth century and in the development of exculpatory doctrines based on mental state, such as the insanity defence and the plea of provocation.

### 2.5 Conclusion

This chapter has put forward the argument that a number of important features link Calvinist theology with some of the most notable moral and social theories to emerge from the Scottish Enlightenment. The first of these similarities is fidelity to a collectivist form of society, the underpinnings of which changed from a divine moral order to intersubjective consensus and which is evident within the criminal law in the way that criminal responsibility and criminality are conceived of. This collectivist perspective is linked to corresponding views about the nature of morality which, in both Calvinist Presbyterianism and Common Sense philosophy, suggest that morality is a matter of objective fact and universally comprehensible. These two features are evident in Scots criminal law in the way that criminality is treated as something that is evident at first sight and capable of being determined by any person, regardless of his or her background.

The same features of moral thought appear to have driven the continual references to community standards and mores that are peppered throughout juristic writings, lawyers’ arguments and judicial declarations over the course of the law’s development. To be clear, the argument is not that the same cultural forces inform each instantiation of these appeals to common sense morality or community standards. In the early post-Reformation era the Calvinist ideal, and to some extent reality, of a holy community is the likely source of the law’s assumption that wrongfulness is unequivocal and easily observed. It might be that at this time when

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125 See Chapter Seven.  
126 See Chapter Six.  
127 See Chapters Four and Six for more detail.
there was a robust, albeit imposed, sense of community that commonly-held values could readily be identified and incorporated into the legal system. However, as the influence of hard-line Calvinism declined and as Enlightenment scholars introduced new, though in many ways fundamentally analogous, theories of morality the law’s appeals to community values appear to change. From this time on, these appeals are more clearly associated with Common Sense philosophy and its central teachings. As Scottish society became more mobile and Kirk discipline waned, these persisting appeals to community morality appear more like rhetorical devices, designed to justify the Scottish Common Law tradition – particularly in respect of the declaratory power, whose legitimacy became ever more contested. By asserting a clear link with the Scottish people and their alleged values, the criminal law sought to appear more in tune with community needs and expectations and, as a result, more democratic and principled.

The chief purpose of considering the many allusions to community values and common sense morality that appear within the criminal law is not to enter into a debate about the legitimacy of the Scottish legal tradition. The aim is rather to expose how much the supposed connection between the law and the community, which is one of the distinguishing features of Scots criminal law, is contingent on the influence of Calvinist Presbyterian ideology and the conceptually linked emergence of Scottish Enlightenment moral thought.

128 On this point see L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997).
PART ONE: SCOPE AND PRINCIPLES OF THE LAW

The following two chapters examine the way that the contours of Scots criminal law transformed over time by tracking fluctuations in the range of conduct that was punishable and in the types of argument that were put forward to justify its prohibition. Starting with the sixteenth and seventeenth centuries, Chapter Three shows how during this era the establishment of Calvinism as the national religion of Scotland had a direct effect on the scope of offences that were punishable in the criminal courts and on the rationales that were used to explain why such punishment was necessary and legitimate. As strict Calvinism began to fall from favour in intellectual circles and also within certain factions of the Kirk, some of the more overtly moralistic ‘sin crimes’ which had regularly been the subject of criminal prosecutions began effectively to be decriminalised. A major factor that contributed to this change was the centralisation of Scottish criminal courts, which occurred following Scotland’s union with England in 1707. This institutional re-arrangement saw greater prosecutorial and judicial control being placed in the hands of Edinburgh-based High Court judges, who used the opportunity to translate their enlightened attitudes into practice by pardoning many of the men and women who were brought before them accused of ‘sin crimes’.

In addition to these changes to the ambit of criminal offences, there was a notable shift in the theoretical underpinnings of particular crimes. In defining these offences there was a move away from relying on Mosaic Law for authority and towards depicting them as crimes against natural law or civil society. Though subtle, this change is significant because it mimics changes in the way that morality and society were conceived of within the Scottish moral tradition: from a model where morality was based on divine laws, the observance of which could create a holy community, to a model in which morality was thought to consist of the shared evaluations of members of a society whose very existence depended on those shared views.129

In Chapter Three the primary legal sources used in tracing these changes are Institutional and academic writings, including Balfour’s Practicks, Mackenzie’s

129 See Chapter Two.
Matters Criminal, Forbes’ Institutes, Bayne’s Institutions and Hume’s Commentaries. These volumes allow for analysis up to the end of the eighteenth century, when the first edition of Hume’s Commentaries was published. Chapter Four takes up the same themes as Chapter Three – the changing scope and principles of the criminal law – and examines the law’s development from the end of the eighteenth century through to the twenty-first century. In contrast to Chapter Three, where a comparatively broad array of offences is considered, Chapter Four focuses exclusively on the declaratory power of the High Court of Justiciary. The reason for this emphasis is that the declaratory power, being the mechanism by which conduct was ‘criminalised’ on the basis of its immorality, best embodies the features of the law that are most salient to this thesis, that is, those which bear the demonstrable influence of the Scottish moral tradition.130

Though the declaratory power is described as a means by which conduct was ‘criminalised’, in reality the High Court did not regard its exercise as a form of criminalisation; the declaratory power was quite clearly framed as a power to punish rather than a power to criminalise. This is not surprising, since at the relevant time the received view was that the judiciary and even the legislature were not engaged in creating law, but simply expressing or declaring the law as it was evidenced in the custom of the nation.131 A different view of legitimate ‘law-making’ therefore prevailed, which was not based on the same rule of law concerns that modern scholars and practitioners take for granted. Despite this different notion of legitimacy the declaratory power attracted criticism, even in its embryonic stages, to the effect that it was a usurpation of legislative authority. The way the judiciary sought to legitimise the power’s use is extremely illuminating for it depends on precisely the same concepts and assumptions that underlie Scottish Common Sense philosophy. In particular, great confidence is placed in common sense reasoning and common sense right and wrong. Indeed, these factors are often the sole ground invoked to justify punishment of allegedly criminal activity. Whether in earnest belief or for rhetorical

130 Of course, many changes to the scope of the criminal law occurred during this period outside the operation of the declaratory power, particularly with the rise of regulatory offences. On this, see L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) chapter 3.
purposes, members of the judiciary assumed that conduct fell into objective spheres of right and wrong, which were derived from the community’s sense of morality and which could be perceived by common sense. Recalling the main principles of the Common Sense school of thought set out in Chapter Two, it is clear that the claims made by the judiciary about the nature of morality and the way it could be discerned are rooted in the same set of ideals.

 Remarkably, very similar appeals to a commonly-held and easily-perceived sense of right and wrong appear in declaratory-style cases right through to the twenty-first century. Although changing standards of legitimacy mean that more recent cases do not refer to the declaratory power explicitly, often denying its use or claiming that a more restrained version of the power is at work, the endurance of judicial appeals to the community and its mores points to the ongoing influence of the Scottish moral tradition. It is not claimed that the judiciary’s references to community values and common sense are conscious references to either the Presbyterian ethic of collectivist morality or the Common Sense notion that morality is created by the community. The claim is rather that the asserted legitimacy of the range of criminal offences in Scots law appears to be rooted in a particular cultural outlook, which is embedded within the Scottish moral tradition.
Chapter Three: From Balfour to Hume

3.1 Introduction

This chapter charts the rise and fall of hard-line Calvinism and argues that it led to changes in the scope of criminal offences and in the reasons that were offered to justify proscribing these offences. In the years following the Reformation, the Calvinist aspirations of creating a holy community and administering effective moral discipline made a two-fold impression on the criminal law. First, steps were taken by the legislature to align the sphere of criminal wrongs with the sphere of immoral acts constituting sins, which reflected the Kirk’s aim of improving public morals and its belief that the positive law should accord with the law of God. Second, the Calvinistic idea that the positive law should be inspired by God’s law was borne out in the ideological bases for the criminal law as a whole as well as for individual crimes. As hard-line Calvinism began to lose its appeal and new ideologies came to the fore in Scottish society, the range of offences that attracted secular punishment became varied, as did the rationales offered in support of their punishment. Starting with Balfour’s *Practicks*, published in the latter portion of the sixteenth century, and ending with Hume’s *Commentaries*, which first appeared at the end of the eighteenth century, this chapter maps out the main points of transformation in the scope of the criminal law and offers explanations for the changes that are informed by the shifting moral climate.

3.2 The post-Reformation era

Balfour’s *Practicks* was the leading criminal text on Scots law in the years immediately following the Reformation. For the most part the *Practicks* are simply a description of the customary law of Scotland and, where applicable, its statutory enactment. Notwithstanding this, the introduction to the *Practicks* contains some analytical discussion of the nature of law, which harbours a resemblance to post-
Reformation natural law theory, which had its roots in Scholasticism. In the opening of his treatise Balfour writes:

The law is devydit in thré parties; in the law of nature, the law of God, and in the positive law. The natural law is that quhilh is written be the finger of God, or of nature, in the heart of man, and quhilh nature hes gevin and ingenerate in all leiving creatures : the law of God is that quhilh is reveillit, and declarit in his maist halie will.

This statement accords with the Scholastic philosopher Aquinas’ division of law into the law of nature, the eternal law (the law of God) and human or civil law (positive law). Since Scholasticism experienced a revival within Protestant natural law theory in the sixteenth and seventeenth centuries, Balfour’s adoption of this formulation shows that his general theory of law was in keeping with the theological philosophy of the age. Moreover, his taxonomy of law also resembles Calvin’s own writings on the matter. In his Institutes of the Christian Religion Calvin states that man has knowledge of the natural law (which he believed to be the basis of God’s moral law) because it has been written on his heart. Likewise he writes that the law of God is revealed in his word, specifically in the Decalogue, and acknowledges and approves of man’s temporal laws, so long as they complement God’s law and ecclesiastical discipline.

Although Balfour’s introduction displays a degree of conceptual affinity with Calvin’s writings and Protestant theology, the rest of the Practicks is largely devoid of philosophical exposition. This is in direct contrast to the next major work written on Scots criminal law, Sir George Mackenzie’s Matters Criminal. This work was published in 1678 and came to be regarded as an institutional writing and it

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136 Ibid, Chapter 8.1.
137 Ibid, Chapter 8.1.
139 Institutional writings are considered formal sources of Scots law and Mackenzie’s Matters Criminal is usually considered to be an institutional writing (The Laws of Scotland: Stair Memorial Encyclopaedia, vol 22, paras 534, 537). In fact, it has been described as being included in “all lists” of authoritative writings (R White et al, The Scottish Legal System (5th ed) (2013) 156).
contains many examples of Calvinist influence. Of course, this naturally raises the question of what explanation might be offered for the discrepancy.

Robinson has examined Mackenzie’s works and their strong sense of morality and writes that “[f]or a natural lawyer under the influence of Calvinism the importance of established religion was fundamental”.\(^\text{140}\) For Robinson then, the dominance of Calvinist culture in Scotland is one of the reasons for Mackenzie’s moralistic stance and for the fact that he lists crimes against God and the Church first in his treatise. Of course, Balfour’s Practicks were also written several years after the Reformation, but the influence of Calvinism is not so obvious within his work. A possible explanation for the ideological sparsity of the Practicks is Balfour’s apparently unsettled religious and political affiliations. Knox, who was a fellow galley slave of Balfour following their capture at the siege of St. Andrew’s castle, described him as “Blasphemous Balfour” and “a man without God”.\(^\text{141}\) It is possible that this trait, coupled to his wavering political allegiance,\(^\text{142}\) meant that Balfour was unwilling to reveal any particular philosophical standpoint in his work.

This suggested explanation highlights the importance of recognising latent biases within an author’s work and the implications this holds for the strength of claims that are made on the basis of a single text. That Robinson attributes some of Mackenzie’s moralistic tendencies to the dominance of Calvinism obviously strengthens the argument that Mackenzie’s account of the criminal law was responsive to the prevailing religious climate. However, it does not necessarily imply that this claim can be extended to the criminal law as a whole.

Undoubtedly, Matters Criminal is in part merely a reflection of Mackenzie’s personal beliefs about the law. He gives his opinions on several areas of the law, most notably in relation to the criminalisation of sins, and he invariably relies on theological authority when discussing their criminality. For example, he opines freely on the criminalisation of witchcraft, a phenomenon that he supported despite


\(^{141}\) Balfour, Practicks xi.

\(^{142}\) Ibid xxxi.
being a well-known defender of witches.\textsuperscript{143} His endorsement of the law against witches is partly founded on the Bible; quoting excerpts from Exodus and Leviticus he concludes:

But since it is expressly condemned in Scripture, and by many general Councils, such as Aurelian, Toletan, and Anacritan, it should not be lawful for us to debate what the Law hath expressly condemn'd, by the same reason, that we should deny Witches…\textsuperscript{144}

In addition to this, Mackenzie offers his view on the punishment of adultery. Again, his opinions are very plainly based on the idea that the law of God is a proper foundation for the secular law. Indeed, he writes that the statute defining the circumstances in which adulterers were to be condemned to death is “only a Brocard…but should not be extended in prejudice of the Law of God, which expressly [sic] ordains Adulterers to die”.\textsuperscript{145} He makes a similar argument against capital punishment for minor thefts, writing that according to God’s moral law a single theft is not punishable by death.\textsuperscript{146} These examples show that Mackenzie regarded the Bible as a laudable basis for the secular criminal law, an idea that was particularly Calvinistic. Unlike some of the earlier European Reformers, Calvin accepted that the moral principles of Mosaic Law were part of the natural law and should be binding.\textsuperscript{147} Indeed, like Mackenzie, Calvin advocated the death penalty for adultery on that basis.\textsuperscript{148}

Even though these examples of theologically-based moralism in \textit{Matters Criminal} are subjective judgments proffered by Mackenzie, there are nevertheless several factors which support the bolder claim that \textit{Matters Criminal} can be taken as representative of the criminal law of his time. First, Mackenzie’s reliance on God’s law as a source of law was followed in Scottish legislation and criminal practice. In the aftermath of the Reformation there was a wave of criminalisation that outlawed Roman Catholic practices and declared various sins which offended against Church

\textsuperscript{143} See A Lang, \textit{Sir George Mackenzie, King’s Advocate, of Rosehaugh: his Life and Times, 1636(?)-1691} (1909) chapter 5.
\textsuperscript{144} Mackenzie, \textit{Matters Criminal} 83.
\textsuperscript{145} \textit{Ibid} 173.
\textsuperscript{146} \textit{Ibid} 195-197.
\textsuperscript{147} J Calvin, \textit{Institutes of the Christian Religion} (Book 2) (1599), Chapters 7, 8.1.
morality to be secular crimes. Acts of Parliament were passed against blasphemy, witchcraft, incest, adultery and fornication. These Acts, and also those criminalising violation of the Sabbath, were passed at the behest of the General Assembly, the highest court of the Church of Scotland, which in 1562 made a supplication to the Queen for punishment of all vices commanded by the law of God to be punished and not yet punished by the law of the realm. Clearly, the fact that the General Assembly could exercise such persuasive influence over the legislature indicates the secular authority’s commitment to the Kirk’s aim of creating a Godly state in which moral discipline was enforceable and sin and crime were concomitant.

Indeed, the judiciary as well as the legislature upheld the idea that Biblical law was a valid source of Scots law. Although there was no legislation criminalising sodomy or bestiality, libels which were held to be relevant were drawn up to include the phrase that: “albeit by the Law of the Omnipotent God, as it is declared in the 20. c. of Leviticus. As well the man who lieth with mankind, as the man who lieth with a beast, be punishable by death”. Therefore, unlike witchcraft, incest, adultery, fornication and blasphemy – sins that were criminal by virtue of specific acts of the Scottish Parliaments – sodomy and bestiality were criminal simply because they were Biblical sins as dictated by the Bible.

Moreover, Mackenzie very obviously intended to produce a text that was both authoritative and which would be used by those in practice, claiming that it contained nothing that “is not warranted by Law, or Decisions, or in which, when I doubted, I did not confer seriously with the learned'st Lawyers of this Age”.

149 1581 A.P.S., III, 212 c.5, though there was an earlier statute criminalising blasphemy (1551 A.P.S., II, 485 c.7).
150 1563 A.P.S., II, 539 c.9.
151 1567 A.P.S., III, 26 c.15.
152 1563 A.P.S., II, 539 c.10. There was also a pre-Reformation act against incest (1551 A.P.S, II, 486 c.12).
154 1579 A.P.S., III, 138 c.70.
155 A Peterkin (ed), The Booke of the Universall Kirk of Scotland (1839) 1:21.
156 Mackenzie, Matters Criminal 162.
157 Mackenzie, Matters Criminal chapter entitled ‘The Design’.
seems that Mackenzie succeeded on both counts, since *Matters Criminal* is dubbed one of the institutional writings of Scots law.  

Arguably, the fact that *Matters Criminal* contains Mackenzie’s personal views on the law shows that it provides valuable insight into his own apparently Calvinist sentiments. This is significant because as one of the country’s most prominent jurists, prolific writers, and formidable Lord Advocates his influence on the way the law was used and perceived was bound to have been considerable. On top of this, the authoritative status of *Matters Criminal* means that the presence of Calvinist undertones throughout holds novel and important implications for the criminal law as a whole.

Having better established the significance of *Matters Criminal* in the context of the present argument, it is important to consider in more detail the various illustrations of Calvinist influence within the treatise. It is apparent that Mackenzie was a lawyer under the influence of Calvinism from Title I, which opens:

> God Almighty having created this Lower World to be equally an instance of his power, and of his goodness, did furnish it with great variety of excellent, and wonderful productions: but lest these should be defaced at pleasure by man, who having ruined himself, doth little value, and is much inclined to ruine every thing besides; therefore God did not only imprint upon his soul some common principles whereby he is led to love order, but did likewise sense the æconomy and government he had placed in the world with rewards and punishments, And it was just, that as these who did virtuously, were to be rewarded, so these who were vitious should be punisht, which punishments are the subject-matter of the Criminal Law, and of this Treatise.

Mackenzie’s reference to man “who having ruined himself, doth little value, and is much inclined to ruine every thing besides” tallies well with the Calvinist doctrine of total depravity which states that man’s fall from grace not only deprived him of his ability to do good, but made him a source of continual sinning. This doctrine finds expression in the Westminster Confession of Faith, the document

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158 See above at n139.
159 As well as authoring *Matters Criminal*, Mackenzie wrote *The Institutions of the Law of Scotland* (1699), which is possibly his most famous legal publication. In addition to these works, Mackenzie wrote widely on political, religious and moral matters as well as dabbling in literary fiction. See biographical introduction to *Matters Criminal* iii-vii.
adopted by the Church of Scotland which sets out the orthodox Calvinist doctrine.\textsuperscript{162} In Chapter VI it is written that as a result of original sin “we are all utterly indisposed, disabled, and made opposite to all good, and wholly inclined to all evil”.\textsuperscript{163} As would be expected, this follows Calvin’s assertion that from original sin man has inherited a “corruption and depravity of nature, extending to all parts of the soul” which mean that his nature “is not only utterly devoid of goodness, but so prolific in all kinds of evil, that it can never be idle”.\textsuperscript{164}

Though this depravity was thought to extend to all aspects of the soul, Calvin taught that man bears an inherent impression of civil society and an inherent understanding of man-made laws, which mean he is naturally inclined to maintain public order.\textsuperscript{165} This description is virtually identical to Mackenzie’s account of the ‘common principles’ imprinted on man’s soul whereby he is led to love order. Mackenzie’s conception of man’s nature and his role in maintaining the civil order therefore appears to have been formed under the influence of the accepted doctrine of the national Kirk.

Taken in isolation, this natural inclination towards ‘civil society’ that Calvinism attributes to mankind might seem to undermine the need for tribunals and punishments; if man is naturally inclined to maintain the social order there is surely less need for laws to restrain his behaviour and for tribunals to enforce his compliance with these laws. In fact, the opposite is true. Calvinist reformers assigned great importance to the law, ascribing to it three primary functions: the civic or political use, which is to restrain people from sinful conduct in order to maintain community harmony; the theological use, which is to reveal to each man his inherent sinfulness so that he might seek God’s grace; and the didactic use, which is to inform man how he might please God through his conduct.\textsuperscript{166} The first use is most significant for present purposes for, despite the belief that man has God’s law written on his heart and a natural propensity to maintain civic order, Calvinism nevertheless

\textsuperscript{162} It was ratified by the Scottish Parliaments in 1690 (A.P.S., IX, 133 c.7).
\textsuperscript{163} Westminster Confession of Faith Chapter VI: IV.
\textsuperscript{164} J Calvin, Institutes of the Christian Religion (Book 2) (1599), Chapter 1.8-1.10.
\textsuperscript{165} Ibid Chapter 2.13.
teaches that man is irresistibly inclined towards vicious actions and decisions. According to Calvinist doctrine, man’s postlapsarian, corrupted will prevents him from following the dictates of natural reason, so written and promulgated laws are necessary to compel him to do so.  

Written laws based on the law of God were therefore considered a kind of restraint over man’s behaviour which, though doing nothing to redeem the internal impurity of man, provided the means for a “forced and extorted righteousness [that] is necessary for the good of society”. The existence and means of enforcing these laws were taken as evidence of God’s providence. According to Calvinism, God is the ultimate sovereign and author of the natural law and he is also the provider of civil magistrates charged with the task of upholding these laws on earth. As the Westminster Confession of Faith states:

\[\text{God, the supreme Lord and King of all the world, has ordained civil magistrates, to be, under Him, over the people, for His own glory, and the public good: and, to this end, has armed them with the power of the sword, for the defence and encouragement of them that are good, and for the punishment of evil doers.}\]

Returning to Mackenzie’s introduction, it is clear that his views on the role of the law and the provenance of the civil magistrate seem to be heavily inspired by Calvinist doctrine. It is by God’s bestowal of an “æconomy and government”, sensed with the ability to distinguish the vicious from the virtuous and to punish accordingly, that peaceable harmony is maintained.

In terms of the scope of the law, the enmeshing of the secular and sacred in *Matters Criminal* goes beyond the clear-cut criminalisation of sin represented by those Acts of Parliament described above. Even crimes which were not specifically crimes against religion or sins according to the Bible are defined in a way that weaves in religious ideas and terminology. In his introduction to treason Mackenzie begins:

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170 Westminster Confession of Faith Chapter XXIII: I.
Unhappy man retains in nothing in so much a desire to be like his Maker, as in that he would be Supreme: and no wonder that this Crime should be incident to him in this laps’d condition, when his will is crooked, and his judgement blind; since the very Angels in their purity, and Man in his innocence, were tempted by it…Treason is a kind of Sacriledge…

The familiar references to man’s “laps’d condition”, his “crooked will” and blindness of judgment allude once again to Mackenzie’s Calvinist influences. Similarly, the ‘core’ crimes of murder and theft which, though sins, had a long history of being criminal under the secular law were depicted by Mackenzie in pointedly Calvinistic terms. He describes theft as contrary to God’s moral law “being insert amongst the commands…like Murder, Incest, and these other crimes” and he explains the prohibition of murder, another transgression of God’s laws, thus:

God Almighty did to the honour of impressing man with his own image, add as a second obligation, a natural horror in every man to be in any accession to the defacing [sic] it; so that he has consulted his own glory, and our security, jointly in these severe laws which he has made against Murder.

Man’s “natural horror” at defacing God’s image by killing his fellow man re-affirms the idea that his heart was inscribed with God’s law, which of course includes an edict against killing. A similarly theistic rationale underpins the prohibition of suicide, which was punished “because God hath forbid man to kill, without making a distinction of killing ourselves or others” and because “he who kills himself, kills Gods Subject”. By extending the horror of damaging mans’ flesh from damaging others to our selves, Mackenzie mirrors Calvin’s elaboration of the

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171 Mackenzie, Matters Criminal 38. Mackenzie’s description of treason as sacrilegious also accords with his strong belief in the divine rights of kings. In Jus Regium (1684) Mackenzie uses the story of the fall of Lucifer (which is alluded to in the quotation pertaining to treason) to warn against anti-royalist rebellion, writing that: “Lucifer might in Reason have contented himself with that share of Knowledge, Glory and Power, which was bestowed upon him, his Almighty, and Bountiful Soveraign [sic]. And Adam should have rested satisfied, with the Glory of having been made after the Image of God, and with being his Lieutenant in this Lower world. But there are such strong charms in Ambition, and Vanity, that the one resolved to hazard all that he possessed, as being second, rather than not try to see if he could be the first, and the other, desiring to improve his present share, forfeited those excellencies which he enjoyed. How jealous then should frail and fallen man be, in debates with those, whom the Almighty has appointed to be his Viceregents amongst them, and to whom he has said, Ye are Gods” (G Mackenzie, Jus Regium (1684) 1-2).

172 Mackenzie, Matters Criminal 196.

173 Ibid 110.

174 By escheat of property or, ironically, by death in cases of attempted self-murder (Mackenzie, Matters Criminal 150-151).

175 Mackenzie, Matters Criminal 146.
sixth commandment (thou shalt not kill). “[W]e must hold the person of man sacred”, he writes, “if we would not divest ourselves of humanity we must cherish our own flesh”.  

3.3 The eighteenth century

The preceding section and its consideration of Balfour’s *Practicks* and Mackenzie’s *Matters Criminal* illustrated the extent to which Calvinist beliefs permeated the criminal law in the post-Reformation era, i.e. the late sixteenth and seventeenth centuries. This section shows how changes during the eighteenth century which resulted in reduced support for hard-line Calvinism led, via a more centralised criminal court structure, to the decriminalisation of various ‘sin crimes’ that had been routinely prosecuted in the previous century. The theoretical underpinnings of individual crimes also underwent a marked transformation. Instead of being based on Mosaic Law, many crimes were instead characterised by their detrimental effect on society or by their conflict with the dictates of natural law. The most significant text of the eighteenth century is undoubtedly Hume’s *Commentaries*, which continues to enjoy authoritative status to this day. In addition to the *Commentaries*, two other volumes that were written nearer the start of the century – Forbes’ *Institutes* and Bayne’s *Institutions* – have also been evaluated in order to provide a more comprehensive account of the alterations in the scope and principles of the law that occurred.

3.4 Centralisation of the criminal courts

The first eighteenth century texts to be written on Scots criminal law were Forbes’ *Institutes* and Bayne’s *Institutions*. Both were published in 1730 and though

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177 Mosaic Law is the Law of Moses.
178 Hume can also be regarded as a nineteenth century writer since his *Commentaries* were published so close to the turn of the century and came to prominence in the nineteenth century. The *Commentaries* are listed in this section simply because they were published during the eighteenth century.
179 Forbes was Professor of Law at the University of Glasgow.
both were fairly well received, neither overshadowed Mackenzie’s work. One reason for this is that Forbes’ *Institutes* and Bayne’s *Institutions* were both slim volumes that added very little to *Matters Criminal*. The similarity of content with *Matters Criminal* is unsurprising because, with the exception of changes to treason laws and repeal of the Witchcraft Acts, the scope of the criminal law remained largely unchanged in the eighteenth century and most of the ‘sin crimes’ that had been enacted and re-enacted following the Reformation remained in force. However, though the legislative scope of the criminal law remained reasonably consistent with the previous century, important changes occurred in the structure of the criminal justice system after the Union with England in 1707, which ultimately had a substantial effect on the range of offences that were prosecuted. The courts were restructured to greater centralise judicial powers and local officials were no longer granted commissions of justiciary to try cases. The now-regular circuit courts therefore became the main site for criminal prosecutions outside the High Court of Justiciary and this in turn gave judges of the High Court the power to restrain local, religious zealots who wished to continue prosecuting moral offences on the basis of biblical law.

Levack uses an example of a 1709 circuit court session to show how, by pardoning several hundred people who had been charged with fornication and adultery, the judges effectively decriminalised those acts. Furthermore, by holding various scriptural injunctions to be irrelevant they took a large step towards secularising Scots criminal law. From that point onwards, sexual crimes would be prosecuted solely on the ground that they violated natural law and Scots law rather than biblical law.

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180 Bayne was Professor of Scots Law at the University of Edinburgh.
182 The Witchcraft Act of 1735 (9 Geo. 2 c.5) repealed all previous statutes against witchcraft and instead penalised the pretence of witchcraft.
185 Ibid at 173. Levack states that after the Perth circuit court session, fornication and adultery were *de facto* decriminalised and were dealt with almost exclusively by the ecclesiastical courts.
than on the basis that they contravened Biblical law, as had been the practice since the Reformation.\textsuperscript{186}

Though adultery and fornication would still be prosecuted within the Church courts, the few offenders who came before the circuit courts charged with these crimes after 1709 were either released or lightly sentenced.\textsuperscript{187} Likewise, the parties who were pardoned of witchcraft at the 1709 session were the last to appear before the justiciary or circuit courts charged with that offence, a full 27 years before witchcraft was officially decriminalised by statute.\textsuperscript{188} Furthermore, Levack suggests that the acquittal of one of the accused charged with incest marks the secular courts’ increased leniency towards this crime too. The fact that after 1709 criminal prosecutions for incest rarely occurred, being dealt with in Kirk sessions instead, supports this view.\textsuperscript{189} The number of minor moralistic offences that reached the justiciary and session courts was also considerably reduced following the court restructuring because, after 1709, the system of dittays whereby ministers and elders could include moral transgressions on the courts’ rolls was abandoned.\textsuperscript{190}

By viewing the criminal law in action as well as its enactment in legislation, it becomes clear that the scope of conduct which was criminal in Scotland in the eighteenth century was actually very responsive to fluctuations in attitude towards religion and morality. Close examination of Forbes’ \textit{Institutes} and Bayne’s \textit{Institutions} demonstrates that a similar effect can be seen in the acknowledged objectives of the criminal law and in the way that crimes were conceptualised and expressed.

\textsuperscript{186} \textit{Ibid}. Nevertheless, libels and criminal letters continued to be drawn up to begin: “by the Law(s) of God, and of this and all other well-governed nations” (J Louthian, \textit{The form of process, before the Court of Justiciary in Scotland} (2\textsuperscript{nd} ed) 79 and the eighteenth century Books of Adjournal). The practice of referring to the law of God petered out towards the end of the century, though it was still occasionally observed. The Divine law also continued to be cited by lawyers in debates on the relevancy of murder charges. See for example \textit{Carlops & Loudon} 10 January 1711 (JC3/3), in which the books of Exodus, Deuteronomy and Numbers were relied upon; \textit{Hugh Sanilands} 28 March 1721 (JC3/10) in which the “ancient precept of Noah” in Genesis was argued in support of punishment of murder with death; \textit{James Carnegie} 15 July 1728 (JC3/15) in which the law of Moses and the books of Exodus and Chapter were cited.


\textsuperscript{188} \textit{Ibid} at 185-186.

\textsuperscript{189} \textit{Ibid} at 189-190.

3.5 Forbes’ Institutes and Bayne’s Institutions

3.5.1 Principles of the criminal Law

For Mackenzie, the purpose of the criminal law had been to justly reward the virtuous and punish the vicious, a notably retributivist aim which reflects the moralism in his writing. When Bayne came to write his *Institutions* he considered the law’s objective to be “Peace and Order of the Community”, whereas Forbes described it as: “to prevent and put a Stop to these Evils, by curbing Vice, and frightening [sic] unruly People into their Duty”, which was necessary because “it is the condition of human Nature, that Men are neither always capable of finding out right, nor sufficiently disposed to follow it when found”.

Both Forbes’ and Bayne’s descriptions of the law’s objectives seem to reflect the Scottish Enlightenment values of observing one’s duties and promoting happiness and prosperity in society. Of course, as would be expected given the continuing dominance of Calvinist doctrine, Forbes makes reference to the familiar themes of repression of vice and mankind’s inability to discern or follow what is right. Interestingly, Forbes’ prior work shows that he had considerable ecclesiastical knowledge while Bayne, on the other hand, spent a large portion of his time away from the Scottish Calvinist influence, pursuing (and ultimately failing in) a career at the English Bar. Whether these differences have any bearing on the distinctions between their ideas about the purpose of the criminal law is impossible to tell, but they are nevertheless noteworthy.

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3.5.2 Particular crimes

A further difference between *Matters Criminal* and the *Institutes* and *Institutions* can be observed in the way that individual crimes are explicated. It is clear that Mackenzie considered the divine law to be a sound basis for the criminal law and that his introductions to various offences contained several similarities to Calvinist beliefs. In contrast, neither Forbes nor Bayne give as full an explanation of the nature of each offence as does Mackenzie. This might partly be due to the brevity of Forbes’ and Bayne’s texts, but it can equally be interpreted as a manifestation of the attitudinal shifts towards religion that were occurring. Bayne’s and Forbes’ shorter introductions to each crime contain some references to God’s law but they are less frequent than in *Matters Criminal*, a fact which perhaps reflects the waning popularity of Calvinism. However, the retention of some references to God’s law is unsurprising given the fact that Scotland was still a Calvinist country. Forbes, for example, associates ordinary adultery, sodomy, cursing and beating one’s parents and the inability to consent to murder with God’s law. Similarly, Bayne refers to the divine law against sodomy, bestiality and parricide. Like Mackenzie, both Bayne and Forbes list offences against God first, before considering offences against the State, the person or property offences. In addition to there being fewer theological references in *Institutes* and *Institutions*, there is also evidence of the reception of a number of Scottish Enlightenment ideals within the two treatises.

In Enlightenment Scotland there was an increasing prevalence of natural law within lawyers’ thinking, which is perceptible throughout Bayne’s *Institutions*, along with the idea that laws primarily exist to benefit society. According to Bayne, bigamy was offensive because it is “repugnant to the Law of Nature” and “destructive of the Ties of Birth which are among the chief Bonds of Society”. Likewise, adultery was forbidden because “[a]s the Ties arising from Marriage are

196 Forbes, *Institutes* 123.
197 Ibid 116.
198 Ibid 143.
200 Bayne, *Institutions* 69, 96.
203 Bayne, *Institutions* 44.
among the chief Bonds of Society, so the matrimonial Contract is an Institution of the greatest Use, and the most subservient to the Interests of Mankind”. Murder, too, was classed as amongst the “the absolute Duties which oblige all Men antecedently to all humane Institution”. Self-murder, which Mackenzie deplored for its breach of Mosaic law and its destruction of one of God’s subjects was, by the eighteenth century, described as “undoubtedly a high Offence against the Law of Nature” “depriving his Majesty of the Benefit of a Subject”. Theft was also described as an offence against the natural law in violation of the “Order of Society”, rather than as a breach of the Decalogue as it had been described in *Matters Criminal*.

This change to the perceived foundations of the law, from being founded in religion to being based on Enlightenment notions such as civic society and natural law, is not only confined to legal writings of the time; it can also be observed in the records of trials detailed in the Books of Adjournal, which give an indication of the way the law was applied in practice and the kinds of argument that were put forward by advocates during debates in court. In one case from 1786 the prosecution put forward a taxonomy of the various classes of crimes and the authority on which they were based, which is very revealing.

The first of the four classes of crime was said by the prosecuting advocate to be crimes against the State or the life, limb, or property of one’s neighbours. He described these offences thus: “Besides their own immorality [they] strike so strongly at the very existence of Society that they are necessarily punished…even before the idea of any written law imposed by the Community to regulate the conduct of individuals has been recognised”. Such crimes, the advocate argued, included murder, robbery and rape and over time had come to include forgery, theft or rapine. These latter crimes, though “full of turpitude” did not in earlier times

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204 *Ibid* 49.
205 *Ibid* 77-78.
206 *Ibid* 80-81.
207 Forbes, *Institutes* 98.
209 Natural law is of course not an Enlightenment notion, but a resurgence in natural law thinking arose in legal spheres during the Scottish Enlightenment.
210 *James Stein* 2 October 1786 (JC3/44).
excite enough resentment or sufficient danger and were not sufficiently inconsistent with the existence of society, the maintenance of which was an acknowledged aim of the Scottish Enlightenment,\textsuperscript{211} to merit punishment.

The second class of crimes set out were those which were not truthfully \textit{mala in se} but were criminalised by legislation because of the damaging consequences they were thought to hold for society at any given time. Interestingly, this class of crime was said to include fornication, profane cursing, Sabbath breaking, drunkenness and perhaps even adultery. These crimes were described thus:

though \textit{mala in se}, as contrary to the Precepts of our holy Religion, have never had any common law punishment of a Criminal nature affixed to them, though they have been the object of different penal Statutes, many of which have gone into disuse, as the manners of Society have altered.

The third class demarcates crimes of conscience as outside the realm of the criminal law, but liable to punishment on the “day of retribution”, and the fourth class includes \textit{mala prohibita} crimes, or “artificial crimes”,\textsuperscript{212} which were created by statute to attain or enforce some aim of Government.

The apportionment of crimes into the first and second categories is most illustrative of the changes in tone evident between Mackenzie’s and Bayne and Forbes’ texts. The crimes that were considered most serious and worthy of punishment, even without Parliamentary enactment, were primarily classed as such by the prosecuting advocate because they were destructive of society. Notably, these crimes were thought to be independent of any written law, a claim which resonates with the idea explored in Chapter Two that the Scottish moral tradition holds wrongfulness to be self-evident and recognisable by anyone. Crimes which offended against religion, on the other hand, were classed as subordinate to crimes against society and their punishment was held to be dependent on the whims of the age. Furthermore, even though these crimes against religion clearly had religion as their basis the reason put forward for their having been criminalised was the fact that they cause damage to society and not the fact that they contravene God’s laws. This

\textsuperscript{211}See Chapter Two.
\textsuperscript{212}James Stein 2 October 1786 (JC3/44).
rejection of the previous century’s rationales for criminalisation and punishment, and the adoption of a new set of rationales, tallies with the changes outlined above within academic and Institutional writings. In turn, this conjoined shift in values corresponds to the shift that occurred in Scottish religious thought from the seventeenth century, when Calvinism unquestionably prevailed, to the eighteenth century when natural law, utilitarianism and deontological ethics challenged these accepted beliefs.

In addition to the apparent reception of natural law and utilitarian theories, there are traces of moral sense theory within Bayne’s Institutions which, as was discussed in Chapter Two, was one of the main theses of Scottish Enlightenment philosophy. He writes that blasphemy:

213 A Broadie (ed), The Cambridge Companion to the Scottish Enlightenment (2003); Chapter Two.
214 Bayne, Institutions 15-16 (emphasis in original).
216 See Chapter Two.
duties were towards God, oneself and others, and it seems that Bayne believed adoration of God was a duty for man to fulfil.

The examples where Forbes’ *Institutes* and Bayne’s *Institutions* replicate Enlightenment attitudes and philosophies at the expense of Calvinist ones suggest that they were influenced by burgeoning changes to Scottish religious culture that were occurring at the time they were published. These burgeoning changes find further expression in Hume’s *Commentaries*.

### 3.6 Hume’s Commentaries

Within Hume’s *Commentaries*, which were published some seventy years after Forbes’ *Institutes* and Bayne’s *Institutions* and which remain an authoritative source of Scots law today, there is a continued juxtaposition of waning theological references and implicit allusion to Scottish Enlightenment moral philosophy. There are still references to Mosaic and divine law and religion is still highly significant, with its contraventions being described as the “highest order of crimes, – those which…tend to loosen the foundations of morality, and undermine the fabric of the national strength and prosperity”. However, amongst these signs of continuity the influence of various strands of Enlightenment philosophy on the principles and scope of the law is also clear.

This contention might initially seem untenable given that Hume explicitly states in the introduction to the *Commentaries* that it is not a philosophical treatise and, furthermore, that the domains of philosophers and lawyers should be kept apart. According to Cairns, this amounts to a rejection of the teachings of John Millar, the Professor of Civil Law at the University of Glasgow under whom Hume studied. Unlike his student, Millar engaged with questions about the purpose of punishment and he clearly adopted a theory of natural justice derived from Adam

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218 Certain aspects of the Scots law approach to homicide, including killing of a housebreaker, killing of *fur diurnus* and the prohibition of wilful murder, were described as in conformance with the Divine law (Hume, *Commentaries* I, 220, 221, 254).
However, the main reason given by Hume for not writing a philosophical treatise of criminal jurisprudence was that he felt his task was to investigate one particular legal system, i.e. Scotland, rather than to ascertain general principles governing the nature of offences and the application and proportion of punishments. This viewpoint, though obviously affirming that Hume did not consider himself a philosopher, does not preclude the possibility that his analysis might disclose a philosophical perspective. Indeed, Hume’s reluctance to seek out general principles of law itself reveals that he held a specific philosophical standpoint. His opinion that law (at least Scots law) could not be chained down to simple and constant rules and therefore did not possess the beauty and harmony of a philosophical system is a dismissal of rationalist accounts of law. In fact, on this point Hume’s opinions bear a remarkable resemblance to those of the philosopher Hume, who rejected the idea that morality or justice could be deduced by reason, instead regarding them as contingent upon social convention.

The likelihood of Hume the philosopher having had an impact on Hume the jurist is fairly high, given that the former was the latter’s uncle. Not only did the two share an affectionate familial bond, Hume also oversaw his nephew’s education. Despite this, Walker has written that there is no evidence of Hume the philosopher’s works having had a direct influence on either lawyers or law, though he concedes that the majority of lawyers must have been aware of his writings given their wide discussion within scholarly society.

Notwithstanding this claim, there is more evidence of Hume’s philosophy influencing the Commentaries in addition to its rejection of a rationalist account of

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222 Hume, Commentaries I, 14.
224 J W Cairns, “Legal Theory” in A Broadie (ed), The Cambridge Companion to the Scottish Enlightenment (2003) 222 at 231. Hume the philosopher’s rejection of the idea that metaphysics and law were complementary is well recorded in a letter he wrote to Adam Smith in which he stated: “A man might as well think of making a fine sauce by a mixture of wormwood and aloes, as an agreeable composition by joining metaphysics and Scottish law” (quoted in A MacIntrye, Whose Justice? Which Rationality? (1988) 283).
law. Hume the philosopher conceived of law as the product of the spirit of each age and, as such, thought that its content varied accordingly.\textsuperscript{227} Similarly, in the introduction to the \textit{Commentaries} Hume states that the “general spirit of that law will always, in some measure, be bent and accommodated to the temper and exigencies of the times; directing its severity against those crimes which the manners of the age breed a direct abhorrence of, or which the present condition of the people renders particularly hurtful, in their consequences to private or to public peace”.\textsuperscript{228} In keeping with the idea that severity of crime is determined by damage to the private or public peace Hume begins his discussion of particular crimes with theft, which he claims is committed more frequently than any other offence.\textsuperscript{229}

Similarly, despite explicitly eschewing all questions of the nature of offences or application of punishment, Hume writes that in regard to theft “the law chiefly considers...not so much the damage to the individual, as the violation of the order of civil society, by dishonesty prevailing over right, and the danger to others of the bad example”.\textsuperscript{230} This statement shows a clear utilitarian persuasion, which Hume compounds through his discussion of capital punishment for a single act of theft. He favours this penalty because in his opinion, following Hale, it was crucial that offences which were particularly prevalent or particularly pernicious to society should be punished severely, even beyond the demerit of a single offence.\textsuperscript{231} Hume therefore placed the peace, good order and prosperity of society above moralistic, retributive concerns such as punishing in accordance with depravity or vice, which was an opinion that would have been completely alien in the earlier post-Reformation, pre-Enlightenment era.

Hume’s description of murder would have been just as incongruous before the growth of Enlightenment humanism. Like Forbes and Bayne, Hume’s perception of the wrong of murder is vastly different from Mackenzie’s. “[T]he crime of homicide”, Hume writes, is that “by which life is taken away, and the person of a

\textsuperscript{227} H A Rommen, \textit{The Natural Law} (1998) 98.
\textsuperscript{228} Hume, \textit{Commentaries} I, 2. See P Stein, “Legal Thought in Eighteenth-Century Scotland” 1957 \textit{Juridical Review} 1 at 19 for more on Hume’s historical view of the law and its connection with the circumstances of society.
\textsuperscript{229} Hume, \textit{Commentaries} I, 57.
\textsuperscript{230} \textit{Ibid} I, 79.
\textsuperscript{231} \textit{Ibid} I, 86.
human creature is destroyed”. The object of homicide laws had thus shifted from Mackenzie’s destruction of God’s image, through Bayne’s offence against the law of nature to Hume’s overtly secular “destruction of a human creature”. Similarly, acts which Mackenzie had abhorred as violations of God’s law were characterised by Hume as unnatural rather than immoral. Most remarkably, Hume (following Blackstone) lists incest, adultery and bigamy as rules of propriety, good neighbourhood and manners rather than as breaches of God’s divine laws. He writes that proper regulation of intercourse between the sexes is essential to the happiness of the individual and to the health and propriety of the state, so it is the duty of all decent and well disposed citizens to observe these regulations. This reference to duty is one of many throughout the Commentaries and provides another link between Hume’s writing and philosophical thought of the time. In particular, Thomas Reid’s ethical theory, which centres on living in good conscience by observing one’s duties, is likely to have had an influence over Hume since Reid was Professor of moral philosophy at Glasgow when Hume came to study law under Professor Millar. The many references to the preservation of society also disclose a distinctly Enlightenment persuasion, based on the aim of creating and maintaining civic society.

3.7 Conclusion

From examining the principles that underpinned the eighteenth century jurists’ accounts of the criminal law and their depictions of individual crimes it becomes clear that there had been several changes since the sixteenth century when Balfour wrote his Practicks and the seventeenth century when Mackenzie wrote his Matters Criminal. The range of ‘sin crimes’ that were prosecuted started to diminish during the early eighteenth century when strict Calvinism first began to lose favour in Scottish society. Likewise, the concurrence with God’s laws that pervaded Balfour’s

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232 Ibid I, 179.
233 Parricide, self-murder, cursing and beating one’s parents, sodomy and bestiality (Hume, Commentaries I, 290, 300, 324, 469).
234 Hume, Commentaries I, 446.
Practicks and the moral retributivism that Mackenzie held to be central gave way to a set of values which focused on the benefit of criminal laws to society, reflecting the Enlightenment concerns of how to create and sustain civilised social arrangements. Divine law was therefore less evidently a source of law with (non-divine) natural law taking its place in the early eighteenth century writings of Forbes and Bayne, and idiosyncratic custom taking its place by the end of the century in Hume’s Commentaries. Finally, tying into the idea that divine law was no longer a source of criminal law, crimes were no longer regarded as wrongs because they breached Mosaic Law and were instead considered to be wrongs because they transgressed the laws of nature or civil society.

The following chapter uses the declaratory power to examine how changes in the scope of the common law of crimes between the nineteenth and twenty-first centuries continued to embody the Scottish moral tradition. Given this constrained focus on the declaratory power, there is no question that the arguments which are put forward should be taken as an attempt to explain the entire criminal law. Not only is no attention paid to important legislative changes that occurred within the sphere of regulatory offences, the declaratory power does not even represent the common law as a whole. However, the aim of this thesis is not to provide an account of the entirety of Scots criminal law; it is to highlight the ways in which the law has been shaped by the Scottish moral tradition and, in respect of the scope of the law from the nineteenth century to the present day, the declaratory power best serves this task. The power is widely recognised as a peculiar feature of Scots criminal law whose existence and use has routinely divided, and occasionally baffled, commentators. It is also remarkably moralistic in that its use is often accompanied by overt references to the immorality or inherent wrongfulness of the conduct that is thought to be punishable on that basis. These features of the power mark it out as a worthwhile topic for investigation, and in the next chapter the argument is advanced that the declaratory power signifies a distinctive trait of the Scottish Common Law tradition that has not previously been recognised, which ties it closely to the Scottish moral tradition.

237 On this see L Farmer Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) chapter 3.
Chapter Four: The Declaratory Power and the Flexible Common Law

4.1 Introduction

The declaratory power, or the power of the High Court of Justiciary to punish “every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution” is widely regarded as a distinctive feature of Scots criminal law. Hume described it as such, and intellectual commentators writing around the time of its first recognition and use remarked that it was a major point of distinction between Scots and English criminal law. This claim of distinctiveness is well founded because although many legal systems accept the reality of judge-made law, it is idiosyncratic of the Scottish legal system that judicial creativity has been so openly acknowledged and even celebrated. Most modern discussion of the power has centered on its legitimacy but, beyond these discussions, the origins and development of the power disclose much about the changing scope of Scots criminal law as well as the rationales that were offered to legitimise not only the power but also the criminal law, and indeed Scottish common law, as a whole.

By situating the declaratory power in its developmental context it can be seen to typify an enduring commitment to manifest criminality that distinguishes Scots criminal law and which relies on the notion that wrongfulness is objective and readily identifiable. Furthermore, this idea that moral norms are easy to identify is shown to be symptomatic of a Scottish Enlightenment world view, specifically that

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238 Hume, Commentaries I, 12.
239 Ibid.
241 For example, see S Styles, “The Declaratory Power: Inevitable and Desirable” 1999 Juridical Review 99 at 100.
put forward by the Common Sense school of thought.\textsuperscript{243} The contention that the declaratory power can be conceptually linked to Scottish Enlightenment thought is strengthened by the sort of arguments that were made to justify the power’s existence and use. By relying on “common reason” and “common sense right and wrong” in their judgments,\textsuperscript{244} the Scottish judiciary has exhibited exceptional faith in the possibility of a commonly held set of norms. This faith in turn conspicuously resembles beliefs about morality that emerged from the Common Sense school of philosophy during the Scottish Enlightenment.\textsuperscript{245}

The endurance of this method of justifying the declaratory power is examined in the latter portion of the chapter, where similar arguments are observed in ‘declaratory-style’ cases of the twentieth and twenty-first centuries. The term ‘declaratory-style’ has been used because although these examples cannot truly be described as examples of the declaratory power’s use, they represent attitude towards judicial development of the common law. Changing standards of legitimacy mean that these later examples of the common law’s flexibility are described in much tamer terms – most commonly in the assertion that the court is merely punishing a new way of committing an existing offence, rather than punishing a new offence – but the types of claims made in support of punishment are remarkably consistent.

The similarities identified between the early and more modern declaratory-style cases do not imply that the same sort of reasoning underpinned the court’s judgments, or that the judges involved ever consciously took recourse in philosophically-informed theories about morality or society. The point in identifying commonalities in judicial accounts of declaratory and declaratory-style cases is simply to advance a fresh account of the origins of the power which, given the lexical likenesses with the modern law, might serve to uncover the roots of more contemporary instances of the common law’s flexibility. In doing so the declaratory power’s significance and place within the overall scheme of Scots criminal law can

\textsuperscript{243} Which, in this respect, shares many attributes of Calvinist Presbyterianism (see Chapter Two).

be better understood, for it is revealed to be another example of the more general beliefs that there is in fact such a thing as community morality, that this morality can be known by any person, and that the law is able to assimilate its precepts. These particular beliefs are argued to be the product of the Scottish moral tradition and their expression within the law is put forward as evidence of the influence of this tradition over the Scottish criminal law.

4.2 Origins of the declaratory power

Apart from being the most commonly cited definition of the declaratory power, Hume's description of the power to punish “every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution”246 is often said to constitute its origins. Some authors, such as Christie and Shiels, have even speculated that Hume invented the power since he gives only two examples to support its existence.247 It is certainly clear that Hume’s enthusiasm for the declaratory power is at odds with the opinion given by Mackenzie more than a century earlier on what should be a crime. According to Mackenzie, the law should be confined to what was provided for in legislation:

First, that is a Cryme, which is declared such by an express Statute, as Murder, Treason; and it were to be wisht, that nothing were a Cryme which is not declared to be so, by a Statute…248

He plainly believed that Parliament should be the only author of the law and that “nor should the people, nay nor our Judges; be made legislators”.249 From this it can be gathered that Mackenzie was strongly in favour of statutory law and supported its

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246 Hume, Commentaries I, 12.
247 The Laws of Scotland: Stair Memorial Encyclopaedia, vol 7, para 6; R Shiels, “The Declaratory Power and the Abolition of the Syllogism” 2010 Scottish Criminal Law 1 at 3. The examples given by Hume are sending incendiary or threatening letters and corruption or alteration of bills, promissory notes and the like (Hume, Commentaries I, 12).
248 Mackenzie, Matters Criminal 3.
249 Ibid 5. At the time Mackenzie was writing judicial precedent appeared to be a source of law but there was certainly no binding rule akin to stare decisis. Even by the mid-eighteenth century, when there is evidence of English influence on the matter, the doctrine was still not fully developed in Scotland – the reason for taking account of case law at this time was that it provided evidence of binding judicial custom. Only in the nineteenth century did a system of precedent akin to stare decisis develop in Scots law (The Laws of Scotland: Stair Memorial Encyclopaedia, vol 22, para 249).
supremacy over preceding case law. Whatever its merits, Mackenzie’s view was not wholly representative of the limits of Scots criminal law at the time he was writing because, as he acknowledged, libels for single adultery drawn up on the basis of the Law of God were held relevant despite there being no statutory authority for its punishment. Rather than being a fully accurate depiction of the criminal law, Mackenzie’s account was, in this regard, an aspirational vision. The particular aspirations he had were motivated by his anxieties over the threat of capricious punishment and the desire that the law be as clear as possible. In the introduction to *Matters Criminal* he explains that crimes should be solely statutory in order to avoid the “arbitrariness of Judges”. In the midst of the notoriously persistent and harsh Covenanting prosecutions it would no doubt have been desirable to tightly restrict the judiciary’s capacity to criminalise and punish. Although Mackenzie was no friend to the Covenanters (given that he was of royalist persuasion), his denouncement of arbitrary punishment fits well with his wider desire that the law be as clear as possible. Mackenzie’s desire to render the law more articulate during this era can also be explained by his royalist affiliations. If the law were clear and its sources unequivocal, then this might prevent radical nonconformists from invoking the language of natural jurisprudence to their advantage. It would also bolster the Restoration settlement, the set of agreements which led to Charles II being proclaimed King of England, Scotland, Wales and Ireland following the eleven years during which Cromwell had governed the Commonwealth. The royalist hope was that if the law were clear and restricted to purely positive sources, there would be less room for disagreement and disobedience.

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251 Ibid.
252 Mackenzie’s enthusiasm for statutory law was also likely attributable to the various codification movements that were occurring at the time (J W Cairns, “Attitudes to Codification and the Scottish Science of Legislation, 1600-1830” (2007) 22 *Tulane European and Civil Law Forum* 1 at 13). These projects were aimed at collecting and rationalising existing statues, customs and practicks so that they might be digested into convenient order, so are different in many respect from modern codification efforts that seek to codify the law and place it on legislative footing.
Conversely, when Hume came to remark that the High Court’s inherent power could much more effectively repress “an evil” than a statute ever could, the prevailing attitude was scepticism as to the merits of statutory law. On top of the ongoing debate about the benefits of common law in comparison to statutory law there were also specifically Scottish complaints about the British Parliament’s inadequacy in legislating for the Scottish people. Hume in particular, with his Tory affiliations, is considered to have emphasised the merits of Scots criminal law – including the declaratory power – in a bid to restore the law’s esteem following the infamous sedition trials of the 1790s. It therefore seems that the social and political context in which each writer was living informed his view of the advantages of a flexible, judiciary-strong common law system or a closely observed statutory legal system.

Despite these different perspectives, it is not altogether clear whether in citing his approval of judge-made law Hume effectively created the declaratory power or whether he was merely documenting criminal practice as he observed it in the Books of Adjournal. Put another way, the question is whether the inherent power has roots that predate its enunciation by Hume that might suggest that it draws on an earlier tradition that its more recent reception has overlooked and which, furthermore, might prove significant in the broader claim that the criminal law was influenced by the Scottish moral tradition.

There is some evidence from the Books of Adjournal that the High Court was in the practice of declaring behaviour to be punishable without statutory authority before Hume’s Commentaries were first published. For example, in the 1786 trial of

254 Hume, Commentaries I, 12.
255 It is remarkable how little emphasis Hume places on statutes compared with Forbes, who was writing not so much earlier.
258 The example of prosecuting single adultery in the absence of any legislation to that effect might suggest that Hume did not create the declaratory power, but given that notour adultery was punishable by death it is perhaps not so radical a deviation from the existing law as to be a clear example of the declaratory power.
there was a debate on the relevancy of a charge of bribery and corruption. It was argued in the panel’s favour that no such offences existed in statute or at common law, to which the prosecutor responded that the common law was “founded in the principles of Common reason, and treats of common right and wrong and it must be plain to the understanding of every man that to corrupt those who are employed in offices of public trust...is a crime of an heinous nature”. He added that “the crime of Bribery...is evidently a moral wrong” and that “every man’s Conscience must teach him that Bribing an officer of the Public to transgress his duty is an act of inherent turpitude, which by the Common principles of right and wrong must be punishable every where as a Crime”.

Later in the case the prosecution argued that it was necessary to punish certain crimes (treason, murder, robbery and rape) despite the absence of any written law declaring them punishable, simply in virtue of their immorality and the threat they posed to society. Moreover, other offences – including theft, rapine and bribery of judges – were described as “full of turpitude” and worthy of punishment because of the growing “common consent of the Society without any special enactment”. These arguments were apparently acceptable to the court because the indictment was found relevant and the trial was allowed to proceed, though the absence of recorded judicial reasoning means it is impossible to know for certain on what basis the libel was held relevant. Though there is no record of the judges’ reasoning, the arguments put forward in support of the libel’s relevancy are extremely familiar, taking account of the discussion of Common Sense philosophy in Chapter Two.

“Common reason” and “common right and wrong” recall the notion that morality is accessible to everyone; indeed “every man’s Conscience” is presented as the means by which “inherent turpitude” is to be known, a statement which also taps into the idea that by nature humans are able to perceive the dictates of morality. Crucially, it is the “common consent of the Society” which determines the act’s incontrovertible wrongfulness. Taken together, the model of morality presented is one in which every individual is able to see that an action is wrongful using his or her conscience (the concept on which moral sense was built) in accordance with a

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James Stein 2 Oct 1786 (JC3/44).

Ibid.
common notion of right and wrong whose ultimate verification rested on societal consensus. The parallels with Scottish moral philosophy are striking.

Other than providing links with the Scottish moral tradition, this case shows that approximately a decade before Hume’s Commentaries were published the High Court recognised arguments that certain mala in se activities, which were subject to no statutory prohibition, should be declared criminal and susceptible to punishment, and allowed trials to proceed on that basis. This finding suggests that the declaratory power is part of a longer-standing commitment to flexibility and judicial creativity than might widely be appreciated. In addition to this, the principles and rationales that are cited in declaratory-style cases disclose a distinctively Scottish approach to legitimising judicial creativity (and, by extension, a flexible range of crimes) that ties into the broader reliance on the notions of community and manifest criminality that is evident across the criminal law.

4.3 Justification of the Common Law

The appeals to common reason and common principles of right and wrong such as those evidenced in the case of James Stein quite clearly show a connection between the declaratory power and the Scottish moral tradition. However, they also reveal something important about the way that the Common Law tradition was conceived of in Scotland and the significance of communal values and intersubjective morality in this regard. Of course, the argument that the Scottish Common Law tradition is distinctive should not be overstated because there are many similarities with the Anglo-American common law tradition, as exemplified by the works of Blackstone and Hale, but there are nevertheless important distinctions to be drawn.

The common law of England was traditionally portrayed as the manifestation of commonly shared values that were the result of common lawyers’ efforts to refine and co-ordinate the social habits of people over time. Yet in this model the judge is depicted as merely a vessel through which the common law is expressed – an

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“oracle”, to use Blackstone’s expression. According to this view of the common law there was no question of judges (or even the legislature) creating law; their job was solely to expound and declare the law, which constituted the historically evidenced custom of the nation. This idea of judge as oracle is the first point of contrast with Scots Common Law. It suggests that the English Common Law was in some sense pre-determined and objective, finding its way into the courtroom via the judge who was simply there to receive and act upon abstract legal truths. Though Postema writes that there were no a priori or ahistorical principles on which English Common Law was based, in Blackstone’s parlance it had allegedly “subsisted immemorially” despite the “rude shock” of the Norman conquest. According to Posner, Blackstone was not engaging in Saxon ethnocentricity or advocating judicial passitivity in making this statement. He was instead attempting to rationalise judicial creativity so that the common law could be adapted to contemporary needs. However, unlike the Scottish admission that a creative judiciary could adapt the law to meet novel concerns by way of the declaratory power, the flexibility of English law was justified as a noble effort to restore the law to its pure and most ordered form. The development of English Common Law was thus dressed up as an attempt to resuscitate an idealised (and abstract) version of its own past.

This purported restoration of the golden age of English law was to be achieved through the operation of practical reason, but not the type of practical reason that is found in the Scottish legal tradition. As Farmer has pointed out, the Scottish Common Law is represented as the embodiment of collective wisdom. Crucially, this collective wisdom is not said to rest on the same sort of abstract principles that Blackstone claimed were the basis of English law and described as “permanent, uniform, and universal; and always conformable to the dictates of truth

263 Ibid 36.
and justice”.

Instead, Scots law is said to relate to a particular community at a particular time and seeks legitimation in the alleged values of that community—arguments that speak to the idea that the social and moral order was secularised, in Taylor’s sense of the term. Hence, the flexibility offered by the declaratory power is a necessary part of this account of the Scottish legal tradition because it provides the means by which the law can respond to changes in the community. Likewise, finding recourse in common reason and common right and wrong is an important part of the Scottish legal system’s method of reinforcing its own legitimacy.

4.4 The role of natural law

Having set out in more detail the differences between the English and Scottish Common Law traditions, it is possible to add another layer of understanding to this interpretation of the declaratory power. As the previous section showed, English Common Law, though reliant on the practical experience and wisdom of judges, grounded its legitimacy and adaptability in an abstract idealised past and sought to embody the principles of truth and justice, both of which are abstract philosophical concepts. In contrast, Scots criminal law, and indeed the Scottish legal tradition more generally, rejects this approach in favour of one based in shared community values and common sense notions of right and wrong. In addition to the influence of Common Sense philosophy and the predominance of manifest criminality, this stance can be explained by the place of natural law in Scottish social, political and legal thought, which in turn relates to the religious identity of the country.

Gunn has argued that although the notion of natural law is significant in the history of Scottish social and political thought, it was never central.

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267 Although this sentiment was tempered by the concession that sometimes these principles had to be modified according to the local or occasional necessities of the state which it is meant to govern, it was essential that this change should not exceed “these eternal boundaries”. It should be noted that here Blackstone is speaking of the principles on which the legislature should form and enact the criminal law (W Blackstone, Commentaries on the Law of England (vol 4) (12th ed) (1795) 3).


269 See Chapter Two.

270 R Gunn, “Scottish political theory: from natural law to Common Sense” (paper given at the University of Istanbul, April 2010) (available at: http://richard-
this is that during the sixteenth and seventeenth centuries, the Calvinist view was of a world steeped in sin, the source of which was not thought to be sensual intemperance but rather deceit or fraud.\textsuperscript{271} According to Gunn, this cultural environment is likely to have led to a mistrust of the idea of natural law, irrespective of how minimal a conceptualisation it was.\textsuperscript{272} For a spell during the eighteenth century, natural law enjoyed greater acceptance in Scottish political thought because of educational links between Scotland and the Netherlands and because Calvinism “made its peace” with the concept.\textsuperscript{273} However, a crisis soon erupted in natural law thinking, which in Scotland took the form of “Pyrrhonian” scepticism, most famously embodied in Hume’s \textit{Treatise of Human Nature}.

Hume’s work cast doubt on the ideas of divine order and covenant-based legitimacy and political obligation. In response, Smith composed his \textit{Theory of Moral Sentiments}, which put forward an alternative foundation for morality and society that was based on human interaction and intersubjective agreement.\textsuperscript{274} This was a procedural answer to the problem of scepticism, which demonstrated how the criteria of moral judgment may be established without attempting to establish what those criteria might be.\textsuperscript{275} This latter point leaves open the possibility that different standards might prevail according to the particular make-up of a society at any given
time, indeed in Smith’s view everyday sentiments were to be preferred over transcendental principles.  

Gunn’s argument that the religious and moral background to Scottish political thought in Scotland led to the rejection of natural law and, with it, universal and absolute principles has potential explanatory significance in the context of the declaratory power. Given the preference in Scottish moral philosophy for variable, community-based standards over absolute and static principles, the declaratory power – with its explicit aim of allowing judges to adapt the criminal law to meet pressing community concerns – appears to embody much the same perspective.

This purported connection between Scottish religious and philosophical culture and the criminal law is bolstered by the role of natural law within Scottish *legal* thought. Cairns has described how although the language of natural law was commonplace in the first half of the eighteenth century certain aspects of natural law theories had undergone a revolution by the middle of the century. One consequence of these changes was that the idea of natural law came to be modified by the view that the development of laws was really a kind of conjectural history. Lord Kames’ *Historical Law Tracts,* which put forward a four-stage theory of development derived from Montesquieu, was a crucial work in this regard. This move towards acceptance of conjectural history within legal thinking meant that the need for adaptability within the law was increasingly recognised. It was considered essential that the law should be malleable in order to meet the exigencies of each particular age. Most striking of all is the fact that Lord Kames advocated a strong role for the courts, rather than the legislature, in undertaking this essential legal reform. Similarly, though Adam Smith took a different view than Lord Kames on the foundation of moral judgment, he accepted Kames’ theory of conjectural history and

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extended its application to the law. Being based on the moral sentiments, Adam Smith’s notion of law was historically dynamic and could adapt to the particular circumstances of society. Like Kames, Smith favoured incremental development of the law through judicial activity, rather than legislative enactment.

When the place of natural law within social, political and legal thought is considered, the declaratory power, and the approach to common law within the Scottish legal tradition more generally, is revealed even more clearly to express the religious and moral culture of Scotland. This interpretation of the power is, it is submitted, more compelling than its more common depiction as either the capricious invention of Hume or an anomaly in the development of Scots criminal law. In the following sections specific instances of the declaratory power’s use are examined in order to establish the way that changing standards of legitimacy gradually diluted the strength of support that the power received. At the same, a remarkable likeness is evident in the types of justification that have been put forward to support its use over the ages.

4.5 Declaratory and declaratory-style cases

4.5.1 Post-Hume uses of the power

Soon after the publication of Hume’s Commentaries the declaratory power appeared in the Books of Adjournal in a trial for unlawful combination or confederacy. In this case the relevancy of the charges was called into question on the basis that the pannels’ behaviour was not in itself so obviously criminal as to ground an indictment without statute or authority, especially since no such offence was mentioned or hinted at by the writers on Scots criminal law. The prosecutor replied that “by the common law of Scotland every injury done to the public intentionally is a crime”. He argued that the dearth of examples of similar previous cases was simply due to the

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282 William Dawson & John Russell 8 March 1808 (JC4/4), extended to James Taylor & others 12 May and 19 October 1808 (JC4/4). This case is also discussed in Hume, Commentaries I, 494.
fact that the “evil was yet in its infancy”, having only emerged since Scotland had become a manufacturing nation. Again, “common justice and common sense” were called upon to justify the common law operating as a “permanent legislature, whose principal and most useful province is to discover and take cognizance of every new offence, which the ingenuity of wickedness may devise”. This open acknowledgment of the court’s considerable creative powers is in direct contrast with more contemporary examples of the declaratory power. At this time there was no need for the prosecution to argue that the High Court was simply punishing a new way of committing an existing offence, as has commonly been argued in more recent cases.283 Given that the prevailing view at the time was that neither legislators nor judges made law but simply declared legal rules on the basis of local custom, this discrepancy is understandable. As time went on changing criteria of legitimacy led to the emergence of a more modest account of the power, which became the standard description of judicial activities during the nineteenth century and beyond.284

Later on in the case the question arose of which types of act could be the subject of the court’s creative powers and the answer provided boiled down to a single criterion: that the behaviour complained of contained the essential qualities of a crime. Of course, this criterion is inherently circuitous but while this might pose considerable problems for modern practitioners and theorists (in that it leaves the question of what are the essential qualities of a crime in the hands of the judiciary or jury),285 it was deployed without abashment by the prosecutor in this case. He was unconcerned with arriving at a robust definition of a crime or even setting out which values should inform such a definition, because he was content that a “vague feeling of the proper answer” to the question “is this a crime?”286 arose as soon as the question was asked. That “vague feeling” was experienced “not speculating as theorists, but judging as lawyers, according to the spirit of what is already

283 See sections 4.5.2 and 4.5.3.
284 It was at this time, the start of the nineteenth century, that Scots law began to receive the notion of precedent, which had been part of the English common law for a longer time (The Laws of Scotland: Stair Memorial Encyclopaedia, vol 22, paras 252-256).
285 An example of this problem in a different form is Transco v HM Advocate 2004 JC 29 in which the adjective ‘criminal’ which was used in the definition of the mens rea for culpable homicide was acknowledged as being circular.
acknowledged to be law" and rested on whether the act was injurious to the public, whether it could have been avoided and whether it was committed with real knowledge of its consequences. This argument is arguably a further instance of the influence of Common Sense philosophy within the criminal law. According to Hume’s notion of common sense morality, the question of rightness and wrongness of acts is reduced to a single question: does any action or sentiment on the general view give a certain satisfaction or uneasiness? Although the terms of this question are not identical to those posed by the prosecutor in William Dawson and John Russell, there is a symmetry that points to a similar mode of thinking and therefore the reception of Scottish moral philosophy.

At the resolution of the case the court was split, with the majority holding that the confederates did not have the implied baseness or depravity which was essential to the notion of an indictable crime and the dissenting judges holding that the practices were an infringement of the freedom of the subject, which struck at the vitals of order and civilised society. This decision can be read as representing the tension between the traditional view of criminality which developed in the early modern law and required prima facie wrongfulness, and the need to respond to new forms of conduct that threatened to undermine the values that were emerging in an age of increasing industry and affluence.

The issue of illegal combination or conspiracy rose again three years later but in this case the now-familiar contention was made that the declaratory power did not give the High Court free rein to criminalise new activities. As the defence argued:

\[\text{[t]he prosecutor bases on the principle that crimes can be declared by the High Court without statute…}\]

\[\text{the proposition comes merely to this, that what is criminal can be declared by the court to be a crime. But, undoubtedly the court has no power to make any facts it pleases criminal. An attempt of this would be an usurpation, which would amount to an abolition of all the law and all the other powers of the state.}\]

\[287\] Ibid.
\[288\] See Chapter Two for a summary of Hume and Reid’s celebration of common sense.
\[290\] Francis Orr, Matthew Chambers, John McDonald, George Emery and others, 11 January 1811 (JC 4/5).
\[291\] Emphasis in original.
Though it was decided that relevant matter could be selected from the indictment to infer criminal punishment, the libel was held to be insufficiently clear and the pannel was dismissed from the Bar.  

A similar distinction between the “power that makes laws” and the “power by which laws are only declared” arose in a case in 1827 in which the defence agent stated that for the court to convict the accused of murder for setting a spring gun to deter trespassers, an activity which had never before been legislated as an offence, would be “an abhorant [sic] and illegal method of making a new law”. Despite these protestations, the libel was found relevant though, again, the lack of recorded judicial reasoning means it is not clear whether in so doing the court endorsed the declaratory power or whether it simply decided that the conduct was correctly libelled as murder. These two cases contain signs that standards of legitimacy were shifting, or at least that they were starting to have an impact on the perceived legitimacy of the court’s ability to exercise its inherent power to punish without restriction.

By the time the case against Bernhard Greenhuff was heard there did not appear to be any doubt left over the application of the declaratory power in Scots law, though there was disagreement about the extent of its use. Greenhuff is the leading and most frequently discussed example of the declaratory power’s use and concerned charges of opening and keeping a common gaming house. Although there was pre-Union legislation that regulated playing cards for money, this was thought not to apply to the “evil” of keeping a gaming house. As a result, the court had to consider whether to exercise its discretionary power and declare the conduct complained of a criminal offence. The majority view was that the court was entitled to uphold the charge because of the danger posed to private and public morals. In delivering his opinion, Lord Meadowbank stated that the court could repress

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292 The libel of unlawful combination or conspiracy was eventually held relevant in 1813, and it was not necessary that the panel should be found guilty of any other acts of violence, intimidation or extortion to be convicted of the offence (William Mackimmie & others, 12 and 13 March 1813 (Hume, Commentaries I, 495)).
293 James Craw, 4 June 1827 (JC 4/17) (emphasis in original).
294 Bernard Greenhuff (1838) 2 Swin 236.
295 Most notably in the dissenting judgment of Lord Cockburn, who also expressed his disapproval of the declaratory power in “Scottish Jurisprudence and Procedure” (Jan 1846) 83(167) Edinburgh Review in National Library Scotland Pamphlets 3/2641.
296 Bernard Greenhuff (1838) 2 Swin 236 at 238.
behaviour that was “by the law of God, and the law of morality, mala in se”. His reasoning was that religion and morality were part of the common law of Scotland, as they were of England, and so if behaviour was contrary to religion and morality then it was an indictable offence at common law.\textsuperscript{297}

This view clearly endorses a strong moralism within the criminal law, and acknowledges the law of God to be a persuasive indication of which acts should be regarded as mala in se, or ‘wrongs in themselves’. In propounding this view, Lord Meadowbank effectively countenanced a theological version of manifest criminality and its use in drawing the boundaries of Scots criminal law. However, in contrast to the majority view, Lord Cockburn issued his now famous dissenting judgment in which he stated that the court was limited to dealing with offences for which there was a fixed nomen juris or a direct precedent. This meant that the court had the power to punish new ways of committing old offences as long as the conduct was within the spirit of a previous decision or a general principle, but it could not use its ‘inherent powers’ to create a new crime even though the behaviour concerned might “imply wickedness and be hurtful”.\textsuperscript{298} Cockburn’s dissenting opinion would eventually come to be the dominant view on the court’s power to punish, but it is interesting to note that only six years earlier Alison had dedicated an entire chapter of his \textit{Principles of the Criminal Law of Scotland} to innominate crimes, which were the “great number of offences constantly emerging in the progress of society which were altogether unknown but have arisen from altered manners”.\textsuperscript{299} In Scotland these offences could be caught under the common law by which every new crime became the object of punishment provided that it was “in itself wrong and hurtful to the persons or property of others”.\textsuperscript{300} The first portion of the nineteenth century therefore represents a crossroads of sorts where the older view that judicial ‘law-making’, i.e.

\textsuperscript{297} \textit{Ibid} at 265. The point that religion was part of the common law of England was made in the case of \textit{R v Curl} (1727) 2 Str 788 in which it was stated that “religion was part of the common law; and therefore whatever is an offence against that, is evidently an offence against the common law. Now morality is the fundamental part of religion, and therefore whatever strikes against that, must for the same reason be an offence against the common law” (cited in \textit{Knuller v DPP} [1973] AC 435 at 471).

\textsuperscript{298} Bernard Greenhuff (1838) 2 Swin 236 at 274.

\textsuperscript{299} A Alison, \textit{Principles of the Criminal Law of Scotland} (1832) 624.

\textsuperscript{300} \textit{Ibid}. Alison contrasts the Scottish position with the position in England where all serious crimes were legislated for. Chapter 34 of \textit{Principles of the Criminal Law of Scotland} sets out the innominate offences listed by Alison.
the inherent power to punish, was fairly innocuous gave way to concerns about the separation of power implications of these practices and their associated legitimacy.

4.5.2 Post-Greenhuff declaratory-style cases

Since the decision in Greenhuff, Cockburn’s more constrained version of the court’s creative powers has dominated Scottish judicial decision-making. Although the distinction between making new offences and punishing novel factual circumstances had been made in earlier cases, it was only after Cockburn’s dissent and the power’s more public criticism that the more restricted form of the power came to be seen as its only legitimate use. In spite of this, the High Court continued to stretch the flexible boundaries of Scots criminal law because, as Gordon has recognised, “general principles”, which are said to be the basis of the law, do not impose the same degree of restraint on judicial decision-making as do previous judgments. As such, “[i]f a principle is expressed sufficiently widely many different forms of conduct may fall under it, and the addition of a new form of conduct will amount to the creation of a new crime”.

Most of the post-Greenhuff illustrations of the flexible scope of Scots criminal law fall into this category, either because the court explicitly admits that it is using the more acceptable, restrained version of the inherent power or by the court's implicit invocation of the power when radically altering the range of criminal offences, or their definitions, on an ad hoc basis. These modern examples, though portrayed in terms that are more favourable to modern legal sensibilities than those used in Greenhuff and its predecessors, nevertheless illustrate the same attitude within the Scottish criminal law tradition that led to the development of the declaratory power itself. The same confidence in identifying right from wrong and the same perceived need to adapt the law to the community’s values (and confidence in the court to be able to determine what these values are) are evident and speak to

301 Francis Orr, Matthew Chambers, John McDonald, George Emery & others, 11 January 1811 (JC 4/5) and James Craw, 4 June 1827 (JC 4/17).
303 Gordon, Criminal Law para 1.22.
the continuing influence of the law’s early ideals that were shaped by the country's religious and moralistic culture.

Soon after *Greenhuff* was decided there was another case, *John Barr*, in which the ‘legitimate’ version of the declaratory power was called upon. The charge was of knowingly swearing a false oath, which was a distinct offence from the crime of perjury since it lacked any appeal to a deity. Following the judgment in *Greenhuff* the charge was found relevant, even though it pertained to conduct that had never previously been punished. Part of the reason for this decision was the fact that the accused’s actions were classed as “immoral and dangerous to society”. In delivering his judgement Lord Cockburn re-iterated the distinction he had drawn in *Greenhuff*, stating: “I don't mean that it may be now declared to be an offence, in virtue of any supposed inherent power in this court to introduce new crimes; but it already actually is an offence, and that because it comes within the range of old and established criminal principles”. In his opinion the offence charged consisted of the same wickedness as perjury, namely the deceptive invasion of the rights of others and the obstruction and contamination of legal proceedings. This decision constituted an enlargement of the law because it extended the punishment of false oaths beyond those offences that had previously been recognised, i.e. perjury, on the basis that this new offence was wicked in the same way and according to the same principles.

A similar basis underlay the court’s decision in *William Fraser*, in which the “sufficiently odious” nature of the offence meant that it was “amply deserving [of] a most severe sentence”. The case involved a man who had contrived to have sex with a woman by pretending to be her husband. Due to Lord Cockburn’s requirement that any punishable conduct should fall under the head of an existing offence or existing principles, the court tried to analyse the crime as a species of either fraud or rape. The majority characterised the accused's actions as fraud, relying on the broad justification that: “Any deceit that injures and violates the rights of another, is clearly

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304 (1839) 2 Swin 282.
305 Lord Mackenzie at 310.
306 Lord Cockburn at 317 (emphasis in original).
307 Ibid.
308 (1847) Ark 280, Lord Medwyn at 207.
punishable”, which has clear parallels with Lord Cockburn’s comments in Barr that the accused's conduct amounted to “deceptive invasions of the rights of others”. While in both cases the relevancy was upheld because the conduct fell within the spirit of an existing category of crime, the offences were also characterised as “wicked”, “odious” and as featuring “extreme atrocity”. In punishing behaviour that had previously never been punished the court made efforts to satisfy Cockburn's requirement, but only by using vague descriptors such as “invading” or “injuring” the rights of others. In order to bolster their claims that the conduct was worthy of punishment, the judges relied on the still-crucial element of the inherent wrongfulness or wickedness of the acts themselves, which would be objectively manifest.

When the Justiciary Court came to consider the case against Charles Sweenie, which was another case of sexual misconduct, the same principles appeared to be in operation. The accused in this case was a man who was charged with having sex with a woman whilst she was asleep and who had therefore not consented. The problem the court faced was that rape at this time was defined as carnal knowledge by force and against a woman’s will. In the case before them the accused had not used force yet, given the lack of the complainer’s consent, his behaviour was considered punishable. The question for the court was whether to label the offence as rape or as some innominate offence of the nature of rape. The majority held that although the offence was not rape the facts libelled could be regarded as a species of indecent assault, which eventually came to be called clandestine injury. An important motivating factor for this decision appeared to be the fear that if the conduct were treated as non-criminal this would leave “grievous wrongs” unpunished. This proposition, according to Lord Deas, was “too repugnant, not only to our moral nature, but to the plainest principles of our criminal jurisprudence, to be for a moment entertained”. Once again the court strived to meet Cockburn’s requirements whilst also taking recourse in a supposedly

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309 Lord Cockburn at 312.
310 (1858) 3 Irv 109.
311 This was later recognised in Lord Advocate’s Reference (No 1 of 2001) 2002 SLT 466 to be an error - a majority of the court in William Fraser had in fact held that rape required only the absence of consent.
312 Charles Sweenie (1858) 3 Irv 109 at 145.
incontrovertible moral code and indisputable, plain principles of the criminal law. That his Lordship spoke of “our moral nature” and “our criminal jurisprudence” emphasises the asserted commonality of the principles on which the decision was based. These principles were not part of an absolute and abstract moral code but one that was said to be representative of the community’s sentiments, as identified and upheld by the judges.  

4.5.3 The twentieth century and beyond

Moving into the twentieth century, there was a spate of declaratory-style cases during the 1920s and 1930s and then again in the 1970s and 1980s. In between these times the power did not receive much attention, so initially it might appear disingenuous to analyse all of the twentieth and twenty-first century cases together. However, the reason for doing so is that the aim of this section is to identify unifying themes that run through the cases in which the inherent flexibility of Scots criminal law has featured. This approach enables recognition of changes in the accepted criteria of legitimacy and in the type of conduct which the law sought to prohibit, whilst also allowing for observation of trends in the justifications put forward by the court.

There are two key trends that are identifiable in this latter era. The first trend is a strong sense of pragmatism, that is, a sense that in criminalising behaviour or in shifting the boundaries of existing crimes the High Court was simply acting to meet

313 As the nineteenth century drew to a close there were a couple more cases where the court upheld the relevancy of previously unpunished acts that met Cockburn’s requirements: William Coutts (1899) 3 Adam 50, which concerned a charge of disturbing a buried body, and Holmes v Lockyer (1869) 1 Coup 221, which concerned a charge of unlawfully intercepting, opening or detaining or causing to be intercepted, opened or detained letters transmitted by the public post.

314 There was also one notable case where the High Court declined to exercise the power: HM Advocate v Semple 1937 JC 41, where the charge was supplying powders to a woman with intent to cause her to abort. According to Lord Justice Clerk Aitchison (at 46) “[i]t may be conduct which ought to be criminal conduct, but that will not make it a crime by the law of Scotland”. He did not doubt that the court had the power to extend the law but thought that it would be inexpedient for the court to consider important matters of public policy so viewed the task as better suited to the legislature. On the other hand, Lord Moncrieff (at 49) stated that to extend the law as the libel required would be to introduce a new crime and would be beyond the competence of a judicial, rather than legislative, act. In a similar vein, Lord Justice General Clyde observed in Quinn v Cunningham 1956 JC 22 that it was for Parliament and not the courts to criminalise reckless cycling.
the needs of Scotland’s changing community. As was suggested in section 4.4, this
trend can be traced back to the way that natural law was conceived of within Scottish
political and philosophical thought in the eighteenth century and so this aspect of the
modern declaratory-style cases is presented as an indication of the persistent
influence of the Scottish moral tradition within the criminal law. The second trend is
the familiar reliance on an objectively discernible community-based sense of
morality in order to justify the court’s creative undertakings. It should be
emphasised that in positing these associations between the older and more modern
declaratory-style cases the argument being advanced is not that the same set of ideals
motivated the judges at each time period. The argument is rather that the very idea
that it is for the judiciary to shape the law in response to the community’s needs
draws on the same set of beliefs, namely an allegedly clear cut sense of community-
derived moral standards that can easily be determined, that has characterised the
Scots criminal law for centuries and which has its origins in the Scottish moral
tradition.

4.5.4 Legal pragmatism

The first main declaratory-style case of the twentieth century was Strathern v
Seaforth, in which the accused had clandestinely taken away another person’s car
knowing that he was not permitted to do so but with the intention of returning the car
soon afterwards. One of the arguments on which the prosecution based their case was
that they were not bound to specify the particular category of crime into which the
offence charged fell, so long as they specified that it was a criminal act, or a “dolous
act inferring punishment”. This argument is of course very much in keeping with
the traditional Scottish view that an act should be punishable simply in light of its
wickedness and that the necessary wickedness would be obvious from the nature of
the act itself. Interestingly, in this case the court did not attempt to demonstrate that
its decision satisfied the Cockburn requirements. Lord Justice Clerk Alness
confirmed that he “should not have required any authority to convince me that the

315 See Chapter Two for how this position is linked to the Scottish moral tradition.
316 1926 JC 100.
317 Ibid at 101.
circumstances set out in this complaint are sufficient, if proved and unexplained, to constitute an offence against the law of Scotland”.\textsuperscript{318} In keeping with previous declaratory-style cases the judges focused on the manifest criminality of the accused’s actions.\textsuperscript{319} However, the primary motivation of the court seems to have been simple pragmatism, with both Lords Alness and Hunter commenting that, because of widespread car ownership, if the alleged conduct were not criminalised the consequences would be very undesirable.\textsuperscript{320} Presumably this was intended to be an example of the common law’s ability to meet the needs of a particular community at a particular time. Lord Alness certainly indicated those were his intentions when he remarked that he was “satisfied that our common law is not so powerless as to be unable to afford a remedy”.\textsuperscript{321}

This same pragmatic spirit could apply beyond criminalising behaviour. In \textit{Sugden v HM Advocate}\textsuperscript{322} a charge of bigamy was challenged on the basis that the Crown’s right to prosecute had prescribed. The reasons given for holding that vicennial prescription of crime was not part of Scots law that are most relevant to the present argument are those of Lord Aitchison, for they touch upon the common law’s inherent flexibility. According to his Lordship, amending the criminal law was not a usurpation of the powers of the legislature but a prerogative of the justiciary, derived from the days when the Justiciar did what it deemed to be just in all matters criminal. The court was therefore entitled both to declare new crimes and to abrogate old defences, and the abrogation of prescription was simply an illustration of this latter function.\textsuperscript{323} The idea that the court can readily perceive that which is just is important here, especially since it was linked to community values and expectations. As his

\textsuperscript{318} \textit{Ibid} at 102.

\textsuperscript{319} The clandestine nature of the taking was of considerable importance in deciding that the conduct was a criminal offence (Lord Anderson at 103).

\textsuperscript{320} 1926 JC 100 at 102.

\textsuperscript{321} \textit{Ibid}. The law of property offences was to be further amended by the judiciary in the case of \textit{Milne v Tudhope} 1981 JC 51 and \textit{Black v Carmichael} 1992 SLT 897. However, the court has not always seen fit to use the declaratory power to enlarge the range of property offences. In \textit{Grant v Allan} 1987 JC 71 the court refused to extend the law to cover the clandestine and unauthorised taking and copying of company information with the intention of selling it to rival organisations. Lord Justice Clerk Ross (at 76) was not satisfied that the behaviour libelled was so obviously of a criminal nature that it should be treated as a crime and, furthermore, he thought that if such a crime were to be created it would be for Parliament to do so.

\textsuperscript{322} 1934 JC 103.

\textsuperscript{323} \textit{Ibid} at 109.
Lordship put it, to allow a notorious crime that was committed twenty years in the past to go unpunished would be “against the public conscience, and contrary to the community sense of what is just, upon which the law and respect for the law must ultimately be based”.324

A similar concern responding to the changing mores of Scottish society was shown in *S v HM Advocate*.325 This case concerned a husband who had been charged with raping his wife, with whom he cohabited. According to the relevant authorities the circumstances of the indictment did not constitute a crime in Scots law, but the court decided that the legal status of women had changed to the extent that the husband’s immunity should no longer apply.326 Changing attitudes to women provided the High Court with further (asserted) justification to radically reform the law of rape twelve years later when it re-defined the offence, which had previously required force, around the concept of consent.327 According to Lord Cullen, “[t]he criminal law exists in order to protect commonly accepted values against socially unacceptable conduct”.328 To reflect these commonly accepted values the law would have to be flexible for “a live system of law should take account of contemporary attitudes and mores…a live system of law should be responsive to changing circumstances”.329 Chalmers has commented that it was inappropriate for the High Court to undertake such major legal reform since it did not, and was not able to, consult on important matters of policy.330 This criticism reflects modern concerns with the separation of powers, and it also emphasises the extent to which the High Court retained its traditional attitude towards amending the parameters of the criminal law. Even after the enactment of the Human Rights Act 1998, which ratified the prohibition against retrospective criminalisation as enshrined in Article 7 of the European Convention on Human Rights, the Scottish High Court continued to regard itself as the proper arbiter of “commonly accepted values” and authorised to enforce

324 *Ibid* at 110.
325 1989 SLT 469.
326 *Ibid* at 473.
327 *Lord Advocate’s Reference (No 1 of 2001)* 2002 SLT 466.
328 *Ibid* at 475.
these values on pain of punishment without any legislative enactment or notice that the conduct would be classed as a criminal offence.\footnote{331}

4.5.5 Objective community-based moral wrongs

The remaining twentieth and twenty-first century declaratory-style cases fall into a number of discrete areas including attempting to pervert (or defeat) the course of justice,\footnote{332} wasting police time,\footnote{333} breach of the peace,\footnote{334} culpable and reckless injury (and culpable homicide based on culpable and reckless conduct)\footnote{335} and indecency.\footnote{336} These areas contain evidence of the traditional Scots law attitude towards criminalisation, namely a robust belief that crime can easily be recognised at face value coupled to an assertion that the values upon which punishment is administered are the collective values of the community. For example, an attempt to bribe a member of a Licensing Court was described as “the plainest instance of an offence against the course of justice”\footnote{337} and a charge against a witness who went into hiding instead of appearing to give evidence was held relevant because it was held to be “clear that if a man, with the evil intention of defeating the ends of justice, takes steps to prevent evidence being available, that is a crime by the law of Scotland”.\footnote{338} As regards breach of the peace, until recently the crime could be

\footnote{331} It should be noted that in the similar cases of SW v UK; CR v UK (1996) 21 EHRR 363 the applicants complained that Article 7 had been breached because they were convicted of raping (in CR’s case of attempting to rape) their wives when at the time the offences took place English common law provided that a husband was immune from prosecution for the rape of his wife. The European Court of Human Rights rejected this argument on the basis that the change in the law was reasonably foreseeable. In essence, the court decided that Article 7 does not prevent judicial clarification of the law so long as the development is in keeping with the essence of the offence and could reasonably be foreseeable.

\footnote{332} See Gordon, Criminal Law paras 1.32-1.36.

\footnote{333} Ibid paras 1.37-1.38.


\footnote{335} Khalig v HM Advocate 1984 JC 23 where the court claimed to be punishing an old crime committed in a new way, which fell under the general principle (found in Hume) that acts that cause real injury to the person, whatever their nature, are crimes. See also Ulhaq v HM Advocate 1991 SLT 614, Lord Advocate’s Reference (No 1 of 1994) 1996 JC 76 and MacAngus v Kane [2009] HCJAC 8.

\footnote{336} McLaughlin v Boyd 1934 JC 19; Watt v Annan 1978 JC 84; Paterson v Lees 1999 JC 159; Webster v Dominick 2005 1 JC 65.

\footnote{337} Logue v HM Advocate 1932 JC 1 (Lord Justice General Clyde at 3). The court did not feel it was necessary to have recourse to the declaratory power in this instance, for it held there was authority for holding that a member of a licensing court was a judge within the meaning of the common law crime.

\footnote{338} HM Advocate v Mannion 1961 JC 79.
committed even in the absence of alarm or annoyance when “the nature of the conduct giving rise to the offence [is] so flagrant as to entitle the court to draw the necessary inference from the conduct itself” – a strong assertion of the principles of manifest criminality. More recently, despite a couple of decisions that narrowed the scope of the offence and despite the assertion that breach of the peace is no longer a “catch all” offence, the boundaries of the crime remain uncertain and it continues to be used to target conduct which offends moral sensibilities.

Perhaps the clearest examples of the High Court invoking the flexibility of Scots common law on the basis of an allegedly strong sense of moralism come from the indecency cases. In *McLaughlin v Boyd* Lord Justice General Clyde stated that:

…it would be a mistake to imagine that the criminal common law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime…I need only refer to the well-known passage in the opening of Baron Hume’s institutional work in which the broad definition of crime – a doleful or wilful offence against society in which matter of ‘violence, dishonesty, falsehood, indecency, irreligion’ is laid down. In my opinion, the statement in Macdonald’s Criminal Law, that ‘all shamelessly indecent conduct is criminal’, is sound, and correctly expresses the law of Scotland.

Following this, the cases in which a crime labelled ‘shameless indecency’ was charged have, for the most part, continued to maintain the loose boundaries of the offence. The English debate on obscene publications proves a useful comparator.

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339 *Young v Heatly* 1959 JC 66 at 70. “Flagrant” conduct was later defined as “conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances” (*Smith v Donnelly* 2002 JC 65 at 71).


342 1934 JC 19

343 *McLaughlin v Boyd* 1934 JC 19 at 23.

344 For example, in *Watt v Annan* 1978 JC 84 Lord Cameron stated (at 89) that it was “impracticable as well as undesirable to attempt to define precisely the limits and ambit of this particular offence” and left it for the legislature to do so if desirable. In *Paterson v Lees* 1999 JC 159 Lord Sutherland (at 163) favoured a “reasonable standard of decency or morals” rather than the more precise “liable to deprave and corrupt” and Lord Coulsfield (at 165) commented that the type of conduct which would be considered indecent or obscene would depend upon social changes. Even when *Webster v Dominick* 2005 1 JC 65 clarified the law to distinguish lewd, indecent and licentious practices and indecent conduct (which was henceforth termed ‘public indecency’) the offence remained somewhat ambiguous, as the decision as to whether a particular act will be regarded as indecent depends on the social standards which change from age to age and whose application depends on the circumstances (Lord Justice Clerk Gill at 79). These references to the changing circumstances of each age reflect the point that Scots judges continued to invoke the notion of legal conjectural history.
here, as Shaw v DPP\textsuperscript{345} contains some discussion of the judiciary’s role as moral custodians, which is very similar to the declaratory power. In that case Viscount Simonds held that even though it was not possible in the twentieth century for the court to create a new head of public policy, “there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State”.\textsuperscript{346} However, those judges who agreed that there was a crime of conspiring to corrupt public morals did so on the basis that this offence already existed in English law, so they did not regard their decision as involving any power of the court to intervene where the legislature had not.

Importantly, Lord Reid disagreed that the offence of conspiring to corrupt public morals existed and stated that even if the court were to extend the general crime of conspiracy to include the conduct libelled this would create a new unlawful act, albeit one which was not strictly a new offence. According to his Lordship, the objections to creating a new crime, which were to do with separation of powers and a lack of consensus on moral issues, applied equally to extending existing offences.\textsuperscript{347} In the later but related case of Knuller v DPP,\textsuperscript{348} which concerned another charge of conspiracy to corrupt public morals, Lord Reid upheld the position he had adopted in Shaw and the majority judges held the view that in neither Knuller nor Shaw was the court acting to create a new offence.\textsuperscript{349} In contrast, Lord Diplock took the view that the decision in Shaw and its acceptance in Knuller were wholly inappropriate on legitimacy grounds. He traced the history of judicial law-making in England and noted that although it had been common practice in the Star Chamber and in the early years of the Court of King’s Bench, by the middle of the nineteenth century the concept of separation of judicial and legislative powers had been accepted into the criminal law (under the influence of leading writers such as Bentham and Austin) and that this had led to legislative consolidation of many English common law crimes. Together with the growth of reliable law reports and the associated

\begin{itemize}
\item \textsuperscript{345} [1962] AC 220.
\item \textsuperscript{346} Shaw v DPP [1962] AC 220 at 267.
\item \textsuperscript{347} Ibid.
\item \textsuperscript{348} [1973] AC 435.
\item \textsuperscript{349} For example, Lord Morris of Borth-Y-Gest, Lord Simon of Glaisdale and Lord Kilbrandon.
\end{itemize}
development of precedent in its modern role, this meant that the common law “crystallised” in this period.350 According to Lord Diplock, Shaw was thus the first case since the English law’s ‘crystallisation’ to attempt to resuscitate the old practices that had pertained under the flexible common law, but the changed constitutional context meant that it was wholly inappropriate to do so.351

The cases of Shaw and Knuller show similarities with the Scottish cases that rely on the diluted version of the declaratory power, i.e. those cases that were heard in the middle of the nineteenth century onwards in which the High Court claims to be punishing a new way of committing a pre-existing offence. By the time these cases were heard the accepted standards of legitimacy had shifted away from the view that both legislators and the judiciary could simply declare the law as they found it to a view of legislators as law-makers and the judiciary as law-interpreters. However, a key difference between the Scottish and English cases is that whereas during the nineteenth century much of English criminal law was placed on statutory footing and was therefore in some respects removed from the common law tradition there was no such change in Scotland, which left it open for the judiciary to continue exercising its discretion in a quasi-legislative fashion. This difference provokes the suggestion that it is simply a matter of contingency that Scots law retains its flexible nature and moralistic streak; had the same process of putting the criminal law into statutory form taken hold in Scotland the declaratory power might have ceased to exist at the start of the nineteenth century as it effectively did in England.353

In reality, however, this lack of legislative enactment is itself part of the story of the Scottish legal tradition. Of course, until Scotland regained its own parliament in 1999 the only legislation that could possibly codify Scots criminal law would have come from the Westminster parliament. For reasons that cannot be explored here, during this time there was little legislative activity in the realm of Scots criminal law,

351 Ibid at 474.
353 Indeed, according to Lord Cooper had the union with England not occurred Scots law would have been codified (T M Cooper, “The Common and the Civil law – a Scot’s view” (1950) 63 Harvard Law Review 468 at 472).
at least in respect of the gravest offences. Irrespective of this fact, there is a widely-held reluctance to codify Scots criminal law because it is regarded by some against the distinctive Scottish criminal law tradition. Despite the un-enacted draft criminal code for Scotland, there has never been a strong demand for the codification of Scots criminal law. The reasons often given in favour of maintaining the Scottish common law regularly call upon the assumption that its flexibility allows it to express the community’s moral judgment. The reasons against codification therefore echo the rationales put forward by the judiciary for using the common law to change the scope of the criminal law – rationales which, it is argued, are based on the particular moral tradition of Scotland.

4.6 Conclusion

When the declaratory power is examined from its origins to its most recent analogues (the declaratory-style cases) it becomes clear that certain aspects have remained fairly consistent. Undoubtedly the concerns that the court has felt compelled to address have changed over time and for that reason the type of conduct which has been deemed by the High Court to be punishable has also differed. The type of argument put forward to justify judicial law-making has also changed with time, in accordance with changing benchmarks of legitimacy. Whilst in the earliest noted cases the declaratory power is openly acknowledged and celebrated, after Cockburn’s Greenhuff dissent the carte blanche form of the power rapidly came to be regarded as illegitimate and so the power was re-cast in its more restricted form. This, it is suggested, is partly attributable to changing ideas of legitimacy that are tied to

355 Ibid at 448.
356 The Draft Criminal Code for Scotland was prepared by E Clive et al and can be accessed at: www.scotlawcom.gov.uk/download_file/view/521/
358 See, for example, J M Thomson, “Scots Law, national identity and the European Union” (1995) 10 Scottish Affairs 1 at 6, where common law crimes are said to reflect the values of the majority of Scots (though these values are thought to be the same as any civilised community) and the potential to criminalise objectively wicked or anti-social behaviour through amorphous crimes is even described as reflecting a particularly Presbyterian approach to wrongdoing.
the increased role of precedent in Scots law and the codification and reform efforts that were going on in England at roughly the same time.

The next major change to affect the legitimacy of judicial creativity was the European Convention of Human Rights and the enactment of the Human Rights Act 1998, which has made it “unthinkable” that the High Court would ever make another radical attempt at criminalisation,359 though the way the law of rape and breach of the peace has been judicially altered since shows that even though the court has not necessarily criminalised new behaviour, it has made significant changes to the scope of each of these offences. This is a practice that can easily be regarded as contrary to the principles of the separation of powers and the rule of law concern of certainty in the law.

Despite these fluctuations in the conduct that has been targeted for criminalisation and the perceived legitimacy of the power itself, the types of rationale offered for maintaining flexibility in the criminal law have been remarkably constant. As recently as 2005 one academic commentator remarked:

If there is merit in the traditional, common law approach to crimes in Scotland, it is that it proceeds from a set of principles of a plain, moral nature. There may be some advantage to this pre-modern approach, with its reliance upon concepts such as ‘evil intent’ and ‘wicked recklessness’. These reflect a recognition ‘that what is ultimately in issue is the community’s moral judgment, and not the satisfaction of a legal formula’.360

It requires little effort to recognise that these sentiments are the same ones that have been put to work to justify the existence of the declaratory power, and indeed the whole Scottish approach to common law development, for hundreds of years. That the two recurring pillars on which this justification rests are a purportedly clear and easy to perceive body of moral norms and the community’s validation of those norms is not simply coincidence. By repeatedly calling on common sense, common judgment and the palpable wrongfulness of offending conduct, the Scottish Common

359 Gordon, Criminal Law para 1.44.
Law tradition has been able to amend the law according to the changing mores and needs of the community (as divined by the judiciary).

This has given the common law a sense of continuity and legitimacy, the reality of which has been recognised as a circuitous, self-referential system that preserves strong judicial control over the common law’s development. \(^{361}\) What has not previously been recognised is that the particularities of this system of legitimation – the appeals to community and plain morality – are dependent on the religious and philosophical heritage of Scotland. Appreciating these origins of the declaratory power makes it clear that judicial ‘criminalisation’ in Scotland has not been based on abstract principles or rationality, but has been shaped by the specific social and cultural history of the nation. This realisation does not only affect the way we perceive the law’s historical development, it also has implications for the ways we might develop the law in the future for any such development will inevitably be informed by the characteristics that are so entrenched in the law’s unique tradition.

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PART TWO: ATTRIBUTION OF CRIMINAL RESPONSIBILITY

Part One of this thesis showed how changes in the Scottish moral tradition influenced the range of offences that were punishable according to Scots law and the principles that were put forward to support their prohibition. From the early post-Reformation era when the law of God was an acknowledged basis of the criminal law, to the replacement of this principle with the particularly Enlightenment concern of maintaining civil society, through to the contemporary importance of the purported morals of Scottish society, these elements can be seen in the law’s attempts to legitimise itself at each stage of its development.

The aim of Part Two is to demonstrate that the attribution of criminal responsibility (and non-responsibility), that is, the way the accused’s liability was confirmed or negated, also owes much to the Scottish moral tradition. More specifically, this section of the thesis argues that a form of character responsibility dominated the early portion of Scots criminal law but that, over time, there was a move towards partial acceptance of capacity responsibility and that the moral tradition in Scotland contributed to this move. To separate out these theories of responsibility might appear to defy theorists such as Horder, who have argued that no single theory of responsibility can explain criminal culpability from either a normative or empirical perspective. However, it is possible to separate out these theories for analytical purposes and, furthermore, it is not argued in this thesis that any one of theory of responsibility accounts for the law at any given period. Instead, the argument is that the relative importance of each theory of responsibility shifted over time, and that this trend can be linked to changes in the Scottish moral tradition.

The terms ‘character responsibility’ and ‘capacity responsibility’ are used in accordance with their widespread use in criminal law theory. Broadly speaking,

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362 J Horder, “Criminal Culpability: The Possibility of a General Theory” (1993) 12(2) Law and Philosophy 193 at 203. In particular, capacity theories of responsibility often incorporate some aspect of choice or a fair opportunity to avoid doing the thing for which a person might be punished (see HLA Hart & J Gardner, Punishment and Responsibility: Essays in the Philosophy of Law (2008)).
364 For example, see V Tadros, Criminal Responsibility (2005) and N Lacey, “Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice” (2007) 1 Criminal Law and Philosophy 233. It is important to note that the different models are thought to refer
capacity responsibility is based on the accused’s ability to understand what he or she is required to do by law, to deliberate and decide what to do, and to control his or her conduct in the light of such decisions. Character responsibility can be divided into what Lacey has termed ‘overall’ character responsibility and ‘cautious’ character responsibility. Overall character responsibility bases criminal responsibility on an assessment of an accused person’s conduct as evidence of a wrongful character trait, for example, indifference to sexual integrity or disregard for human life. On this view, it is the role of the criminal law to convict and stigmatise those who are of a bad disposition and thus the criminal law is regarded as a quasi-moral mechanism for punishing bad or anti-social character. As such, criminal responsibility is attributed according to a broad array of evidence including not merely previous convictions for similar offences but the accused’s full criminal record and even evidence of his or her general lifestyle.

In contrast, cautious character responsibility is restricted to an assessment of the specific conduct that relates to the allegation under consideration, though in doing so it seeks to locate that conduct in a broader time-frame than is implied by the capacity principles. Advocates of this sort of character theory argue that they do not hold the actor responsible for his or her character per se, as this would potentially lead to imposing punishment for something over which the actor has little or no control. Instead, character is used to ensure that the acts for which the actor is being held responsible are reflective of his or her agency. As Norrie is keen to emphasise, this form of criminal responsibility is very different to earlier versions of character responsibility, the type that Lacey has called ‘overall’ or ‘non-cautious’, because it attempts to make a genuine reading of the moral behaviour of an accused person and, in doing so, offer a much more inclusive account of his or her

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367 Ibid at 239.
In Chapter Five non-cautious character responsibility is shown to have been the prevalent model of responsibility in the post-Reformation era. This is demonstrated through an examination of the way that the criminal law was administered in practice, both before and during the trial, and the kind of evidence that was considered acceptable and relevant in determining guilt. At this time the strongly collectivist structure of society encouraged a non-cautious form of criminal responsibility, which was facilitated by the close connection that existed between the criminal courts and the Kirk’s own network of courts. Both sets of tribunals relied heavily on evidence of the accused’s reputation and standing and each supported the other in accomplishing their respective tasks. As strict Calvinism lost some of its support and Kirk discipline began to decline this type of evidence became increasingly difficult to obtain and, together with increasing social mobility and the rising importance of the individual in philosophical and political discourse, the attribution of criminal responsibility became less dependent on non-cautious character responsibility and more impartial. However, aspects of the accused’s lifestyle and character remained relevant to the attribution of criminal responsibility and the fact that certain categories of status were criminalised in the late eighteenth and early nineteenth centuries shows that character responsibility was not completely displaced from Scots criminal law. This retention of character responsibility is also associated with the Scottish moral tradition because it can partly be explained by the emergence of the police as a distinct supervisory body during the latter half of the nineteenth century. As is explored further in section 5.4, the Scottish police were linked to the civic tradition of the Scottish Enlightenment and their activities were to a certain extent a response to the lacuna left by declining Church involvement in maintaining social order.

Chapter Six charts the rise of capacity responsibility in the nineteenth century but concentrates on the attribution of non-responsibility rather than the attribution of responsibility. This change in focus might be thought to raise issues of incompatibility between the two chapters given the different characteristics of

responsibility and non-responsibility.\textsuperscript{370} For example, Duff states that agency, which is usually that which is denied in an attribution of non-responsibility, is a question of capacity whereas character responsibility relates to the objects of criminal responsibility, i.e. what an agent is held to be responsible for.\textsuperscript{371} Similarly, Tadros argues that status-responsibility and the attribution of responsibility are separate issues, with capacity being relevant to status-responsibility (the capability to form true beliefs and evaluations about the world) and irrelevant to the attribution of responsibility (whether a particular action or event can be attributed to an agent).\textsuperscript{372} These discrepancies throw doubt on whether it is useful to refer to the attribution of non-responsibility in a narrative which plots the changing characteristics of responsibility attribution. Indeed if status-responsibility, which operates at the level of non-responsibility, is uniquely connected with capacity responsibility then what is categorised in Chapter Six as a rise in the relevance of capacity responsibility might signify nothing other than the fact that the chapter concentrates on non-responsibility.

However, the reason that Chapter Six concentrates on non-responsibility is itself indicative of the importance of capacity responsibility at this time. The nineteenth century marked the beginning of a heightened and more nuanced engagement with the principles of attributing non-responsibility, which was partly due to the emergence of psychiatry as a recognised discipline. The emergence of psychiatry might also account for the fact that the nineteenth and twentieth centuries are often pinpointed as the time at which character responsibility tailed off and was replaced with much more psychologically informed \textit{mens rea} requirements.\textsuperscript{373} This growth of psychologically informed \textit{mentes reae} is an important aspect of the attribution of criminal responsibility and is explored in the context of Scots law in Part Three. Instead of focussing on \textit{mentes reae}, Chapter Six scrutinises the changing shape of criminal responsibility through the lens of the attribution of non-responsibility and explains how the defences of insanity, provocation and diminished

\begin{itemize}
\item \textsuperscript{370} On this point see A Loughnan, “The Asymmetry of Responsibility and Non-Responsibility in Criminal Law” (forthcoming).
\item \textsuperscript{371} R A Duff, \textit{Answering for Crime} (2007) 39.
\item \textsuperscript{372} V Tadros, \textit{Criminal Responsibility} (2005) 54-56.
\end{itemize}
responsibility were all shaped by the Scottish moral tradition.

It is argued that one effect of the influence of the moral tradition was to limit the transition towards capacity responsibility in such a way as to render it partial. As Lacey has persuasively contended, the idea that character responsibility was ever completely replaced by capacity responsibility is misguided, since character can still be seen in several contemporary practices of responsibility-attribution. Following this, the contention in Chapter Six is that character responsibility continued to hold considerable importance in the arena of mental incapacity, particularly in relation to the insanity defence. This argument corresponds to Loughnan’s work, which has shown that the turn towards greater technicality and precision in attributing criminal responsibility, which is evident in the increased importance of mental state, did not occur in the same way in relation to mental incapacity. On the contrary, in terms of determining mental incapacity character has proved remarkably persistent, taking form in the idea that ‘madness’ is dispositional and can be ‘read off’ the accused’s conduct.

In Chapter Six it is argued that these observations are true of the Scottish approach to attributing non-responsibility on the basis of mental state. On one line of authority the contours of the insanity defence were drawn according to the view that insanity was a common sense concept whose determination could safely be left in the hands of jurors. The same confidence in jury discretion underpinned the plea of diminished responsibility, which shows that character responsibility endured in Scots criminal law and that it did so on the basis of arguments about common sense and the value of lay epistemology. These arguments hark back to those of the Common Sense school of thought, which were set out in Chapter Two. The other main line of authority on the insanity defence draws directly on another facet of the Common Sense school of thought: Thomas Reid’s theory of the active powers. In Chapter Six parallels are drawn between Reid’s theory and the way that the insanity defence was restricted to cognitive insanity, to the exclusion of volitional insanity. A similar

376 Ibid 49-58.
theoretical outlook is shown to have also underpinned the law on provocation.

In summary, this part of the thesis seeks to substantiate the claim that Scots criminal law underwent a partial shift from non-cautious character responsibility towards capacity responsibility, and that Calvinist and Enlightenment beliefs about morality and human agency contributed towards these changes. This argument is made in the face of concerns that it is overly ambitious to try to connect institutional practice to any particular theory of responsibility, and even more so to try to explain changes in theory and practice by linking them to changes in intellectual ideals or socio-political conditions. According to this view, it is likely that the law has never adopted a coherent theory of criminal responsibility and so no such theory can be observed in doctrines of responsibility. Of course, it is highly probable that no one theory of responsibility will be manifest in the law’s practices at any given time, so it might be accurate to describe the law as failing to hold a deep commitment to any coherent theory of criminal responsibility. However, this failure to commit to a single theory of criminal responsibility is far from problematic in an explanatory account of the law; a lack or combination of particular theories of responsibility might be crucial to an account of the criminal justice practices of a particular legal system at a particular time. In other words, the failure to commit to one particular model of responsibility might in itself be of essential interpretive value, as indeed is the case in the following two chapters of this thesis.

Chapter Five: Character Responsibility and its Decline

5.1 Introduction

The aim of this chapter is to analyse the development of the attribution of criminal responsibility in Scots law. It is argued that as Scottish society expanded beyond the tightly-knit communities that had characterised the sixteenth and seventeenth centuries and the dominance of the Kirk waned, the processes of attributing criminal responsibility transformed correspondingly from being based predominantly on ‘non-cautious’ character responsibility towards a more anonymous process of attributing criminal responsibility which afforded less importance to the character and reputation of the accused. In spite of these shifts, character continued to be determinative of criminal responsibility in some respects such as the use of previous convictions and the criminalisation of certain types of ‘undesirable’ statuses. In both of these respects, in its move away from non-cautious character responsibility and in the partially enduring relevance of character responsibility, the attribution of criminal responsibility is shown to have had connections with the Scottish moral tradition.

5.2 Post-Reformation era

In the period immediately following the Reformation when Calvinism was at its height in Scotland, criminal responsibility was attributed in accordance with a model of non-cautious character responsibility. This can be seen in the way that the criminal courts functioned and in the types of evidence upon which assessments of guilt were made. In adopting this non-cautious form of responsibility the criminal courts were encouraged and supported by the Kirk courts, which together forged a collaborative network of moralistic discipline in which the accused’s character was evaluated in a comprehensive manner. This mutually influential relationship between the Church and the criminal justice system is most evident in the way that the two sets of tribunals operated.

The Kirk’s system of courts was established in the years following the Reformation and included, in ascending order of authority, the Kirk sessions,
Presbyteries, Synods and the General Assembly. Amongst their other functions, these courts were charged with administering moral discipline to the populace by imposing penance, fines or, in the most serious cases, excommunication. The Kirk sessions, which were the courts that dealt with the majority of disciplinary cases, were primarily concerned with sexual offences such as fornication, scandalous carriage and adultery. Their other main concerns were Sabbath breach, drunkenness, ‘unseemlie behaviour’ and miscellaneous moral offences such as failing to attend Church.

Alongside the Church courts was a complex network of lay courts whose main function was to administer the secular law. Despite their disparate remits, there was a high degree of co-operation between the two court systems. This was partly because several of the moral offences that were punished by the Kirk were also secular crimes following the introduction of legislation to that effect. This legislation was actively enforced by the secular courts, particularly in the early years of the Reformation and during the ‘Second Scottish Reformation’ of the mid-seventeenth century. A further reason for the interaction between the two court systems was that in Calvinist Scotland, moral discipline and the maintenance of law and order were regarded as complementary aims. The Church courts could rely on the civil authorities for support when investigating and punishing moral offences, which was one of the reasons they were able to exercise such pervasive and effective discipline. In turn, the Kirk sessions referred cases of serious moral depravity, such as incest or sodomy, to the lay authorities for trial. This ecclesiastical involvement in the lay courts’ criminal caseload extended all the way to the

379 General Assembly Act 1592, A.P.S., III, 542 c.8.
382 See Chapter Three.
Justiciary Court, the most senior criminal court in Scotland. However, merely referring morals cases to the secular authorities was not the limit of the Kirk’s involvement in criminal justice. Occasionally, the Church courts transgressed their established remit to participate in the prosecution of purely secular offences.

The case of William Fraser is a good example of this practice, as it is a case in which the Kirk authorities played a dynamic role in criminal proceedings, rather than simply referring the offence to the civil magistrate for trial. Fraser was charged with “crewall slauchter and murthour” which, being a capital crime, was to be tried by the civil authorities. However, in the Justiciary Court the prosecution relied on the findings of the ministers of the Presbytery of Deir to support its case. The ministers had been charged by the Synod of Aberdeen to investigate the quality of the murder and had found the killing to be “wylde and wilfull” rather than accidental. This evidence and the testimonials of the ministers who conducted the investigation were key pieces of evidence against the accused, which contributed to his conviction. The competency of this evidence shows that Kirk proceedings were given considerable credence by the Justiciary Court, which is remarkable given that the Kirk investigations had not considered the accused’s guilt of the crime (which had simply been assumed) but only the nature of the killing.

The significance of this collaborative approach is that it shows that in post-Reformation Scotland there was direct ecclesiastical participation in the administration of secular criminal law. One reason for the Kirk’s input is that via its courts, especially the Kirk sessions, it had the kind of visible, controlling presence in the community that the state alone could not achieve prior to the advent of extensive law enforcement officials. This privileged position meant the Kirk could provide a supply of much-needed evidence to the criminal courts in an age when forensic

386 Dittays (indictments) libelling moral offences were commonly submitted by ministers and elders (S J Davies, “The Courts and the Scottish Legal System 1600-1747: The Case of Stirlingshire” in V Gatrell et al (eds), Crime and the Law (1980) 120 at 149).
387 30th July 1641 (S A Gillon (ed), Selected Justiciary Cases 1624-1650 (vol 2) (1972) 443).
388 Church of Scotland, The first and second booke of discipline together with some acts of the Generall Assemblies, clearing and confirming the same: and an act of Parliament (1621) 50.
389 S A Gillon (ed), Selected Justiciary Cases 1624-1650 (vol 2) (1972) 450. As a result of the ministers’ findings, the General Assembly ordained that William Fraser be excommunicated.
evidence and modern modes of state detection were not yet available. However, another reason it was considered appropriate for the Church to have such an involved role is that both the criminal law and the Kirk, through its disciplinary regime, were seen as fulfilling a similar function: holding people to account for morally culpable behaviour.

In addition to demonstrating the Kirk’s active role in secular criminal proceedings, the Fraser case illustrates the similarities between the type of evidence that was used by the Kirk and criminal courts in the proceedings leading up to and during the trial. Significantly, both tribunals relied heavily on evidence of the accused’s overall character. During the hearing to determine Fraser’s excommunication from the Presbytery it was asserted that “it is notourlie knawin” that the deceased “was schamefullie and crewallie murdreist be Williame Fraser…” 391 Similarly, one of the main adminicles of condemnatory evidence at the criminal trial was Fraser’s “common bruit and fame” – essentially hearsay evidence that was unfavourable to the accused. Notoriety of character was therefore a major indicator of guilt in both sets of proceedings, and the Fraser case was not unique in this respect. In fact, the case is broadly representative of the way that assizes (juries) functioned in criminal cases and the way that judgments were made at Kirk sessions.

The sessions frequently operated on the basis of local knowledge, which came into their possession via the elders who were the “eyes, ears and hands of the church”. 392 For their part, the criminal courts drew assizers from the locality of the alleged offence who were familiar with the accused and the circumstances surrounding the charges. 393 Once selected, assize members were expected to fulfil two functions: to be “judges in so far as they consider probation led by others and judge whether proved or not proved” and to be witnesses “in so far as they may condemn, upon proper knowledge, without any other Probation”. 394

394 Mackenzie, Matters Criminal 498.
This second function is crucial. In essence, the jury was entitled to return a verdict solely on the basis of its own knowledge, such as in the case of Andro Wast where the Lord Advocate led no evidence and relied solely on the averments in the ditty.\(^{395}\) Some case records suggest that the assize was actually encouraged to make convictions on this basis since “the maist pairt of thame [the assize] ar cuntrie men and knawis the pannell his viscious lyf and conversatioun and that his guiltines of the particuler thiftis contenit in his ditty is sufficientlie known to thame”.\(^{396}\) The assize thus afforded the moral quality of an accused person’s lifestyle and character extraordinary significance, in striking contrast to the purportedly impartial assessment of the accused’s criminal responsibility that occurs today.

It is telling that both the secular and ecclesiastical authorities approached the question of the accused’s guilt in comparable ways. Of course, both were operating under the same socio-political conditions so a degree of similarity in procedure and ethos is perhaps unsurprising. Lacey has associated the use of character-based theories of responsibility with problems of co-ordination and legitimacy faced by early legal systems.\(^{397}\) In these systems centralised criminal justice agencies were undeveloped and frequently unreliable, so members of the local community often judged the accused against the backdrop of his or her character and previous behaviour. This account can partially explain the situation in sixteenth and seventeenth century Scotland where, until the High Court of Justiciary was established in 1672, the only non-local criminal tribunals were the justice-ayres, which were renowned for being irregular and unsatisfactory.\(^{398}\)

However, unlike the criminal courts, the ecclesiastical courts were a paradigmatic system of centrally administered local tribunals in which national and


\(^{396}\) Case against George Wryght, S A Gillon (ed), *Selected Justiciary Cases 1624-1650* (vol 1) (1953) 222. In this case the prosecutor made it clear that he would protest wilful error against the jury if they were to acquit.


local assemblies were strongly connected. Yet these tribunals regularly assigned guilt and administered punishment on a character-driven basis. Clearly co-ordination problems were not the only factor contributing to the prevalence of this mode of attributing responsibility. There is another explanation for the shared use of character-based responsibility by criminal and ecclesiastical courts: both tribunals’ chief tasks were regarded as different species of the same genus. That is, they were both seeking to hold the accused morally responsible for his actions and therefore, on this basis, attributing responsibility after an assessment of the respectability and character of the accused must have seemed entirely appropriate.

5.3 The post-Union era

Despite various troubled fluctuations between Presbyterian and Episcopalian governance throughout the course of the seventeenth century, the Kirk sessions continued to impose public discipline as they had since the Reformation, and in doing so they continued to be assisted by the civil authorities. The criminal courts also continued to operate in much the same way as they had. However, towards the end of the century and during the early eighteenth century several changes contributed to the decline of hard-line Calvinism and the deterioration of the Kirk sessions. These changes were intimately connected to the relative importance of the individual in relation to wider society and therefore provide a potential link with the decline of non-cautious character responsibility, since in Scotland the use of character in determining liability was closely connected to the role of the community in the Calvinist model of society.

The first factor which contributed to the decline of Church discipline in Scotland is the fact that the Moderates, who dominated the Scottish Kirk during the eighteenth century, took a milder view of the enforcement of discipline than had their predecessors. This change in sentiment was to an extent mirrored outside the Church, particularly in the upper echelons of society. As the Calvinist disciplinary

401 R B Sher, Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh (1985) 166.
regime began to lose popularity, the Kirk found itself unable to rely on the support it needed to enforce its discipline. From its early inception as a privilege of the penitent, Church discipline had evolved into a system in which punishments were judicially meted out after wrongdoing had been proved in the Kirk courts. Over time, the Church courts became increasingly aligned with lay criminal courts and came to rely on them to bolster their authority. While there was still popular support for the Calvinist disciplinary regime this had worked to the Kirk’s advantage, but once this backing disappeared and as moralistic offences were retracted from the superior criminal courts’ remit the Kirk was faced with the reality that by relying on the secular criminal courts for support it had undermined its own authority and could no longer maintain its agenda of moral reform.

Eventually the Kirk Session’s ambit shrank to purely sexual offences and by the end of the eighteenth century public Kirk discipline had effectively ceased, though private rebukes continued to be administered. In considering the decline of public Kirk discipline it should be noted that this was not uniform. In rural areas the Kirk sessions continued to administer punishments and were involved in the investigation of ‘non-moral’ offences such as murder, theft and assault until the 1830s. Nevertheless, the net outcome of the changes in the eighteenth century was that Kirk discipline no longer occupied the same place in public life as it had for the previous century and a half. One result of this change was that a major source of local knowledge about alleged criminals and the circumstances of their alleged crimes disappeared. Parishioners, ministers and elders were increasingly estranged from their neighbours and, accordingly, their knowledge of each other’s affairs lessened significantly. This in turn meant that reliable character evidence was

402 I M Clark, A History of Church Discipline in Scotland (1929) 153.
403 See Chapter Three. The inferior criminal courts continued to hear less serious moralistic offences. In fact, following the union with England more of these offences were heard before the secular authorities as Justices of Peace began to secure firmer footing (S J Davies, “The Courts and the Scottish Legal System 1600-1747: The Case of Stirlingshire” in V Gatrell et al (eds), Crime and the Law (1980) 120 at 134).
404 C G Brown, Religion and Society in Scotland since 1707 (1997) 76.
405 Ibid 72.
406 This can be seen in the fact that ‘testificats’ (certificates of good character issued by the Kirk) were no longer required of men and women who wished to move from one parish to another (R Mitchison & L Leneman, Sexuality and Social Control: Scotland, 1660-1780 (1989) 60).
harder to obtain and that the Church courts could no longer assist with criminal prosecutions in this regard.

In this sense, the abatement of Church discipline had an impact on the attribution of criminal responsibility for purely pragmatic reasons. Without the input of Church elders, there was a limited supply of the sort of evidence which was necessary to make an assessment of the accused’s character. In addition to this effect on the availability of evidence, the decline of Calvinist Presbyterianism brought about a change to the role of the individual in relation to the rest of the community. Chapter Two showed that Calvinist Presbyterianism encouraged and facilitated a particularly collectivist form of society, which prioritised the community and its judgment of the individual. Inevitably, when this social arrangement began to break down this diluted the dominance of the community over the individual. Not only did changing social arrangements suggest a shift towards individualism, even the Church itself began to become less communal in nature. A number of factors have been suggested for this change including a growing humanitarian ethic, the erosion of hard-line Calvinism, and the rise of Evangelicalism, which was considerably more individualistic than traditional Calvinism. As attitudes within the Church and in wider society began to shift towards individualism, the requirement for an impartial assessment of guilt that was rooted in an evaluation of the accused as an individual rather than in the community’s opinion of him or her became more pressing.

In fact, the Scottish judicial system did become more impartial, particularly after the union with England when the criminal courts were centralised. This process of centralisation saw the reintroduction of circuit courts, which were held regularly for the first time. In 1747 the centralisation of the courts advanced further when

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the Abolition of Heritable Jurisdictions (Scotland) Act\textsuperscript{411} swept away many of the inferior courts and, with them, the face-to-face local supervision that had been the norm. Following this, a more impersonal system of adjudication grew to take its place.\textsuperscript{412} In this new centralised system, which aimed at impartiality, not only was it deemed inappropriate for local knowledge to be used in establishing guilt,\textsuperscript{413} it also became more difficult to secure the attendance of witnesses drawn from the accused’s home vicinity. As communities grew and their sense of unity lessened, attendance at criminal trials was increasingly considered a burden. In the absence of those who had been summoned as witnesses, judges were frequently forced to call upon alternative non-local witnesses who were fit and available.\textsuperscript{414} Apart from being a necessary measure, Maclaurin attributed this reduced reliance on local knowledge to the realisation that in order to have a fair trial the pannel ought to be tried at a distance from his ordinary place of residence by jurors who did not live there. This was to avoid the danger that the accused would be tried by friends or enemies who might be prejudiced or might wish to make an example of him.\textsuperscript{415}

Other than amending the range of potential jurors, the move away from community-informed character responsibility had an impact on the role that jurors were expected to play. By the time Hume wrote his \textit{Commentaries} jurors had ceased to act as both witnesses and judges and instead judged guilt only on the evidence that was laid before them.\textsuperscript{416} No longer were they expected to found their decisions on their personal knowledge of the accused’s character and reputation. Indeed Hume specifies that the prosecutor was unable to rely on proof of the accused’s general bad fame, whether in respect of temper, or honesty (unless there was charge of being a thief by habite and repute) or licentious habits, or any other vice or disposition.\textsuperscript{417} Nevertheless, previous conduct that was deemed relevant to the alleged crime continued to be important in assigning liability. So, repeated convictions for theft

\begin{thebibliography}{99}
\bibitem{411} 20 Geo II, c43.
\bibitem{414} I D Willock, \textit{The Origins and Development of the Jury in Scotland} (1966) 148.
\bibitem{415} J Maclaurin, \textit{Arguments and decisions in remarkable cases, before the High Court of Justiciary, and other supreme courts, in Scotland} (1774) xxvii.
\bibitem{416} I D Willock, \textit{The Origins and Development of the Jury in Scotland} (1966) 197.
\bibitem{417} Hume, \textit{Commentaries} II, 413.
\end{thebibliography}
were still an aggravating factor which led to harsher punishment on the basis that it showed a “corrupt and an incorrigible disposition”. Admittedly, there is a difference between using character evidence to determine the appropriate punishment and using it to determine culpability. However, in Scotland the distinction was not so clear because the aggravation was included as part of the charge (and therefore was heard by the trier for fact) rather than being brought in after culpability had been determined, as was the case in England.

An accused person’s previous convictions were therefore given considerable significance, which indicates that character responsibility still partially underpinned the criminal law. A further sign of the continued commitment to character responsibility is the way that the charge of being a thief by common habite and repute was used. Habite and repute could act as either an aggravation to exacerbate punishment or it could be charged as a free-standing offence, according to the long-standing practice in Scotland. The traditional method by which the accused’s reputation as a thief was established was that the court would hear of his or her standing in the eyes of the local neighbourhood or, alternatively, a single witness drawn from that area. The charge of habite and repute was thus intimately bound with the role of the community and the model of character responsibility.

To summarise, the era beginning with the decline of hard-line Calvinism through to the end of the eighteenth century can be described as representing a partial move away non-cautious character responsibility. The main factor indicating that character responsibility was no longer seen as entirely appropriate was the fact that the trial process became increasingly anonymous, in that it aimed to ensure that jurors and accused persons were unknown to each other, and increasingly concerned with assessing the accused’s conduct on an isolated occasion rather than his or her character and lifestyle. This change can partly be explained by the fading influence of Calvinist Presbyterianism, which in Scotland had provided many of the conditions

418 Hume, Commentaries I, 95. This was the most common aggravation of theft (P T Riggs, “Prosecutors, Juries, Judges and Punishment in Early Nineteenth-Century Scotland” (2012) 32(2) Journal of Scottish Historical Studies 166 at 171).
419 H Barclay, On the Administration of Criminal Law in Scotland (1862) 17.
420 James Miln, 1 March 1758 (JC 3/31).
421 Hume, Commentaries I, 93.
necessary for attributing criminal responsibility on the basis of character. These conditions included easily-available knowledge of the accused’s reputation and a social arrangement in which the community was prioritised over the individual. Despite these changes, character continued to be important in attributing criminal responsibility, which is demonstrated in the continued importance of previous convictions (in both sentencing and determining guilt) and the charge of habite and repute (as both an aggravation and free-standing offence). Character responsibility would continue to be relevant in attributing criminal responsibility throughout the nineteenth century but shifting patterns of prosecution and the changing role of the police meant that its relevance would be different.

5.4 The nineteenth century

Throughout the nineteenth century, the charge of habite and repute continued to be libelled with remarkable frequency though it could no longer operate as a free-standing offence. Indeed the abundance of aggravated theft more generally was notorious, a fact lamented by Lord Cockburn who wrote of a circuit journey to Arbroath in 1844:

Bad thefts, and plenty transportations, but no glorious murder…None, in short, of the poetry of crime; all prosaic theft – aggravated by housebreaking, habite and repute, and previous conviction.

The sheer volume of prosecutions in which habite and repute was charged suggests that there was no decline in the prominence of character responsibility at the start of the nineteenth century. However, another explanation is that there was simply a general upsurge in the number of property offences in the first half of the nineteenth century due to increased poverty and changing social perceptions of property.

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422 In examining the Books of Adjournal it became clear that there were a vast number of prosecutions for aggravated theft during the first half of the nineteenth century, including the charge of being habite and repute a thief.

423 Mary Bentley alias Kingsley alias Miller & Houston Cathie, 27 January 1823 (JC 4/13). In this case the informant for His Majesty’s Advocate stated that it was not certain at what point the charge of habite and repute had gradually subsided from a point of dittay to a mere aggravation.

424 H Cockburn, Circuit Journeys (1889) 222.
ownership, which stemmed from the rapidly growing urban population.\textsuperscript{425} Given that habite and repute could only be charged in relation to property offences, its prevalence can partially be attributed to the rise in this sort of offence.

Despite its widespread use, there were signs of a movement to quell the charge of habite and repute. According to one practitioner of the age, there was a growing tendency to restrict rather than extend the operation of the charge.\textsuperscript{426} This was reflected in another case in which the prosecution attempted to attach the aggravation (and the aggravation of having previously been convicted of theft) to a charge of reset. After an objection to the relevancy of the indictment the court ordered ‘Informations’ on the matter and was told by His Majesty’s Advocate’s that the objection was founded on the “peculiar nature of the aggravation of habite and repute…and the propriety of limiting its application as far as possible”. He added that the aggravation was “to some degree of an anomalous nature” in that it “allows the general character of the accused to be put in issue” and, furthermore, allows “punishment of crimes to be regulated, not by the specific offence of which the individual has been proved guilty, but by the opinion which his neighbours may have formed about his ways and habits of life”.\textsuperscript{427}

The outcome of the case was that the aggravations were held not to be relevant, but the indictment was held to be quoad ultra relevant to infer the pains of law. This outcome together with the opinion of the prosecutor’s informant indicates a turn away from the idea that a person should be punished for his or her general character or reputation and towards the idea that liability should depend on a much narrower evaluation of the accused’s conduct during the specific incident charged.

A similar trend can be observed in the way that previous convictions were perceived. The sheriff Hugh Barclay, in an address to the Juridical Society and the Legal and Speculative Society of Glasgow, highlighted the difference between the way that previous convictions were treated in Scots and English law. The Scottish

\textsuperscript{425} I Donnachie, ‘“The Darker Side”: A speculative survey of Scottish crime during the first half of the nineteenth century” (1995) 15(1) Scottish Economic and Social History 5 at 8-9. The mid-1820s, the late 1830s and the mid-1840s show a particular rise in thefts, which reflect periods of economic hardship.

\textsuperscript{426} George Buckley, 12 July 1822 (JC 4/13).

\textsuperscript{427} Mary Bentley alias Kingsley alias Miller & Houston Cathie, 27 January 1823 (JC 4/13).
practice was to inform the jury of the accused’s previous convictions before it had reached a verdict. Conversely, the English practice was to present prior convictions to the court after conviction and solely in order to regulate the level of punishment. Barclay objected to the Scottish practice on the basis that the prophylactic measure of instructing jurors to ignore the accused’s previous convictions until they had reached a verdict was almost certainly ineffective. These concerns illustrate the way that attitudes to assigning criminal responsibility were changing. It was no longer deemed acceptable to make issue of the accused’s character in determining his or her culpability, but nevertheless the practice of doing so remained formally acceptable.

Although habite and repute was consistently – even increasingly – charged, the type of evidence on which the aggravation could rest came to be regarded differently over time. According to Alison, at the beginning of the century the testimony of neighbours was thought to be the best means of establishing habite and repute. By the latter portion of the century attitudes had changed such that police testimony was considered preferable. In Alison’s opinion, this difference was down to the increased viciousness of thieves in the age in which he was writing – their depraved habits, irregular life and inconsistent domicile meant that it was impossible to identify who were their neighbours or to find any person among their associates who would be sufficiently trustworthy to testify.

This attitudinal change speaks to a distinct shift that occurred in the first half of the nineteenth century when the Scottish police became far more regulated. At the end of the eighteenth century most burghs did not have permanent salaried watchmen and, as the previous sections have shown, a combination of magistrates, county justices and Kirk elders took charge of all crimes in their designated areas. However, at the end of the century falling Church attendance and declining religious control meant that the traditional means of dealing with the problems of crime and immorality began to fail, so much so that the era was regarded as one of growing

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428 H Barclay, On the Administration of Criminal Law in Scotland (1862) 17.
429 Alison was contrasting the position of the law when he wrote with what it had been when Burnett wrote A Treatise on Various Branches of the Criminal Law of Scotland, which was published in 1811 (A Alison, Principles of the Criminal Law of Scotland (1832) 298-302).
immorality.\textsuperscript{431} This sense of heightened immorality was tightly bound to the challenge of maintaining law and order; indeed, the high levels of criminality that were experienced in the early decades of the nineteenth century were seen as comprehensible only in moral and theological terms.\textsuperscript{432}

In addition to the dwindling efficacy of community and Church-imposed social order, religion began to be viewed as a personal rather than communal responsibility\textsuperscript{433} and, as such, a void appeared in the task of preserving public morality which the police were expected, and would attempt, to fill.\textsuperscript{434} This change in the burden of maintaining public order and morality is reflected in the fact that from the 1850s onwards the task of the police became less to do with maintaining social order and more to do with enforcing moral behaviour.\textsuperscript{435} Arguably, the Scottish police were well-placed to undertake this mission for, as Barrie has argued, the institution of policing in Scotland had its roots in the civic tradition of the Scottish Enlightenment and, up until its centralisation in the middle of the nineteenth century, local police commissions had very close ties to the community and were more democratic than their English counterparts.\textsuperscript{436}

The process of police centralisation was tied up to the perceived need for more robust supervision, which was informed by a combination of the apparent immorality of the age, the country’s commercial expansion and changing attitudes towards poverty and property. In general, the effects of the police reforms of the first half of the nineteenth century were greater harmonisation of local police forces and a

\textsuperscript{431} Ibid 34-36
\textsuperscript{436} The ability of the police to act as instruments of municipal morality must not be overstated. Since large numbers of the ‘lower orders’ lived on the outskirts of cities they were outside police boundaries, which did not extend very far until the 1846 Municipal Police Extension Act (D G Barrie, Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865 (2008) 131-132, 204).
proliferation in the amount of legislation that affected the police and their powers.\footnote{The Burgh Police (Scotland) Act 1833 was the first national policing enactment relating to Scottish towns, whose purpose was to give burghs new and extended powers to fund and administer local services. Further statutes followed, which gave the police greater civic and public amenity powers. In 1857, the Country and Police Burgh Act was passed in order to amalgamate small burgh police forces with county constabularies in order to achieve better co-ordination and consolidation (D G Barrie, \textit{Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865} (2008) 171-183).} The impact of these changes can be seen in the explosion of summary prosecutions for relatively minor crimes including public order offences, begging, drunkenness, petty theft and breach of the peace.\footnote{D G Barrie, \textit{Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865} (2008) 198.} In terms of the role of character responsibility, the most pertinent aspect of the changing nature of policing was the fact that many of the offences which were dealt with by the police effectively criminalised undesirable statuses.\footnote{Lacey has drawn attention to the point that criminalisation of status is one of the ways in which character is relevant to the attribution of criminal responsibility (N Lacey, “The Resurgence of Character: Responsibility in the context of criminalisation” in R A Duff & S Green (eds), \textit{Philosophical Foundations of Criminal Law} (2011) 151 at 157).} A large part of the newly reformed police forces’ remit was prosecuting nuisance activities, which was in keeping with their role as surrogate guardians of public morality.\footnote{Report from the departmental committee on habitual offenders, vagrants, beggars, inebriates, and juvenile delinquents (1895) iv, vi. The increased spatial ambit of the police, coupled to the growth in police legislation meant that there was an increase in the number of petty offences that were detected and prosecuted.} This task involved monitoring certain classes of the population including vagrants, beggars, habitual inebriates and prostitutes who, simply in virtue of their status and character, were subject to prosecution.\footnote{L Farmer, \textit{Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present} (1997) 114-117; Report from the departmental committee on habitual offenders, vagrants, beggars, inebriates, and juvenile delinquents (1895) viii-x, xxxi – xlviii. Vagrants and beggars were punishable according to the Public Health Act 1871 and Prevention of Crimes Act 1871. Begging was an offence under the Burgh Police (Scotland) Act 1892 and various Police Acts. At common law loitering and importuning were not crimes or punishable outside the burghs (Burgh Police (Scotland) Act 1892). To constitute an offence under the Burgh Police Act a person must have been a common prostitute or street-walker and must have either loitered about or importuned passengers for the purpose of prostitution. Most Special Police Acts contained the same offence and penalty. Habitual drunkards were subject to prosecution under the Habitual Drunkards Act 1879.} In the main, therefore, the effects of police reform in the nineteenth century did little to reduce the relevance of character responsibility in Scots criminal law.
5.5 Conclusion

Scots criminal law would eventually follow English law in holding previous convictions to be admissible only after a verdict had been delivered and the sentencing stage had been reached.\(^{442}\) Notwithstanding this, previous convictions continued to act as aggravations of crimes, and not only for multiple instances of the same crime.\(^{443}\) Although these aggravations are relevant to the punishment received rather than the determination of culpability, they demonstrate the enduring importance of character within the broad exercise of determining criminal responsibility as a whole. As Farmer has argued, these aggravations have proved more important in practice than specific provisions on habitual criminality.\(^{444}\)

As for the charge of habite and repute, the definition of theft would eventually be broadened and its seriousness downgraded with the result that habite and repute could be charged across a wider range of dishonesty offences.\(^{445}\) Overall, the number of offences in which habite and repute was charged would decline, along with charges for aggravated theft in general. Riggs has shown that the decline in charges of aggravated theft in the nineteenth century was a symptom of the increased demands that were placed on the prosecution system. With a greater number of property offences being perpetrated, detected and prosecuted it became impossible for juries to hear every case, so there was a concerted effort to minimise the number of trials that would reach the Justiciary Court. To accomplish this, fiscals were sometimes instructed not to charge aggravations to property offences simply in order to keep the cases within the sheriff’s jurisdiction.\(^{446}\)

\(^{442}\) Criminal Procedure (Scotland) Act 1887, s 67 (consolidated in the Criminal Procedure (Scotland) Act 1995); Report from the departmental committee on habitual offenders, vagrants, beggars, inebriates, and juvenile delinquents (1895) xv. Despite this change, it was common practice in summary courts to read out the accused’s previous convictions as part of charge even after 1887 Act was passed (L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) 118).

\(^{443}\) Previous convictions could aggravate offences of the same class rather than simply the same crime (Criminal Procedure (Scotland) Act 1887, s 63-65 (consolidated in the Criminal Procedure (Scotland) Act 1995)).

\(^{444}\) L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) 120.

\(^{445}\) Ibid.

The first key conclusion about the changes away from character responsibility and towards capacity responsibility is that although they came about due to a combination of several factors, many of which were simply the product of a rapidly growing society rather than any ideological change, they can plausibly be connected to the specifically Calvinistic aim of securing social and moral order. As the position of Calvinism within Scotland began to weaken due to its reduced support within and outside the Church and as the Kirk was increasingly unable to impose discipline, the collectivist structures which had allowed (and even encouraged) character responsibility to operate gradually eroded.

The second key conclusion about the shifts in responsibility attribution outlined in this chapter is that although there was clearly a move away from non-cautious character responsibility during the eighteenth century, character responsibility remained important within Scots criminal law. This is clear in the way that previous convictions and the charge of habite and repute were used and in the criminalisation of certain status types. It has been argued that this continued relevance of character can partially be explained with reference to the Scottish moral tradition. As the Kirk lost the ability to influence social and moral behaviour the police, who were rooted in the Scottish moral tradition by way of the Enlightenment concern with civic society, took up the task of attempting to regulate immoral conduct. According to the arguments advanced in this chapter, therefore, both the downturn and retention of character responsibility during the eighteenth and nineteenth centuries owes much to the changing character of the Scottish moral tradition at that time.

A final change at the end of the nineteenth century contributed to the rejection of character evidence in Scots criminal law: the introduction of the Criminal Evidence Act 1898. This Act allowed the accused to give testimony and thus created a place for psychologised states of mind in determining culpability.\textsuperscript{447} This change undoubtedly paved the way towards a model of criminal responsibility that placed greater emphasis on capacity. As capacity became more important, psychologised \textit{mentes reae} gained greater relevance in the context of determining.

culpability, a change which is explored in Chapters Seven and Eight. In addition to this, the rise of capacity responsibility played an important role in the growth of mental state defences, the topic of which is the basis of the next chapter, in which it is argued that the development of these defences in Scotland bears the imprint of Scottish moral and theological thought.
Chapter Six: The Development of Mental State Defences

6.1 Introduction

This chapter contributes to the more general aim of this part of the thesis, to show that there was partial acceptance of capacity responsibility in nineteenth century Scots criminal law, by examining the growth of mental state defences. The term ‘mental state defences’ is used to refer to defences in which the accused’s mental state is the basis for attributing non-responsibility. To that end, the main discussion is of the insanity defence, while the defence of provocation and the plea of diminished responsibility are mentioned when relevant to the overall argument. This overall argument is that in keeping with the increasing importance of mental state\textsuperscript{448} the early conceptualisation of insanity, which was based on its external manifestation,\textsuperscript{449} came to be partially displaced by a more psychologically informed formulation that paid more heed to the accused’s mental state. It is further argued that this displacement was informed by changes in the religious and intellectual culture of Scotland, specifically by the replacement of a Calvinist view of moral agency with an Enlightenment view of the moral subject, which was rooted in Thomas Reid’s theory of the active powers. Of course, the emergence of the psychiatric sciences was crucial in the evolution of the insanity defence, so this factor is given consideration – particularly in respect of the apparent conflict between professional physicians and lawyers at the time.

Although the thrust of the argument in this chapter is that capacity responsibility became more pertinent in the ascription of non-responsibility, this contention is moderated by the qualification that capacity responsibility was only partially accepted. In essence, the insanity defence remained closely associated with character, as is evident in the belief that madness was dispositional and could be ‘read off’ the conduct of the accused. As Loughnan has argued, this conceptualisation of madness as ‘manifest’ has links to the paradigm of manifest

\textsuperscript{448} Discussed in Chapters Seven and Eight.
\textsuperscript{449} This is similar to what Loughnan has termed ‘manifest madness’ (A Loughnan, “‘In a Kind of Mad Way’: A Historical Perspective on Evidence and Proof of Mental Incapacity” (2011) 35(3) Melbourne University Law Review 1047; A Loughnan, Manifest Madness: Mental Incapacity in Criminal Law (2012)).
criminality and also with character responsibility. Again, this belief that insanity was evident at face value is linked to the Scottish moral tradition, particularly the Common Sense school of thought which placed ultimate importance on lay epistemology and judgment.

6.2 The insanity defence

6.2.1 Shifts in the insanity defence

One of the central claims of this chapter is that there was a shift in Scots criminal law from one conceptualisation of insanity towards another. However, this claim should not be taken to imply that this shift was cohesive or linear. In fact, until its recent reform and statutory enactment the Scots law of insanity was notoriously vague and difficult to define with any clarity. This was partly due to the fact that many Scottish cases of insanity have been dealt with by a plea in bar of trial rather than by invoking the insanity defence. This means that there have been comparatively few opportunities to hone the defence definition. A further explanation for the obscurity is that Scottish juries have frequently been given inconsistent directions on the meaning and application of the insanity defence. However, despite diverging

450 Discussed further in Chapters Seven and Eight.
454 In addition, since the 1930s diminished responsibility has been more commonly pled than the insanity defence to charges of murder (N Walker, Crime and Insanity in England (vol I: The Historical Perspective) (1968) 144). With reference to England, Mackay writes that since its introduction in the Homicide Act 1957 diminished responsibility has eclipsed the insanity defence in murder prosecutions (R D Mackay, Mental Condition Defences in the Criminal Law (1995) 79-80, 100, 181).
455 Gordon, Criminal Law para 10.42.
456 An important fact in understanding this inconsistency is that until the creation of the Court of Criminal Appeal by the Criminal Appeal (Scotland) Act 1927 there was no way by which different jury directions could be reconciled. Furthermore, it appears that even since the appeal court’s creation the point has not been raised frequently, due to how often the insanity is successfully pled. For example, in a 1996 study on mental disorders and criminal proceedings in all three cases involving both a plea in bar of trial and the insanity defence, the defence was successfully pled. In the twelve cases studied which involved the insanity defence alone, in all but two cases the defence was successful (M Burman & C Connelly, Mentally Disordered Offenders and Criminal Proceedings: The Operation of Part VI of the Criminal Procedure (Scotland) Act 1995 (1999) 15.2 – 15.8).
jury directions, it is possible to distinguish two prominent trends in the way that the
defence has historically been defined. One of these definitions is very similar to the
English definition of insanity, as constituted by the M‘Naghten Rules,\textsuperscript{457} and the
other is a much broader test of soundness of mind, which leaves the assessment of
the accused’s mental state entirely with the jury.\textsuperscript{458} While these two approaches are
not unique to Scots law, the way they are expounded and the context of their
development hint at the influence of distinctive cultural forces that have not
previously been acknowledged.

6.2.2 Cognitive insanity

According to early Scots law, as illustrated by Matters Criminal, insane offenders
were simply considered “furious” and unable to commit a crime, for the law regarded
them as no more guilty than “a beast is to be repute guilty and punishable for the
wrong they do”.\textsuperscript{459} The reason punishment was not inflicted was that the insane were
recognised as being “abundantly punished by their own fury”.\textsuperscript{460} At this time, the
particular way that insanity was recognised was in keeping with Loughnan’s notion
of “manifest madness”\textsuperscript{461} which, being derived from Fletcher’s account of manifest
criminality, places similar importance on the accused’s external conduct. Indeed the
key axiom of manifest madness is: “madness is as madness does”.\textsuperscript{462} This tight
connection between conduct and responsibility means that the accused’s actions have
great significance in the law’s doctrines and practices. During Mackenzie’s time,
Scots law conformed to the paradigm of manifest madness in holding that
punishment would only be spared when the accused was “absolutely furious”.\textsuperscript{463} In
other words, only if the accused displayed clear and forceful external signs of

\textsuperscript{457} \textit{R v McNaughten} (1843) 8 ER 718.
\textsuperscript{458} On these two strands of thought see V Tadros, “Insanity and the Capacity for Criminal
\textsuperscript{459} Mackenzie, \textit{Matters Criminal} 15.
\textsuperscript{460} Ibid.
\textsuperscript{461} A Loughnan, “‘In a Kind of Mad Way’: A Historical Perspective on Evidence and Proof of Mental
\textsuperscript{462} A Loughnan, Manifest Madness: Mental Incapacity in Criminal Law (2012) 53-54.
\textsuperscript{463} Mackenzie, \textit{Matters Criminal} 16.
madness would he or she be acquitted.\textsuperscript{464} Because only “raving lunatics” were regarded as irresponsible, it was easy to see, literally, if an accused was responsible or not.\textsuperscript{465}

For the most part, the texts on Scots criminal law that followed \textit{Matters Criminal} provided that offenders were to be excused if they lacked the ability to reason or to distinguish between good and evil.\textsuperscript{466} A similar definition of insanity was offered by Hume in his \textit{Commentaries} where he described an:

absolute alienation of reason, \textit{‘ut continua mentis alienatione, omni intellectu careat’}, such a disease that deprives the patient of the knowledge of the true position of things about him, and of the discernment of friend from foe, and gives him up to the impulse of his own distempered fancy, divested of all self-government, or control of his passions.\textsuperscript{467}

Like the earlier conceptualisations of insanity, Hume’s account is premised on a cognitive, reason-based view of insanity, but it also appears to include a volitional element in the form of the accused’s ability to control his passions. By suggesting that disease might prevent control of the passions, Hume appears to be countenancing a mild form of something like irresistible impulse.\textsuperscript{468} However, later in the text in the context of provocation Hume makes it clear that simple want of command of temper would not excuse an offender in the same way that an alienation of reason might, adding that:

[\textit{t}o curb and repress a jealous, choleric, or quarrelsome humour, so far as this can be done without injustice in the particular case, and thus to bend the temper to the course of civil order, is the main scope of the law\textsuperscript{469}.

\textsuperscript{464} In the 1889 volume of the Juridical Review Scott noted that the only forms of insanity that existed before the early nineteenth century were “wretched imbeciles” who were “hooted and hunted”, and “violent maniacs” who were a terror to society (C Scott, “Insanity in its Relation to the Criminal Law” (1889) 1 Juridical Review 237 at 240).
\textsuperscript{465} Gordon, \textit{Criminal Law} para 10.17.
\textsuperscript{466} W Forbes, \textit{The Great Body of the Law of Scotland} (vol 2) 23-24 (http://www.forbes.gla.ac.uk/). Bayne also notes that if a person was under a distemper which divested him of the use of his reason he should not be punished, because the chief end of punishment (deterrence) would be lost (Bayne, \textit{Institutions} 13-14).
\textsuperscript{467} Hume, \textit{Commentaries} I, 37-38 (1797 edition). In the 4\textsuperscript{th} edition of the \textit{Commentaries} the last section on being “divested of all self-government, or control of his passion” is omitted.
\textsuperscript{468} Chalmers and Leverick hold the view that the Institutional writers, specifically Hume and Alison, do not recognise the concept of irresistible impulse (J Chalmers & F Leverick, \textit{Criminal Defences and Pleas in Bar of Trial} (2006) para 7.42).
\textsuperscript{469} Hume, \textit{Commentaries} I, 249.
These further remarks on the contours of responsibility clarify that, for Hume, loss of reason was the primary form of insanity. Even though his definition of the defence might include a volitional element, this was to be strictly interpreted in keeping with society’s expectations of self-control.

That Hume distinguished between command of temper and alienation of reason, and that he saw one of the law’s objectives as being to inculcate citizens with an appropriate degree of self-control is significant. The image of the legal subject that is implied by his definition of insanity has many similarities with the image of the moral subject that lay at the heart of Scottish Common Sense philosophy. Furthermore, the moral agent that was portrayed in Scottish Common Sense philosophy was very different from the moral agent that was portrayed in earlier Calvinist thinking and both entailed different theories of individual responsibility. Under the Calvinist view, deviant behaviour was traditionally attributed to the innate and universal depravity of mankind. Once Enlightenment philosophers had introduced the notion of man’s innate ability to understand and conform to God’s moral laws there was potential for a more nuanced conception of insanity to emerge. Since it was taken for granted that every person had the ability to discern and understand the laws of morality, accounts of moral responsibility could go beyond reason and give priority to volition. In other words, because the Enlightenment subject was said to have been bestowed with fully functioning reasoning capacities, in order to avoid responsibility he or she would need to rely on some other factor – specifically, capacity for self-control. The shift away from a Calvinist notion of moral agency towards an Enlightenment notion of moral agency can therefore provide a prospective explanation for the general shift in the way that criminal non-responsibility – as enshrined in the insanity defence – was conceived of, from a basic account premised on crude assessments of behaviour to one that was, at least in theory, much broader.

The following sections outline the two primary trends in the way that the insanity defence evolved from its early ‘manifest madness’, and show that both of these trends reflect different features of Scottish Enlightenment philosophy. One trend sees the defence operating in a similar manner to the English M’Naghten Rules,
that is, being limited to instances where the accused was unaware of the nature of his or her actions, or of their wrongfulness. This trend is evident in a string of jury directions that were given by Lord Hope in the 1840s and 1850s. These directions display an attitude towards the notion of volitional insanity that bears remarkable likeness to Thomas Reid’s theory of the active powers, which was an important work in Scottish Common Sense philosophy and is outlined in more detail below.470 The development of the provocation defence is conceptually linked to this first trend, sharing the same resemblance to Reid’s theoretical position. The second trend is judicial faith in a common sense assessment of the accused’s soundness of mind, which is displayed in a series of jury directions delivered by Lord Moncrieff in the 1870s. His faith in common sense reasoning and judgment represents the importance of common sense reasoning and the importance of intersubjective consensus, which were also facets of Scottish Enlightenment moral and social thought.471 This second trend is further reflected in the emergence of the doctrine of diminished responsibility, which allowed the jury to identify impaired sanity for the purpose of partially excusing the accused.

It might seem odd that Scottish Enlightenment philosophy, which developed in the eighteenth century, does not appear have had an influence on legal conceptions of criminal responsibility until the middle of the nineteenth century. One explanation for this delay is that the criminal law only began to re-evaluate its position on non-responsibility when psychiatric notions of insanity began to gain prominence at the start of the nineteenth century.472 A further explanation is that the connection between Scottish philosophy and common sense is not one that the eighteenth century philosophers made themselves; only in the nineteenth century did Scottish philosophy become ‘self-aware’.473 Yet another explanation relates specifically to Thomas Reid’s philosophy. Whereas Hume was arguably the name most strongly associated with Scottish philosophy in the eighteenth century, Reid’s work

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471 See Chapter Two.

472 This is discussed in more detail in section 6.3.2.

dominated the nineteenth century. In fact, the connections between criminal non-responsibility and Reid’s philosophy run deeper than simple chronological concurrence. According to Graham, Reid differed from Hume and Smith in that he assumed that questions of mind and psychology lay at the heart of philosophy rather than questions of social enquiry.

6.3 Volitional insanity, provocation and the active powers

6.3.1 Volitional insanity

The trend in Scots law of limiting the insanity defence to cognitive issues is well recognised, as is the patchy rejection of volitional insanity. In fact, whenever a cognitive test of insanity was adopted or re-affirmed in Scots law it was often explicitly at the expense of any volitional alternatives or additions. This tendency against accepting a volitional version of insanity can be traced to the way that Lord Hope defined the parameters of the defence, for in doing so he consistently directed the jury that insanity should be assessed using a purely cognitive test. For example, in Jas Gibson his Lordship held that for the insanity defence to apply the accused had to “believe, not that the crime is wrong in the abstract (for most madmen do admit murder to be wrong, and punishable in the abstract), but that the particular act…was not an offence against the law”.

So the only issues to be considered were whether the accused knew the nature of the act he had committed and whether he believed it to be contrary to law; any further questions about his ability to abstain from wrongful conduct were deemed irrelevant.

Before exploring Lord Hope’s reasons for rejecting a volitional test of insanity it is important first to understand the context in which the trials he presided over were decided. The time at which these trials were heard is significant for it

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474 Ibid at 341.
475 Ibid at 344. Reid’s Inquiry into the Human Mind, on the Principle of Common Sense (1765) was dedicated to the task of understanding the mind and its operations.
476 Chalmers and Leverick describe the cognitive test of insanity as always having been accepted, and the volitional test as having a “chequered history” (J Chalmers & F Leverick, Criminal Defences and Pleas in Bar of Trial (2006) para 7.02).
477 (1844) 2 Brown 332.
478 Jas Gibson (1844) 2 Brown 332 at 356-357.
marked an important turning point in a complex and at times turbulent relationship between the developing psychiatric and well-established legal professions. Appreciating this relationship situates the arguments about the influence of Common Sense philosophy that are posited below within the more familiar debate about the insanity defence, which centres on the interface between law and medicine. It also provides the background information that is necessary to understand how volitional insanity emerged as a challenge to cognitive insanity and why Lord Hope was forced to confront its spectre in the High Court of Justiciary.

6.3.2 The interface between law and psychiatry

The start of the nineteenth century is usually pinpointed as the source of the conflict between law and psychiatry over the question of insanity because at this time two crucial developments occurred. The first was that it started to become widely recognised that mental abnormality was, at least in part, the province of the medical profession. The second was that, under the influence of moral philosophers, the law began to become more concerned with the mental elements of behaviour and conduct.\footnote{R Ormrod, “The Debate Between Psychiatry and the Law” (1975) 127 British Journal of Psychiatry 193 at 193.} These two factors meant that psychiatric professionals and legal writers and practitioners were increasingly attempting to assert dominance over the same area: the identification and proof of insanity in alleged offenders. Of course, the conflict between law and psychiatry was neither uniform nor was it comprehensive. There were members of the medical community who rejected the potential for insanity and intellectual coherence to co-exist and, similarly, certain defence agents characterised deviant behaviour as the product of delusion, i.e. in psychiatric terms.\footnote{J P Eigen, “An Inducement to Morbid Minds” in M Dubber & L Farmer (eds), Modern Histories of Crime and Punishment (2007) 66 at 76-77; J Wood, The Natural Guardians of the Race: Heredity, Hygiene, Alcohol and Degeneration in Scottish Psychiatry, c. 1860-1920, PhD Thesis, University of Edinburgh, 2011 at 11.}

However, it is clear that there were palpable difficulties between the two professions, as is evident from the voluminous literature on the matter. Indeed, so
much had been said on the subject by the time the 1895 Annual Meeting of the British Medical Association took place that Dr Maudsley, who opened the discussion on criminal responsibility and insanity, stated:

I cannot help feeling that I am undertaking a task which is likely to be somewhat barren, for there is little to be said that has not been said over and over again... notwithstanding that the legal test has been condemned by eminent judges and that it has no foundation in science, it still flourishes in full vigour.481

Broadly speaking, the main criticisms of the law were that it was not sensitive enough to the various degrees and many forms of insanity (including emotional insanity) and, second, that medical opinion on the responsibility of potentially insane offenders was not given sufficient credit. For their part, lawyers and judges were prone to think that medical men were too quick to base irresponsibility on the ground of insanity whenever a crime had been carried out and, furthermore, to base these claims on nothing more than their own experience and judgment.482

The first development cited at the start of this section – greater recognition of the medical complexity of insanity – is illustrated by the publication in 1798 of the Scottish doctor Sir Alexander Crichton’s An Inquiry into the Nature and Origin of

481 H Maudsley, “Criminal Responsibility in Relation to Insanity” (1895) 41 British Journal of Psychiatry 657 at 657.
482 See, for example, H Maudsley, “Criminal Responsibility in Relation to Insanity” (1895) 41 British Journal of Psychiatry 657; G M Robertson, “Sanity or Insanity? A brief account of the Legal and Medical Views of Insanity, and some practical difficulties” (1895) 41 British Journal of Psychiatry 433; W Norwood East, “The Legal Aspects of Psychiatry: Crime and Punishment” (1946) 92 British Journal of Psychiatry 682; H Savage & C Mercier, “Insanity of Conduct” (1896) 176 Journal of Mental Science 1; R H Noot, “The Responsibility of the Insane: Should they be punished? A Reply to Dr Mercier” (1899) British Journal of Psychiatry 53; J Crichton Browne, “Notes on Homicidal Insanity” (1863) 46(9) British Journal of Psychiatry 197; Editorial comment on “Insanity and Homicide” (1872) 18 British Journal of Psychiatry 61; Editorial comment on “Insanity and Crime: A Medico-Legal Commentary on the Case of George Victor Townley” (1863) 46 Journal of Medical Science; T Laycock, “On the Naming and Classification of Mental Diseases and Defects” (1863) 46(9) Journal of Medical Science 11; W Norwood East, “The Legal Aspects of Psychiatry: Crime and Punishment” (1946) 92 British Journal of Psychiatry 682. These difficulties were as pronounced in Scotland as elsewhere. In October 1869 the Scottish branch of the Medico-Psychological Association met with the Lord Advocate to discuss advancements in science and the lag in the law’s approach to dealing with mentally defective criminals. Unfortunately, as the Lord Advocate pointed out, the members of the Association had not “pointed out any practical measure for the remedy of existing evils” but he thanked them for their views in any case (Note on “Deputation of the Scotch Branch of the Medico-Psychological Association to the Lord Advocate” (1869) British Journal of Psychiatry 590 at 592). See also D Skae, The Legal Relations of Insanity: The Civil Incapacity and Legal Responsibility of the Insane (1867).
Mental Derangement. Crichton claimed that his treatise was the only British publication on the topic of mental derangement, other than Dr Thomas Arnold’s Observations on the Nature, Kinds, Causes, and Prevention of Insanity, Lunacy, or Madness. Crichton’s work listed a varied and nuanced range of insanity ‘types’ which included perceptional, intellectual, emotional and volitional, derangement of the will, and combinations of these. Furthermore, Crichton remarked that although moralists and metaphysicians had written extensively on the volitions, their views were “no use whatever to a medical inquirer, except inasmuch as he himself is concerned in the morals of the community he lives in”. Crichton’s focus on the influence of the emotions on mental state had a direct impact on the relationship between psychiatry and the law, as Crichton himself was called as a witness (by defence counsel Thomas Erskine) in the English trial of James Hadfield for treason in 1800. The outcome of Hadfield’s trial marked a change in the law’s approach to insanity, for he was acquitted not because of a failure of reason – he had acted perfectly logically and rationally – but because he suffered from religious delusions. The decision to acquit Hadfield represented a departure from the strict ‘loss of reason’ approach to the insanity defence and acceptance of the fact that there were other forms of mental disorder by which a person might avoid criminal responsibility.

Following this verdict, medical testimony in Old Bailey trials increasingly began to reflect the French concept of ‘manie sans délire’ (insanity without delirium) or, in other words, monomania in which the accused’s reasoning was clear in all but one area. This idea that there could be insanity without complete loss of reason

483 A Crichton, An Inquiry into the Nature and Origin of Mental Derangement (vols 1 & 2) (1798).
484 Published in 1782. Although many of the works discussed in this section were either published or written in England, it seems likely that the educated Scots living in industrial cities would have been aware of their existence. For the nineteenth-century Scottish intelligentsia, establishing a pan-British racial identity was more of a priority than delineating Anglo-Scottish boundaries (J Wood, The Natural Guardians of the Race: Heredity, Hygiene, Alcohol and Degeneration in Scottish Psychiatry, c. 1860-1920, PhD Thesis, University of Edinburgh, 2011 at 16).
485 A Crichton, An Inquiry into the Nature and Origin of Mental Derangement (vol 1) (1798) at 547.
486 Ibid (vol 2) at 98.
489 Ibid at 73.
gained further prominence with the publication of Prichard’s *A Treatise on Insanity and other Disorders Affecting the Mind*[^490] – the work which is often cited as the origin of the concept of moral insanity (despite that in this regard Prichard’s writing was essentially derived from the work of the French psychiatrists Pinel and Georget).[^491] Just three years later, the concept of moral insanity started to receive attention in the United States when Isaac Ray, one of the founding fathers of forensic psychiatry, published *A Treatise on the Medical Jurisprudence of Insanity*. Ray’s treatise exercised much influence over the development of the English insanity defence because during the now famous trial of Daniel M’Naghten for the murder of Edward Drummond the defence counsel Alexander Cockburn relied heavily on Ray’s arguments.

During his address to the court and jury, Cockburn emphasised how far scientific knowledge of mental disease had advanced in recent years and pointed out how the failure to incorporate these developments into the legal definition of insanity had rendered the defence deficient. He also characterised M’Naghten, who suffered from paranoid delusions, as “the victim of ungovernable impulse, which wholly takes away from him the character of a reasonable and responsible being”.[^492] These arguments were not in keeping with existing legal authority and were founded on innovative psychiatric notions of mental disorder which had never before been brought into the courtroom.

Although Cockburn also called upon legal authorities in his defence strategy, the evidence which appears to have held most weight in the decision to acquit M’Naghten was excerpts from Ray’s treatise and the testimony of medical witnesses who verified that M’Naghten’s disease had deprived him of control over his actions.[^493] This indicated an acceptance in the legal realm of newer psychiatric notions of insanity. Even though Lord Chief Justice Tindal did not refer to monomania, moral insanity or a diseased mind or will when he drew the trial to a

[^490]: Published in 1835.
close, it was the first time that medical authority had been pitted against legal authority in order to effect a change in the law.\textsuperscript{494} Of course, the earlier decision in \textit{Hadfield} had widened the insanity defence beyond its earlier definition but this was accomplished by legal ingenuity rather than by reliance on medical evidence.\textsuperscript{495} Following M’Naghten’s acquittal, the judges who had sat on the case went on to issue the much stricter M’Naghten Rules which, in effect, reversed the concessions to volitional insanity that had been implicit in the decision to acquit.\textsuperscript{496} Nonetheless, the high profile of the M’Naghten case was undoubtedly one of the major catalysts for the consternation that arose in both medical and legal circles over each profession’s conception of insanity.

In addition to its role in the debate between the legal and medical professions, the M’Naghten trial provides a likely explanation for how Isaac Ray’s ideas came to be discussed in the High Court of Justiciary. M’Naghten’s case was very well publicised and it seems no coincidence that just one year after the case arose and the Rules had been issued that defence counsel in the trial of \textit{Gibson} cited Ray’s writings. However, Lord Hope announced to the jury that they were not to consider the definition of insanity offered by medical men, especially not the “fantastic and shadowy” definition as to be found in Ray.\textsuperscript{497} Whichever way the threat of volitional insanity came to the attention of the Scottish judiciary, it was clearly regarded as a potentially destructive menace. Lord Inglis’ emphatic comments in \textit{Alexander Milne}\textsuperscript{498} illustrate this point well, for when a medical witness was asked whether it was possible that a patient with monomania might be aware of the nature of his crime and yet feel irresistibly impelled to commit it Lord Inglis replied that “[i]f all the physicians in Europe were to state that, I would tell the jury that they must not believe it, or act on it”.\textsuperscript{499} Such jealous control of the insanity defence did not go unnoticed. Indeed one commentator of the age speculated that the outcome in cases

\textsuperscript{494} B L Diamond, “Isaac Ray and the Trial of Daniel McNaghten” (1956) 112 \textit{American Journal of Psychiatry} 651 at 651.
\textsuperscript{495} Ibid at 655.
\textsuperscript{496} \textit{R v McNaughten} (1843) 8 ER 718.
\textsuperscript{497} \textit{Jas Gibson} (1844) 2 Brown 332 at 357. Copies of Ray’s treatise would have been available in Scotland for members of the judiciary to read, as it was published in England and Scotland in 1839 (W E Barton, \textit{The History and Influence of the American Psychiatric Association} (1987) at 81).
\textsuperscript{498} (1863) 4 Irv 301.
\textsuperscript{499} Ibid at 334.
such as *Gibson* and *Lillie Smith* (both of which are discussed below) was attributable to fear in the judiciary that psychiatric arguments might be used to classify wilful and atrocious acts as symptoms of disease rather than crimes, in a move which would threaten to undermine the very foundations of morality and responsibility.\(^{500}\)

In response to the threat of medical encroachment the judiciary clung to metaphysical and moralistic ideals of insanity. Undoubtedly, this tendency frustrated medical professionals such as Dr Laycock, Professor of the Practice of Medicine and of Clinical Medicine and Lecturer on Medical Psychology and Mental Disease in the University of Edinburgh, who complained that “medical witnesses are often forced into theoretical statements of no value whatever” whereas he “would say that no metaphysical questions whatever should be submitted to either a medical or non-medical tribunal”. According to Laycock, “[t]he question should not be as to the knowledge or beliefs of the prisoner, but this plain proposition – did he commit the crime in consequence of a diseased state of the brain…”.\(^{501}\)

The problem of the judiciary’s metaphysical tendencies was apparently widespread; at least this was the perception even if it was not the reality. An article in the *Juridical Review* described Scots lawyers as so metaphysically inclined that they could scarcely fail to succumb to prevalent metaphysical conceptions of insanity.\(^{502}\) In the same article Lord Hope was singled out as being especially prone to this sort of weakness, being accused of talking of theological, ethical, metaphysical and sociological matters as practical and settled propositions which ought to influence the verdict of “ordinary men entirely unaccustomed to such matters”.\(^{503}\) But the same tendency to invoke metaphysical dogmas was said to be “almost universal among the judges of Scotland” of that time, with Hope being merely “a flagrant example of general perversion”.\(^{504}\) The key point is that the Scottish judiciary reacted to the threat of psychiatric notions of insanity in a distinctively metaphysical way. The particular ways in which they protected their supremacy in the matter of insanity and

500 C Scott, “Insanity in its Relation to the Criminal Law” (1889) 1 *Juridical Review* 237 at 254.
503 *Ibid* at 241.
504 *Ibid* at 242.
criminal responsibility is the focus of the following sections and in these it will be seen that the judges’ responses were not just metaphysical – they drew on fundamental concepts from Scottish moral philosophy and religious thought.

6.4 Lord Hope’s rejection of volitional insanity

Lord Hope’s rejection of volitional insanity is the natural place to begin considering the metaphysical slant to the Scots law of insanity because, as was noted above, he was one of the most metaphysically inclined judges of his era. Furthermore, his reasons for rejecting volitional insanity are particularly valuable as they shed light on the ideological grounds that appear to have motivated his reliance on an exclusively cognitive definition of insanity. According to Lord Hope, if an accused person was suffering from a distortion rather than an alienation of reason he ought to be punished because, in breaking the law, he had given way to the temptations of “ill-regulated, morbid, distempered, and ungovernable feelings and passions, and prejudices” and had “indulge[d] in their gratification and satisfaction”. Lord Hope’s opinion on this point was openly inspired by theology, as is shown by the way that he equiparates Scots law and God’s teaching: “[t]he view of the law is the doctrine of the Bible – the man chooses to commit the act: he gives way to the suggestions and temptations which are strong, only because he has long indulged in such thoughts. Rely upon it, he was not tempted above what he was able to bear”.505

Whilst the theological basis of this statement is immediately obvious, its connections with Common Sense philosophy might not be. As was set out in Chapter Two, one of the innovations of the Scottish Enlightenment was the belief that God had endowed man with an innate moral sense and, furthermore, with the ability to conform his behaviour to the dictates of that sense. In his Essays on the Active Powers of Man Thomas Reid sets out this proposition when he writes that the “Supreme Being” gave man a “light” to direct his moral conduct506 and, in addition,

505 Jas Gibson (1844) 2 Brown 332 at 360 (emphasis in original).
506 T Reid, Essays on the Active Powers of Man (1788) 251. Reid’s father was a Kirk minister and, as a committed member of the Kirk, Thomas Reid produced a philosophy that conformed to his religious beliefs (A Broadie, A History of Scottish Philosophy (2010) 239).
gave him certain (limited) powers, which Reid termed the “active powers”.507 These active powers consisted of the will, sensibilities, passions, affections and appetites, and were distinct from the intellectual powers of understanding, judgment, perception and reflection.508 Importantly, Reid argued that both the active powers, including passions, and the intellectual powers, including reason, make up the moral faculty or conscience.509

These features of Reid’s Active Powers would suggest that if Scots law were to accord with its reasoning then the definition of insanity would incorporate volitional as well as cognitive elements as, according to Reid, both are crucial in holding a person to account. Obviously, Lord Hope expressly rejected any such suggestion, so it is not immediately clear how his jury directions might be said to reproduce the Common Sense vision of moral agency. The answer lies in the fact that an important part of the Common Sense philosophical perspective held that it was incumbent on each person to manage and use the powers he or she had been given by God in the proper way. Indeed, Reid went as far as to say that “[e]very thing virtuous and praise-worthy must lie in the right use of our power; every thing vicious and blameable in the abuse of it”.510 Overcoming undesirable passions by using one’s God-given power to do so was thus seen as the primary way in which human virtue could flourish511 and the more difficult the conquest, the more glorious it was.512 This apotheosis of the proper use of man’s power led Reid to the reject the idea that a person might be compelled by necessity to act in a wrongful way, stating:

That although the doctrine of necessity be supported by invincible arguments, and though it be the most consolatory doctrine in the world; yet no man, in his most serious moments, when he sits himself before the throne of his Maker, can possibly believe it, but must then necessarily lay aside this glorious doctrine and return to the humiliating conviction of his having made bad use of the power which God had given him.513

Reid took the same stark position in respect of the passions so that, in his view, there simply were no passions so strong that they could be regarded as irresistible. He

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507 Ibid introduction.
508 Ibid 59.
509 Ibid 262.
510 Ibid introduction.
511 Ibid 186.
512 Ibid 262.
513 Ibid 316.
conceded that a passion which was difficult to control might alleviate blame, but as it would not be *irresistible* it could not exculpate wholly.\textsuperscript{514}

This account of Reid’s philosophy shows that the form of moral agency on which it is based is one where volitional powers are assumed, along with a corresponding duty to make full use of these powers even, indeed especially, in the face of great temptation. Having established this, Lord Hope’s directions can clearly be seen to reflect the same ideas of moral agency. The accused in *Gibson* was said to have indulged in the satisfaction of distempered feelings and passions and for that reason was to be held accountable. The question of whether he could or ought to have governed these feelings was never asked; it was simply assumed that he could and should have.

Similarly, in *Geo Bryce*\textsuperscript{515} Lord Justice General McNeill, who followed Lord Hope in his hostility to the notion of irresistible impulse, stated that:

> I can by no means endorse the doctrine that seems to be held, that when a man cannot control his disposition to do an act he is not responsible for it. Nothing is more common than a person being unable to control his passions…merely because you call it a paroxysm of monomania, that is not a reason for holding that such persons are to be held out of the pale of the law in regard to answering for the consequences of the crime they commit.\textsuperscript{516}

This remark acknowledges that it might be difficult to control the passions but the statement that a person is “unable to control” them is plainly not intended to imply that the passions themselves are uncontrollable. It is the person who is unable to exercise control rather than the passions that are uncontrollable, which explains why the accused remains fully accountable for his or her crimes.

A further example of Lord Hope’s approach to insanity and the rationales behind it is offered in *George Lillie Smith*.\textsuperscript{517} Here again Lord Hope rejected the ideas of “moral insanity” or “what they call irresistible impulses, by which man is driven into crime, while it is not proved that his reason is destroyed”.\textsuperscript{518}

\begin{itemize}
\item \textsuperscript{514} *Ibid* 319-320.
\item \textsuperscript{515} (1874) 4 Irv 506.
\item \textsuperscript{516} *Geo Bryce* (1874) 4 Irv 506 at 526.
\item \textsuperscript{517} (1855) 2 Irv 1.
\item \textsuperscript{518} (1855) 2 Irv 1 at 53.
\end{itemize}
held, again relying on Biblical doctrine, that these types of arguments were not relevant to the question of insanity. The reasons he gave were that if the accused “chooses to commit crimes” and “gives way to temptations” which he has long indulged in his thoughts he will not be exempt from punishment because the temptation was not more than he could bear. In the absence of an alienation of reason the law would hold that “he can resist, and must resist any temptations to commit an act against the law”.

This direction is another ringing endorsement of the Common Sense conception of moral agency in that it presumes a universal level of self-control, and encourages execution of such self-control by punishing failure to do so. The most telling phrase in Lord Hope’s judgement, which reveals the remarkable resemblance between his sentiments and Reid’s is: “[t]he panel must be shewn to be unable, by the visitation of God, to do what his duty to God requires – to struggle and overcome his passions, which every man possessed of reason may”.

Encapsulated in this sentence is the idea that reason is a capricious gift from God that might be retracted at any moment and, furthermore, that reason, if present, complements the faculty to control the passions, which is also bestowed by God. These sentiments are virtually identical to those found in Reid’s *Active Powers*, even down to the valorisation of the struggle to remain master of one’s passions.

The parallels between Reid’s Common Sense philosophy and Lord Hope’s directions on insanity suggest that the latter’s views were in part shaped by an Enlightenment view of moral agency. However, coupled to his references to Biblical doctrine some of Lord Hope’s other comments on the nature of insanity suggest an affinity with an older, Calvinist-inspired view of criminal responsibility. In *Elizabeth Yates*, for example, Lord Hope states that:

The gambler who destroys himself, because ruin is staring him in the face, is a responsible agent, and violates the laws of God. It is not insanity that is the cause of his crime – it is the distempered and disordered workings of a depraved nature within him. You must not consider that insanity is proved by the wicked, or the irrational, or the irrereligious character of the act done: that is not the view of human nature: it is not the view that our religion gives us of it. There are many cases arising from moral depravity and moral wickedness, which pass

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519 *Ibid* at 60.
520 *Ibid* at 62.
521 (1847) *Ark* 238.
In these directions to the jury Lord Hope, true to form, denies the possibility that responsibility might be negated by evidence that the accused had carried out immoral or illegal acts. His worry that irrational or irreligious acts might imply the accused’s insanity was probably due to a combination of the perceived threat of domination by medical opinion and the paradox presented to jurists by the Common Sense view of human agency.\textsuperscript{523} Since, according to Common Sense philosophy, responsibility was grounded in mankind’s universal and God-given cognitive, moral and volitional faculties, instances of immoral or irrational action might, paradoxically, indicate that the actor was unaccountable. If accountability was demonstrated by rational and moral actions then, conversely, evidence of immoral or irrational behaviour might imply a lack of accountability. Clearly, it was undesirable that criminal offenders might benefit from this paradox so, in Lord Hope’s case, this possibility was flatly denied by calling upon the familiar Calvinist motif of a “depraved nature”. A combination of Enlightenment and Calvinist ideas about moral agency thus animated Lord Hope’s rejection of volitional insanity and his endorsement of cognitive insanity.

### 6.5 Provocation

The Enlightenment view of agency which played such a key role in Lord Hope’s rejection of volitional insanity can also be seen in the development of the provocation defence. Prior to the inception of Common Sense philosophy in Scotland, there was some recognition that killing in the heat of the moment or in response to provocation was not as culpable as pre-meditated homicide, which found form in the ancient distinction between intentional killing and killing \textit{chaude mella} and the rule

\footnotesize{\textsuperscript{522} Ibid at 240.\
\textsuperscript{523} American ante-bellum lawyers also encountered this difficulty (S L Blumenthal, “The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law” (2008) 26(1) \textit{Law and History Review} 99 at 102).}
that revenge killings were unjustifiable. But by the end of the eighteenth century the key account of provocation, provided in Hume’s *Commentaries*, had become more nuanced and revealed a greater regard for the accused’s internal condition.

This move, towards greater recognition of mental state within the provocation defence, has been identified and traced by Horder in his examination of English law on the matter. Horder shows that during the eighteenth century the provocation defence changed from being an assessment of the proportionality of the defendant’s reaction to an assessment of whether he or she had lost self-control. Prior to this turning point, responses to provocation which were ‘proportionate’, in the sense that they were deemed appropriate acts of retribution, would be excused under the law. Over time, self-control emerged as the measure of provocation and the relevant question became whether the defendant’s response had been immediate and instinctive. Horder attributes this change to the appearance in the eighteenth century of a qualitative distinction between reason and the passions within the soul. With the introduction of this distinction the test for provocation became whether the controlling power of reason had been eclipsed by the passions and desires. The question was no longer whether the defendant’s retaliation was appropriate, but whether the provocation produced such an overwhelming response that he or she became deaf to reason.

Perhaps unsurprisingly, given that Scottish philosophy and psychiatry had both come to distinguish between reason and the passions (or between intellectual and volitional mental maladies), the Scots law of provocation underwent a similar alteration. However, in Scotland the change occurred in a distinctive way that was clearly informed by Reid’s Common Sense conception of human agency. The first indication that the provocation defence had become more concerned with the accused’s inner state is in the way that Hume differentiates between provoked and

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524 Mackenzie, *Matters Criminal* Title XI.
525 The position on mitigation of punishment for killing on provocation was uncertain prior to Hume. It should also be noted that use of the provocation plea in practice was far from settled and the plea was only properly recognised in the late eighteenth century (L Farmer, *Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present* (1997) 130-131, 153).
527 *Ibid* chapter 2.
528 *Ibid* 73.
529 *Ibid* 77.
unprovoked homicide. He describes homicide on provocation as not actuated by “wickedness of heart, or hatred of the deceased, but by the sudden impulse of resentment, excited by high and real injuries, and accompanied with terror and agitation of the spirits”.\textsuperscript{530} The terms “impulse of resentment” and “agitation of the spirits” show that the defence was now expected to accommodate the kind of immediate and passionate response that Horder attributes to the eighteenth and nineteenth century shift in English law.\textsuperscript{531}

The peculiarities of the Scots law change become clear once Hume’s account of the “impulse of resentment” is set out in full, when it emerges that the same Common Sense philosophy concepts which underpinned the rejection of volitional insanity appear to have shaped the provocation defence too.\textsuperscript{532} Hume writes:

For although, like other animals, we are subject to the feeling of resentment on injuries, which is necessary to our preservation; yet it is not in our species, as in theirs, a blind and ungovernable impulse; but has been placed by the Author of our nature, under the control of a superior principle, which may serve to restrain it within those just and salutary bounds, where it answers its proper ends; and by means of which, if duly and habitually exerted, not only the conduct of the individual may be regulated, but even the feeling itself may in a great measure be chastened and subdued…To gain this state of self-command is every man’s duty…\textsuperscript{533}

Again there is an assumption of a universal, God-given ability to control one’s passions that was propounded by Reid and used by Lord Hope in his unwavering adherence to the cognitive test of insanity. Furthermore, within Hume’s account of provocation there is a duty on all recipients of this power, or “superior principle”, to maximise its use and efficacy. These duties call to mind the importance placed by

\textsuperscript{530} Hume, Commentaries I, 239.
\textsuperscript{531} Horder explains that in the transformation of the English law of provocation a disproportionate response came to be evidence of the defendant’s mental state. If it appeared that he or she was not lost in the passion of anger then his or her acts would be seen as signs of a wicked disposition and would therefore not be excused. The issue of proportionality had thus been recast as a sign of the defendant’s self-control rather than a gauge of the retributive justness of his or her response (J Horder, Provocation and Responsibility (1992) 90-92). Hume’s description suggests that Scots law embodied similar concerns. At a general level, this change accords with a shift away from Fletcher’s manifest criminality and towards subjective criminality, which is discussed further in Chapters Seven and Eight.
\textsuperscript{532} At the time when Hume studied law it was common for law students to attend lectures given by philosophers at their particular institutions. Hume studied under Professor John Millar (and indeed lodged with him), whose philosophy colleague was Professor Thomas Reid so it is likely that Baron Hume would have been familiar with, or at least conscious of, Reid’s moral philosophy (D Walker, The Scottish Jurists (1985) 282-291; J W Cairns, “Hume, David (bap. 1757, d. 1838)”, Oxford Dictionary of National Biography (2004) online edition, May 2007 (available at: http://www.oxforddnb.com/view/article/14142)).
\textsuperscript{533} Hume, Commentaries I, 239.
Reid on making use of one’s powers to fulfil one’s duties to God and Hope’s condemnation of prisoners whom he perceived as having fallen short in this duty.

Failure to meet one’s duty of self-command was constituted by engaging in mortal retaliation without an adequately serious cause. Only when the provocation endured was very grave, often to the endangerment of the accused’s life, would the pannel be excused for his “loss of presence of mind and excess of the just measure of retaliation”. According to Hume, this sort of behaviour ought to be punished in order to put men “on their guard” and to “serve as a corrective of sudden passion”. This goal was the reason given for the strict restrictions that were imposed on the circumstances in which provocation would excuse an offender. Though the defence was thought necessary to allow for the “limited degree of perfection to which our constitution permits us to aspire”, it was also deemed essential to “keep the allowance for the frailties of our condition within as narrow bounds as may be; because by means of this wholesome discipline, men may improve and be corrected”.

So, as with the English law of provocation, the accused would have no excuse if he appeared to be “master of his emotions”. But in Scots law the matter was not settled if it was established that the accused had lost mastery over his emotions; the defence had tight boundaries, which limited its use for the distinctive purpose of strengthening man’s universal and divine gift of the power to control his passions and emotions. The law therefore echoed the philosophical premise that every person had a duty to master his or her passions and emotions, and that this duty was one that all were capable of fulfilling. The law also valorised mankind’s struggle to fulfil this duty by aiming to encourage offenders and innocent observers to strengthen their powers of self-control by sheer will and effort. In both of these respects the law expressed doctrines that were central to Scottish Common Sense philosophy, and in particular to Thomas Reid’s school of thought.

534 Ibid I, 248. In its nineteenth century transition, the Scottish conception of gravity of provocation gained a foothold in the English law, but it came to be replaced by the subjective test of whether the defendant had actually lost self-control and then later by a reasonable person style test (J Horder, Provocation and Responsibility (1992) 93-106).
535 Hume, Commentaries I, 239.
536 Ibid I, 239.
537 Ibid I, 252.
6.6 Common Sense and soundness of mind

The influence of Reid’s theory of active powers on the rejection of volitional insanity and the development of the provocation defence is the first key trend in the partial move towards capacity responsibility in Scots law. The second trend, which is discussed in the following sections, consists of the judiciary leaving the matter of ascribing non-responsibility almost entirely in the hands of the jury. In the law of insanity this trend can be seen in the ‘soundness of mind’ test, which was established in a spate of jury directions that were delivered by Lord Moncrieff in the 1870s.\(^{538}\) In these decisions Lord Moncrieff explicitly moved away from the strict, M’Naghten-like formulation that had become the standard and towards a more open textured test of soundness of mind.

Apart from Lord Moncrieff’s directions on the insanity defence, this second trend can also explain the development of the doctrine of diminished responsibility by Lord Deas in the nineteenth century. The widening of diminished responsibility to incorporate questions of responsibility as well as questions of punishment was accomplished by placing more power in the hands of the jury. Jurors were entrusted to use their common sense to identify when the mental state of the accused was such as to justify downgrading his or her conviction to a less serious category of offence. While both these moves might, and should, be regarded as a strategy to insulate the issue of mental state and criminal responsibility from the potentially damaging invasion of psychiatric notions, they also align with ongoing attempts within the Scottish legal tradition to legitimise its authority on the basis of community standards and values. These attempts, it is argued, are in turn symptomatic of the type of societal expectation that the religious and moral culture imposed, from the early communitarian model enforced by Kirk elders through to the Enlightenment ideals of intersubjective judgment and common sense reasoning.\(^{539}\)

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\(^{538}\) See section 6.6.1.
\(^{539}\) See Chapter Two.
6.6.1 Lord Moncrieff’s ‘soundness of mind’ test

Though Lord Moncrieff’s reworking of the insanity defence is theoretically significant, its practical significance is limited by the fact that he is regarded “an eccentric in this branch of the law” and because his directions have not subsequently been drawn upon very often. His jury directions were not at all in keeping with those given by Lord Hope or indeed those which followed Lord Hope in his unforgivingly strict formulation of the insanity test.

An example of jury directions which followed Lord Hope’s strict approach is Lord Inglis’ directions in Andrew Brown, which specified that a person who is weak because of the indulgence of bad habits or who is deeply depraved due to faults in his education or himself could not rely on the insanity defence. These directions followed Lord Hope’s very closely both in content and in the reasons given for restricting the defence. In contrast to Lord Inglis’ strict approach, Lords Cockburn and Cowan relaxed the insanity defence enough to recognise a volitional element, but they did not broaden the test as much as Lord Moncrieff would go on to do. The case of James Denny Scott illustrates Lord Cockburn’s approach, which was to explain that the insanity defence amounted to absolute insanity at the moment and in the act for which the accused was being tried, while adding that the defence might be applicable when the accused was under “an impulse, so irresistible to him, that he was not a free agent”. This endorsement of volitional insanity was quickly qualified with the proviso that it must be recognised with “great jealousy”.

Similarly, in John McFadyen Lord Cowan charged the jury that insanity was characterised by the cognitive failing of defective reason, but he extended the effects of such a cognitive failure to include the accused’s capacity to restrain himself from doing what he knew to be wrong. In the main, therefore, in the cases which preceded Lord Moncrieff’s reformulation of the defence the jury were informed that the

540 Gordon, Criminal Law para 10.35.
541 (1866) 5 Irv 215.
542 Ibid at 217.
544 (1853) 1 Irv 132.
545 Ibid at 141-142 (emphasis in original).
546 Ibid.
547 (1860) 3 Irv 650.
relevant test they had to apply was essentially cognitive with the tentative addition of
a restricted version of a volitional test. This was a considerably stricter definition of
insanity than Lord Moncrieff’s “soundness of mind”.

Despite the discord between Lord Moncrieff’s test for insanity and the
definitions that flanked it, the part of his definition that is most relevant to the present
argument is the one aspect that seems to have endured: his assertion that insanity
should be assessed according to purely quotidian criteria. By using this standard as
the test for insanity, Lord Moncrieff adopted a formulation of insanity that embodied
a commitment to the same values of common sense and intersubjective judgment that
were deployed in other areas of the criminal law.\(^{548}\) For Lord Moncrieff, the fact that
the test of soundness of mind would require considerable jury interpretation was part
of its merit, since it meant that the insanity defence would rest on common sense
judgments of ordinary laypersons.

An illustration of this point comes from one of the cases over which Lord
Moncrieff presided, in which an issue arose of whether paroxysmal mania could
ground a plea of insanity. According to a medical witness, this was one type of mania
which might render a person insane despite involving no delusions or affliction of the
intellect.\(^{549}\) In such instances the accused might be perfectly able to know right from
wrong but still be insane, which was precisely the type of case in which Lord Hope
would have excluded the defence. Yet Lord Moncrieff left open the possibility of
accepting the defence, stating that insanity was “fortunately…not a matter in which
either the opinion of doctors or the definitions of lawyers can be held conclusive”;
instead it was matter of fact which was purely for the jury to decide.\(^{550}\) The only
direction he gave was that the question was soundness of mind and not, as other
cases might suggest, knowledge of right or wrong. These instructions created the
potential for the jury to acquit an accused person even if it were proved that he knew
the nature of what he had done and that it was wrong.\(^{551}\) The relevant tests the jury

\(^{548}\) See Chapter Two.
\(^{549}\) Eliza Sinclair (1871) 2 Coup 73 at 88.
\(^{550}\) Ibid at 90.
\(^{551}\) The same move can be observed in: Archibald Miller (1874) 3 Coup 16 at 18; James Macklin
(1876) 3 Coup 257 at 260; Thomas Barr (1876) 3 Coup 261 at 263.
had to apply in making its assessment were simply “the ordinary rules which apply in
daily life” and “common practical sense”.

Interestingly, even though Lord Hope’s definition of the insanity defence was
so different to Lord Moncrieff’s, when it came to the question of whether the test had
been met he advocated a similar common sense approach. In Gibson Lord Hope
charged the jury to “bring their own common sense, knowledge of mankind, and
estimate of truth” to bear on the matter of the accused’s sanity and in George Lillie
Smith he directed that:

men of common sense, and acquainted with the ordinary actions of mankind, not taking up
any particular views of insanity whatever, but acting upon the dictates of their own good
sense, are far better judges than either medical men or lawyers as to that state of mind which
should except a man from liability to punishment for a criminal act.

This attitude proved remarkably resilient in the Scots law of insanity. In 1946 after
a presentation by the former Commissioner of Prisons at the Annual Meeting of the
Royal Medico-Psychological Association in Edinburgh Lord Cooper, the then Lord
Justice Clerk, stated that:

The person you have to convince is the man in the jury box, who is apt to apply to such
matters the yardstick of a robust and vigorous common sense, and who feels in his bones that
you cannot convert a criminal into a patient by the simple expedient of describing the age-
long characteristics of the typical criminal in words borrowed from ancient Greek
philosophy.

552 James Macklin (1876) 3 Coup 257 at 260. The same test was prescribed in Thomas Barr (1876) 3
Coup 261 at 263.
553 Archibald Miller (1894) 3 Coup 16 at 17.
554 Jas Gibson (1844) 2 Brown 332 at 357.
555 George Lillie Smith (1855) 2 Irv 1 at 61.
556 A similar attitude can be seen within the law of diminished responsibility. For example, in
Carraher v HM Advocate 1956 JC 108 Lord Justice General Normand (at 117) stated that: “The Court
has a duty to see that trial by judge and jury according to law is not subordinated to medical theories;
and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive
rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded
as being possessed of diminished responsibility”.
557 W Norwood East, “The Legal Aspects of Psychiatry: Crime and Punishment” (1946) 92 British
Journal of Psychiatry 682 at 702.
6.6.2 The emergence of diminished responsibility

It should now be clear that the second trend – of faith in common sense notions of sanity and its manifestation – informed Lord Moncrieff’s adaptation of the insanity defence. In the following section it is argued that this trend is also one of the factors that contributed to the emergence of a distinctively Scottish doctrine of culpability: diminished responsibility.

At the start of the nineteenth century the flexible and informal nature of sentencing practices in Scotland meant that Scottish courts could take the mental weakness of an accused person into account when determining his or her sentence or when deciding whether to recommend him or her to mercy.\(^{558}\) Indeed the potential for partial insanity to influence punishment can be traced back even further,\(^{559}\) but it was the nineteenth century that saw the plea develop, in the hands of Lord Deas, into a doctrine which could be used to alter the category of crime of which the accused was convicted.\(^{560}\) The case which heralded this change in the nature of the plea was *HM Advocate v Dingwall*\(^{561}\) in which the accused, who was reliant on alcohol, suffered from *delirium tremens*. He had also apparently been rendered weak-minded by severe sunstroke and thus upon killing his wife, he pled insanity. Even though Dingwall’s condition did not constitute legal insanity, Lord Deas charged the jury that he “could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence” and that the panel’s weakness of mind was an element that could be taken into account in making this decision.\(^{562}\) Following *Dingwall* the doctrine was considered in *HM Advocate v McLean*\(^{563}\) when Lord Deas used the opportunity to re-enforce his decision in

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\(^{558}\) Gordon, *Criminal Law* para 11.03.

\(^{559}\) Mackenzie recognised that partial responsibility would moderate punishment (Mackenzie, *Matters Criminal* 16). Hume also noted the practice of mental weakness underpinning recommendations to mercy (Hume, *Commentaries* I, 38) and Alison stated that a partially deranged accused whose mental state falls short of insanity should be found guilty but recommended to mercy (A Alison, *Principles of the Criminal Law of Scotland* (1832) 652). See Gordon, *Criminal Law* paras 11.10-11.12 for a summary of the pre-Dingwall case law.


\(^{561}\) (1867) 5 Irv 466.

\(^{562}\) *Ibid* at 479.

\(^{563}\) (1876) 3 Coup 334.
Dingwall by stating that it was both right and legally sound to take into account the accused’s state of mind on occasions where he suffered from a weakness of intellect or mental infirmity. He further confirmed that the panel’s state of mind could modify both the legal category of the crime as well as the punishment. In the years that followed, and indeed up until the twentieth century, Lord Deas’ views on the doctrine of diminished responsibility gained ready acceptance.

The effect of the change in diminished responsibility was to allow degrees of mental impairment which fell short of insanity to have an impact not only on sentencing, but on responsibility too. However, according to Gordon this expansion was not the result of a conscious decision to strengthen the connection between mental state and responsibility; it was actually contingent on the fact that there was a mandatory penalty for murder. The fixed penalty meant that the only way for the courts to take any mental abnormality short of insanity into account when punishing homicide was to acquit the accused of murder and to convict him of culpable homicide. In other words, diminished responsibility was only ever a means of mitigating punishment and mental state was only ever one mitigating factor amongst many. Because the only way to reduce a mandatory capital sentence was to amend the nature of the conviction, the plea evolved to enable this practice and was rationalised in such a way that it affected responsibility as well as punishment. Irrespective of whether the plea’s expansion was simply a pragmatic way of circumventing the death penalty, it is clear that greater concern for mental state was the animating force. The fact that there was a perceived need to

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564 Ibid at 337.
565 Ibid at 338. McLean was not in fact a trial for murder but a sentencing hearing for a conviction of theft by housebreaking.
567 Of course, mental abnormalities could affect punishment by way of the sentence being commuted. The significance of the defence was that control over the decision as to how to punish the accused shifted from the executive to the jury (under the direction of the judge).
568 Gordon, Criminal Law para 11.03. Farmer makes a similar argument about the emergence of culpable homicide more generally. He explains that humanitarian considerations led to a reduction in the number of factual circumstances in which the death penalty would apply to crimes such as theft or criminal damage to property but in the case of homicide, when the outcome was always the same, the only way of distinguishing capital and non-capital cases was on the basis of mental state (L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) 147).
569 Wood notes that December 1889 edition of The Medical Press, which was a London publication, shows that there was greater judicial sympathy towards those with ‘a taint of insanity’, which resulted
circumvent capital punishment on these grounds at all testifies to the law’s increased focus on offenders’ inner states.

With the emergence of culpable homicide as a positive category of offence\textsuperscript{570} and the already permeable boundary between factors relating to defences (and therefore conviction) and mitigating factors relating to sentencing\textsuperscript{571} the expansion of diminished responsibility was remarkably simple.\textsuperscript{572} Though these factors were crucial in expediting the doctrine of diminished responsibility, part of the explanation of why the plea widened must also lie in the particular way that the insanity defence was defined at the same time. Although Lords Cockburn and Cowan had made inroads into accepting volitional insanity, when Dingwall was decided the test for insanity was essentially cognitive. Indeed, Lord Deas charged the jury that the legal question of sanity was whether Dingwall had committed the killing with sufficient mental capacity to know that the act was contrary to law and punishable.\textsuperscript{573} Furthermore, it was significant that Lord Deas located the power to assess whether mental state should be taken into account in “the province of the jury”. The decision was not made by medical professionals, nor circumscribed by the judiciary or executive. In this sense the doctrine of diminished responsibility accords with the changes in the insanity defence which began, under Lord Moncrieff, to open up considerably and was entrusted in the hands of the jury.

It might be that fear of encroachment by the medical profession in the courtroom motivated their Lordships to promote the jury’s common and practical sense in their directions. Certainly it was felt as a rebuke by the medical

\textsuperscript{570} Farmer characterises the growth of culpable homicide as a combination of humanitarian efforts and a response to the tendency of juries to acquit persons charged with murder rather than allow them to be hanged, which in itself was a reaction to the state’s new interest in enforcing the law more strictly to achieve uniformity in jurisdiction (L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) 147).

\textsuperscript{571} A Loughnan, Manifest Madness: Mental Incapacity in Criminal Law (2012) 227.

\textsuperscript{572} The transition was so smooth as barely to be noticed. As late as 1890 an article in the Juridical Review stated that it was unfortunate that Scots law did not recognise degrees of criminal responsibility or responsibility with a diminished amount of imputability (E F Willoughby, “The Criminal Responsibility of the Insane” (1890) 2 Juridical Review 220 at 233).

\textsuperscript{573} HM Advocate v Dingwall (1867) 5 Irv 466 at 476.
professionals whose opinions were regarded so suspiciously. Yet this point on its own does not explain the desire to keep the test of insanity, or diminished responsibility, within the hands of the jury. For if the judiciary merely wished to prevent medical notions of insanity from seeping into the law they need only have guarded the defence in their own hands, but instead the assessment of insanity was repeatedly cast as being neither a question of medical science nor defined in legal terms.

An alternative explanation for preserving the jury’s remit over the precise boundaries of the insanity defence is that doing so tapped into a lengthy tradition in Scottish society in which collectivism and common sense were prized. The context of this tradition varied from its early inception in the post-Reformation era when strong, tightly-knit communities genuinely prevailed, through to Enlightenment notions of common sense and intersubjective morality. The judiciary’s regard for these concepts outlived their popularity in intellectual circles and, as was argued in respect of the declaratory power, it might be that this was simply a legitimising device for preserving the Scottish Common Law tradition. Even if the judiciary’s faith in the ordinary man’s common sense was rhetorical rather than sincere, locating its potential provenance in the Scottish moral tradition provides a deeper understanding of the insanity defence than pre-existing explanations, which simply link it to the growing medicalisation of psychology.

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574 Dr Laycock remarked on how regrettable it was that medical witnesses were not asked their opinion on the accused’s state of responsibility and that diagnosis of a disease with so many different degrees was entrusted to inexperienced laymen (T Laycock, “On the Legal Consequences of the Responsibility of the Insane and its Consequences” (1864) 10 British Journal of Psychiatry 350 at 354). See also the opinion of the physician Dr David Skae in D Skae, The Legal Relations of Insanity: the civil incapacity and legal responsibility of the insane (1867).
575 For example, in Archibald Miller at 17.
576 See Chapter Two.
577 Wood has argued that the Historical School, which was the dominant movement in Scottish legal thinking against codification, used the notions of ‘good sense’ or conventional wisdom to support their conservative agenda. As such, the interests of judges and conservative legal theorists were inclined towards an account of law in which the sources, justification and legitimacy were based on historical developments supposedly rooted in the character of the people (J Wood, The Natural Guardians of the Race: Heredity, Hygiene, Alcohol and Degeneration in Scottish Psychiatry, c. 1860-1920, PhD Thesis, University of Edinburgh, 2011 at 199-203).
6.7 Conclusion

This chapter, together with the previous one, has traced the way in which criminal responsibility and non-responsibility were attributed in Scots criminal law from the post-Reformation era through to the nineteenth century. Chapter Five showed how non-cautious character responsibility prevailed during the sixteenth and seventeenth centuries, which was associated with the moralistic way in which liability was ascribed by both the criminal and Church courts, often in conjunction. In the eighteenth century, as public Church discipline began to fall from favour the community-based structure of Scottish society began to break down, a process which was also the product of wider changes in society which rendered it increasingly individualistic. This turn towards individualism, it is argued, is linked with a partial rejection of character responsibility, which is evidenced in growing aspirations for an impartial and detached process of attributing criminal responsibility. Notwithstanding this change, character responsibility remained relevant to the ascription of criminal responsibility throughout the nineteenth century. This can be seen in the significance that was afforded to previous convictions, in the charge of habite and repute and in the criminalisation and prosecution of certain forms of ‘undesirable’ status. It is argued that this continued relevance of character is at least in part related to the changing nature of the police in the nineteenth century, specifically the way in which they were expected to fill a lacuna in the protection of morals that was created by the decline of Church discipline and its congregational ethos.

In Chapter Six the theme of changing forms of criminal responsibility was extended to the attribution of non-responsibility with the claim that capacity responsibility began to take greater hold. The rise of capacity responsibility is evidenced in the way that the insanity defence became increasingly concerned with issues of psychological capacity. However, the fact that insanity was routinely held to be a matter of common sense which defied legal or medical definition means that character responsibility, in the sense of insanity being regarded as a disposition that could be ‘read off’ conduct, continued to play a fundamental role. In both of these respects the Scottish moral tradition was influential. The move towards greater
recognition of capacity was partly a result of the fact that psychiatry was gaining prominence as a discipline, which meant that the mental state of the accused came under increased scrutiny. Nevertheless the particular way in which the boundaries of the insanity defence were determined was in accordance with a model of human agency that bore striking resemblance to both Common Sense philosophy and Calvinist doctrine. Likewise, the elements of criminal non-responsibility that were based in character responsibility, such as Moncrieff’s entrusting the jury with a very loose definition of insanity, have ties to the Common Sense belief that lay knowledge is of paramount significance.

The attribution of criminal responsibility and non-responsibility, which has been the focus on the last part of this thesis, is a very important aspect of understanding the development of the criminal law. However, it only forms one element of the overall structure of criminal culpability. Another crucial element is the form and structure of mens rea requirements. The next part of the thesis, Part Three, undertakes an investigation of this element of criminal culpability by tracing the relevance of mental state within criminal law doctrine. Chapter Seven reveals that the early law was essentially objectivist, in the sense that the accused’s mental state had very little bearing on his or her culpability. Instead, the manifest wrongfulness of the accused’s conduct was the chief measure of guilt. Taking account of the type of society that existed under the Calvinist reformers, this feature of the law is unsurprising. In a society where the code of morality was treated as if it were incontestable and the Church ensured that any act to breach this code would be deemed culpable, it makes sense that a criminal act would attract culpability irrespective of intentions or foreseeability: the simple act of breaking society’s code of conduct was enough to attract punishment. The rest of Chapter Seven argues that the accused’s mental state gradually gained significance over the course of the eighteenth century and that one explanation for this change is the increased regard for the individual’s inner state that was introduced by Scottish Enlightenment thinkers. In Chapter Eight the significance of mental state in determining culpability is examined through to the present day by concentrating on the endurance of morally evaluative mens rea terms. One of the distinguishing attributes of Scots criminal law
is that it has retained the notions of ‘wickedness’ and ‘evil’ in its definitions of theft and murder and in Chapter Eight the moral import of these terms is scrutinised.
PART THREE: THE IMPORTANCE OF MENTAL STATE

The general theme of Part Three is the importance of mental state in determining criminal culpability. Chapter Seven argues that during the eighteenth century Scots criminal law underwent a partial paradigm shift from objective criminality to subjective criminality. It further argues that the transition from a Calvinist view of human nature towards the view of human agency advanced by Scottish Enlightenment philosophers provides an interpretive explanation for this change. Given that Chapter Seven relies on the distinction between objective and subjective criminality, some consideration is first of all due to the terms ‘objective’ and ‘subjective’.

The distinction between objective and subjective in the context of criminal law theory is relatively recent. Nourse remarks that prior to the 1960s the distinction was nowhere to be found in criminal law writings, but that since then it has come to dominate the discourse surrounding various key debates. These comments highlight the potential ahistoricism in using the terms to account for the criminal law prior to the 1960s. A further challenge posed by using the distinction is that in some ways it is extremely artificial, a feature which Nourse describes as symptomatic of various unsuccessful attempts to attain a neutral, normativity-free criminal law. Both of these points illustrate the limitations of using the terms ‘subjective’ and ‘objective’ in criminal law scholarship. However, these issues are less of a problem in this thesis as here the terms are used in a purely descriptive and analytical, rather than normative, way. Furthermore, since the trends that are analysed in Chapter Seven have a broad sweep they can be explained using the terms ‘subjective’ and ‘objective’ without relying on the finer nuances of the distinction between them.

580 Fletcher advocates this use (G Fletcher, Rethinking Criminal Law (1978) 121).
In order to avoid potential confusion, it is worth setting out perhaps the most common use of the subjective/objective distinction, even though is not used in this thesis. Most often the terms ‘subjective’ and ‘objective’ are used in criminal law theory to refer to two opposed ideals of mens rea.\textsuperscript{581} A purely subjectivist account of mens rea bases culpability on the accused’s mental state at the time of the alleged wrongdoing, i.e. what the accused intended or foresaw or whether he or she was aware of certain prohibited circumstances. In contrast, the typical objectivist approach measures the accused’s conduct against a general standard of reasonableness and ascribes liability when the harm caused or the risk of that harm was reasonably foreseeable or when he or she should have been aware of certain prohibited circumstances. However, the reason why this version of the distinction between subjective and objective is not relevant in the following chapter is that it rests on the assumption that mens rea in one or other of these two forms is a crucial factor in assessing culpability. That this is an assumption which is the product of historical evolution rather than an empirical or transcendental truth is not always acknowledged, even though various scholars have drawn attention to this point.\textsuperscript{582}

The most prominent and foundational argument for the contingent role of mens rea in determining criminal culpability is given in Fletcher’s \textit{Rethinking Criminal Law}. By Fletcher’s account, the current Anglo-American paradigm of ‘subjective criminality’, in which intention forms the core of culpability, was preceded by a substantially different paradigm of ‘manifest criminality’ in which intention was subsidiary to action.\textsuperscript{583} Under this earlier model, a crime was regarded as an act that any objective observer would recognise as criminal despite knowing nothing about the mental state of the actor. Only once this initial threshold of manifest criminality had been crossed did the question of intent (or rather lack of intent) arise, and then only to defuse the authenticity of incriminating appearances.

\textsuperscript{581} Very few criminal theorists are pure subjectivists or pure objectivists; most acknowledge that culpability is made up of a combination of subjectivism and objectivism.
\textsuperscript{583} G Fletcher, \textit{Rethinking Criminal Law} (1978) 115-117.
By contrast, within the contemporary paradigm of subjective criminality, the actions of an alleged criminal are important simply to demonstrate the firmness of his or her criminal intent; they need not be incriminating in themselves.\(^{584}\) It is this paradigm shift – from an idea of criminality that centres on acts and appearances to one in which the key question is imputing to the accused a necessary state of mind – that structures the analysis in Chapter Seven.

The findings of Chapter Seven inform the discussion in Chapter Eight. To summarise, Chapter Seven shows that the eighteenth century marked a partial shift from a general and highly evaluative form of culpability that was rooted in the wrongfulness of the accused’s actions towards more modern, offence-specific *mentes reae*, and that this change coincided with an increased concern with individual responsibility. Notwithstanding this development, *dole* – the general form of culpability described by Hume – continued to be of key importance and certain features of the structure of homicide suggest that culpability continued to be founded on the inherent wrongfulness of the criminal act rather than the blameworthy mindset of the actor. For example, the malice required for murder remained implicit in any act of unjustified or inexcusable killing and there was no need for the actor’s degree of intention to be proved as a condition of liability.\(^{585}\)

Given that culpability continued to be defined in morally charged, generic terms, the issue in Chapter Eight is to what extent this particular way of thinking extended beyond the eighteenth century and into the modern law.\(^{586}\) In other words, the question is whether the modern general part and certain *mentes reae* of Scots law are still underpinned by these older notions of culpability and, furthermore, whether the morally evaluative terms in which they are expressed have any enduring significance. The aim in seeking out potential genealogical links between the modern law and older forms of culpability is not to deny or obscure important changes that have occurred in the meaning and attribution of liability, nor is it to substantiate any

\(^{584}\) Ibid 118.
claims about the legitimacy of the Scottish legal system that rely on tradition and continuity for authority. The aim is rather to promote a more culturally and historically informed understanding of various issues that continue to occupy the time of courts and academics, for example, the requirement in murder for wicked intention or wicked recklessness and the fact that judges continue to invoke the concept of *dole* when determining cases.\(^{587}\) Not only does this illuminate these elements of the law from a new angle, it has the potential to inform debates about the merits and demerits of the Scottish approach to culpability. Understanding the Scottish view of culpability in a more historically contextualised manner helps reveal the types of ideals and beliefs that have been inherited and are now implicit in the modern law. Ultimately, the aim is not to engage with the merits of the Scottish approach but merely to better understand it by identifying areas of continuity and change that underlie the linguistic congruence which connects the older and more modern forms of criminal culpability, and to assess the symbolic and operative significance they hold.

Although Chapter Seven charts the partial rise of subjectivism, it does not argue that the modern conception of individual responsibility based on subjective liability arose at that time. Indeed, taken together, Chapters Seven and Eight suggest that such a form of criminal responsibility has never fully taken hold in Scotland. Instead the argument presented is that during the eighteenth century the law became more subjectivist, which is to say that it began to pay greater attention to the accused’s mental state at a general level rather than becoming subjectivist in the

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\(^{587}\) For example, in *Elsherkisi v HM Advocate* [2011] HCJAC 100; *Spendiff v HM Advocate* 2005 1 JC 338; *Transco plc v HM Advocate* 2004 JC 29; *Drury v HM Advocate* 2001 SCCR 583; *Lord Advocate’s Reference (No 2 of 1992)* 1992 SCCR 960; *Roberts v Hamilton* 1989 JC 91; *Merrin v S* 1987 SLT 193; *Stewart v Thain* 1981 JC 13; *Dean v John Menzies (Holdings) Ltd* 1981 JC 23; *Cawthorne v HM Advocate* 1968 JC 32; *Gray v Hawthorne* 1964 JC 69. For discussion of the use of *dole* in modern Scots law see P R Ferguson & C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2009) paras 6.9.1-6.9.2; Gordon, *Criminal Law* para 7.02; Scottish Law Commission, Report on *The Mental Element in Crime* (Scot Law Com No 180, 1983) para 2.14; *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 7, para 60; R Shiels, “The Unsettled Relevance of *dole*” 2010 *Scottish Criminal Law* 421. Sheldon puts forward the argument that the Scottish approach to causation, as shown in the ‘supply’ cases such as *Khaliq v HM Advocate* 1984 SLT 137 and *Ulhaq v HM Advocate* 1991 SLT 614, is also a manifestation of *dole* since the accused’s wickedness is used to characterise his or her actions as reckless and also to forge a causal link between the accused’s actions and the resultant harm, in spite of the intervening actions of third parties (D Sheldon, “*Dole, Directness and Foresight in Causation: Lord Advocate’s Reference No.1 of 1994*” 1996 *Juridical Review* 25).
modern sense of the word i.e. basing culpability on what the accused intended or foresaw or whether he or she was aware of certain prohibited circumstances.

As with the analysis of the declaratory power in Chapter Four, the account of the importance of mental states offered in Chapters Seven and Eight does not purport to be an exhaustive account of criminal culpability in Scots law. In Chapter Eight where the analysis relates to nineteenth and twentieth century law, certain forms of criminal liability have consciously been excluded. In the same way that Chapters Four and Six avoided discussing the impact of the growth of regulatory and strict liability offences on the scope of the law and the attribution of criminal responsibility, Chapter Eight omits these developments from its discussion of the structure of culpability. The predominant reason for taking this approach is that it best illustrates the influence of the Scottish moral tradition on the criminal law. Making the choice to select these elements is not to deny the importance, indeed the necessity, of issues relating to strict liability and regulatory offences in a complete account of the substance of the criminal law or its application. It is simply a recognition of the particular focus of this thesis.\footnote{For discussion of the growth of regulatory offences in nineteenth century Scots criminal law see L Farmer, \textit{Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present} (1997) chapter 3. For an historicised account of how subjectivist theory became orthodox in the mid-twentieth century which attempts to reconcile subjective fault and strict liability see P Ramsay, “The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State” (2006) 69(1) \textit{Modern Law Review} 29.}
Chapter Seven: From Objective to Subjective Criminality

7.1 Introduction

The aim of this chapter is to show that during the eighteenth century Scots criminal law developed from a primarily objectivist model of criminality, which dominated in the post-Reformation era, to become more subjectivist and that this change was linked to shifting attitudes to the nature of human agency. The connection between the post-Reformation era and objectivist, or manifest, criminality ties in with the special status afforded to the community under the Calvinist regime of moral discipline. According to Fletcher, in the model of manifest criminality there is a natural connection between the criminal law and community experience.\(^{589}\) This makes sense within the context of post-Reformation Scotland since manifest criminality assigns great importance to observers’ perceptions of the accused’s activities and during the sixteenth and seventeenth centuries, when communities were small and stable, these observers would have been the accused’s neighbours. Furthermore, given that manifest criminality is based on the idea that crimes are identifiable at face value, the clear demarcation between right and wrong that the Calvinist code of morality provided would have contributed to the belief that the wrongfulness of actions could easily be observed.

As new ideas about human nature began to emerge in the eighteenth century, greater concern was given to the motivations and dispositions of an actor, which were signified by his or her actions. In this chapter it is argued that this change in moral thought maps on to the way that the greater attention was paid within the law to the accused’s mental state in determining criminal culpability. However, although the argument presented is that the law became increasingly subjectivist, it is argued that this shift was incomplete. Important aspects of the law remained primarily objectivist and, towards the end of this chapter, an explanation for this element of continuity is put forward that draws on the moral tradition of Scotland.

7.2 The post-Reformation era

During the post-Reformation era the criminal law was predominantly objectivist. There was a certain regard for the accused’s intentions, but this bore very little resemblance to the subjectivist versions of *mens rea* that dominate contemporary criminal law theory and practice. According to Mackenzie, a criminal mind was essential because “the wickedness of the designe, makes only an action criminal”.

This “wickedness” was rooted in the actor’s will since “man can only offend what is voluntar to him…the will is the only fountain of wickedness”. Holding wickedness to be rooted in the will closely resembles Calvin’s *Institutes* where it is written that “if the whole man is subject to the dominion of sin, surely the will, which is its principal seat, must be bound with the closest chains”. So, at this early stage of the law’s development, when the Calvinist regime of social reform was at its height, an offender’s ‘designe’ or intention was important to his or her culpability but it was a very specific evaluative conception of intention that, following Calvinist doctrine, was couched in terms of a wicked will.

Lacey has argued that the use of evaluative terms such as malice, and indeed wickedness, was most prevalent in legal systems in which lay people could be expected to recognise wrongdoing when they saw it. This description clearly coheres with Fletcher’s account of manifest criminality and, furthermore, it coheres with the way that Scottish assizes determined verdicts at this time. As was shown in Chapter Five, the community’s perception of the accused’s actions often formed the basis of a criminal conviction, and assizers were even occasionally encouraged to convict solely on the strength of the community’s knowledge. A similarly objectivist perspective underlay the standards of proof that applied in respect of *dole* or ‘wicked design’. Despite being a requisite for liability, there was no need for the

590 Mackenzie, *Matters Criminal* 8. Balfour’s *Practicks* does not contain any general consideration of the mental element of crimes. The only terms that appear to suggest some degree of intentionality are in relation to specific offences including: “wilfullie and maliciouslie” in respect of fire-raising (509), “foirthochoft felonie” in respect of murder (512), “willinglie” in respect of false weights and measures (520) and “wittingly” in respect of receiving stolen goods (528).


592 J Calvin, *Institutes of the Christian Religion* (1599) Book 2, Chapter 2.27.


594 See section 5.2.
prosecution to prove *dolus*, and it was often inferred from presumptions and conjectures.\(^{595}\) Indeed, some acts, such as sodomy and adultery,\(^ {596}\) were considered so wicked that simple proof of their commission was sufficient for conviction.\(^ {597}\) In other words, especially in respect of the most blatantly immoral crimes, assessors were trusted to recognise wrongdoing when they saw it and when they saw it this was enough to convict without further inquiry into the accused’s state of mind.

Further evidence that the criminal law at this time was concerned more with acts than with mental state is that design, or intention, was believed to be a “private, and conceal'd act of the mind, which escapes the severest probation”.\(^ {598}\) Again, this belief married with contemporary Calvinist teaching, which stated that man is subject to two forms of separate governance: the spiritual, pertaining to the life of the soul, and the temporal, pertaining to peaceable society. The spiritual jurisdiction was thought to reside in the mind and the temporal jurisdiction was thought to regulate man’s external behaviour.\(^ {599}\) Whilst human lawgivers were entitled to consider the *animus* with which the act was done, they could do so only to the extent that it was externally manifested.\(^ {600}\) A dichotomy between mind and act therefore pervaded Reformation theology and was mirrored in the criminal law which deemed it inappropriate and, furthermore, impossible to know the accused’s mental state.

This acceptance that there could be no knowledge of man’s inner state also provides a possible explanation for the fact that in Scots law at this time there was a single, overarching concept of culpability – *dolus* – instead of a hierarchy of psychologised (and morally-neutral) *mens rea* to determine the appropriate level of culpability. With the exception of homicide, which could be either ‘forethocht felony’ or *chaude melle*,\(^ {601}\) there was no differentiation between levels of culpability for the same act. Since it was thought to be impossible to see inside the accused’s mind it

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596 The two examples given by Mackenzie (Mackenzie, *Matters Criminal* 9).
598 Ibid.
601 *Chaud melle or rixa* was an ancient law term which referred to homicide committed “on a sudden, and in heat of blood” (W Bell, *A Dictionary and Digest of the Law of Scotland, with Short Explanations of the Most Ordinary English Law Terms* (1861, originally published in 1839) 160.
would be unfair to distinguish between instances of the same criminal act on the basis of the mental state which accompanied those acts.  

7.2.1 The law of attempts

The inference of dole from manifestly wicked acts and the lack of enquiry into the accused’s mental state both indicate that Scots law during the post-Reformation era fitted the paradigm of manifest criminality. This suggestion is strengthened by the law of attempts liability. In his objectivist theory of criminal attempts Fletcher stresses the importance of committing an act (specifically, an act or acts which bear on the intended outcome), the criminality of which can be assessed without reference to intent. Similarly, in more recent work Robinson and Darley have characterised the objectivist view of attempts as holding their gravamen to be objective harm or evil. By this view, culpability ought to be assessed according to how close the accused’s conduct came to bringing about that evil or harm.

Within Scots law during the sixteenth and seventeenth centuries there was no general theory of attempts liability and indeed there were very few cases where punishment was imposed for an unconsummated offence. This in itself shows the extent to which the law was motivated by objective harm. The dearth of inchoate offences that were punishable shows that the central focus of the law at this time was the completed wrongful act. Despite this, there were a few examples of attempts that were thought to be rightly punishable. Significantly, the types of offence whose attempt would be punished were those that would precipitate the greatest harm were they successfully completed. So, attempted fire-raising, a crime described as “high in nature”, was punishable “because of the atrociousness of this Crime”.

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602 Mackenzie, Matters Criminal 13-14.
603 G Fletcher, Rethinking Criminal Law (1978) 138.
605 Balfour’s Practicks contains no discussion of attempts liability. Mackenzie’s Matters Criminal contains no discussion of criminal attempts at a general level and the only crimes for which there is any discussion of attempts liability are fire-raising and parricide, both of which are considered later in this section.
606 Mackenzie, Matters Criminal 73.
Similarly, any person who brought home poison for “any use by which any Christian man or woman may take bodily harm” could be punished for treason.\textsuperscript{607} Again, the seriousness of outcome motivated the drive to punish: “[t]he reason of this severity proceeds from the abominableness of that Crime”.\textsuperscript{608} Whilst this is not strictly speaking an example of attempts liability because it was a separate offence of buying and bringing home poison, the harm that the offence sought to prevent was the physical injury brought about by administering the poison. The fact that punishment was justified by the “abominableness” of this harm rather than the criminal intentions of the offender shows an objectivist perspective.

One further example of the objectivist nature of attempts liability at this time is the crime of parricide. Parricide, the act of killing one’s parent, was described by Mackenzie as “[s]o horrid” that “what would be but a degree of guilt in other crimes, makes a compleat crime here”.\textsuperscript{609} Once more, it is the horridness of the crime rather than the heinousness of the offender’s intentions which makes the attempt punishable. This point is made abundantly clear when Mackenzie distinguishes between “crimes, which are only committed against our fortunes, and in cases which may be repaired” and crimes which are “irrepairable, when committed, and are atrocious, and concern the safety of our persons, wherein attempts should be highly punished”.\textsuperscript{610} In making this distinction, Mackenzie is focussing on the damage caused by the crime, rather than the depravity or dangerousness of the offender’s criminal intentions and thus conforms to the objectivist form of attempts liability.

\subsection*{7.3 The transition towards subjectivism}

In Chapter Two the argument was advanced that during the course of the eighteenth century a combination of declining support for hard-line Calvinism and the development of certain Enlightenment philosophies in the upper echelons of society led to increased regard for the individual’s inner state. Here it is argued that this change was one of the forces that contributed to a contemporaneous move towards

\begin{footnotes}
\item[607] Ibid 67.
\item[608] Ibid 68.
\item[609] Ibid 157.
\item[610] Ibid 209.
\end{footnotes}
increased subjectivism in Scots criminal law. In contrast to the Calvinist view of
human agency, which centred on total depravity, these Enlightenment philosophies
suggested that mankind had an inherent ability to discern right from wrong and to act
upon that distinction. This in turn had the effect that it became pertinent to examine
the desires and sentiments that motivated actions, for they became the key to
assessing the actions’ moral worth.\textsuperscript{611}

Despite this, it is important to recognise that the move towards subjectivism
within Scots law was incomplete, and that the law still bore many marks of manifest
criminality. A further explanation centred on the role of religious culture and its
association with socio-political arrangements can be offered for this peculiarity. The
Scottish Enlightenment was essentially a bifurcated phenomenon and for all that
theories of man’s natural benevolence were permeating the intellectual circles of
Scottish society, they had far less impact at a parochial level. The key philosophers
of the period were all members of the upper classes and the Moderate party, which
was sympathetic to their values, had little control over the lower courts of the Kirk,
notwithstanding its firm authority in the General Assembly.\textsuperscript{612} This meant that
amongst the intellectual and professional elite there was a rejection of hard-line
Calvinism and an adoption of tolerant attitudes and optimism about human nature,
but for the majority of the lay population there was little direct change.

The Kirk continued to have a similar role in day-to-day life as it had in the
early years of the Reformation\textsuperscript{613} and so, at one level, there continued to be the same
collectivist societal arrangements and strong sense of common (albeit imposed)
morality in the early to middle of the eighteenth century. Given that there were
concurrent yet differing opinions about the nature of mankind and morality
emanating from the Church and from philosophers of the age, it is perhaps to be
expected that the criminal law should exhibit a mix of older depravity-based \textit{mens
rea} and a newer concern over the accused’s subjective mental state. This newer
concern for the accused’s mental state is borne out in three particular areas, which
are examined in the remainder of the chapter: the way that \textit{mens rea} separated into

\textsuperscript{611} See Chapter Two.
\textsuperscript{612} A L Drummond & J Bulloch, \textit{The Scottish Church 1688-1843} (1973) 65.
\textsuperscript{613} \textit{Ibid.}
crime-specific *mentes reae*, the increasing concern with intention within legal practice and the rationale offered for attempts liability.

7.3.1 The development of *mens rea*

In Bayne’s *Institutions*, which was published in 1730, he writes that *dole* or a malevolent intention is essential to make an action criminal. The reason for this, and the reason why negligence was not criminalised, was that the criminal law was concerned with the actor’s will and not with the criminal event itself.\(^{614}\) Forbes’ description in his *Institutes* is very similar: he writes that no action is criminal without an evil intention or wicked design which, though not presumed, must be inferred due to its clandestine nature. The grounds of inference he states as being valid are essentially conjectures drawn either from the quality and character of the person or from the nature of the facts and circumstances.\(^{615}\) In this early part of the century, therefore, there was still an overarching general form of *mens rea* which was couched in the will but it was manifested in external criminal acts and their surrounding facts and circumstances. Moreover, motivations and intentions were still considered unimportant in assessing culpability, which can be seen from an examination of the Books of Adjournal.

At the start of the eighteenth century there continued to be a comparatively large number of trials for acts that were popularly regarded as wrongs for which there could be conviction upon proof of their commission alone. In keeping with the previous century, there were a number of trials for incest,\(^{616}\) bestiality\(^{617}\) and adultery.\(^{618}\) In these trials the focus was very much on the depravity and ‘unnaturalness’ of the acts as opposed to the specific intentions or motives of the


\(^{615}\) Forbes, *Institutes* 3.

\(^{616}\) For example, David & Margaret Myles 9 November 1700; Mary Grahame 29 November 1700; James Drysdaill 2 January 1705; George & Jannet Johnstoune 4 June 1705; Thomas Hardy & Elizabeth Smith 12 November 1705; Elizabeth Hunter 25 February 1706 (JC3/1).

\(^{617}\) For example, David Hoge 8 July 1700; Thomas Fothershame 9 November 1700 (JC3/1); Andrew Smith 2 December 1712 (JC3/4); Alexander Neil January 1714 (JC3/5).

\(^{618}\) For example, William Johnstoune 13 January 1701; Elspeth Johnstoune and Isobell Crawford 9 November 1700; George & Jannet Johnstoune 4 June 1705; Thomas Hardy & Elizabeth Smith 12 November 1705; Elizabeth Hunter 25 February 1706 (JC3/1); John McCalpin 17 July 1710; Mary Hamilton 1 August 1710 (JC3/3).
accused. For example, in the case against James Gray for rapt and ravishment of an infant girl the crime was described as a “horrid and wicked Crime of both unnaturall violence and filthiness” carried out with “unnaturall and Devilish Lust”. If a libel did refer to something resembling mens rea it was always phrased in heavily moralistic language, such as “unaccountable wickedness and malice”. Libels that included any stronger indication of a particular intention were likely to be met with suspicion by defence counsel, such as in the case against James Gordon in which it was stated: “designes of way lying and other evil designes which being all actus animi, that fall not under sense and consequently can never be proven by witnesses cannot be the subject of a Criminal lybell”. So, even though it was generally accepted that malice often formed part of the libel, this malice was not interpreted as a subjective mental state of the accused and there was no question of the prosecution having to prove any such mindset:

all lybells does [sic] still alleadge malice, which no doubt is Inward and actus animi that falls not under sense but the deed it self and the Crime consisting in facts being subjoined, and in effect of such a high and atrocious nature, the preceeding alleadgances of malice and designe are thereby plainly presumed, So that there is nothing here extraordinary but what is to be found in every lybell where malice is consistently lybelled, although it be animi and presumed from the deed, and if the manner of the malice and designe be more particularly lybelled, It still comes to the same point viz. That it is clearly presumed from the deeds and the Crime that after happened in this Case, are in themselves so wicked and Cruell, as doe not only presume the malice and designe lybelled, But do also Intimate, That the pannel hath been fully possesst with a most Inveterate and deadly feu…

The deeds and their quality were therefore the cornerstone of criminal liability and malice was simply presumed from their commission. Hence, manifest criminality was still the predominant basis for criminal responsibility.

Over time there was an increase in the regularity with which advocates’ submissions referred to intention and design as essential aspects of the accused’s culpability. Yet despite this increasing regard for intention, it was still thought to

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619 James Gray 9 August 1702 (JC3/1).
620 John Mortone 13 January 1701 (JC3/1).
621 James Gordon 22 July 1707 (JC3/2).
622 Ibid.
623 For example, in William Kennedy 30 June 1710 (JC3/3) it was argued that crimes were to be measured according to intention and designe, and that accusations and information against the accused should be understood to flow from his or her intention. Similarly in Alexander Rigby 17 July 1710
lie in the heinousness of the accused’s acts and there was still no question of intention being a separate issue of proof. Thus, in Jean Ramsay’s trial for murder it was emphasised that though *animus occidendi* was a necessary part of the libel, the essential malice could be implied from the fact that the act was purposely and designedly done, without provocation. Similarly, in the case of *Gasper Reysano* the fact that the mischief was designedly and purposely done meant that the nature of the act itself constituted the malice; it was for the pannel to show that the homicide was accidental.

This idea that malice or intention was to be inferred from the circumstances and the depravity of the accused’s acts was not limited to violent crimes against the person. It applied in respect of any crime, as was shown in the trial of *John Tennent* for theft where it was argued that every crime has *dolus* as its nature and essence but that it is seldom or never directly proven and only presumed from the effects of the offence. As well as continuing to be implied by the depravity of the act itself, even though *mens rea* was more frequently libelled in terms of intention the language used in depicting that intention continued to be morally and religiously charged. A good example of this point is the case of *James Campbell*, who was being tried for various crimes including poisoning, in which the prosecution termed the accused’s actions a “hellish project” of “evil designs” and “malicious intentions” carried out with “deadly malice”.

Around the middle of the century, a more nuanced conception of culpability emerged in which a distinction was drawn between “higher crimes” and “indifferent acts”, the latter of which might be crimes or not depending on the circumstances. In *John Grant and others*, in which the accused were charged with convocation and riot, the jury found it proven that the accused had pulled down and destroyed a

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624 27 February 1713 (JC3/4). A very similar argument was made in *James McNab* 15 March 1714 (JC3/5). Where a weapon that could endanger life was used this also implied *dolus* or design (*Sir John Shaw* 30 Jan 1716 (JC3/7)).

625 9 December 1724 (JC3/12).

626 30 July 1714 (JC3/5).

627 21 March 1721 (JC 3/10). The prosecution also used the phrases “vilanous [sic] designs”, “wicked proceedings” and “hellish intentions”.

628 5 March 1757 (JC3/31).
number of braes but they also stipulated in their verdict that they thought the accused to have carried out their destructive acts in the belief that they (the accused) had been making a legal interruption.\textsuperscript{629} The jury therefore concluded that the libel was not proven, and counsel for the pannel moved the court to make a ruling on the outcome that should result from this verdict. The court allowed the request and accordingly ordered memorials to be given by both the prosecution and the defence.\textsuperscript{630} In the defence memorials the pannels’ counsel set out the following distinction:

As the Will is the Source of all Actions for which men are accountable, so the Essence of every Crime must consist in the bad purpose or intent from which it proceeded. In the higher Crimes of Murder Robbery and the like the malevolent or felonious Intention is presumed from the Act itself which produces the Crime, But where the particular fact Charged is indifferent in itself and may be either Criminal or Innocent according to the purpose and Intent of the party against whom that fact is Charged as a Crime There it is necessary for the accuser to charge in his Indictment a felonious Malevolent or Injurious Intention and to prove such Intention from the circumstance of the Case to the satisfaction of the Jury for this is necessary to Constitute the Crime.\textsuperscript{631}

Although the prosecutor obviously disagreed with the defence counsel’s position, he agreed that intent was crucial in establishing guilt, for he responded that:

As the guilt in every supposed Crime arises from the animus or intention of the Committer, so the defence of a pannel against the Crime charged upon him must likeways arise from his animus his intent & his belief at the time of the fact charged against him and the Jury must gather the Evidence of the Intent in both cases from the circumstances which occur\textsuperscript{sic} in the proof.\textsuperscript{632}

The prosecution thus accepted that the pannels’ actions in pulling down and destroying the braes could have been to create a legal interruption, though obviously he disputed this reading of the pannels’ intention. This discussion shows that although the idea of certain crimes being punishable and forbidden because the acts themselves were manifestly criminal was still popular in Scots law, it now only

\textsuperscript{629} It is not entirely clear from the court record exactly what ‘legal interruption’ means in this case, but it appears to relate to the enjoyment of a servitude.

\textsuperscript{630} Memorials were statements written by counsel which allowed them to comment on the import of the evidence adduced (D R Parratt, \textit{Written Pleadings in Scots Civil Procedure} (2006) 29, 36). For an example of the use of memorials in the criminal law see B S Jackson, “The Memorials in \textit{Haggart and H. M. Advocate v Hogg and Soutar, 1738}” in D Sellar (ed), \textit{Stair Society Miscellany II} (vol 35) (2006) 221.

\textsuperscript{631} John Grant and others 5 March 1757 (JC3/31).

\textsuperscript{632} Ibid.
accounted for a portion of behaviour that was regarded as criminal. It is likely that this change was partly attributable to the rise in public order offences that would have accompanied an increasing population with growing political awareness. However, the developing recognition that the range of criminal offences exceeded merely those acts which were manifestly criminal also signalled a heightened awareness of (and concern for) the concept of a criminal mind. For in respect of those acts that were not instantly recognisable as crimes and which could not attract punishment for their mere commission, criminality clearly hinged on mental state. If the act alone was potentially innocuous then the added element that would make it a punishable offence was a felonious, malevolent or injurious intention.

Despite this movement towards a recognisably modern approach to mens rea, the intention required for these ‘indifferent acts’ was still necessarily inferred from the circumstances of the case. This is demonstrated by the sedition trial of James Tytler in which the prosecution observed that “in this case, perhaps, more than any other there is the Room for the question of intention”. It was stated that words of the most seditious tendency could not be uttered from mere rashness and folly without a view to stirring up sedition, but that intention must nevertheless be judged from the whole circumstance including the occasion, time, place and persons involved.

Another continuing feature throughout the eighteenth century was the presence of moralistic language. By the latter portion of the century the phrase ‘feloniously and wickedly’ started to appear with increasing regularity in criminal indictments, and it became even more common from the start of the nineteenth century. This terminology was clearly morally evaluative but its meaning apparently caused lawyers of the time little difficulty, at least in comparison to contemporary jurists. This is clear from the case of Archibald Cullings in which it was held that “the term felonious is well known in the Law of Scotland and is used in every

633 Though some of the older, ‘classic’ crimes were regarded as being within this new category of potentially non-criminal acts. For example, in the trial of Robert Robb for perjury it was argued that though intention was in most cases presumed, the libel should contain the accusation that the accused had acted with a wilful and deliberate purpose, for acts can be committed in numerous ways with no criminal intention (22 December 1766 (JC3/34)).

634 James Tytler 7 January 1798 (JC3/46).
Criminal Libel almost that occurs, it implies a Criminal premeditation, a wilfull forethought”. 635

This interpretation is particularly interesting, not just because it shows that practising lawyers of the age were comfortable with using moralistic language. At the start of the century words such as malice and wickedness were used simply to denote the commission of a wrongful act which, when proved to have occurred without justification or excuse, would lead to conviction and punishment. By the end of the century, however, ‘felonious’ was accepted as being shorthand for premeditation and wilful forethought: in other words, intention. Of course, premeditation or wilful forethought were still inferred from the circumstances surrounding the alleged crime so the method of proof continued to be objective inference. However, it is significant that increasingly it was explicated that the subjective mental state of the accused, his or her intention or purpose, was the object of legal enquiry.

7.3.2 The law of attempts

As with the post-Reformation period, the law of attempts liability reflects the extent to which the criminal law embodied manifest or subjective criminality. During the eighteenth century there does not appear to have been much change to the law, with the books of Adjournal showing prosecutions for attempted bestiality, poisoning, subornation of false evidence, bribery and murder. The focus was still on the manifest criminality of the act and the element of the accused’s conduct which justified punishment was still the harm that it caused. This is illustrated by a trial for attempted bribery or corruption 636 in which Lord Alemoor stated that for an attempt to be actionable the prosecutor must have suffered some hurt, because punishment was only permissible when a violence or a breach of the peace had occurred. 637

635 21 August 1786 (JC3/44).
636 HM Advocate v George Dempster November 1767 in J M Dreghorn, Arguments, and decisions, in remarkable cases, before the High Court of Justiciary, and other supreme courts, in Scotland (1774) 382.
637 Ibid.
7.4 Hume and the nineteenth century

7.4.1 From mens rea to mentes reae

At the turn of the nineteenth century Hume’s Commentaries were published and quickly gained authoritative status. In the Commentaries the general mens rea that was required for criminal responsibility – dole – is defined as “that malicious and wilful purpose, which, according to all authorities, herein conformable to nature and reason, is essential to the guilt of any crime” and amounts to the “corrupt and malignant disposition of the offender, the heart contemptuous of order, and regardless of social duty”. This definition bears some similarity to Mackenzie’s “wicked designe”, Bayne’s “malicious intention” and Forbes’ “evil intention or wicked design” in that it retains morally normative terminology in the form of “malicious”, “corrupt” and “malignant”. However, a new dimension is present within Hume’s definition: contempt for order and disregard for social duty. These new elements were contrary to the values of Enlightenment philosophy and Moderate theology, both of which aimed to promote civil society and social order and harmony, so their addition to the general mens rea of Scots law is characteristic of the moral climate of the age. The fact that dole did not need to be proved is consistent with the earlier articulations of Scots law and shows the persistence of manifest criminality.

The mental state required for murder follows a similar pattern. Wilful murder was committed when the killing was wilful and carried out with malice aforethought, but this was simply another way of expressing the more general sense of dole as a “wicked and mischievous purpose…contradistinguished to those motives of

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639 Hume, Commentaries (1797 edition) I, 92. In the fourth edition dole is described as “that corrupt and evil intention”.
640 In this respect, it is similar to Foster’s Crown Cases, a volume on English criminal law which described the implied malice required for murder as: “an [sic] heart regardless of social duty and fatally bent on mischief” (M Foster, Report of some proceedings on the commission for the trial of the rebels in the year 1746, in the county of Surry; and of other crown cases: to which are added discourses upon a few branches of the crown law (2nd ed) (1776) 257).
641 See Chapter Two.
642 Hume, Commentaries I, 21.
necessity, duty, or allowable infirmity, which may serve to justify or excuse the deed.\textsuperscript{643} The requisite malice was therefore implied in the act of killing and it was for the pannel to overcome this presumption by showing that he or she had some grounds for justification or exculpation.\textsuperscript{644} This principle was applied in \textit{HM Advocate v James Craw}\textsuperscript{645} in which the accused was charged with murder after a trespasser was killed by a spring gun that Craw had set to fire at anyone who trespassed on his land. Craw’s counsel challenged the relevancy of the libel on the basis that setting such a trap was not in itself unlawful (a point which the prosecution accepted). However, the prosecution relied on the Biblical premise “whosoever sheddeth man’s blood by man shall his blood be shed”\textsuperscript{646} to argue that the \textit{prima facie} wrong of killing another person should automatically be punishable as murder if the killing was not justified, casual or culpable homicide. It was on this basis that the libel of murder was held to be relevant. The prosecution’s successful argument clearly resonates with the model of manifest criminality, for the starting point of culpability was the readily-perceived wrongfulness of the act and the accused’s intentions and motivations played a subsidiary, exculpatory role.

Further evidence that the general part of Scots law continued to be partially rooted in the model of manifest criminality is provided by the persisting dichotomy between act and mind. The law continued to be almost exclusively concerned with assessing external acts and did not regard evaluation of the internal state of the accused’s mind or heart to be within its remit. For example, a falsehood that was purely a matter of opinion or belief was not deemed to be perjury because for this type of act man was “answerable only to his own conscience”.\textsuperscript{647} Another example of the dichotomy is forgery, which would only be a matter for the magistrate after there had been an act of uttering. Before this external act there was merely a “wickedness of the heart, for which the offender answers not in any human tribunal”.\textsuperscript{648} The reasons given by Hume for the divide between the act and mind are similar to those given by Mackenzie in the previous century i.e. the “impossibility of searching into

\textsuperscript{643} \textit{Ibid} I, 254.
\textsuperscript{644} \textit{Ibid}.
\textsuperscript{645} 4 June 1827 (JC 4/17).
\textsuperscript{646} This premise, which was quoted by the prosecution, comes from Genesis 9:6.
\textsuperscript{647} Hume, \textit{Commentaries} I, 369.
\textsuperscript{648} \textit{Ibid} I, 149.
the heart and secret thoughts,’ and an apparent confidence in divine retribution for the various internal vices that were outwith the realm of the criminal law. It should be noted that whilst this sentiment was echoed in legal practice, there was at least one case in which it was argued that the reason that mere intentions were not punished in earthly tribunals was not that they could not be proved (‘they can be proved by man very often, and they often may be avowed’) or that they would be dealt with in the next life, but rather that ‘society suffers no direct injury except from what is done’.

Despite these various elements of the law that remained firmly objectivist, there are indications of a further shift towards subjective criminality, which is demonstrated in the increasing relevance of the intentions and motivations of alleged criminals. The rationales offered for this shift and the terms used to describe it point to the reception of Scottish moral philosophy of the time. Hume writes that:

Whatever be the cause which impels a person to the doing of those things, which are destructive of the interest or the bonds of society, his will is not on that account the less vicious, or his nature the less depraved. It is only the greater proof of his depravity, that he could do these things, without even feeling that they were wrong.

This attitude is a combination of the pre-Enlightenment Calvinistic notion that proscribed behaviour indicates a vicious will and depraved nature and the philosophy of moral sentiments that developed in Scotland during the eighteenth century and conceived of morality as something that could be perceived and acted upon. Failure to appreciate and act upon these moral intuitions could be regarded as nothing other than evidence of a seriously depraved nature.

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650 Unkindness, ingratitude, treachery and oppression could all contribute to the death of the sufferer, according to Hume, but guilt of this sort could not be judged as a criminal homicide in the ‘tribunals of this world’ (Hume, Commentaries I, 189).
651 Frances Orr 11 January 1811 (JC 4/5) (emphasis in original).
652 See Chapter Two.
653 Hume, Commentaries (1797 edition) I, 25. In the 1986 reprint this same passage is phrased: “be the cause what it may, which impels a man to do such things as are subversive of society, his will is not on that account the less inordinate, or his nature the less depraved: It is only the greater proof of his depravity, that he could do such things, without even feeling that they are wrong”.
654 See Chapter Six for how the same combination of Calvinist depravity and Scottish moral philosophy influenced the insanity defence.
Perhaps the strongest indication that Scots law was becoming more subjectivist is in the growth of *mentes reae* that were particular to different crimes. The first example that demonstrates this move towards requiring crime-specific mental states comes from the law of theft. Mackenzie defined the crime as “a fraudulent away-taking, or using what belongs to another man, without the owners [sic] consent”. Similarly, Forbes wrote that theft is taking away or using for lucre any moveable thing belonging to another without his consent. Use of the term ‘fraudulent’ implies that in order to be guilty of theft the purported thief must have known that the property belonged to another, as does the lack of the owner’s consent, so in that respect mental state was an element of the definition of theft during the seventeenth and early eighteenth centuries. However, Hume’s definition makes the accused’s mental state an explicit element of the offence. He writes that “[t]aking must be with felonious purpose; by one who knows that the thing belongs to another, and who means to deprive him of his property”.  

Likewise, whereas for Mackenzie receipt of theft required “recept of the thing stoln [sic] willingly and knowingly”, by the end of the eighteenth century “knowledge of the vicious quality of the thing” was the main thrust of the offence “for there lies his guilt, and the substance of the charge”. Even the clearest offences against morality, which in Mackenzie’s time could be punished on proof of commission alone, had by Hume’s time developed to require proof of the accused’s knowledge. It was essential for guilt of incest “as of all other crimes, that the parties, at the time of their offending, have been in the knowledge of that circumstance, wherein the wrong lies; so that either of them, who was then ignorant of the relation, (if such a thing should happen) shall be free of all punishment”.  

The changes in the definition of theft, reset and incest all signal an increased regard for offence-specific culpable mental states and therefore the increased subjectivism within the criminal law. In addition to this, Hume and Mackenzie’s differing approaches to defining adultery, another of the clearly moralistic offences,

656 Forbes, *Institutes* 147.
657 Hume, *Commentaries* I, 73.
supports the argument that it was changing attitudes to religion that were making an impact upon the law of *mens rea*. According to Hume, adultery could only be committed if there was a subsisting and lawful marriage,\(^660\) whereas according to Mackenzie even violation of a “supposed marriage” constituted adultery because the committer had done all that lay within his power to commit the offence.\(^661\) Hume disagreed with Mackenzie on this point because he believed that the party’s guilty intention was not the law’s object and that punishment was inflicted only for “evil and pernicious deeds” done in violation of the laws.\(^662\) This difference appears to contradict the shift towards subjective criminality that is being argued for here, as Hume seems more concerned with acts than with intentions. However, further examination indicates that the difference in opinion is likely to be attributable to the growing humanitarian impetus of the age. Hume did not simply dismiss the accused’s mental state as irrelevant; he envisaged it having an exculpatory function. In contrast to Mackenzie who wrote that mental state could be used to catch offenders who were not actually married, Hume states that since adultery was not one of those acts “which naturally imply dole”, there is no crime unless the pannel was aware of the marriage and that it was for the prosecution to prove general notoriety of the marriage or the pannel’s special knowledge of it.\(^663\)

7.4.2 The law of attempts

In the same way that the law of attempts expressed the law’s manifest criminality in the post-Reformation era and at the start of the eighteenth century, it also reflects changes in the model of criminality that were occurring at the start of the nineteenth century. In the first edition of Hume’s *Commentaries*, which was published in 1797, there is no separate discussion of attempts liability but it is recognised that an attempt to commit a serious offence could be punished legitimately, albeit not as harshly as the completed crime.\(^664\) Liability for attempts remained for the most part objectivist,

\(^{660}\) *Ibid* 1, 456.

\(^{661}\) Mackenzie, *Matters Criminal* 175.

\(^{662}\) Hume, *Commentaries* 1, 456.

\(^{663}\) *Ibid* 1, 457.

\(^{664}\) Hume specifically refers to the punishment of attempted theft, robbery and murder.
being chiefly concerned with the line between attempts and completed offences rather than the line between preparation to commit a crime and a punishable attempt. Thus the cases that concerned Hume were those where the last act had been reached before the completed offence was carried out. For example, Hume emphasises that to incur liability for theft the pannel must have taken and carried away another’s property; anything else, no matter how clearly it implied felonious purpose, would merely amount to an attempt.\footnote{Hume, \textit{Commentaries} I, 70.} Similarly, to be guilty of robbery, fire-raising or murder the accused must have undertaken the very last act that would be required to effect the crime before being held responsible. Even if a pannel who had committed an assault was caught with his hand on the purse of his victim, or had taken his victim to the brink of the grave, he would only be regarded as having attempted the completed offence (of robbery or murder, respectively).\footnote{Ibid I, 104, 126-127, 179. This approach to attempted robbery was applied in \textit{Thomas Whyte}, 13 July 1814 (JC 4/7).}

Of course, due to the fact that Scots law adopted a ‘final stage’ approach to identifying criminal attempts,\footnote{The majority of the Scottish authorities support a ‘final stage’ theory of attempts liability (Gordon, \textit{Criminal Law} paras 6.28-6.43) and Hume advocated a ‘last act’ theory of attempts, requiring the accused to have done the act by which he meant and expected to perpetrate the crime and which put repentance out of his power (Hume, \textit{Commentaries} I, 27).} it was inevitable that the last act would constitute both the line between preparation and perpetration and also the line between attempt and the completed offence. However, the fact that the distinction was regarded as dividing an offence from its attempt rather than an attempt from mere preparation (i.e. an act not culpable enough to constitute a punishable attempt) suggests that the law was still aimed at preventing the objective harm of the full offence rather than punishing a criminal intention which might indicate a potential future threat. Interestingly, by the time the \textit{Commentaries} reached its fourth edition\footnote{In 1844, with a supplement by B R Bell.} there was a whole section dedicated to punishing attempts. In this section it is written that if an accused brought about some lesser harm in the course of intentionally committing a more serious offence he would be responsible for the harm he had caused and his intention to carry out the more serious offence would act as an aggravation.\footnote{Hume, \textit{Commentaries} I, 26.}
This development can be explained by the fact that by this time lawyers had developed the practice of libelling an assault (or whatever harm was caused) along with the accused’s intention to commit the more serious offence as an aggravation, rather than simply libelling the attempt to commit a more serious crime directly. 670 According to Hume, this was undesirable because charging the attempt to bring about the intended outcome directly would be “nearer to the truth”. 671 In contrast to the Scottish method, the English practice was to charge the intention to commit a crime directly. Indeed the English approach had long been to punish all stages of intended crimes, including threats, challenges and words amounting to threats, on the basis of its potential future danger to society. 672

These differing perspectives on the law of criminal attempts are unsurprising if we recall the foundations upon which Scottish criminal law had developed. In Scotland a long tradition of judicial reliance on alleged moral consensus and on the ability of laypersons to discern right from wrong underpinned a perception of criminal attempts that placed objective harm at the forefront of culpability. This in turn meant that some tangible harm was required in every libel, for if the accused’s intentions were to be at all relevant they had to be conjoined to a palpable injury or harm. That the final edition of the Commentaries reveals dissatisfaction with this fact suggests that there was a desire to change the law to allow potential wrongdoing to be caught and punished, even where the criminal intent could only be proved by conduct which was not in itself criminal. 673 Given that this desire to change the law rests on greater recognition of dangerous intentions and a decreased concern with a manifestly criminal act, it seems that the way attempts liability was perceived indicates a move from manifest to subjective criminality.

In practice, the two forms of charging inchoate offences, i.e. charging an attempt to commit a crime and charging a crime coupled to an intention to commit a

670 Ibid.
671 Ibid.
673 In spite of the signs of discontent in the Commentaries, there was little change to the law of attempts other than legislation which extended mandatory capital sentencing to certain forms of attempted murder (An Act for the more effectual Punishment of Attempts to murder in certain Cases in Scotland 1829 (10 Geo. c.28)). Given that it was already possible to charge attempted murder, this Act did not expand criminal liability for attempts.
more serious crime, were not always kept separate. This is demonstrated in the case of George Buckley, a trial for housebreaking with intent to steal.\textsuperscript{674} In this case the panel argued that making criminal intent the substantive matter of the charge was contrary to the rules of Scots law. In response, the prosecutor stated that the criminal intention with which the simple act (housebreaking) was done constituted the character of the offence and that housebreaking with intent to steal was seen in law as a criminal attempt. He added that the existing practice was to charge housebreaking with intent to steal whenever it was doubtful that an attempt to steal could clearly be proved on the facts. A debate then followed on whether the object of the law’s punishment was the violence done in furtherance of a criminal intention or the dangerous intention itself. In delivering his judgment, Lord Justice Clerk Boyle did not rule out the possibility that bare intention could be punished stating that “where nothing is made out but pure and unexecuted intention, the case must be much more doubtful”.\textsuperscript{675} He then added the point that “much must depend on the circumstance of the case”, which did not add much clarity except in confirming that an intention which is clearly evidenced was a relevant article of a charge.

To summarise, by the nineteenth century the idea that intention to commit a crime could, in some circumstances, amount to an indictable offence began to be accepted so long as it was attached to an underlying completed offence. This, it is argued, illustrates the law’s increasing regard for culpable mental states and thus the law’s increasing subjectivism. Of course, by the end of the century a general rule on attempts liability had emerged, which stipulated that any attempt to commit an offence is an offence in itself, which remains the position in the contemporary law.\textsuperscript{676}

7.5 Conclusion

From a form of culpability akin to Fletcher’s manifest criminality, by the end of the nineteenth century Scots law had come to resemble something more analogous to his subjective criminality. At the most general level this change meant that the law

\textsuperscript{674} 12 July 1822 (JC 4/13).
\textsuperscript{675} Ibid.
\textsuperscript{676} Criminal Procedure (Scotland) Act 1887 s61, now embodied in s294 of the Criminal Procedure (Scotland) Act 1995.
began to take greater account of the accused’s mental state at the time the offence was committed, rather than simply determining whether he or she had perpetrated a wrongful act in the absence of justifying or excusing conditions. At a more specific level, the claim that a shift from manifest to subjective criminality had occurred is supported by the way that *mens rea* grew in importance, the development of offence-specific *mentes reae* and changes in law of attempts liability. This shift towards subjectivism in Scots criminal law has not previously been identified, nor has the argument been made it can potentially be explained by the emergence of Scottish moral sense philosophy.

Conceptually, the move towards subjectivism that is traced in this chapter is linked to the shift towards capacity responsibility that was put forward in the previous chapter. Both movements represent the law’s increasing regard for the psychological aspects of responsibility and culpability and it is argued that both are linked to innovative theories of human agency that were introduced during the Scottish Enlightenment. Similarly, just as the move from character to capacity responsibility was partial, so was the transformation from manifest to subjective criminality incomplete. In one important respect Scots law remained distinctly affiliated with the model of manifest criminality, namely, in the retention of morally evaluative *mens rea* terms. The following chapter is devoted to considering Scots law’s retention of the terms ‘wicked’ and ‘evil’ and to assessing whether their continued use suggests that the older, general form of culpability that is outlined in the first portion of this chapter still underpins the modern law or whether the terms are now so devoid of their original meaning that they lack any real import.
Chapter Eight: Evaluative Mentes Reae

8.1 Introduction

This chapter tracks the development of culpability in the nineteenth century and demonstrates that the move towards subjectivism that was identified in the previous chapter continued, with changes in the depiction of homicide suggesting a greater concern with intention. Following this, the analysis of culpability is extended through to the modern law by scrutinising the use of morally evaluative mens rea terms in the criminal law and establishing whether they hold any continuing significance. In undertaking this enterprise, the key focus is homicide law, with some consideration being given to the law of assault. There are good reasons for focussing on homicide despite its limited empirical significance and the fact that it has already received disproportionate attention from scholars. The main reason is that discussions about mens rea frequently centre on the law of homicide, which in itself is a consequence of the fact that judicial decisions on the mens rea of homicide have genuine influence over the rest of the law, rather than being confined to that sphere.

In addition, the law of homicide, along with the law of assault, is most pertinent in tracing the kinds of influences that are under examination in the rest of this thesis. The moralistic term ‘wicked recklessness’, which forms part of the definition of murder, has been lauded for its flexibility and common sense, non-technical meaning, which in turn has been said to enable the law to reflect the community’s “moral judgment”. Such adulations accord with arguments that have been made elsewhere in this thesis about the character of Scots criminal law and the way it invokes allegedly special ties with community morality for legitimacy.

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677 Farmer has persuasively argued that one reason the law of homicide receives disproportionate attention is that it is often portrayed as the realisation of the genius of Scots criminal law. Thus, it has been depicted as the synthesis of practical reason, community and national character and has gained significant symbolic and moral value (L Farmer, Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present (1997) 145, 165).

678 Gordon notes that discussions of mens rea tend to be influenced by cases of murder, if only because most of the cases on mens rea are murder cases (commentary to Petto v HM Advocate 2011 SCCR 519 at 534).

679 See section 8.4.

680 Gordon, Criminal Law para 7.60.

681 See in particular discussion of the declaratory power in Chapter Four and the development of mental state defences in Chapter Six.
These consistencies add weight to the argument that the Scottish moral tradition might also provide an explanation for the development (or lack of development) in the law’s approach to culpable mental states. In the remainder of this chapter this hypothesis is explored, along with the possibility that a similar argument can be advanced about the terms ‘wicked intention’, which is now also part of the definition of murder, and ‘evil intent’, which is part of the definition of assault.

In contrast to other Anglo-American jurisdictions, which have largely purged their criminal laws of morally evaluative terms in pursuit of greater value-neutrality, the retention of the terms ‘wicked recklessness’, ‘wicked intention’ and ‘evil intent’ appears unusual and archaic. The argument in this chapter is that because of the way that the terms ‘evil’ and ‘wicked’ have been used over time they have lost much of their former meaning, but they nevertheless continue to harbour structural significance in the modern Scottish approach to culpability. More specifically, the endurance of these morally evaluative terms has preserved an archaic approach to culpability – at least in the offences of murder and assault – which is rooted in the model of manifest criminality and which is evidenced in the internal structure of these crimes. Under this approach, culpability consists of a wrongful act absent any relevant defence, rather than a wrongful act combined with a particular mens rea.

Recalling the format of culpability that existed in the post-Reformation era, which was outlined in the previous chapter, it is clear that this idea of manifest wrongfulness coupled to the absence of a viable defence (which itself inheres in the wrongful act) has ancient origins in Scots law and a close connection with the Scottish moral tradition. The discovery that the same model of culpability remains within the contemporary law strengthens the conviction that an understanding of the history of Scots criminal law can help explain some of the conundrums that plague contemporary doctrinal lawyers, such as those posed by use of the term ‘wicked’ in

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682 See section 8.5.2.
683 See section 8.5.1.
684 G Fletcher, The Grammar of Criminal Law (vol 1) (2001) 44. For an account of this process in English law see K J M Smith, Lawyers, Legislators and Theorists (1998) chapters 4 and 9. The move to purge English law of morally evaluative mens rea terms began in the nineteenth century though it was not completed due to continued ardour for the normative flexibility offered by these terms. The judicial practice of characterising mens rea in undefined, moral condemnations such as ‘wickedness’ or ‘evil’ fell into decline in the first half of the twentieth century.
685 See the introduction to Part Three.
the law of murder. It also supports the thesis that the Scottish moral tradition has a significant role to play in such explanations.

8.2 Culpability in the nineteenth century

Alison’s *Principles of the Criminal Law of Scotland*, which was published in 1831, was the first comprehensive volume written on Scots criminal law in the nineteenth century. Within the text there are signs that a different, more subjectivist, model of culpability was at work compared to that of the eighteenth century. Since Alison does not set out a general theory of culpability, his treatment of the law of homicide gives the clearest indications of how mental state was relevant to guilt. To begin with, whereas in Hume’s *Commentaries* a great deal of attention is paid to the physical consequences of an offender’s homicidal actions before considering the different degrees of homicide, in Alison’s discussion of homicide the first distinctions are based upon intention and the majority of the ‘other’ questions which relate to the circumstances of the killing are framed in terms of intention too. This change in emphasis suggests that the older view of culpability, which underpinned Hume’s account and was ‘read off’ the act of wrongdoing, was fading by the time Alison wrote his *Principles*. By that time a new set of concerns relating to the accused’s intentions in committing the offence underpinned the decision of whether he or she ought to be held culpable.

The same pattern can be seen by contrasting the order that Hume and Alison impose on the different degrees of homicide. Alison lists murder first, which he defines as an act that produces death “in consequence of a deliberate intention to kill, or to inflict a minor injury of such a kind as indicates an utter recklessness as to the

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686 Discussed further below.
687 For example, whether the person died of the harm libelled, whether the cause of death was certain, what would happen if the person had been on their deathbed before the offence was alleged to have occurred, the consequences for the accused if the wound was capable of being cured, the status of the victim, and the several ways of carrying out the killing. (Hume, *Commentaries* 181-184, 187-189).
688 For example, how to infer the intention of the accused from expressions uttered before the fatal injury was inflicted and the fact that it would be murder if death ensued from an intention to kill or to do some other “highly wicked and felonious act” (A Alison, *Principles of the Criminal Law of Scotland* (1832) 10, 51).
689 This was of course around the time that psychiatric medicine began to spark greater concern with the accused’s mental state (see Chapter Six).
The life of the sufferer, whether he live or die.” Not only is murder treated as paramount, it is cast in terms of the accused’s mental attitude so that intent to kill or recklessness to life are essential constituents of the crime. Following this, Alison goes on to describe culpable homicide before concluding the section with a discussion of casual homicide. In contrast, this order is completely reversed in the Commentaries: the first class of homicide Hume discusses is casual, which is followed by justifiable homicide, then culpable homicide and he ends with murder, which he defines as homicide that is “done wilfully, and out of malice aforethought”. Hume’s ordering of homicide, beginning with casual homicide and working towards murder, resembles the model of manifest criminality in the way that it works towards the conclusion that a killing is murder via the exclusion of other less serious forms of homicide. Like the model of manifest criminality, Hume’s description of homicide starts with a wrongful act, which is then analysed for traces of exculpatory factors. In the absence of these factors, the killing is judged to be murder. In contrast, Alison’s account of homicide operates much more similarly to the model of subjective criminality because it is centred on the wrongful intention of the actor. By beginning with a discussion of murder, which is defined with explicit reference to the accused’s mental state, Alison’s ordering of homicide suggests a more modern, subjectivist view of culpability in which the accused’s intentions are paramount and are therefore the first consideration to be taken into account in determining the nature of a killing.

Although the terms ‘wilfully’ and ‘malice afore-thought’ are used by Hume in his description of murder, it is clear that they do not denote intention or mental attitude in any modern sense and they certainly do not imply that intention or mental state is an independent part of the offence definition. All that is meant by ‘wilfully’ and ‘malice afore-thought’ is the “larger and more general sense of dole, or a wicked and mischievous purpose, and as contradistinguished to those motives of necessity, duty, or allowable infirmity, which may serve to justify or excuse the deed”. Even

690 A Alison, Principles of the Criminal Law of Scotland (1832) 1.
692 Hume, Commentaries I, 254.
the alternative way of committing murder – killing with a purpose to do “excessive and grievous injury” which showed “at least an absolute indifference whether he [the victim] live or die” — was simply regarded as another instance of dole: this “corrupt disregard” of the person and existence of others was simply another way of proving “dole or malice, the depraved and wicked purpose, which the law requires and is content with”.

This conception of murder might further explain the order in which Hume’s discussion of homicide progresses. Reflecting manifest criminality, the act of injuring was of primary importance and so is discussed at length first. Once the requisite act (with no need to prove intention or recklessness separately) had been established, the question then arose of whether the killing was justifiable or excusable (i.e. whether it was inculpable or culpable homicide), and if it was neither then the crime would be murder. For Alison, dole continued to be the primary form of culpability in homicide cases and it continued to provide the explanation of why intentional killings and killings committed with utter recklessness were considered equivalent in terms of culpability. Yet there is a key difference between Alison’s and Hume’s accounts of homicide. Alison, unlike Hume, states explicitly that the prosecutor is generally obliged to prove that death arose either from intention or such recklessness as law deems equivalent before the prisoner substantiates anything in his defence. So although the required malice was still implied in the act of unjustified or inexcusable killing with no need for the prosecution to prove malice or deadly hatred, this rule was recognised to be of limited importance in practice for it was clear that the prosecution had to prove intention or recklessness.

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693 Ibid I, 257.
694 Ibid I, 258 (emphasis in original).
695 According to Hume, the malice is implied _prima facie_ in the act of intentional killing, which is the highest possible injury. It therefore lies with the pannel to overcome this presumption with evidence of some of circumstances of necessity, or excusable infirmity, which may serve him for a defence (Hume, _Commentaries_ I, 254).
696 Alison quotes Hume directly on this point (A Alison, _Principles of the Criminal Law of Scotland_ (1832) 2).
697 A Alison, _Principles of the Criminal Law of Scotland_ (1832) 50.
698 Ibid 49-50.
In effect, the act and the will had been separated and while the act could still provide evidence of the will, the two had to be proved independently.699

The formulation of murder most familiar to modern Scots lawyers is based on the one given by Macdonald in his 1867 *A Practical Treatise on the Criminal Law of Scotland* which was, until recently, the standard definition for academics and practitioners alike.700 Macdonald describes murder as “any wilful acts causing the destruction of human life, whether plainly intended to kill, or displaying such utter and wicked recklessness, as to imply a disposition depraved enough to be regardless of the consequences”.701 Referencing Hume, Macdonald re-states the general rule that “the law holds a man to be punishable as a criminal whether his deed is in itself a completed crime, or an attempt to commit crime…The deed must be overt and must be done with wicked intent”. This wicked intent was “an inference to be drawn from the circumstances of the deed as well as from any explanation by the man”.702

Though most of the hallmarks of the old model of culpability remain, there are subtle differences between Macdonald and his predecessors which indicate a further change in focus. As with Alison, act and mental state are cleaved apart but the accused’s indifference, whilst being described as a measure of the accused’s wickedness, is in effect a standard of recklessness.703 Farmer argues that this shows a tension between the moralistic terminology used, which invokes the old law, and the increasing subjective influence which, though objectively inferred, is decidedly more concerned with mental state.704 The fact that within Macdonald’s work a wrongful act is equated with a wicked intent, rather than one of the more general concepts of *dole*,

699 Farmer locates this change in the growth of culpable homicide by negligence, which required a new balancing of duties, foresight and contributory actions (L Farmer, *Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present* (1997) 159-160).
700 Gordon, *Criminal Law* para 23.11.
701 J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (1867) 140. The wording is very slightly different in the most recent 5th edition of Macdonald’s treatise in which it is written that murder is “any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences” (J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th ed by J Walker & D J Stevenson) (1948) 89).
malice or a ‘depraved purpose’ supports this perspective. The term ‘wicked’ remains but instead of indicating purpose or character it is now attached to intention or, alternatively, to recklessness.

8.3 The modern approach to culpability

One of the difficulties in achieving a clear view of the way that mens rea terms apply in the modern law is that since the Criminal Procedure (Scotland) Act 1887 was enacted it has not been necessary to include in criminal allegations any of the phrases that have traditionally been associated with a requisite mental state. This means that unlike older indictments which used to describe each component of an offence in detail, in more modern charges the terms ‘wilfully’, ‘maliciously’, ‘wickedly and feloniously’, ‘falsely and fraudulently’, ‘knowingly’, ‘culpably and recklessly’, and other similar expressions are implied in every case to which they are relevant.705 One effect of this change is that the mental elements of certain common law crimes have rarely been referred to in charges and have therefore seldom been debated in court, which means that their meanings are uncertain.706

Notwithstanding the fact that there is now no need to include these mental state terms they sometimes still appear in charges707 and the Scottish courts also use a range of other phrases to signify something like mens rea. Christie has composed a taxonomy of these phrases and observes that non-specific conceptions of moral guilt and malice have not been required, which is not to say that they have not been used, since at least the time of Hume.708 He adds that equally vague forms of general intent, which often incorporate an evaluative element such as ‘wilful’, ‘evil’ or ‘wicked’, are too closely linked to specific offences (particularly assault and murder) to be

705 S 5 Criminal Procedure (Scotland) Act 1887.
706 The Laws of Scotland: Stair Memorial Encyclopaedia, vol 7, para 74; Gordon, Criminal Law para 7.29.
707 Especially in charges for inominate offences such as “culpably, wilfully and recklessly” supplying solvents and containers to children in Khaliq v HM Advocate 1984 JC 23 and “culpably, wilfully and recklessly” seizing hold of a person, pushing her and causing her to fall down the stairs in HM Advocate v Harris 1993 SCCR 559. The use of these words was thought by Lord Prosser in Harris to be superfluous (at 575).
useful in describing a common mental state for all crimes. However, although such general and evaluative terms continue to appear in the law, according to Christie they are now used less frequently by practitioners, judges and law reporters, all of whom have used the term ‘mens rea’ with greater regularity since the nineteenth century either to refer to the mental element required for most crimes or the particular (though often unspecified) mental element of a specific offence. In spite of the move towards using the term ‘mens rea’, dole or some other general and vague form of culpability continues to be used in Scots law and evaluative terms such as ‘wicked’ and ‘evil’ remain important features of the modern law.

These vestiges of the pre-mens rea approach to culpability are held in mixed esteem. To some, dole is seen as problematic because it insinuates the continued relevance of the concept of bad moral character, which is regarded as out of place in modern notions of mens rea. As for the term ‘wicked’ and the mens rea of homicide more generally, it has been maligned for its indeterminacy. For example, in Petto v HM Advocate Lord Gill stated: “In Scotland we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy”. This sort of “loose terminology” has also been criticised for creating confusion because whereas in Hume’s time dole was used in order to make an explicit moral judgment about the accused’s whole character, today the Crown must establish only the specific actus reus and mens rea of the crime(s) charged. On the other hand, some writers regard the use of dole in the modern law as a harmless reminder of the moral component of guilt, the historical roots of this

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709 Ibid para 68.
710 Ibid para 70.
711 P R Ferguson & C McDiarmid, Scots Criminal Law: A Critical Analysis (2009) para 6.9.1. Use of the terms ‘wicked’ and ‘evil’ are discussed in more detail below. As regards dole, Jones and Christie state that though the term is not in common use today, the moralistic approach reflected in Hume still provides the background of the modern criminal law (T H Jones & M G A Christie, Criminal Law (5th ed) (2012) para 3-18). See n587 for examples of cases in which the court has relied on the concept of dole.
714 Petto v HM Advocate 2012 JC 105 at 111.
part of the law and the “essentially Scottish nature of Scots criminal law”. Whether praised or condemned, the contemporary Scottish approach to mens rea is clearly seen as a distinctive feature of the criminal law which demonstrates its moralism, so understanding its significance is an important part of this thesis. In the following sections the terms ‘wicked’ and ‘evil’ are examined in order to assess their significance within the definition and structure of murder and assault respectively.

**8.4 The definition of wicked recklessness**

In this section the modern use of the term ‘wicked recklessness’ is evaluated with a view to establishing whether it carries any moral import or, alternatively, whether it has been shorn of any normativity that it might have held at an earlier time. The overall conclusion is that much of the evaluative import of the phrase, which has traditionally been thought to lend the law flexibility, has been lost but that this change only occurred in recent years. Until then, the term ‘wicked recklessness’ allowed for a much greater degree of moral judgment than other more psychologically-oriented constructions of mens rea, such as those found in English law.

As has already been mentioned, until recently the standard definition of murder in Scots law was Macdonald’s “any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences”. This definition could be contrasted with the English definition of murder, which requires intention to kill or to cause grievous bodily harm and which, despite appearing straightforward, has generated a number of judgments on the vexatious issue of the meaning of intention. According to an influential article by Lord Goff, the advantage of the

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716 The Laws of Scotland: Stair Memorial Encyclopaedia, vol 7, para 66 (emphasis in original).
718 R v Cunningham [1982] AC 566.
719 For example, DPP v Smith [1961] AC 290; R v Hyam [1975] AC 66; R v Moloney [1985] AC 905; R v Hancock and Shankland [1986] AC 455. See also Scottish Law Commission, Report on The Mental Element in Crime (Scot Law Com No 180, 1983) paras 2.15-2.30. For one example of
Scottish approach was that it allowed a person to be found guilty of murder without their having consciously appreciated the risk of death, so long as that person’s actions demonstrated indifference as to the consequences for the victim – a result which he believed conforms to judges’ and juries’ feelings.\textsuperscript{720}

Lord Goff’s impression of the Scots law of murder reveals that one of its perceived strengths was that it allowed judgments of culpability to be based on an objective assessment of the accused’s conduct as measured against an undefined, visceral standard of guilt. Lord Goff was not alone in holding this impression. In oral evidence before the Select Committee on Murder and Life Imprisonment Dr Ashworth\textsuperscript{721} remarked that the Scottish idea of wicked recklessness did not require the court to be blinkered by too narrow a conception of grievous bodily harm or knowledge of risk of death, adding that “in the Scots idea there is not anything ‘the law’, the whole test is what the jury think”.\textsuperscript{722} Professor Leigh shared a similar view, stating that wicked recklessness is imprecise, flexible and allows the jury considerable discretion since it does not require that they be satisfied that the accused was aware of the risk of death.\textsuperscript{723} Notwithstanding the fact that these impressions were shared by several esteemed individuals, there were also signs that this interpretation was incorrect and that the law was in fact less flexible and less able to take account of the kind of ‘gut instinct’ evaluations that it was thought able to take into account.\textsuperscript{724}

In any event, the issue has recently been reconsidered in a series of cases, the outcome of which suggests that the wicked recklessness way of committing murder requires some intentional physical act that aims to inflict harm, which means that the


\textsuperscript{721} As he was then.

\textsuperscript{722} Report of the Select Committee on Murder and Life Imprisonment (vol 2), 1988-89 para 167.

\textsuperscript{723} Ibid 285 at para 3.

\textsuperscript{724} In his article, Lord Goff wrote that there was authority for the position that Scots law might require an intention to do grave personal injury in order to find a person guilty of murder but he concluded that this was a third form of \textit{mens rea}, distinct from intentional and wickedly reckless murder, rather than a qualification to the \textit{mens rea} of wicked recklessness. In their memorandum to the Select Committee on Murder and Life Imprisonment the Faculty of Advocates suggested that this interpretation was wrong and that intent to cause bodily injury was simply one example from which a conclusion of wicked recklessness could be drawn.
problem of intention can no longer be sidestepped.\footnote{J Chalmers, “The True Meaning of ‘Wicked Recklessness’: HM Advocate v Purcell” (2008) 12 Edinburgh Law Review 298 at 301.} This was of course the main advantage of the Scottish approach identified by Lord Goff and thus its erosion has consequences for the extent to which the modern law embodies the flexibility and moral candour that it once did.\footnote{In HM Advocate v Purcell [2007] HCJ 13 the court endorsed the view that murder consists of death caused with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences (at para 16). Shortly after this case was decided the court considered the issue in Petto v HM Advocate 2012 JC 105 where it was held that “deliberate acceptance” of the “virtual certainty” of the risk of death was equivalent to an intention that death should occur (at 109).} In the most recent case to consider the requirement for intention, \textit{Petto v HM Advocate}, Lord Eassie used the term ‘virtual certainty’ in his account of the law, which is the phrase used in English law to describe an intention to kill or to cause serious bodily harm.\footnote{C McDiarmid, “‘Something Wicked this Way Comes’: The Mens Rea of Murder in Scots Law” 2012 Juridical Review 283 at 297, referring to \textit{R v Woollin (Stephen Leslie)} [1999] 1 AC 82 for authority; Petto v HM Advocate 2012 JC 105 at 109.} This might suggest that the court in Petto was suggesting a preference for restricting murder to intentional killing.\footnote{Gordon speculates that this might be the case in his commentary (Petto v HM Advocate 2011 SCCR 519 at 534).} Despite this similarity between the English approach to intention and that in Petto, when similar phrasing was used in \textit{HM Advocate v Purcell} Gordon wrote that the distinction between the ways of committing murder in Scots law is not based on a “scientific” description of a state of mind but on an assessment of wickedness.\footnote{HM Advocate v Purcell 2007 SCCR 520 at 530 – 531.}

Following these cases, the law on wicked recklessness has been described as “unsettled”\footnote{C Stoddart, “Definition Under Strain” (17 October 2011) Journal of the Law Society of Scotland.} but the general effect has been to limit the operative flexibility of wicked recklessness and to cast doubt on whether it permits the same degree of moral judgment it was once taken to allow.\footnote{Ferguson and McDiarmid describe the decision in HM Advocate v Purcell [2007] HCJ 13 as having called into question the “inherent flexibility, and the ability to follow blameworthiness” which wicked recklessness presented (P R Ferguson & C McDiarmid, Scots Criminal Law: A Critical Analysis (2009) para 9.12.7).} Of course, it is impossible to predict how the law of homicide might change as a result of its review by the Scottish Law Commission\footnote{At the time of writing the Scottish Law Commission’s incomplete project on homicide was postponed due to other priorities.} but it is clear from the discussion above that until relatively recently the Scots law of murder enabled the accused’s conduct to be assessed against a loosely-defined, morally evaluative standard, which in turn allowed for a high degree
of jury discretion and was in keeping with the pre-mens rea notion of culpability. It is only in the very latest cases that wicked recklessness seems to have been interpreted far more restrictively, and with greater regard to the subjective intentions of the accused. Only since these recent changes can it be emphatically said that the endurance of morally evaluative terminology does not imply that the old style of culpability has survived.

8.5 Evaluative terminology and the structure of culpability

The sections above have considered the relationship between the categories of homicide and the relevance of ‘wicked’ to the way that one limb of the definition of murder – ‘wicked recklessness’ – has been used in practice. These aspects of the law are important in understanding the conception of culpability which underpins the law, but they do not provide the full picture. The term ‘evil’ appears in the mens rea for assault and the term ‘wicked’ also applies to the second limb of the definition of murder – ‘wicked intention’ – and given that these sort of evaluative terms are criticised for being imprecise and uncertain whilst simultaneously lauded for maintaining the nexus between current morality (as represented by the jury) and the law it is essential to evaluate their use too. Understanding the way such phrases have been interpreted further clarifies to what extent the early, pre-mens rea form of culpability has endured in the contemporary law.

733 Similar criticisms have been made of some evaluative adverbs in English law such as ‘dishonest’ which, though partially defined in the Theft Act 1968, is said to allow the jury to apply their own standards of dishonesty, which might result in inconsistent verdicts (R Tur, “Dishonesty and the Jury: A Case Study in the Moral Content of Law” in A P Griffiths ed, Philosophy and Practice (1984) 75 at 76). In its report on Fraud the Law Commission described ‘dishonesty’ as an “unusual element” of all the major Theft Act crimes and the common law offence of conspiracy to defraud because it necessitates a moral as well as a factual enquiry. After considering the advantage of flexibility that is provided by using the term ‘dishonesty’, the Law Commission considered its demerits, which included: insufficient regard for fair labelling, uncertainty in the offence definition, and lack of fair warning (uncertainty and lack of fair warning forming the principle of legal legality, which is protected by the European Convention on Human Rights) and decided not to propose a general dishonesty offence (Law Commission, Report on Fraud (Law Com No 276, 2012) paras 5.1, 5.12-5.44, 5.57).

8.5.1 Evil intention

‘Evil’ has been part of the definition of assault ever since Macdonald wrote that evil intention is the essence of the offence. Before this time descriptions of assault did not include any mention of evil intention. For example, the only reference to intention made by Alison relates to various aggravations of assault, including intent to ravish, intent to rob and so on. Earlier still, in Hume’s time, there was an array of graphically described common law crimes which were essentially non-fatal offences (termed real injuries) against the person and which varied in culpability according to the harm suffered by the victim. In keeping with the law of homicide, the early law was therefore almost exclusively concerned with the physical consequences of the assault rather than the particular intentions of the perpetrator. When Macdonald came to rely upon the concept of evil intent he used it to distinguish assault from accidental injuries and to explain why certain otherwise intentional injuries, such as those incurred by professional boxers under the Queensberry Rules, were not assaults. It was the absence of evil intent that rendered them lawful.

The interesting point about Macdonald’s reliance on evil intent is that it marks a departure from the early view that a wrongful act was invariably a criminal offence – in other words, the old model of manifest criminality. Relying on evil intent shows a new concern with intentionality, which mimics the changing emphasis in the law of homicide and signifies that a new conception of culpability was in operation. Another key point, whose significance is more fully explored below, is that any inferences of criminality that were conjured up by the prima facie act of causing injury were not negated by a separate defence or by designating certain modes of causing harm acceptable (such as sports). Instead, the possibility of refuting the presumption of wrongfulness was provided by including a morally

736 A Alison, Principles of the Criminal Law of Scotland (1832) 184-185.
737 There were also a number of statutory offences including beating or cursing one’s parents (1666 A.P.S., c.20), assaulting members of the clergy (1587 A.P.S., c.27; 1633 A.P.S., c.7; 1670 A.P.S., c.4); striking in the presence of the king or in his chamber (1593 A.P.S., c.177); striking in the king’s palace (1600, A.P.S., c.26); pursuance of the king’s officers (1600, A.P.S., c.4).
738 Hume, Commentaries I, 324-339.
739 J H A Macdonald, A Practical Treatise on the Criminal Law of Scotland (1867) 177.
740 Ibid 116.
evaluative term in the definition of the offence. This aspect of Macdonald’s account of assault clearly has ties with the early notion of culpability, for act and intention (or will) are conjoined and culpability depends not on whether the particular act and mental state requirements are satisfied but whether the *prima facie* wrongfulness of the accused’s act is defeated by some element of justification, which is implicit in the definition of the offence.\(^{741}\)

A similar tendency can be seen in the more recent decisions of *Smart v HMA*\(^{742}\) and *Lord Advocate’s Reference (No 2 of 1992)*.\(^{743}\) In *Smart* the appellant was convicted of assault despite his argument that because the complainer had allegedly agreed to fight him he could not have had the evil intention required to be convicted of assault. The sheriff rejected the claim that consent is a defence to assault because “[t]he essence of the crime of assault is that there should be in the mind of the assailant a malicious and wicked intention to injure the victim…the essence of the crime lies in the mind of the assailant and not in the mind of the victim”.\(^{744}\) On appeal, Lord Justice Clerk Wheatley approved the sheriff’s decision and re-iterated the position set out in Macdonald that ‘evil intention’ means intent to injure and do bodily harm. This point means that sporting injuries are not assaults because the intention of the person who causes the injury is to engage in the relevant game rather than to harm the opponent.\(^{745}\) So in *Smart* a similar view of evil intention was taken as in Macdonald, which is to say that the court retained the notion that a heinous intention marks out an accused’s activities as criminal, instead of introducing a defence of consent in order to determine which intentionally inflicted injuries should be regarded as culpable and which should not.

At first sight, *Lord Advocate’s Reference (No 2 of 1992)* appears to repudiate the view that ‘evil’ has any evaluative significance in the modern law of assault,

\(^{741}\) See the introduction to Part Three and section 7.2.
\(^{742}\) 1975 JC 30.
\(^{743}\) 1992 SCCR 960.
\(^{744}\) *Smart v HM Advocate* 1975 JC 30 at 31. A similar approach was taken in *Stewart v Nisbet* [2012] HCJAC 167 at para 36.
\(^{745}\) *Smart v HM Advocate* 1975 JC at 33. This is a remarkably narrow construction of ‘intent’, which seems almost to equate it with ‘purpose’.
because ‘evil intention’ was effectively equated with intent to injure. For this reason, the case would appear to illustrate a move away from the old model of culpability. However, examining the individual judgments that were delivered suggests that they are informed by a conception of culpability that is very similar to that of the earlier authorities. The accused was charged with assault with intent to rob and attempted robbery but he argued that his actions had been a joke and that he therefore could not have had the evil intent necessary for assault. Following the accused’s acquittal, the Lord Advocate referred the question of whether such a defence existed to the High Court, which held that it did not. In delivering the majority opinion, Lord Justice Clerk Ross stated that the accused’s claim that his actions were a joke was merely evidence of his motive or ulterior intention and was therefore not relevant in determining his guilt. He added that the term ‘evil intention’ simply means that assault cannot be committed accidentally, recklessly or negligently. Lord Cowie reached the same conclusion and specified that in this case the meaning of ‘evil intent’ was to be derived from “the quality of the act…and, in the second place, whether the act was committed deliberately as opposed to carelessly, recklessly or negligently. It is the quality of the act itself, assuming that there was no justification for it, which must be considered in deciding whether it was evil”. It is clear that once again the court thought ‘evilness’ to be something that resides in the quality of the act and which serves, by its absence, to determine whether the accused’s actions are culpable and therefore punishable.

It is worth noting that both Lords Cowie and Sutherland emphasised that evil intention is an important aspect of the definition of assault, but that this perspective conflicts with other professional opinions on the matter. For example, in his

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747 The argument that ‘evil intent’ implies the old model of culpability is also supported by the way it has been used in ‘reasonable chastisement’ cases in order to establish whether the accused’s actions were excessive and therefore criminal. See, for example, Gray v Hawthorne 1964 JC 69 in which Lord Guthrie stated that in cases where the severity of chastisement by a person with disciplinary powers (in this case a headmaster) was in issue the question was whether there has been dole on the part of the accused, adding that this is the evil intent necessary to constitute a crime in Scotland (at 75). See also P Spink & S Spink, “What is reasonable chastisement?” (1 June 1999) Journal of the Law Society of Scotland. This area of the law is now governed by Part 7 of the Criminal Justice (Scotland) Act 2003.


749 Ibid at 968.
commentary on the case Gordon writes that it is unfortunate that the court continued to use the phrase ‘evil intent’, because the issue is not whether the accused or his intention were evil but whether he intended to do what was criminal. Similarly, Jones and Christie state that the epithet ‘evil’ is unnecessary in defining assault and suggest that “evil intent is simply an outmoded way of referring to ‘intent’.” Whilst this interpretation is of course correct given the ratio of the case, it slightly obscures the point that within their Lordships’ deliberations there are hints that their idea of intention is not quite the same as the modern conception which has, in effect, been cleaved from considerations of justification or excuse. The fact that Lord Cowie located evil intent in the act itself, assuming no justification, and the fact that Lord Sutherland found the idea of bare intention perplexing because it did not incorporate any element of moral heinousness both suggest that there is some residue of the old model of culpability at work.

The High Court took a similar approach to dividing intentional harmful actions into culpable and inculpable in the case of HM Advocate v Harris. The case concerned a club steward who had been charged with assault and, alternatively, with culpably, wilfully and recklessly seizing hold of the complainer, pushing her and causing her to fall down the stairs. Lord Justice Clerk Ross held that the two charges were correctly regarded as alternatives because the first was a crime of intention and the second was a crime of recklessness. In trying to tease out the distinction between the two charges, Lord Murray stated that not every action of pushing or seizing another person is an assault; only those sorts of actions done with criminal intent – the intent to injure – are assaults. Yet conduct which would not be classified as an assault because, though being intentional in the sense of deliberate, it reveals no intention to injure might nevertheless be criminal if the accused had

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752 His Lordship remarked that the word ‘intention’ (rather than the word ‘evil’) is confusing because it is possible to have an intention to perform certain acts without necessarily intending any evil consequences (Lord Advocate’s Reference No 2 of 1992 1992 SCCR 960 at 970).
753 1993 SCCR 559.
754 At 564.
shown a sufficiently high degree of *recklessness* as to the potentially harmful consequences of his or her actions.\(^\text{755}\)

This decision, that unintentional (in the sense of having unintended harmful consequences) though sufficiently reckless conduct which results in injury is a crime, was one of the key points of the case but what is more interesting for present purposes is the way that intention was discussed by the court. As in the other authorities discussed above, the court held that conduct which would otherwise be regarded as assault would not be culpable if it lacked criminal intent. Furthermore, this intent was not regarded as something to be proved, owing to its being implied in the presumptively wrongful act of manhandling another. Instead, the absence of intent would need to be proved in order to relieve the offender of liability.\(^\text{756}\)

Crucially, the negation of wrongdoing, in the form of absence of intent, forms part of the definition of the crime. It is not a separate defence nor is it presumed that certain types of conduct or perpetrator are free from culpability. To illustrate this point, Lord Murray cited policemen and ambulance workers as examples of people who have occasional cause to push others in the course of their employment but who are regarded as justified or excused in doing so. Once again, their exemption from liability was framed not as a matter of these workers’ status or their having a valid defence, but because they were said to lack criminal intent.\(^\text{757}\) The important point is that in each of the cases where the meaning of evil intention was brought under scrutiny the court held that it is a necessary part of the definition of assault because it distinguishes justified (and therefore inculpable) conduct from conduct which ought to be considered an assault. As a consequence, the factors which negate wrongdoing are bound up in the definition of the offence in the form of the evaluative term ‘evil’. Including this evaluative aspect, which pulls culpability-denying elements into the

\(^\text{755}\) At 566.

\(^\text{756}\) Lord McCluskey, who was in dissent with the majority judgment, stated that when the Crown charges assault ‘evil intent’ is not averred because it is treated as a secondary fact which is proved by inference from the primary facts, i.e. the actings of the accused (*HM Advocate v Harris* 1993 SCCR 559 at 569). Lord Morison (at 572) remarked that it is easy to envisage circumstances where the deliberate acts of seizing and pushing someone do not constitute assault, although in the absence of any legitimate explanation they would be presumed to do so.

\(^\text{757}\) *HM Advocate v Harris* 1993 SCCR 559 at 566. Lord McCluskey (at 571) agreed with this point, stating that the legal justification for policemen’s manhandling persons in the course of their duty is the absence of the *mens rea* for assault.
offence definition, is essential because culpability is considered to be automatically
derived from the nature of the wrongful act itself.

8.5.2 Wicked Intention

The structural implications of including a morally evaluative term in the definition of
assault have also arisen within the law of murder. The most obvious, and
controversial, example of this is the case of \textit{Drury v HMA}.\footnote{2001 SCCR 583. Chalmers and Leverick describe \textit{Drury} as \textquotedblleft the most controversial judicial
decision on Scots criminal law in recent years" (J Chalmers & F Leverick, \textit{“Murder through the
} The main issue for the
court was whether the concept of proportionality applied to the provokedence
defence in cases of infidelity but, in considering this issue, the court decided to reflect upon
the law of murder and culpable homicide more widely.\footnote{\textit{Drury v HM Advocate} 2001 SCCR 583 at 597-588.}
The first aspect of this
more general topic the court considered was the definition of murder. At the trial the
judge had directed the jury that murder is \textquoteleft\textquoteleft any wilful act causing the destruction of
life, either intending to kill or displaying such wicked recklessness as to imply a
disposition depraved enough to be regardless of the consequences\textquoteright\textquoteright .\footnote{Ibid at 588.}
Even though
this definition was almost identical to the definition put forward by Macdonald, on
appeal Lord Justice General Rodger described it as \textquoteleft\textquoteleft at best incomplete and, to that
extent, inaccurate\textquoteright\textquoteright .\footnote{Ibid.}
The inaccuracy was said to reside in the fact that \textquoteleft\textquoteleft intention\textquoteright\textquoteright was unqualified by the epithet \textquoteleft\textquoteleft wicked\textquoteright\textquoteright, for \textquoteleft\textquoteleft just as the recklessness has to be
wicked so also must the intention be wicked\textquoteright\textquoteright .\footnote{Ibid.}
Recalling Hume\textquotesingle s account of \textit{dole},
Lord Rodger added that saying the perpetrator \textquoteleft\textquoteleft wickedly\textquoteright intends to kill is just a
shorthand way of referring to the murderer\textquotesingle s \textquoteleft wicked and mischievous purpose\textquoteright in
contradistinction to \textquoteleft those motives of necessity, duty, or allowable infirmity which
may serve to justify or excuse\textquoteright .\footnote{Ibid at 589.}

It is obvious from this comment that the old model of culpability was driving
Lord Rodger\textquotesingle s opinion, and this is clearer still in his remarks about provocation. He
disapproved of the notion that provocation reduces murder to culpable homicide
because it suggests that the jury should consider the issue of provocation only after

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\item \footnote{2001 SCCR 583. Chalmers and Leverick describe \textit{Drury} as \textquoteleft\textquoteleft the most controversial judicial
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\item \footnote{\textit{Drury v HM Advocate} 2001 SCCR 583 at 597-588.}
\item \footnote{Ibid at 588.}
\item \footnote{Ibid.}
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they have determined that the accused would (absent provocation) be guilty of murder. According to His Lordship, this was wrong because provocation is simply one of the factors that the jury ought to take into account when assessing the accused’s mental state in order to decide whether his actions were culpable and wicked or merely culpable, i.e. whether they should convict of murder or culpable homicide. More revealing still is the way that Lord Rodger linked the need for an evaluative epithet to the defence of provocation, and indeed to defences more generally. According to his Lordship, because a person who kills under provocation acts intentionally, in the sense of deliberately, it is really the absence of wickedness that makes him or her guilty of culpable homicide rather than murder. In a similar vein, Lord Johnston declared that it would be “erroneous if not dangerous” to assume that just because there was an intention to kill that it would amount to murder if implemented. He added that:

There are a number of cases where intent to kill would yield completely the opposite inference, for example, in relation to self-defence or, for that matter, in the case of Hill, where there was an obvious intention to kill yet the necessary murderous intent was lacking by reason of provocation. In approaching the question of murder therefore, in my opinion it is essential to attach to the phrase ‘intent to kill’ some epithet such as ‘wicked’ or ‘evil’ to connote a state of mind sufficient to meet the test of murder.

Several of the other judges offered similar opinions, extending the discussion to include the plea of diminished responsibility. Despite the consensus between judges on this point, the decision was very poorly received by academics and

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764 Ibid at 591. In *HM Advocate v Kerr* 2011 SLT 430 a similar perspective informed the court’s judgment. In *Kerr* the accused was charged with *inter alia* attempted murder and tried to plead diminished responsibility. The Crown lodged a preliminary minute submitting that the plea of diminished responsibility was not available to the accused because it was only available to persons indicted for murder. The minute was refused and on appeal the court held that in cases where diminished responsibility was in issue the jury must take into account evidence of the accused’s diminished responsibility in deciding whether he or she had the necessary wicked intention or wicked recklessness to be convicted of murder (at 433).

765 Ibid at 609.

766 Ibid.

767 Lord Mackay of Drumadoon (at 615) agreed that the standard definitions of murder and culpable homicide were, in the circumstances of the case, incomplete and in certain respects misleading. Lord Nimmo Smith (at 611) stated that Macdonald’s definition is invariably used in modern practice but is incomplete because though it is sufficient to exclude accidental killing it is not sufficient to exclude intentional but justified killing in self-defence. Nor is it sufficient to take account of killing which is intentional but where the accused is affected by diminished responsibility or provocation. In the case of *HM Advocate v Kerr* the court applied the reasoning in *Drury* when diminished responsibility was in issue (see above, n763).
commentators. One of the major causes for concern was that the judges in Drury had incorporated the defences to murder into the offence definition by using the word ‘wicked’ as shorthand for them all. Analytically, this move was regarded as undesirable and out of step with modern views of criminal responsibility. Furthermore, according to modern practice and the law of evidence it is normal to break down a criminal offence into the actus reus, mens rea and absence of a valid defence, with the Crown having to prove the absence of a defence only when the defence has discharged the evidential burden (or if the Crown leads evidence to this effect). In addition to this, the decision was thought by some commentators to be unclear on whether ‘wicked intention’ incorporated only strictly defined situations which prevent intentional killings from being classed as murder or whether it created the potential for juries to convict of culpable homicide on the basis of any circumstance which mitigates the accused’s moral blame. There were other criticisms of the decision, but they are not so relevant from the perspective of a general discussion about culpability.

To some extent, the criticisms of Drury and the obscurity it raised have been ameliorated, or at least clarified, in the more recent case Elsherkisi v HM Advocate. Elsherkisi was an appeal against a conviction for racially aggravated murder on the ground that the trial judge had misdirected the jury when he said that an intention to kill was “obviously wicked”. The appellant argued, relying on Drury,

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768 See Gordon’s commentary on the case (2001 SCCR 583 at 619). Chalmers also points out that the court made this pronouncement on the mens rea of murder without referring to Scott v HM Advocate 1996 SLT 519 in which the High Court rejected counsel’s attempts to define murder in terms of wicked intent (J Chalmers, “Collapsing the Structure of Criminal Law” 2001 Scots Law Times (News) 241 at 242).

769 See Gordon’s commentary on the case (2001 SCCR 583 at 619).

770 J Chalmers, “Collapsing the Structure of Criminal Law” 2001 Scots Law Times (News) 241 at 241-243. Chalmers notes that the tripartite analysis of criminal offences was reaffirmed in the first major criminal appeal decision following Drury. In Lord Advocate’s Reference No 1 of 2001 2001 JC 143 the court held that the defence of necessity would not affect the mens rea of malicious mischief and that it operates as a freestanding defence. Furthermore, the court’s opinion in Drury that diminished responsibility affects mens rea was ignored in the full bench reassessment of diminished responsibility in Galbraith v HM Advocate (No 2) 2001 SLT 953. See also J Chalmers & F Leverick, “Murder through the Looking Glass: Gillon v HM Advocate” (2007) 11 Edinburgh Law Review 230 at 231.


that it is always for the jury to decide whether the wickedness required for murder exists, so that even where there was a deliberate intention to kill the jury are entitled to conclude that such wickedness is absent.\footnote{At para 4.} The court held that the jury does not have an unfettered discretion in deciding whether the accused’s intention was wicked. In the absence of any legally relevant factor capable of justifying or excusing the accused’s actions the jury should be directed that they must convict of murder.\footnote{At paras 11-13.}

The outcome of Elsherkisi indicates that Drury has not altered the definition of murder so radically as to allow any factor in a case to render the accused less culpable; the relevant defences and pleas still constrain the jury’s decision to acquit or, alternatively, to convict of culpable homicide. However, the court did not consider Hume’s sense of wickedness as dole to be outdated and inappropriate in contemporary decision-making. Indeed, Lord Hardie quoted with approval the portion of Drury where it was held that ‘wickedly’ intending to kill means “as contradistinguished to those motives of necessity, duty, or allowable infirmity, which may serve to justify or excuse the deed”, declaring this observation to be equally applicable at the present time.\footnote{At para10.} So while ‘wicked intention’ does not allow the jury to make an unchecked moral assessment of the accused or his or her behaviour, it does seem to amount to the old notion of culpability as embodied in dole. Furthermore, although it is clear that the position adopted in Elsherkisi, which in itself was drawn from Hume and accepted in Drury, does not necessitate any change to the rules of evidence or the distribution of evidentiary burdens.\footnote{At para11.} It still conflates the structure of criminal offences that Chalmers and others argue is representative of modern thinking and practice, that is: actus reus, mens rea and absence of a valid defence.\footnote{J Chalmers, “Collapsing the Structure of Criminal Law” 2001 Scots Law Times (News) 241. For an account of the different ways (the bipartite, tripartite and quadripartite systems) of structuring criminal offences see G Fletcher, The Grammar of Criminal Law (vol 1) (2007) 43-58.}
8.5.3 ‘Wickedness’ and ‘evilness’: a common ground

In his discussion of the decision in *Drury*, Chalmers writes that ‘wicked intent’ might appear familiar to those conversant with the law of assault because the *mens rea* of that offence is well-understood to be ‘evil intent’. However, he adds that there is an important difference between the *mens rea* of assault and the *mens rea* of murder, as set out in *Drury*, which is that the High Court has stripped the epithet ‘evil’ of all of its meaning so that in this context it simply means that assault cannot be committed accidentally or recklessly. This is of course an accurate account of the law, but if the interpretation of ‘evil’ offered above is credible, then there might be a deeper connection between the two evaluative *mens rea* terms that points to the continued relevance of the old, pre-*mens rea* model of culpability.

As with wicked intention, evil intention is thought to be a necessary aspect of the offence definition. As with wicked intention, the reason why evil intention is thought to be necessary is that by intentionally committing an offence the accused has engaged in a *prima facie* wrongful act which, unless justified or excused by the absence of a morally evaluative quality (evil in the case of assault and wickedness in the case of murder), marks him or her out as culpable and liable. With regard to both assault and murder the High Court has rejected the model of culpability that is representative of modern thought and scholarship, which separates the absence of defences from the proof of *actus reus* and *mens rea*, in favour of a much older model of culpability which effectively incorporates the absence of defences into the offence definition. This older model of culpability is rooted in manifest criminality and a generalised form of blameworthiness which is very similar to Hume’s notion of *dole* and has been shown in the previous chapter to have been connected with, and facilitated by, the conceptions of morality and its association with society that is representative of the Scottish moral order.

779 In section 8.5.1.
8.6 Conclusion

In this chapter the process of mapping the law’s shift towards subjectivism that began in Chapter Seven has continued through the nineteenth century and up to the present day. Charting subtle but significant changes in the law of homicide, it becomes apparent that the intentions and mental attitude of the accused have acquired greater significance over time, which suggests that a more subjectivist form of culpability has come to underpin the law. Despite the gradual move away from the generalised form of culpability that was prevalent in the law’s early development towards more intention and risk-oriented *mente rea*, the old form of culpability has never completely been displaced from Scots law. This is clear from the continued relevance of *doe* and in the way that the morally evaluative terms ‘wicked’ and ‘evil’ endure within the definitions of murder and assault.

These evaluative terms are not merely rhetorical flourishes; they are the hallmark of the pre-*mentes reae* form of culpability and they shape the structure and meaning of the offences they are used to define. In the context of modern expectations of the criminal law, which usually stipulate that culpability should be described in purportedly neutral terms that relate to psychological mental states, these archaic terms inevitably appear incongruous. As has been shown by the analysis in this chapter, this incongruity is more complex than has previously been acknowledged.

For example, when Chalmers and Leverick argue that the court in *Drury* was seduced into drawing an unnecessary parallel between wicked recklessness and intention that criticism is well-made, but only when delivered with the rider that the modern view of culpability does (and should) operate within the rest of the law. When compared to the court’s treatment of assault, where there is a similar perceived need to attach an evaluative epithet to the required intention, the decision to qualify murderous intention with the phrase ‘wicked’ might appear slightly less anomalous (though not necessarily any more meritorious). Likewise, when Chalmers points out that there is nothing in Hume to suggest that provocation should be analysed in terms

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of *mens rea*, which is the implication of the judgment in *Drury*, this is not a full appreciation of the problem.\(^{781}\) There is indeed nothing in Hume to suggest that provocation should be analysed in terms of *mens rea*, but that is largely because *mens rea* was not the form of culpability which was in operation at that time. At that time provocation indicated a lack of *dole* or “wickedness of heart”, and that concept simply does not carry over into modern theories of *mens rea*. So the reliance on Hume by the court in *Drury* seems to make little sense but, as this chapter has shown, this is for reasons that only become clear when the law’s historical development is taken into account.\(^{782}\)

Paying heed to the history of culpability in Scots law, the tensions produced in *Drury* and other cases where morally evaluative terminology is used appear in a different light. They are not merely caused by the court using language that is outdated; they arise because there is something inherently discordant about a modern court, which operates within a legal system that has made a partial transition to a modern form of culpability, relying on a notion of culpability that prevailed prior to this transition. A debate about the merits of each form of culpability is beyond the aim of this chapter, but it is clear that any attempt to marry one form of culpability with the other – usually in the absence of any thorough consideration of the underlying differences between them – is the main reason why Scots criminal law is criticised in this regard.

In addition to explaining some of the law’s tensions and incongruences, understanding the history of the Scottish approach to culpability reveals a sense of cohesion between this area of the criminal law and others. Being rooted in manifest criminality, the pre-*mens rea* form of culpability shares a conceptual grounding with the principles on which the range of criminal offences was determined and criminal responsibility was attributed in the early law. Assuming the arguments in Chapter Two are accepted, this paradigm of manifest criminality is accordant with, and was facilitated by, the Scottish moral tradition.

\(^{781}\) J Chalmers, “Collapsing the Structure of Criminal Law” 2001 *Scots Law Times (News)* 241 at 244.

Furthermore, the arguments that are frequently offered in favour of retaining moralistic terms of culpability in Scots law draw upon the same themes that are used in justifying the declaratory power. In both of these areas the flexibility of the criminal law is portrayed as advantageous by asserting a special connection between the criminal law and the community’s sense of morality. As was argued in Chapter Two, this reliance on community mores and common sense morality can be traced back to the influence of the Scottish moral tradition and so the identification of a pre-\textit{mens rea} approach to the culpability within the modern law fortifies the argument that the Scottish moral tradition has contemporary relevance to the law; its embeddedness within the law demands attention if not necessarily acceptance.

\textsuperscript{783} And in Chapter Four in relation to the declaratory power.
Chapter Nine: Conclusions

9.1 Summary of conclusions

The foremost conclusion of this thesis is that the Scottish moral tradition has influenced the development of Scots criminal law in a number of ways, and that this has repercussions for the way that the modern law is understood. This conclusion rests on a subsidiary set of conclusions, the most foundational of which is the existence of what has been dubbed the ‘Scottish moral tradition’. In Chapter Two this conclusion was asserted on the basis of several unappreciated points of similarity between Calvinist Presbyterianism and Scottish Enlightenment philosophy. These links between the two schools of thought provide the basis for the argument that there are characteristics that epitomise the Scottish moral tradition and that these can plausibly be affiliated with certain criminal law theories. The most notable characteristic of the Scottish moral tradition is reliance on a shared and accessible sense of morality, and this characteristic is what enables the most crucial associations with criminal law theory. Both Fletcher’s manifest criminality and Lacey’s model of non-cautious character responsibility depend on the existence of an unambiguous code of norms and within both theoretical models it is essential that this code is easily-accessible to all individuals, regardless of their particular characteristics. For this reason the arguments and conclusions in Parts One to Three of this thesis are organised around these central theoretical themes, as well as the more specific features of Calvinist theology and Scottish Enlightenment thought.

At a more detailed level, the influence of the Scottish moral tradition can be divided into three broad categories. These categories are: the scope of the criminal law, the attribution of criminal responsibility and the importance of mental state. Charting the aspects of legal doctrine and practice which reflect the general characteristics and particular doctrines of the Scottish moral tradition leads to the conclusion that not only were a substantial number of concepts and ideas imported into the criminal law, they also had an enduring impact. This impact has important

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784 The term ‘school of thought’ is used loosely here and does not imply that either Calvinist thought or Scottish Enlightenment philosophy is uniform, or that the different writers discussed would have considered themselves to be part of any school or tradition.
explanatory force in accounting for significant continuities that exist within the
criminal law, such as the flexible and moralistic approach to defining crimes that is
evident in the use of the declaratory power and in the continued use of evaluative
terminology to define culpability.

With regards to the scope of the law, Chapters Three and Four tracked the
correlation between changing attitudes towards religion and fluctuations in the scope
of proscribed conduct. They showed how the rationales offered in support of
punishing these offences initially corresponded with Calvinist beliefs about the
purposes of law and then came to rest on a purported connection between the
criminal law and community values, which ties in with the way that morality is
conceived of according to Scottish Enlightenment philosophy. This alleged
association between the criminal law and the community continues to be invoked by
contemporary judges and commentators, which simultaneously shows the endurance
of this connection and reveals its provenance.

Chapters Five and Six linked the attribution of criminal responsibility and
non-responsibility to the changing status of Calvinism within Scottish society and to
the inception of Enlightenment theories of human agency. Starting with a system in
which criminal responsibility was attributed on the basis of character, often with the
assistance of Church officials, there was a move towards ensuring greater anonymity
in the trial process by requiring that jurors and accused persons be unknown to one
another. The role of the Scottish moral tradition in this change lies in the realisation
that the breakdown of Church discipline contributed to a corresponding loss of the
tightly-knit communities that had enabled attribution of responsibility on the basis of
character. This change meant that, in addition to the increasing individualism of
society which made character assessment progressively inappropriate, it was no
longer possible to obtain the sort of evidence – of notoriety and reputation – that was
needed in order to judge an accused’s character.

Following the conclusion that the Scottish moral tradition contributed to the
abatement of character responsibility in Scots criminal law, Chapter Six showed how
greater concern for capacity responsibility began to emerge during the nineteenth
century. At the start of the century the growth of psychiatric medicine precipitated a
number of developments in the attribution of non-responsibility, most notably in attempts to modify the insanity defence and in the creation of the plea of diminished responsibility. Both of these changes signalled the increasing relevance of capacity responsibility and, crucially, the contours of these doctrines of non-attribution bore the influence of Scottish Enlightenment philosophy – particularly Thomas Reid’s *Essays on the Active Powers of Man*.

Finally, Chapters Seven and Eight examined the shifting models of culpability that have underpinned Scots criminal law at different points in its development. From an objectivist model of culpability that was rooted in the wrongfulness of the accused’s actions and which gave little consideration to his or her mental state the law became increasingly subjectivist, affording culpable mental states greater significance. In Chapter Seven it was argued that this change, which began during the eighteenth century, can partially be accounted for by changing ideas about human agency that were introduced around the same time. Despite the shift towards subjectivism, there were aspects of the law that remained highly objectivist, such as the general and evaluative form of culpability known as *dole* and the morally charged terms ‘wicked’ and ‘evil’, which are still used to define the offences of murder and assault in contemporary Scots law.

In Chapter Eight these moralistic terms were analysed and it was revealed that though much of their normative import has been lost, their influence is still evident in the internal structure of murder and assault. Both of these crimes exhibit signs of a pre-*mens rea* approach to culpability, which is founded on the *prima facie* wrongfulness of acts and is negated by the absence of a morally evaluative element of the offence, rather than by a distinct defence. These structural features of murder and assault indicate that the survival of evaluative terminology has implications beyond simple linguistic anachronism; their survival signals the presence of a deeper anachronism, which is created by the juxtaposition of modern legal ideals and an ancient form of culpability. The origins of this ancient form of culpability appear to be deeply embedded in the Scottish moral tradition and thus an appreciation of this point enhances the way that the modern law is understood.
9.2 Original contributions to knowledge

Having re-iterated the main conclusions of this thesis the original contributions to knowledge are clear. In offering an original account of the development of Scots criminal law which draws on the Scottish moral tradition, it has argued for the existence of several links between Calvinist theology and Enlightenment philosophy which are not widely acknowledged. These connections are potentially significant for other historians with an interest in the history of moral ideas and may prove beneficial in other legal (and non-legal) scholarly contexts. Furthermore, it has drawn new parallels between these religious and philosophical ideas, both on their own and when taken together as part of a tradition, and criminal law theory and doctrine. These parallels are not only original in their own right, they also suggest that further inter-disciplinary influences are likely to be traceable and set a precedent for making such connections in future work. These contributions to existing knowledge are not restricted to any particular legal system or even to any particular cultural force. On the contrary, this thesis demonstrates the potential value and fruitfulness of adopting a socio-cultural approach to any area of legal research, particularly when in an historical context. One of its key general contributions to knowledge is therefore an affirmation of the proposition that theoretical and doctrinal research ought to form a mutually-informing bond with historical legal research.

More specifically, several of the findings in this thesis contribute to existing knowledge about the substance and operation of Scots criminal law at different eras throughout history. The influence of theological and Scottish Enlightenment thought on the criminal law has not previously been considered and so analysing the law from this perspective offers a fresh understanding of Scots criminal law in the sixteenth, seventeenth, eighteenth, nineteenth and twentieth centuries. Beyond these historical contributions to knowledge, this thesis offers original explanations of apparently anomalous features of the contemporary law that allow for a fuller understanding of their significance and which recognises that they are part of a long tradition in Scots criminal law that relies on the Scottish moral tradition for its legitimacy and coherence.
### Appendix 1: Table of Cases

- *Alexander Milne* (1863) 4 Irv 301
- *Archibald Miller* (1874) 3 Coup 16
- *Andrew Brown* (1866) 5 Irv 215
- *Bernard Greenhuff* (1838) 2 Swin 236
- *Black v Carmichael* 1992 SLT 897
- *Bowes v McGowan* [2010] HCJAC 55
- *Carraher v HM Advocate* 1956 JC 108
- *Cawthorne v HM Advocate* 1968 JC 32
- *Charles Sweeney* 1858) 3 Irv 109
- *Dean v John Menzie (Holdings) Ltd* 1981 JC 23
- *DPP v Smith* [1961] AC 290
- *Drury v HM Advocate* 2001 SCCR 583
- *Eliza Sinclair* (1871) 2 Coup 73
- *Elizabeth Yates* (1847) Ark 238
- *Elsherkisi v HM Advocate* [2011] HCJAC 100
- *Galbraith v HM Advocate (No 2)* 2001 SLT 953
- *Geo Bryce* (1874) 4 Irv 506.
- *George Lillie Smith* (1855) 2 Irv 1
- *Grant v Allan* 1987 JC 71
- *Gray v Hawthorne* 1964 JC 69
- *Harris v HM Advocate* [2009] HCJAC 80
- *HM Advocate v Dingwall* (1867) 5 Irv 466
- *HM Advocate v Harris* 1993 SCCR 559
- *HM Advocate v Kerr* 2011 SLT 430
- *HM Advocate v Mannion* 1961 JC 79
- *HM Advocate v McLean* (1876) 3 Coup at 334
- *HM Advocate v Semple* 1937 JC 41
- *Holmes v Lockyer* (1869) 1 Coup 221
- *James Denny Scott* (1853) 1 Irv 132
- *James Macklin* (1876) 3 Coup 257
- *Jas Gibson* (1844) 2 Brown 332
- *John McFadyen* (1860) 3 Irv 650
- *Khaliq v HM Advocate* 1984 JC 23
- *Knulter v DPP* [1973] AC 435
- *Logue v HM Advocate* 1932 JC 1
- *Lord Advocate’s Reference (No 1 of 1994)* 1996 JC 76
- *Lord Advocate’s Reference (No 1 of 2001)* 2002 SLT 466
• MacAngus v Kane [2009] HCJAC 8
• McLaughlin v Boyd 1934 JC 19
• Merrin v S 1987 SLT 193
• Milne v Tudhope 1981 JC 51
• Paterson v Lees 1999 JC 159
• Petto v HM Advocate 2012 JC 105
• Quinn v Cunningham 1956 JC 22
• R v Cunningham [1982] AC 566
• R v Hancock and Shankland [1986] AC 455
• R v Hyam [1975] AC 66
• R v McNaughten (1843) 8 ER 718
• R v Moloney [1985] AC 905
• R v Woollin (Stephen Leslie) [1999] 1 AC 82
• Roberts v Hamilton 1989 JC 91
• S v HM Advocate 1989 SLT 469
• Shaw v DPP [1962] AC 220
• Smart v HM Advocate 1975 JC 30 at
• Smith v Donnelly 2002 JC 65
• Spendiff v HM Advocate 2005 1 JC 338
• Stewart v Nisbet [2012] HCJAC 167
• Stewart v Thain 1981 JC 13
• Strathern v Seaforth 1926 JC 100
• Sugden v HM Advocate 1934 JC 103
• SW v UK; CR v UK (1996) 21 EHRR 363
• Thomas Barr (1876) 3 Coup 261
• Transco plc v HM Advocate 2004 JC 29
• Ulhaq v HM Advocate 1991 SLT 614
• Watt v Annan 1978 JC 84
• Webster v Dominick 2005 1 JC 65
• William Fraser (1847) Ark 280
• Young v Heatly 1959 JC 66
Appendix 2: Table of Legislation

- Abolition of Mass Act 1560 A.P.S., II, 535 c.4
- An Act for the more effectual Punishment of Attempts to murder in certain Cases in Scotland 1829 (10 Geo. 4 c.28)
- Blasphemy Acts 1551 A.P.S., II, 485 c.7; 1581, A.P.S., III, 212 c.5
- Burgh Police (Scotland) Act 1892
- Church Act 1581 A.P.S., III, 210 c.1
- Church Jurisdiction Act 1567, A.P.S., III, 24 c.12
- Church Patronage Act 1712 (10, Anne, c.12)
- Claim of Right 1689 A.P.S., IX, 38 c.28
- Confession of Faith Ratification Act 1560 A.P.S., II, 526 c.1
- Confession of Faith Ratification Act 1690 A.P.S., IX, 133 c.7
- Criminal Appeal Scotland Act 1926 (16 & 17 Geo. V)
- Criminal Procedure (Scotland) Act 1887
- Criminal Procedure (Scotland) Act 1995
- Cursing and Beating Parents Act 1661, A.P.S., VII, 202 c.215
- General Assembly Act 1592, A.P.S., III, 542 c.8
- Habitual Drunkards Act 1879
- Human Rights Act 1998
- Incest Act 1567 A.P.S., III, 26 c.15
- Mass Act 1567 A.P.S., III, 22 c.5
- Papal Jurisdiction Act 1560 A.P.S., II, 535 c.2
- Prevention of Crimes Act 1871
- Public Health Act 1871
- Repeal of Acts in support of Papacy Act 1567 A.P.S. III, 13 c. 4
- Scottish Episcopalians Act 1711 (10, Anne, c.10)
- Toleration Act 1711 (10, Anne, c.6)
- Union with England Act 1707
- Witchcraft Act 1563 A.P.S., II, 539 c.9
- Union with Scotland Act 1706
- Witchcraft Act 1735 (9 Geo. 2 c.5)
- 1551 A.P.S., II, 486 c.12
- 1563 A.P.S., II, 539 c.9
- 1567 A.P.S., III, 25 c.14
- 1579 A.P.S., III, 138 c.70
- 1587 A.P.S., c.27
- 1593 A.P.S., c.177
- 1600, A.P.S., c.4
- 1600, A.P.S., c.26
• 1633 A.P.S., c.7
• 1666 A.P.S., c.20
• 1670 A.P.S., c.4
Appendix 3: Archival Sources

- JC3/1
- JC3/2
- JC3/3
- JC3/4
- JC3/5
- JC3/7
- JC3/10
- JC3/12
- JC3/13
- JC3/15
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- JC4/13
- JC4/14
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- JC4/16
- JC4/17
- JC4/18
- JC4/24
- JC4/27
- JC4/30
- JC4/33
- JC4/36
Appendix 4: Bibliography

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