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Debatable Land: An Essay on the Relationship Between English and Scottish Criminal Law

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This article proposes that a better understanding of the identity of Scots criminal law can be developed through an analysis of the similarities between English and Scots law rather than by concentrating on the differences. It argues that historically there are striking similarities between the two laws which have been overlooked or ignored for various reasons. It goes on to argue that many of the current differences between the two laws can be explained in terms of contemporary academic and institutional conditions, and that these offer a better foundation on which to construct a principled theoretical understanding of Scots criminal law.

A. INTRODUCTION

The "debatable land" was an area of the Border Marches, the strip of land between Scotland and England at the time when the border between the two nations was unsettled. It was a small area to the east and north of Carlisle and Gretna Green,[1] although the term could just as well be applied to the whole of the border country between Carlisle and Dumfries in the west, and Berwick and Alnwick in the east, for the status and identity of this land was debatable in a number of different ways. It was not only a matter of the indeterminacy of the border, though the almost constant raids or reiving and warring had led to the area being put under the jurisdiction of special wardens. It was also that, in the process of being fought over, it at times fell outside the jurisdiction of both countries. It was

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1 On the debatable land see J Reed, *Border Ballads* (1973), ch 1; T I Rae, *The Administration of the Scottish Frontier 1513–1603* (1966). For an example see the ballad "Kinmont Willie":

> And as we cross'd the Bateable Land,
> When to the English side we held,
> The first o' men that we met wi',
> Whae sould it be but fause Sakelde?

literally lawless, the land of broken men and outlaws, laid waste by decree and by battle,[2] where the law could only be made or imposed by physical force. It was at the same time a psychological space where the different cultures collided, and each defined itself through its proximity to the other.[3] And the terms of the debate over the physical, legal and cultural identity of this area were those of violence and poverty, romance and superstition.[4] It was border country in the truest sense of the term, and this borderland, the debatable land, has ever been central to the Scottish identity, its importance belied by its peripheral position in the nation.

This essay is a journey through the debatable land of the criminal law, the shared territory that lies between the English and Scottish laws. I shall make the claim that up to the post-war period, more or less until the passing of the Homicide Act 1957, there are a number of striking similarities between the two laws, a claim that I shall illustrate by means of a few key examples. I will thus argue that there has only been a major divergence in the substantive law of the two systems over the last forty years. In so doing I wish to contest the frequently made claim that there is a fundamental divergence between the two systems of criminal law, explained in terms of the Scottish character or the distinctive "genius" of Scots law, and that this in its turn requires that we rethink the terms in which the identity of Scots law is defined.[5] It will thus be argued that any differences, which have become much more marked over the subsequent period, have little to do with such supposedly fundamental characteristics and must instead be explained in terms of more contemporary differences in the legal and academic culture of the two jurisdictions. There are many articles on the differences between the two systems which reveal a preoccupation with the importance of this difference as a means of establishing a distinctive identity—and the potential threat to identity that is contained in the possibility of identity.[6] However, it could be argued that as a result of this there are few studies

2 A proclamation of 1551 by the Wardens of both countries decreed that: "All Englishmen and Scottishmen . . . are and shall be free to rob, burn, spoil, slay, murder and destroy all and every such person or persons, their bodies, buildings, goods and cattle as do remain or shall inhabit upon any part of the said Debatable Land, without any redress to be made for the same" (cited in Reed, *Border Ballads*, 42).

3 For a fine fictional account of the psychological space of the borders, which not only explores the world of myths and ballads but also plays with an elastic notion of the physical space, see J Hogg, *The Three Perils of Man* (1822, 1996 reprint).

4 ". . . singing down the centuries their strange and melancholy tales of love and hate and longing, of thieving and killing, of jealousy, incest, witchcraft and revenge" (Reed, *Border Ballads*, 10).

5 This is an exercise that has also been shaped by the personal schizophrenic experience of learning and teaching and subsequently conducting research into English criminal law.

6 There is a long tradition of such writings beginning with D Hume, *Commentaries on the Law of Scotland Respecting Crimes* 4th edn (1844, henceforth Hume, *Commentaries*), introduction. See, for example, H Cockburn, "(Untitled) review of Alison's Remarks on Administration of Criminal Justice in Scotland" (1825) 82 *Edinburgh Review* 450–464; W Forsyth, "Scotland and England"

that truly examine the identity of the Scots law, for this is a question that can perhaps only be properly addressed by proceeding in the manner proposed here. In concluding, the article will begin to address the question of what a distinctive Scots criminal law, freed of these essentialist explanations, might look like. This essay accordingly begins from the simple premise that it may be more instructive to look for similarities between the two systems, the shared peripheral territory, as a means of showing how the boundary or border between the two has been constructed.

It is worth dwelling for a moment on the meaning of borders for this can further elucidate the nature of the problem. Our understanding of this term has changed over time, together with our changed understanding of nation and nationality.[7] In the modern nation-state the border is a line to be passed over, a transitional moment that signifies the periphery, the point at which the journey to the centre commences or concludes. A border in this sense is purely a political or administrative boundary, referring to a line of absolute division—where Scotland ends and England begins—rather than a territorial space. The Scottish Borders itself is now a region that is passed over or through as the traveller goes from Scotland to England, the turbulent history signified only by a name designating an administrative area—ironically entirely within Scotland—and the border reiver lives only as the chosen symbol of a public relations exercise. In this sense the border is the furthest point from the centre, a moment of physical and psychological separation, and the space of the Borders is peripheral to Scottish identity. However, the border was not always the limit of the jurisdiction of the state. It could be an area, rather than a line, where communities lived out the drama of defining their own identity. It was a territorial space that was both permeable and indeterminate, where two cultures, two extremes, met—and becoming in that process the central or common ground of the debate. Now the Scottish heartland is sought in the central belt, and the further you move from the centre the weaker or more diluted it is thought to become; but the Scottish identity was equally forged on the peripheries, in the debatable land where one country imperceptibly becomes the other, and the law was made in an area that was lawless. The borders were the crucible in which the Scottish identity was shaped, not through the process of division or separation, but through a mingling and conflict of cultures—this was the point at which the sense of identity needed to be strongest. It is clear,

(1858) 108 *Edinburgh Review* 343–376; A D Gibb, "The inter-relation of the legal systems of Scotland and England" (1937) 53 *Law Quarterly Review* (LQR) 61–79; T B Smith, *British Justice. The Scottish Contribution* (1961, henceforth Smith, *British Justice*).

7 "They are a people that will be Scottishe when they will, and Englishe at their pleasure" (1583), quoted in Reed, *Border Ballads*, 10. On borders and nations generally, see B Anderson, *Imagined Communities* (1980) chs 1 and 2.

then, that we should not begin our investigation from the centre, where such differences are both accentuated and protected, but from this debatable land where the cultures come together.

B. SHARED TERRITORY

The theme of the argument is that in general terms the English and Scottish criminal law were close in terminology, substance and structure in the post-war period but that, beginning approximately with the Homicide Act 1957, there has been a period of divergence as the English law, in particular, underwent a process of revision and modernisation. Put in more direct terms, it can be argued that much of the Scots common law of crime reads as pre-1960s English law. I realise, of course, that this is an extravagant claim and that for every example of similarity that can be presented there are no doubt an equal, or possibly greater, number of counter-examples. Equally, I would acknowledge that it is possible to be distracted from the underlying differences between systems by the existence of superficial similarities in terminology. I would, however, ask a little forbearance, for the purpose is neither to claim an exact equivalence nor to undermine the separate character of Scots law—claims that might justifiably provoke a defensive reaction on the part of Scots lawyers. The purpose of this claim is the more limited one of suggesting that in certain key areas and understandings of criminal law and liability, there is little evidence of the existence of that fundamental divergence between the laws that has been claimed by certain defenders of a distinctive Scottish legal tradition. I propose to look briefly at four different areas of the law to build up a picture of a common "Common Law mind". These are the areas of offences against property, the doctrine of provocation, the law of homicide, and the declaratory power of the High Court. These have been chosen either because they have come to be regarded as indicators of a more fundamental difference between the two systems, or as areas in which divergence in the period after 1957 has been the greatest.[8]

(1) Offences against Property

It is appropriate to begin with a discussion of offences against property since it is often assumed that this is the area in which there are the greatest differences between English and Scots law. Historically shaped by the extensive use, and avoidance, of the death penalty, the protection of private and public property has been of a peculiar

8 There are any number of other examples where similar questions and issues could be explored. The response to mental illness and the reception of the M'Naghten Rules in Scotland or the question of the defence of intoxication are two that suggest themselves. It is not the purpose of this article to undertake such a full-scale survey, however valuable that might be.

symbolic importance to the English legal mind.[9] The English law, moreover, is largely statutory and has been since at least 1861 when the existing statutory law was consolidated into a single statute.[10] However, if the forces that formed the laws, and the uses which were made of the law, in the two jurisdictions were not the same, it is none the less striking that prior to the recent codification of the English law in the Criminal Damage Act 1971 and the Theft Acts of 1968 and 1978 there were broad similarities in the terminology and definition of property offences—and in the absence of principle underlying the development of both. If we take the law of theft, for example, we find that the basic definition of the crime is composed of the same three elements: the taking *lucri causa*, defined in terms of movement (*amotio* or *asportatio*), and the intention permanently to deprive the owner thereof (*animus furandi*)—a term frequently translated as "felonious taking" although strictly speaking this has no meaning under Scots law.[11] Such similarities should not surprise us since the law in both jurisdictions was drawn from Roman sources,[12] and the English consolidations of the law in the mid-nineteenth century, unlike more recent statutes, sought to preserve the form of the Common Law by purging it of the legislative excesses of the previous century.[13] There are clearly also differences—the most obvious being the use of the term larceny in England—but these are largely questions of terminology alone and do not affect the underlying structure of the law.

Some of the most interesting resemblances occur in the way that the definitions of particular crimes are structured, for these point not only to a common origin, but to similar patterns of development. For example, although burglary is a separate nominate crime under English law, rather than being regarded as an aggravation of

9 See, for example, the now classic treatment of eighteenth-century property offences in D Hay, "Property, authority and the criminal law" in D Hay et al (eds), *Albion's Fatal Tree* (1975), 17–63. See more generally J Hall, *Theft, Law and Society* 2nd edn (1952, henceforth Hall, *Theft, Law and Society*) bk 1, and G Fletcher, *Rethinking Criminal Law* (1978, henceforth Fletcher, *Rethinking Criminal Law*) chs 1–3 on the development of the common law of theft.

10 24 & 25 Vict c 96 (1861). Cf Hall, *Theft, Law and Society*, 34: "practically the entire modern law of theft has been a product of the eighteenth century". On eighteenth-century Scottish attitudes towards legislation, see L Farmer, *Criminal Law, Tradition and Legal Order. Crime and the Genius of Scots Law 1747 to the Present* (1997, henceforth Farmer, *Criminal Law*), ch 2.

11 See e.g. J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* 5th edn (1948, henceforth Macdonald, *Practical Treatise*), 16: "Theft is the felonious taking and appropriation of property . . .". In England theft was defined under the Larceny Act 1916, s 1(1), as where a person "without the consent of the owner . . . takes and carries away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof".

12 See e.g. Hume, *Commentaries*, i, 57. Cf W Blackstone, *Commentaries on the Laws of England* 1st edn (1765–69, 1979 reprint), iv, ch 17 and J F Stephen, *A History of the Criminal Law of England* (1883) ch 28.

13 The Acts of 1861 were consolidations only of the statutory and not the common law of crime. On this point see C S Greaves, *The Criminal Law Consolidation and Amendment Acts of 24 & 25 Vict* 2nd edn (1861), introduction.

a basic offence of theft, the two jurisdictions share a common approach in the way that aggravation/crime is defined in terms of the buildings that might be broken into, or in the distinction drawn in the courts between actual and constructive breaking.[14] This is also true of crimes of damage to property where prior to the 1971 Act in England the definitions were of the same type. In both jurisdictions the modern crime had taken shape through the amalgamation of some serious public order offences and other more minor mischiefs or trespasses against property, together with various statutes either protecting specific types of property (e.g. railways, industrial machinery) or protecting against certain types of damage (e.g. causing damage by explosions). This haphazard accretion of offences had over time produced a certain amount of conceptual inconsistency, which the 1971 Act was intended to remedy in England.[15] In spite of the fact that the bulk of the English law was contained in the Act 24 & 25 Victoria c 97, the division of the crime into different degrees according to the type of property destroyed and the "malice" of the offender reflected origins in the common law of both countries.[16] Both jurisdictions had historically distinguished the more serious crime of deliberately setting fire to a dwelling house as a separate nominate offence (fire-raising and arson respectively), although by the post-war period the definition of a house had become sufficiently elastic as to encompass almost all structures and thus render the crime practically indistinguishable from other types of malicious destruction of or damage to property. These other offences were treated as various forms of malicious mischief, where the degree of malice had gradually become the decisive factor in defining the seriousness of the offence.[17]

This points to a further level at which common ground can be recognised, namely the way that the courts paralleled each other in recognising and dealing with certain problem cases, a point that can be best illustrated by examining the historical development of the law of theft.[18] In both jurisdictions the traditional definition of theft gave rise to a common problem: theft had been defined as requiring the felonious

14 Cf the crime of reset or receiving stolen property. In English law this was criminalised through the process of extending the notion of the resetter being an accessory after the fact—something that would not have been possible under Scots law. See G H Gordon, *Criminal Law* 2nd edn (1978, henceforth Gordon, *Criminal Law*), para 5–57. On the development of English law see Hall, *Theft, Law and Society*, 52–58.

15 On this see Malicious Damage (Law Com No 29, 1970).

16 To leave aside the questions of whether this was an instance of Scots borrowing from the English or *vice versa*.

17 As opposed to the means of destruction or the circumstances surrounding the crime. See for England, C S Kenny, *Outlines of Criminal Law* 15th edn (1936, henceforth Kenny, *Outlines*), ch XI, and for Scotland, Macdonald, *Practical Treatise*, 79–86.

18 That is, the situations that were recognised as hard cases in the two jurisdictions. On problematisation and incremental growth of the English common law particularly in relation to the subject-matter of theft see Hall, *Theft, Law and Society*, ch 3. He also points out that English legislation of the eighteenth century did not seek to alter the structure of the common law.

taking of property, but in certain increasingly common cases it was not clear that there had been an actual taking from the possession of another, the theftuous intent apparently only being formed at some point after the possession of the property had passed legitimately to the "thief". Hume's discussion of this, for example, sets out a fairly orthodox eighteenth-century account of the law. This aimed to restrict the scope of theft within narrow bounds by distinguishing between the crime of theft and other forms of appropriation of property (fraud, swindling and breach of trust), which was done on the grounds that it was the responsibility of the owner to ensure the trustworthiness of those to whom they entrusted goods. He none the less also admitted the possibility of the constructive extension of the concept of possession so as to protect certain forms of property that were being passed into either the possession or custody of third parties.[19] Though first discussed in English law in 1473 in the famous Carrier's Case,[20] the types of situation that gave rise to these problems became increasingly common in both jurisdictions from the mid-eighteenth-century onwards, with the expansion of commerce and the increased circulation of commercial property. The changing interpretation of the law in the period after Hume also reflects a common response to the decreasing use of capital punishment for the crime of theft.[21] In both jurisdictions the response to the problems was a judicial reinterpretation of the basic elements of the common law definition. Thus, theft came to be defined primarily in terms of intent, and the actions of the accused from the point at which they formed the intent onwards were treated as a constructive form of taking.[22] The physical act became less important in favour of a more diffuse idea of appropriation, thus breaking the traditional distinction between theft and breach of trust. It is important to note, however, that these constructive extensions of the law cannot be said to have taken place on a particularly principled basis. Indeed, it is not clear that there was in either jurisdiction a single principle (or principles) around which the law developed. An expanded notion of intent allowed the scope of the law to be judicially extended in response to changing patterns of social and commercial organisation,[23] but the common factor is above all the reliance on judicial opportunism. What is perhaps most surprising is the continuing absence of a clear definition of something as apparently fundamental as the central concept

19 Hume, *Commentaries*, i, 57–70.

20 YB 13 Edw IV f 9, pl 5. On the Carrier's Case see Hall, *Theft, Law and Society*, ch 1, and Fletcher, *Rethinking Criminal Law*, ch 2.

21 In England the death penalty was abolished for most forms of theft by the early 1830s (7 & 8 Geo IV c 29; 2 & 3 Wm IV c 62; 3 & 4 Wm IV c 44). In Scotland theft theoretically remained a capital crime until the passing of the Criminal Procedure (Scotland) Act 1887, s 56, though in practice it had ceased to be so long before this.

22 For illustration see the Scottish cases of *John Smith* (1838) 2 Swin 28 and *Geo Brown* (1839) 2 Swin 394 and the English cases of *R* v *Pear* (1779) 168 ER 208 and *R* v *Thurborn* (1848) 169 ER 293.

23 Cf Fletcher, *Rethinking Criminal Law*, ch 3, on the shift between "manifest" and "subjective" criminality.

of property.[24] This process of a shared stumbling from one problem to the next and contriving to make a virtue out of expediency is something that terminated only with the passing of the Theft Act 1968. This set the course of English law on another path altogether by attempting to reorder the basis of the law of theft—though sadly it cannot be reported that it has led to any greater clarity of expression or of judicial comprehension.

(2) Provocation

The doctrine of provocation, Hume writes, requires a more restrictive application in Scotland than in England, particularly in relation to the acceptance of provocation by verbal injury alone, due to the more "fervent" character of the Scots.[25] Yet a close examination once again reveals a common pattern in the development of law in the period up to 1957. One of the key issues, indeed, in this area has been precisely that of whether words could be admitted as a form of provocation or whether use of the plea was restricted to provocation by deeds alone. Broadly speaking, prior to 1957 there was judicial resistance in both jurisdictions to the admission of provocation by words or insulting or disgusting behaviour, even though there were isolated instances of cases where judges had allowed the question to go to the jury.[26] This narrow approach was justified on the grounds that the provocation had to be brought within certain accepted categories (principally those of serious assault, assault of a third party, or adultery). The explanation given for this resistance was that provocation was regarded as having developed out of the doctrine of killing in self-defence, as a middle path between the stark alternatives of a finding of guilt with the mandatory death penalty, or the complete exculpation of the accused. It held in common with self-defence the requirement that there be some correspondence between the provocation given and the response as a justification for the recognition of human frailty.[27] The categories, having developed out of theories which justified the killing in terms of the appropriate response to affronts to masculine honour, had gradually taken on the character of more fixed legal rules.[28] These rules tended to displace the

24 On this point see Hall, *Theft, Law and Society*, ch 3. I Dennis, "The critical condition of criminal law" (1997) 50 *Current Legal Problems* 213–249 at 221–223 argues that the 1968 Act seeks to define theft in terms of the offence against property rather than the trespass on possession, criticising the inability of the judiciary to appreciate the consequences of this shift in their interpretation of the Act.

25 Hume, *Commentaries*, i, 249—on the basis that a greater restraint was therefore the necessary aim of the law.

26 See the cases discussed in Gordon, *Criminal Law*, paras 25–26 to 25–29.

27 It was not until the case of *Crawford* v *HM Advocate* 1950 JC 67 that a strong distinction between the pleas of self-defence and provocation was drawn in Scots law: cf *HM Advocate* v *Kizileviczius* 1938 JC 60. On the early development of the pleas of self-defence and provocation in Scots law see Farmer, *Criminal Law*, ch 5.

28 See generally J Horder, *Provocation and Responsibility* (1992, henceforth Horder, *Provocation*), esp ch 5.

question of whether the response was justified, to replace it with "a kind of legal presumption that the defendant was in fact carried to revenge by the irresistible impulse of ungovernable passion".[29] It was presumed that there could never be correspondence between verbal provocation and killing in retaliation. The courts in both jurisdictions were thus willing to admit verbal provocation only in the extremely limited circumstance of the disclosure of an adulterous relationship, on the grounds that this could be regarded as an extension of one of the existing accepted categories.[30]

More interestingly, judicial discussion of the question suggests that this position has been further justified in terms of the respective functions of judge and jury, with the judge being able to withhold the plea from the jury if it did not fall into one of the pre-existing categories.[31] The question of correspondence between provocation and retaliation could, at best, operate as a triggering factor—not raising the general question of whether the response was justified in the circumstances, but allowing certain actions to be considered as potentially falling within one of the legal categories. The role of the jury was thus heavily circumscribed by legal considerations. The importance of this point can be thrown into sharper relief if we consider the impact of the changes introduced into the English law of provocation by s 3 of the Homicide Act 1957. The Act modified the existing common law rather than completely replacing it, the principal change being made in the rule governing the circumstances under which provocation could be considered by the jury. The plea was extended to all cases of homicide where there was some factual evidence of the existence of provocation.[32] This represented an important shift in the balance between law and fact in the courtroom, and to some extent a diminution of the power of the judge, as it was established that the existence of provocation as a matter of fact, and hence the issue of the justifiability of the response, was always to be left to the jury (subject to certain guidelines). Horder has suggested that recent English case-law on the characteristics of the "reasonable man" under provocation is better understood as an attempt to restore judicial control of the doctrine—by reinterpreting the 1957 Act so as to restore certain "objective" legal categories which would prevent the

29 Ibid, 89. Horder even suggests (ibid, 93) that the decline of honour-based theories in English law was connected in some way to Scottish doctrine.

30 Even this would not always be sufficient to ground the claim. For example, in the leading English case of *DPP* v *Holmes* [1946] AC 588 the House of Lords held that a statement by a wife about her adultery was not sufficient provocation to justify a verdict of manslaughter. For Scotland see Hume, *Commentaries*, i, 245; *HM Advocate* v *Hill* 1941 JC 59 and *HM Advocate* v *Delaney* 1945 JC 138, both of which are discussed in Gordon, *Criminal Law*, at para 25–24.

31 See e.g. Viscount Simon in *Holmes* (above, n 30).

32 Section 3 of the Act states: Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

question of justifiability going to the jury—rather than as a particular application of the conflict over subjectivism.[33] The position in Scotland, meanwhile, has remained that verbal provocation is normally inadmissible, notwithstanding the existence of a few recent, and exceptional, cases where at the discretion of the judge evidence of verbal provocation has been left to the jury.[34]

This discussion thus reveals that Scots law does, in fact, take a more restrictive approach to the question of provocation than that taken in English law[35]—though not, as is now apparent, for the reasons suggested by Hume. The recent divergence between the two laws is less a reflection of national character, on this interpretation, than a question of the respective roles of judge and jury. Reframing the issue in this way then puts resistance by the Scottish legal profession and judiciary to the extension of the 1957 Act to Scotland into a new light. It was argued at the time that this change would be both unwarrantable and unnecessary because the position in Scotland was that the question of verbal provocation could already be left to the jury—a claim that Gordon suggests was and is unfounded.[36] While the claim is, on the face of it, a rather puzzling one, given the weight of evidence to the contrary, it makes a little more sense when considered in the more specific context of what impact the change would have on criminal procedure, for it would entail that control over the meaning of provocation would pass from the judge to the jury. This should also be read together with the general resistance led by Lord Cooper in his evidence to the Royal Commission to the possibility of any legislative change being made to the existing criminal law, for this suggests a general defensiveness and resistance to change on the part of the Scottish judiciary.[37] The general position, then, once again suggests an apparent absence of underlying principle, as the judiciary cling onto their control over the distribution of questions of fact and law and their power to prevent such questions going to the jury.[38] This places a greater importance on the claim that Scots law is more directly in touch with the values of the community, a point to which we shall have to return in the following discussion.

33 Horder, *Provocation*, chs 7 and 8. Cf A Ashworth, *Principles of Criminal Law* 2nd edn (1995), 225–229. See, for example, the approach taken by the Court of Appeal in the cases of *Ahluwaliah* [1992] 4 All ER 889 and *R* v *Dryden* [1995] 4 All ER 987. For a recent decision which makes this distinction very clearly and questions the approach taken by the Court of Appeal to the matter of the personal characteristics of the accused, see Lord Goff in *Luc Thiet Thuan* [1996] 2 All ER 1033.

34 See the cases discussed in *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME), vol 7, para 273.

35 This is without even discussing the question of cumulative provocation and domestic violence where Scots law has shown little willingness to consider the depth of the problem. See T H Jones and M G A Christie, *Criminal Law* 2nd edn (1996), 219–220, for the most recent summary of the position.

36 HC/HL Deb, 28 Jan 1957, col 784. See Gordon, *Criminal Law*, para 25–26.

37 On Lord Cooper's evidence to the Royal Commission see Farmer, *Criminal Law*, 160–166.

38 This also raises a question about the role of the reasonable man. Since the question of justifiability is dealt with through the idea of correspondence, the broader question of justifiability in the circumstances—necessary in England because of the extended grounds of provocation—does not arise under Scots law. See Gordon, *Criminal Law*, paras 25–32 to 25–37.

(3) Murder/manslaughter

This same pattern is evident if we turn from provocation to the development of the law of homicide more generally. In both jurisdictions the early distinction was made between murder and accidental killings, the former being defined in terms of whether there was "malice aforethought" ("forethocht felony").[39] Later, other defences and mitigating circumstances, such as self-defence and provocation, where the presumption of malice derived from the killing could be negated, began to be recognised. The category of culpable homicide/manslaughter, defined in terms of the degree of intent or recklessness, gradually emerged as the central category of criminal homicide. By the middle of this century there was a common movement towards the recognition that malice or intent was to be inferred from the circumstances, rather than being a presumption of law.[40] In both jurisdictions, however, the law was still hedged around by a large number of residual technical rules, and these have undermined claims to coherency or principle throughout the modern period. Thus, murder was divided into the categories of voluntary and involuntary murder. The latter was a form of constructive malice or intention, similar to the old felony-murder rule, where death occurring in the course of certain serious crimes was automatically treated as murder. In England prior to the 1957 Act constructive malice was recognised in two situations: where death occurred while resisting lawful arrest by an officer of justice; and where death occurred in the course of, or furtherance of, a felony of violence.[41] Scottish judges were reluctant to admit the existence of constructive malice in Scotland to the Royal Commission but, as Gordon dryly comments, the evidence is rather to the contrary.[42] While in England following the abolition of constructive malice in the 1957 Act s 1(1) (followed by the Criminal Justice Act 1967 s 8), the movement has been towards a test of liability based on the actual foresight of the accused, Scots law has struggled to rid itself of the constructive doctrine, something that has only now been achieved through

39 On possible borrowings see W D H Sellar, "Forethocht felony, malice aforethought and the classification of homicide" in W M Gordon and T D Fergus (eds), *Legal History in the Making* (1991), 43–59.

40 In England moving towards a test of subjective malice, i.e. actual foresight of the circumstances, prior to the decision in *DPP* v *Smith* [1960] 3 All ER 161. See also J W C Turner, "The mental element in crimes at common law", in L Radzinowicz and J W C Turner (eds), *The Modern Approach to Criminal Law* (1945) 195–261.

41 See Kenny, *Outlines*, 152–162. See also the 16th edn of this text by J W C Turner (1952) at 122, for a more concise formulation of the "modern" felony-murder rule. (Cf "these 'constructive' doctrines always lead to trouble": Denning LJ in *Hosegood* v *Hosegood* [1950] TLR 735).

42 Gordon, *Criminal Law*, 746. See e.g. *Miller and Denovan*, unreported, 1960 (discussed in Gordon, *Criminal Law*, at 23–26). See also Macdonald, *Practical Treatise*, 90 ("Murder may be by personal violence, or by poisoning, or by causing death while committing some other serious crime"), or at 91 ("Where death results from the perpetration of any serious or dangerous crime, murder may have been committed, although the specific intent to kill be absent").

adapting the meaning of Macdonald's definition of "wicked recklessness" to a requirement of a display of actual recklessness on the part of the accused.[43]

The category of culpable homicide/manslaughter is likewise structured by the survival of certain technical rules. In both jurisdictions it has been divided between unlawful act manslaughter, which operates on the basis of a form of constructive intention, and involuntary manslaughter where death occurs in the course of the performance of an otherwise lawful act. These distinctions have survived in spite of having been subjected to criticism, and neither system has dealt adequately with the types of problem that are thrown up by their survival—although recently there have been marked differences in approach.[44] In England the courts have struggled with little success to reconcile the constructive rules with a general approach that requires actual foresight of the harm. Most recently this has led to the intriguing resurrection of the category of manslaughter by gross negligence by the House of Lords—though it appears that legislation will be necessary to lay to rest the doctrine of constructive manslaughter.[45] In Scotland, by contrast, there have been no recent cases on negligent culpable homicide,[46] and it seems that the courts are content to operate with an extended category of recklessness that allows them to pass judgment on the basis of the general criminality of the conduct rather than the actual or implied foresight of the accused.[47]

While it is certainly arguable that in general terms this again mirrors a pattern where the English judiciary have shown willing to restrict the scope of questions of law in order to leave a greater scope to the jury, in contrast to the jealous preservation of this power on the part of the Scottish courts,[48] this is not a conclusion that I want to labour in this context. On the one hand, this is because the effect would be to inflate the practical importance of these conceptual distinctions: in both jurisdictions the distinction between murder and culpable homicide/manslaughter is blurred and remains so because it is something that tends to be determined by the decision of the prosecutor to charge for one crime or the other, rather than by any of the

43 For a classic statement of the "subjective" position see G Williams, *Criminal Law: The General Part* (1953). For Scots law, where the meaning of the term "recklessness" has remained rather vague, see the discussion in Gordon, *Criminal Law*, paras 23–14 to 23–31.

44 Compare the English "drugs" cases of *R* v *Cato* [1976] 1 All ER 260 and *R* v *Dalby* [1982] 1 All ER 916 with the Scottish case of *Lord Advocate's Reference (No 1 of 1994)* 1995 SCCR 177 and commentary by D Sheldon, "Dole, directness and foresight" 1996 *Juridical Review* (JR) 25–41.

45 *R* v *Prentice* [1993] 4 All ER 935; *Adomako* [1994] 2 All ER 79, overruling *Stone & Dobinson* [1977] 2 All ER 341. See also Legislating the Criminal Code: Involuntary Manslaughter (Law Com No 237, 1996).

46 Though see the unreported case of *Ross Fontana* (1990) cited in Jones and Christie, *Criminal Law*, at 218.

47 See e.g. *Lourie & Fry* 1988 SCCR 634. For discussion see Farmer, *Criminal Law*, 167–172.

48 It might, for example, be interesting to reinterpret the plea of Lord Goff for the adoption by the English courts of the Scottish concept of "wicked recklessness" in this way. See his "The mental element in the crime of murder" (1988) 104 LQR 30–59.

theoretical distinctions that are of such importance to academic lawyers.[49] On the other hand, it is because the state of the law of homicide has had more interesting consequences for the development of general theories of liability in the two jurisdictions and this, in turn, has consequences for our larger argument. The English law of homicide post-1957 can be read in terms of a movement to draw stricter distinctions between the categories of homicide on the basis of concepts of intention and foresight of risk. In George Fletcher's terms, there is a general movement towards "act-oriented" liability (which also shifts the fact-law distinction) by adopting a general theory of excessive risk-taking,[50] a movement that would in a certain sense be completed with the enactment of the current Law Commission proposals on the reform of the law of manslaughter.[51] This, to be sure, has been a halting process, driven in large part by the demands of a newly professionalised academic legal culture and encountering only partial acceptance on the part of the judiciary.[52] Notwithstanding, it is a movement that has also structured the development of general theories of criminal liability in England as the law of homicide has become a model for criminal law as a whole. In the same period Scots law has largely operated with an "objective" test of liability, which occasionally veers towards the outrightly moralistic, as Scots law remains rooted in the idea of the judgement of conduct rather than of the mental element.[53] No clear single pattern of liability—no principled basis to the law—has emerged within the law of homicide, let alone, as we shall see in the next section, in the criminal law as a whole.

(4) The declaratory power of the High Court

It is a broad characteristic of Common Law systems in general, rather than the Scottish system in particular, to claim an inherent jurisdiction to criminalise new crimes or old crimes committed in a novel manner. It could be argued, in fact, that this is the least remarkable aspect of either system. There is almost a necessary claim to a residual jurisdiction in a Common Law court—although this can undoubtedly be fostered by the sort of open-ended criminal procedure that both systems have enjoyed. While not always expressed in an explicit form, the behaviour of the courts in both jurisdictions evidences a clear belief in the existence of such a

49 It is interesting to note, for example, that in *Moloney* [1985] 1 All ER 1025, the leading English case on intention, Lord Bridge heavily criticised the prosecution for having charged murder rather than manslaughter.

50 Fletcher, *Rethinking Criminal Law*, 259–274.

51 See above, n 45.

52 For three accounts of this process from very different perspectives see Dennis, "Critical condition", 219–221, 223–228; J Horder, "Two histories and four hidden principles of mens rea" (1997) 113 LQR 95–119; and N Lacey, "A clear concept of intention: elusive or illusory?" (1993) 56 *Modern Law Review* (MLR) 621–642.

53 The former being expressed most recently in the *Lord Advocate's Reference (No 1 of 1994)* 1995 SCCR 177.

power. The position of the English courts today is surely not far removed from that of the Scottish courts, where it is only the explicit, rather than implicit, use of the power that is regarded as a problem. Indeed, the most surprising feature of English law is that the question of judicial law-making was problematised relatively late;[54] a broad overview of the jurisprudence of the English courts this century shows an uncanny resemblance to that of the Scottish courts in the same period.[55] On this view, it is beyond question that Scottish jurists writing at the beginning of the nineteenth and again in the mid-twentieth century sought to codify the existence of the power in a certain form as a means of marking out the difference between the two systems.

As a result of this, however, the question of the declaratory power must be treated as more than just a historical curiosity, because it has been placed at the heart of an argument about the principled basis of the Scottish system. The existence of principle in Scots law, it is argued, means that there is a natural constraint on the operation of the power and, going further, founds a more fundamental claim about the distinctive nature of Scots law and the proper role of judges and jurists in its development. Even at this level, however, it is not easy to sustain the argument that the development of Scots criminal law has been either distinctive or principled. The English criminal law may have had different institutional roots in the courts of assizes and common pleas, but the process of development of the modern law is broadly comparable to that of Scotland. In both jurisdictions the pre-modern law developed according to the constraints and possibilities afforded by the procedures and practices of the central courts. However, by the early nineteenth century the substantive law was in the process of being separated from these peculiar procedural origins and being expressed in the form of independent rules that were capable of a more general application.[56] There remained, of course, differences in the mode of expression, but the key point is that this process was largely the result of the work of jurists seeking to systematise and order the law—whether this was done in the form of manuals of practice or in the form of an academic commentary. A feature of Scots criminal law in this period is actually that there was very little discussion of the principles of the

54 In the case of *Shaw* v *DPP* [1962] AC 220. This was due, amongst other things, to the different attitude in England towards the development of the law through legislation in the nineteenth century. See generally M Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England 1830–1914* (1990).

55 See the discussions in A T H Smith, "Judicial law-making in the criminal law" (1984) 100 LQR 46–76; R M Jackson, "Common law misdemeanours" (1936–38) 6 *Cambridge Law Journal* 193–201; Ashworth, *Principles*, chs 2 and 3; C K Allen, "The nature of crime", in *Legal Duties* (1931), 221–252.

56 On Scotland see J W Cairns, "Hamesucken and the major premiss in the libel 1672–1770: criminal law in the age of enlightenment", in R F Hunter (ed), *Justice and Crime* (1993) 138–179. In general see M Lobban, *The Common Law and English Jurisprudence 1760–1850* (1991); D Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (1989).

penal law. The ready acceptance of Hume's *Commentaries*, which itself makes little or no attempt to expound the principles on which the law is supposedly based, has meant that there has been little discussion of what the principles of the criminal law might be.[57] This is certainly the case, as I have argued elsewhere, in relation to Hume's discussion of the declaratory power. This is expressed neither in terms of rule or principle, but merely viewed as an unremarkable facet of common law procedure. It is not clear whether we should be more troubled by Hume's omission, here and elsewhere, to discuss principle or by the continued inability of modern writers to come to terms with this omission.[58]

In other respects it remains exceedingly unclear what is being talked about when criminal lawyers or judges refer to the principled basis of criminal law. There are at least three broad versions of this claim, and these may co-exist in a particular system without necessarily being consistent with each other. The first, which is the most commonly made version of the claim today, is that there are certain general principles of criminal liability, relating to the capacities and qualities of the individual actor, that are capable of standing apart from the particular substantive crimes (the general part).[59] These, in combination with the principle of legality, essentially codify the criminal law as a relation between state power and a rational, autonomous individual—though this is done in terms of a structure of liability that is derived from the modern law of homicide. However, these principles are relative newcomers to the field, at least in the manner in which contemporary theorists use them as a prescriptive guide to the nature and scope of the law: prior to the 1950s neither Scots nor English law had an extended treatment of any general principles of liability in this sense. If we compare, for example, the treatment in two of the leading textbooks of the period—the fifth edition of Macdonald's *Criminal Law* (1948) and the fifteenth edition of Kenny's *Outlines of Criminal Law* (1936)[60]—we find a short treatment of the idea of criminal capacity (capacity, insanity, minority, complicity) followed by a reasonably detailed exposition of the substantive law, and with the latter part of each book being

57 In England by comparison there was a vast literature on the principles and purposes of the criminal law. See for different approaches W Eden, *Principles of Penal Law* (1771); J Bentham, *Introduction to the Principles and Morals of Legislation* (1789); E H East, *A Treatise on Pleas of the Crown* (1803). For a reasonably full bibliography see L Radzinowicz, *A History of English Criminal Law and its Administration from 1750: vol I: The Movement for Reform* (1948).

58 See e.g. SME, vol 7, paras 5–15 for the suggestions that Hume laid down a rule (Christie) or that he invented the existence of the power (Gane). These types of argument are discussed in Farmer, *Criminal Law*, ch 2. This has been exacerbated by the recent tendency of the court to treat statements in Hume as if they were principles of law.

59 A good recent example of the first is Ashworth, *Principles*. In Scots law see Gordon, *Criminal Law*, Part I. See in general N Lacey, "Contingency, coherence and conceptualism: reflections on the encounter between 'critique' and 'the philosophy of the criminal law'", in R A Duff, *Philosophy and Criminal Law* (1998), 9–59.

60 The 16th edn (1952) was the first under the editorship of J W C Turner, who revised the structure of the book in order to introduce the theory of subjectivism more fully, and presaged the later transformation of English law.

devoted to criminal procedure. It is clear that, to the extent that either of the books seek to elucidate the principles of the law, they were reluctant to do so in terms of any single pattern of liability that was to be imposed across the law as a whole.[61]

The second sense in which the claim to principle is made takes the form of the argument that the criminal law should protect certain social interests or values, such as person, property, the state and so on. Crime, in this sense, is defined as the breach of these civil rights, and the function of the criminal law, as the necessary adjunct of the civil law, is to sanction breaches in those civil rights as a means of protecting the aggregate interests of those individuals who make up the larger community.[62] The maxim *actus non facit reum nisi mens sit rea* is recognised as being of importance to the law, although not in the strong sense appealed to in the first claim, of founding a general principle of foresight or intention. It instead takes the form of a minimum recognition of voluntariness or mental element in the definition of each crime. The principle appealed to is thus a formal claim about the coherency of function of the legal system as a whole and the organisation or exposition of the law, rather than being a particular claim about the nature of criminal liability or even the internal consistency of the field.[63] It is thus recognised that each area of law has developed independently and according to different principles. This, certainly, would seem to be closer to the model of exposition adopted in the texts referred to above, though as we have already noted there was, for example, no single clear concept of property. To the extent that this is largely a principle of exposition, however, it is not of much guidance in the resolution of particular disputes, and it is extremely unlikely that judges are referring to principle in this sense of the term when discussing the declaratory power.

This brings us to the third type of claim, for the form in which this claim is normally made is that the practice or experience of the law in the government of social life is both guided and constrained by certain principles or values. Thus, it is argued that the law reflects certain principles or values in its practice and that to enforce the law in this sense cannot be seen to breach the principle of legality since the display of flexibility is merely a means of enacting and responding to community values and understandings of the functions of the criminal law. This type of claim is perhaps closest to the conventional accounts of Scots law—and it is a claim that is characteristic of Common Law systems.[64] Without rehearsing the arguments against

61 On different patterns of liability in the law see Fletcher, *Rethinking Criminal Law*, Part I.

62 A classic version of this claim is to be found in J F Stephen, *Digest of the Criminal Law* (1877).

63 This, for example, is the sense in which Bentham elaborates the idea of principle in the criminal law. See *Of Laws in General* (1970 reprint), chs XVI-XVIII.

64 See e.g. S Styles, "Something to declare: a defence of the declaratory power of the High Court", in Hunter, *Justice and Crime*, 211–231, and the arguments reviewed in I D Willock, "The declaratory power: still indefensible", 1996 JR 97–108. See also A Cadoppi, "*Nulla poena sine lege* and Scots criminal law: a continental perspective" 1998 JR 73–88.

this position in any detail, it is enough to state two related reservations. The first is that the principled basis of the law in this sense is at best a claim about the role of the courts in the development of the law, and that it does not entail any consequences for the substance of the law itself. Certainly it is abundantly clear that there are no substantive principles that can be extrapolated from the actual use of the declaratory power—though it might be thought desirable that the law were developed within some sort of conceptual or theoretical limits (or that this is desirable given the absence of even procedural constraints). This, at best, would suggest the need for greater clarity about what precisely is being done by the courts when they claim to act in a "principled" manner on behalf of the community. More cynically, we might suggest that there is a deliberate elision of these different senses of principle in order to blur the boundaries of the law. The second reservation is that it is simply no longer clear, as prosecution and enforcement have been professionalised and as the experience of the courts is increasingly distanced from the practices and agencies that govern social life, that the courts are in a position to speak directly on behalf of the community.[65] In other words, the social and institutional basis for this third appeal to principle has been displaced by the growth of modern institutions of criminal justice. This necessarily has certain consequences, not only for the way in which academic lawyers must think about the law, but also for the law's own capacity to reflect social values in its procedures and practices.

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The purpose of this brief survey has been to elaborate the claim that both systems have historically shared certain common characteristics, and to hint at the nature of the distinctions that seem to divide the contemporary systems. The general conclusion that we would be permitted to draw at this point is that the differences between the two laws have never been either as fundamental or as absolute as they have been understood to be, and that this belief leads to a fundamental misunderstanding of the relation between the criminal law of the two jurisdictions. Historically it is clear that the territory between the two laws has been a much more debatable land, without any clear historical points of demarcation in substance. It is from within and traversing this common area that symbolic borders have been constructed, marking out the shared ground as peripheral, and distancing what has lain in common.

C. DRAWING BORDERS

We have now seen some of the points through which the border has been drawn, and it is clear that, in symbolic terms at least, the effect has been that of establishing

65 W T Murphy, "As if: *camera juridica*", in C Douzinas, P Goodrich and Y Hachamovitch (eds), *Politics, Post-Modernity and Critical Legal Studies: The Legality of Contingency* (1994), 69–106.

a substantial distance between the laws. However, if the argument so far has been concerned with the tracing out of what lies in common between the two systems, it is now necessary to shift the focus, to look at the reasons for the divergence between the two laws in the period since 1957. In addressing this question we find that two broad explanations present themselves. The first argues in terms of the relative degree of progress or development of the two systems to suggest that Scots law is more backward, that it is a slow or late developer in legal terms. This is to argue that the renaissance in Anglo-American penal theory that began in the 1950s,[66] and which was the prelude to an extraordinary wave of legal reform, simply by-passed Scotland. The developments that have characterised English law in this period—the reform and modernisation of the law through codification and the explosion of interest in criminal legal theory—are largely absent from Scots law, and as a result it has been left behind. The second makes a more familiar claim about the fundamental characteristics of the two systems. This is the argument that the distinctive nature and genius of Scots law is an expression of the separate identity of the Scottish nation. The possibility of some convergence between the systems in the period we have discussed may even be allowed, but is attributed to overbearing English legal ideas and institutions squeezing the vitality out of the native Scottish ones. The more recent divergence is then explained in terms of the rediscovery or renaissance of Scottish legal thought coinciding, fortuitously or otherwise, with the rebirth of political and cultural nationalism in Scotland.[67]

Whatever the respective merits of these explanations, it is certainly clear that there has been both a qualitative and a quantitative transformation in the discussion of criminal law in England over the last forty years, and that this cannot be explained wholly in terms of the influence of certain books—no matter how stimulating—not least because these same books have been available to Scots lawyers and academics for the same length of time. The obvious starting point for comparison might then be to turn to look at the legal and academic culture, the environment in which this literature is produced.

Beginning with even the most rudimentary comparison of appellate decisions in criminal cases in the two cultures, we immediately encounter striking differences: Scottish decisions are on the whole much shorter than their English equivalents; there are a far greater number of decisions in which one judge gives the judgment

66 The main works here would be H L A Hart, *Punishment and Responsibility* (1968); G Williams, *Criminal Law: The General Part* (1953); and J Hall, *Principles of Criminal Law* 2nd edn (1960).

67 On this generally see Lord Cooper, *The Scottish Legal Tradition* (1949) and Smith, *British Justice*. These are discussed in I D Willock, "The Scottish legal heritage revisited" in J P Grant (ed), *Independence and Devolution: The Legal Implications for Scotland* (1976), 1–14, and in Farmer, *Criminal Law*, ch 2.

of the court; and dissenting judgments are practically non-existent. While these are not necessarily conclusive of any argument, they are certainly strong indicators of the existence of a certain malaise: of the absence of arguments in court which challenge accepted judicial understandings, and of a judicial attitude that seeks only to preserve the status quo. The impression that there seems to be little interest or concern in the development of the substantive criminal law is confirmed if we look more closely. To take only a few of the more egregious examples we find that the judiciary have regularly displayed a lack of understanding of the existing law and of the implications of their decisions. Thus, in the case of *Cawthorne* v *HM Advocate*, Lord Guthrie may unwittingly have introduced a new ground for the *mens rea* of murder into the law of Scotland;[68] in the case of *Meek & Others* v *HM Advocate*, a contentious English decision on the law of error in rape was said to be one which "readily accords with the law of Scotland";[69] and in a series of decisions on the crime of "causing real injury" to another, the High Court has rendered meaningless the concept of causation in crimes against the person.[70] Although the Scottish judiciary is certainly not unique in these failings—for English commentators can regularly be heard to complain about the inability of members of the judiciary to grasp even the most basic points of the law[71]—these suggest the existence of a judicial culture where discussion of, or reflection on, the principles of the law or criminal liability is discouraged.

It is tempting to attribute this entirely to the personalities and influence of certain individual judges—and it is clear that this is an important factor. Thus, in Scotland one would single out the particular influence at different times of, say, Lords Cooper and Emslie. The influence of these judges extended beyond any actual decisions to their organisation of the court, and the fostering of a particular judicial style. This is to be seen, for example, in their respective contributions to the Royal Commission on Capital Punishment in 1950 and the House of Lords Select Committee on Murder and Life Imprisonment in 1989.[72] These are important not only as unique (though non-authoritative) judicial statements of the basis of criminal liability in Scots law, but also because they reveal a certain tone of resistance to theory, where legal

68 1968 JC 32.

69 1982 SCCR 613.

70 See *Khaliq* v *HM Advocate* 1983 SCCR 483; *Ulhaq* v *HM Advocate* 1990 SCCR 593; *Lord Advocate's Reference (No 1 of 1994)* 1995 SCCR 177.

71 The most notorious example is G Williams, "The Lords and impossible attempts" (1986) 45 CLJ 33–83, correcting Lord Bridge in *Anderton* v *Ryan* [1985] AC 560. Generally see N Lacey, "The territory of the criminal law" (1985) 5 *Oxford Journal of Legal Studies* 453–462; Dennis, "Critical condition", 215–218.

72 Evidence presented to the Royal Commission on Capital Punishment (18th day, 4 April 1950); Report of the House of Lords Select Committee on Murder and Life Imprisonment (HL Paper 78 I-III (1989)), discussed in Farmer, *Criminal Law*, ch 5.

argument is eschewed in favour of expediency.[73] This may be compared with England where, in spite of academic complaints, there have been some notable contributions made to the development of the criminal law by judges in the superior courts.[74] The important point here is not so much that the English judiciary has been consistent in the following of a particular theory of liability—for it has not—but that there have been members of the judiciary who have at least shown some grasp of criminal jurisprudence and displayed a willingness to engage with the problems to which it gives rise.

More important than this individual influence, however, are the rules of criminal procedure and the operations of the criminal justice system, for together these provide the setting in which judicial decision-making takes place—indeed, it may even be a consequence of Scottish procedure that it allows certain individual judges to exercise a disproportionate influence. English commentators have already pointed to the effects of the reform of the Court of Appeal and appeals procedure in the 1960s in giving the court greater weight and fostering a higher level of judicial discussion of questions of substantive law.[75] In Scotland, however, the increase in the workload of the High Court, in both its trial and appellate jurisdiction, over the last thirty years due to the greater availability of criminal legal aid does not seem to have had any comparable impact on the quality of decisions. It is probable that this is in part a consequence of earlier reforms of criminal procedure, and in particular that rule introduced by the Criminal Procedure (Scotland) Act 1887 which did away with the requirement that the prosecutor specify words of intent in every indictment.[76] This freed the courts from the need to examine the specific wording of each indictment, allowing a more general consideration of the guilt of the accused. One unremarked consequence of this has been that that recent strand of criminal law theory which has been led by linguistic philosophy to consider the precise meaning of certain words of intent, and which has dominated judicial and academic culture in England, has been denied the opportunity to take hold in the Scottish courts. In addition, prosecutorial discretion in Scotland has meant that indictments are framed as alternatives, or that crimes are charged at the lesser level in order either to produce

73 A striking example of the depth of this resistance, and of a possible change in judicial culture, is to be seen in the recent case of *Baxter* v *HM Advocate* 1997 SCCR 437 at 439, where the Lord Justice-General rebuked counsel in the following terms: "Somewhat surprisingly we were told that neither side had found any authority on what could be regarded as incitement. There is in fact quite a body of authority on what constitutes incitement in the context of art and part guilt of a completed crime, as a glance at paragraphs 5–22 and 5–23 of Gordon's *Criminal Law* shows."

74 E.g. Lords Devlin, Diplock and Mustill, and more recently Lords Bridge (excepting his aberration on criminal attempts) and Goff and Lord Chief Justice Taylor. While not everyone would agree with the positive effects of these interventions of all these judges, their influence is unquestionable.

75 See Dennis, "Critical condition", 233–236; R Pattenden, *English Criminal Appeals 1844–1994* (1996), chs 1 & 2.

76 Sections 5–8, 58, 59. See now Criminal Procedure (Scotland) Act 1995, Sch 3.

guilty pleas or to leave questions of liability to the judge at the sentencing stage. It is also worth stressing that the extent of judicial law-making in the Scottish courts is something that is directly connected to the willingness of the Crown Office to stretch the limits of the law in the prosecution of certain conduct.[77]

One response might be to remark that the High Court and Crown Office are merely compensating for some of the notorious shortcomings of the Scottish Law Commission in the area of criminal law reform, and the poor quality of Scottish legislation on crime and criminal procedure.[78] On this view, an active judiciary has become the necessary carrier of legal reform in Scots criminal law. However, leaving aside the reservations already expressed about the principles that operate here and the continuing capacity of the courts to carry out this function, it is instructive to compare this with the situation in England. There much of the post-1957 development has been statutory, driven in particular by the establishment of the Law Commission and the initiation of the current codification project in 1967, as well as the creation of the Criminal Law Revision Committee by the Home Office in 1959.[79] These initiatives gave a small group of academic lawyers a stake in the process of law reform, providing them with a platform from which to promote a particular theory of liability which married theoretical concerns with questions of substantive law. In England this also coincided with the expansion of the universities in the 1960s. This changed the nature of legal scholarship as a new breed of professional academic lawyers weakened the tradition of the professional teaching of the law. Whether or not one agrees with the particular vision of criminal law that has been pursued by the codifiers—and whether or not there is any prospect of the code actually being legislated—it is unquestionable that these developments have raised the level of interest in and standard of debate on questions of criminal law in both academic and judicial contexts.

In Scotland, by contrast, an active resistance to the possibility of legislation coupled with judicial law-making based on unarticulated principles has led to the creation of a very different sort of academic culture.[80] It is clear that legal writing, particularly in the area of criminal law, has long been dominated by the concerns of practitioners,

77 As indicated above at 43–44, certain of these remarks would also apply to England, except perhaps that the system being bigger is less easy to control.

78 This is the subject of a valuable recent paper: C H W Gane, "Criminal law reform in Scotland" (1998) 3 *Scottish Law & Practice Quarterly* 101–116, although he probably underestimates the extent to which the courts have created this role for themselves. See also T H Jones, "Criminal justice and devolution", 1997 JR 201–218 at 202–205.

79 See Law Commission Annual Report (1968). See also Codification of Criminal Law. A Report to the Law Commission (Law Com No 143, 1985) and A Criminal Code for England and Wales vol 1: Report and Draft Criminal Code Bill (Law Com No 177, 1989).

80 It will be interesting to see whether the unoffical draft Scottish Criminal Code currently under preparation will have the effect of stimulating debate on this subject in Scotland.

with the result that there has been little sustained analysis of Scots criminal law. There have been limited opportunities or outlets for academic writing on the subject. The few journals devoted to Scots law do not provide the space to develop theoretical arguments, and legal publishers have shown a marked preference for texts which are capable of bridging the markets of students and practitioners. Recent publishing initiatives in the area of criminal law have taken one of two forms. On the one hand we have seen the republication of the supposed classics of the genre[81]—though in the case of Macdonald's *Practical Treatise* or Alison's *Principles of Criminal Law* it might have been better had they been allowed to pass quietly into obscurity, since these serve only to remind us of how threadbare the Scottish tradition really is. On the other hand, the "Law in Practice" series and the publication of rival student texts on criminal law, while welcome, are perhaps better indicators of the economics of publishing and the financial imperatives of the Research Assessment Exercise than of the belated flowering of an academic culture.[82] It is clear that the one outstanding attempt to provide a systematic and contemporary theoretical account of the law, Sheriff Gordon's *Criminal Law*,[83] is valued by lawyers for its apparent comprehensiveness rather than for the sophisticated argument it develops concerning the nature of liability. The limited extent of its impact on the judiciary is apparent from the increasingly despairing tone of Gordon's commentaries in the *Scottish Criminal Case Reports*. It is indeed arguable that until very recently there has been little academic legal culture to speak of in Scotland.[84]

We are now in a position to return to and reassess the broad explanations for divergence that were offered at the beginning of this section. The problem with the first view—that Scots law is backward—is of course that it relies on its own "Whig history", a belief in a certain type of progress. Lying at the heart of this is the assumption that only a general subjective theory of liability can provide the foundation for criminal law, and that this can only be introduced into the law by means of the enactment of a criminal code. This is given a historical foundation through the interpretation of the modern law in terms of the irresistible rise of subjectivism—a view that is read back into the past to claim a longer "enlightened" lineage for this theory than is in fact the case.[85] This, moreover, generalises from the particular

81 Hume's *Commentaries* was republished in 1986, Alison's *Principles of the Criminal Law of Scotland* (1832) and *Practice of the Criminal Law of Scotland* (1833) in 1989, and Macdonald's *Practical Treatise* in 1986.

82 Though occasionally authors have shown a willingness to stretch the constraints of the format. See esp M Christie, *Breach of the Peace* (1990). The rival student texts are Jones and Christie, *Criminal Law* and A McCall Smith and D Sheldon, *Scots Criminal Law* (1994).

83 1st edn, 1967; 2nd edn, 1978.

84 K G C Reid, "The rise of the academic lawyer in Scotland" in H L MacQueen (ed), *Scots Law into the 21st Century* (1996), 39–49.

85 For conflicting versions of challenges to this view see Lacey, "Contingency", and Horder, "Two histories".

conditions that have obtained in England to a claim about modernity and progress in criminal law in general. These supposedly natural and universal assumptions have been challenged by critical legal theory[86]—and they can equally be challenged by a comparative point of view. These developments are far from inevitable and, as we shall see, may be undesirable or inappropriate in the context of Scottish ideas and institutions. The second type of explanation, however, in spite of its superficial attractions, is also deeply problematic. This is in part for reasons that we have already considered: that there is little evidence of the fundamental divergence that is claimed, nor of the supposedly principled basis of the system. It is also because this tradition is deeply unworldly, creating certain myths about a simple world that it saw was passing and of the "destiny" of Scots law. It is also highly conservative, since a closer analysis reveals a fear of the development of the modern state and a nostalgic longing for the past.[87] The Scottish legal tradition, then, has not in fact been about the simple preservation of Scottish identity, but its invention and the consequent rejection of the possibility of certain types of reform. It has been of unquestionable importance to the revival of a self confidence amongst Scots lawyers, but its own increasing marginalisation is itself evidence of the passing of the view of Scots law and its relation to Scottish identity that it sought to promote. In conclusion, then, both explanations have exaggerated difference because of the need to press a particular project; just as importantly, both have neglected the actual differences in practice that would support a clearer view of the two jurisdictions.

D. CONCLUSION: DEBATABLE LAND

Whatever the shortcomings of these two explanations, it is clear that they offer two different bases for the law, the two main types of discourse that are available in which to theorise the contemporary criminal law. One is based on codification and the extension of a certain form of subjective liability, the other on claims or myths about the Scottish character and community. These two positions present themselves as the alternatives in the dilemma that faces Scots law: to assimilate or to separate? Is it better to join the mainstream of Anglo-American thought or to pursue a course of isolation? Yet we have also seen that this is a false dichotomy, for neither position presents an adequate explanation of the position of Scots law. On the one hand, it is arguable that the institutional conditions to support the former do not exist in Scotland—and the prospect of playing catch-up with English law is not necessarily

86 See notably A W Norrie, *Crime Reason and History: A Critical Introduction to Criminal Law* (1993), and now P Rush, S McVeigh and A Young, *Criminal Legal Doctrine* (1997).

87 For a discussion of the historiographies of Scottish and Anglo-British identities see C Kidd, *Subverting Scotland's Past: Scottish Whig Histories and the Creation of an Anglo-British Identity 1689–c.1830* (1993).

an attractive one, even though to a great extent this is the path that is being followed in recent writing. More importantly, this approach is presently being seriously questioned in England, and it would be ironic in the extreme if Scots law were to seek to move towards such a theory at the moment at which it was being abandoned in the rest of the Anglophone world. On the other hand, the second position poses a different set of problems as a principled basis for the law, since the principles that are claimed to exist have been shown to be largely illusory and it seems in the end to fall back on questionable assertions about law and community in Scotland.

However, the different institutional conditions in Scotland do support the idea of the existence of a distinctive legal culture, a point that is of increasing importance as we move closer to the establishment of the new Scottish Parliament. This poses a challenge in terms of developing a principled basis for the law within the existing legal culture. In order to do this I think that there is a need to reflect on the nature of the Scottish law, without pursuing some of the more essentialist arguments associated with the Scottish legal tradition. The challenge, then, is to attempt to formulate the principled basis of the system, principles which might properly guide us in our understanding of the law.[88] In the formulation of such principles it is necessary to follow two methodological guidelines (as I have attempted to do in this article): that there should be a close attention to history; and that attention should be paid to the relations between practice, procedure and substantive law.[89] The principles that are developed on this basis should thus not be alien or unrelated to the context in which they have been developed, but just as importantly this requires some redefinition of the idea of doctrine so that it is not conceived of as being purely abstract or theoretical. This, it should be clear, amounts to the rejection of the idea of a general and abstract theory of liability as this has been developed in much contemporary Anglo-American criminal law theory. On this basis, and drawing from the analysis presented in this article, I would suggest that the law could begin to be understood in terms of the following types of principles: that constructive rules should be rejected, because there is clear evidence that they are used in a haphazard and *ad hoc* manner; that there should be closed definitions of crimes and open definitions of defences; that there should be principles of how to review or use English or other authority so as to develop the sort of comparative understanding of the law that is necessary in a small jurisdiction; that the limits on creativity and flexibility in the law should have to include, for example, limits on the exercise of

88 Cf the principles set out in Jones and Christie, *Criminal Law*, 358–361 (prospectivity, certainty, effectiveness and fairness) or in Gane, "Criminal law reform", 114–116. Compare also the recent interest in the principles of penal legislation in English law: A Ashworth, "Towards a theory of criminal legislation" (1989) 1 *Criminal Law Forum* 41–63.

89 This argument is developed in Farmer, *Criminal Law*, ch 1. The argument of this article, however, is developed according to similar methodological precepts.

prosecutorial discretion and criminal procedure. Above all, the criminal law should be judged less in terms of its supposedly distinctive character, essentially a negative definition concerned only with origins, and more in terms of the justice and accountability of the system as a whole.

This article has tried to return the debatable land of the criminal law to the centre of argument about the identity of Scots law and so we should conclude by returning to the debatable land with which we began. The debatable land was a land of myth. Where the two countries met was also understood by its inhabitants to be the land where the worlds of the natural and the supernatural collided. The path to faerie led from under the Eildon hills, and the border ballads tell tales of demon lovers and witches, the Queen of Elfland and the return of the dead. The inexplicable is explained, loss and love lamented in songs of magic and regret. It is thus an appropriate metaphor for the encounter between the separate worlds of Scottish and English criminal law, for this too is a place where we have encountered myths of the spirit of the law and lamentation for the loss of innocence which is the inevitable consequence of the encounter between the two worlds. Love and death, then, have been the preoccupations of the Scottish tradition. However, while in the ballads the normal consequence of this loss is a greater self-understanding and knowledge of the world, in the case of Scots law there has rather been an increase in delusion and the retreat into myth. The land is debatable in the sense that it is contested territory. We should not want to end this debate and retreat into isolation.