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Declaring Crimes

Chloë Kennedy*

Abstract: For centuries, Scots criminal law has been renowned for its flexibility and adaptability. One striking example of this characteristic is the so-called declaratory power: the power of Scotland's highest criminal court to declare conduct punishable in the absence of statutory authority or direct precedent. This article considers the origins and early use of the declaratory power in light of some of the questions that occupied key thinkers in Enlightenment Scotland to show how, in contrast to its contemporary opprobrium, the power might once have appeared unobjectionable. It then considers some more recent examples of judicial lawmaking in Scots criminal law and suggests that this nuanced historical understanding casts them in a potentially more favourable light. Beyond their relevance to Scots law, these observations resonate with more general debates about the requirements of legality, legal authority, the limits of judicial discretion and the relationship between laws and the community.

Keywords: criminal law, legal history, common law, authority, legitimacy, judicial discretion

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1. Introduction

Suppose a person were to ask this question – What part of Europe is it where a court of law claims, and, in virtue of its own decision, actually exercises, the power of declaring any action it thinks proper to be a crime; and of applying whatever punishment it deems expedient to the new offences thus judicially introduced? Would he not be considered a conceited fellow, who was stating a conundrum, to which he knew that, in the plain meaning of the words, there was no answer? But, unfortunately, there is an answer. The place is Scotland.

(Henry Cockburn, 1846)¹

One of the distinctive features of Scots law is its extensive and malleable body of common law crimes.² Both individually and collectively, common law crimes in Scotland have traditionally been regarded as possessing an inherent flexibility that allows for swift adaptation to the changing needs of the community as they arise. A particularly striking example of this characteristic is the so-called declaratory power of the High Court of Justiciary: the ability of Scotland's highest criminal court 'competently to punish, (with the exception of life and limb), every act which is obviously of a criminal nature; though it be such which in time past has never been

¹ 'Scottish Criminal Jurisprudence and Procedure' (1846) 83 *Edinburgh Review* 196, 210.

² While judicial creativity is not exclusive to the Scottish High Court, the degree to which it is acknowledged is idiosyncratic (Alexander Nikolaevich Shytov, *Conscience and Love in Making Judicial Decisions* (Springer 2001) 168). Irrespective of its accuracy, the claim of distinctiveness came to be an important dimension of the perception and self-understanding of Scots criminal law (see, for example, J Scott (ed), 'Observations on Some Distinctions Between the English and Scottish Systems of Law' (1820) 1(4) *London Magazine* 408, 409 and J F Waller (ed), 'The Criminal Jurisprudence of Scotland' (1847) 29 *Dublin University Magazine* 391, 394).

the subject of prosecution'.³ Unsurprisingly, this power has long attracted criticism on rule of law grounds.⁴ Indeed, despite having rarely been invoked explicitly since its emergence at the end of the eighteenth century, and notwithstanding the claim that 'its exercise today is unthinkable',⁵ the power continues to vex its detractors.⁶ For example, when delivering the 2013 Annual Lecture of the Society of Solicitors in the Supreme Court, the Lord President, Lord Gill, warned of the 'perils of judge-made law', suggesting that it was time to 'lay the declaratory power to rest'.⁷

The main criticisms laid against the declaratory power are that it flouts the desiderata of legal certainty, accessibility and non-retroactivity⁸ and that it enables a small number of judges to decide what the law should be.⁹ To modern eyes, these complaints appear incontrovertible. Assessed against mainstream contemporary expectations, the declaratory power can seem to sanction unfettered judicial discretion and allow for the arbitrary and illegitimate extension of the criminal law. This point is exacerbated by the fact that, despite having received considerable attention, no full

³ David Hume, *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes*, (Bell & Bradfute 1797 vol 1) lii.

⁴ Especially in light of the prohibition of retrospective criminalization, as enshrined by Article 7 of the European Convention on Human Rights (see Jonathan Burchell and Christopher Gane, 'Shamelessness Scotched: the Domain of Decency after Dominick' (2004) Edin LR 231; I D Willock, 'The Declaratory Power – Still Indefensible' 1996 Jur Rev 97; M G A Christie, 'Criminal Law' *The Laws of Scotland: Stair Memorial Encyclopaedia* (Reissue, 2005) paras 1, 15).

⁵ M G A Christie, 'Criminal Law' (n 4) para 15.

⁶ There have been occasional champions of the power e.g. S Styles, 'The Declaratory Power: Inevitable and Desirable' 1999 Jur Rev 99 and S Styles, 'Something to Declare: A Defence of the Declaratory Power of the High Court of Justiciary' in R F Hunter (ed), *Justice and Crime* (T & T Clark 1993). For more qualified endorsement of the flexibility of Scots criminal law see T H Jones, 'Common Law and Criminal Law: the Scottish example' [1990] Crim LR 292.

⁷ Scottish Legal News, December 2013 (obtained from publication's records).

⁸ T H Jones and M G A Christie, *Criminal Law* (6th edn, W Green 2015) para 2-20.

⁹ Scottish Legal News (n7).

historical understanding of the declaratory power has been forthcoming.¹⁰ As a consequence, within contemporary scholarship the declaratory power tends to feature not only as a source of disdain but also confusion. As two commentators have recently remarked, '[i]t seems...not particularly clear why the High Court ever had, or claimed to have, such a power',¹¹ adding that 'former attempts by the High Court to formulate new types of criminal behaviour by exercise of the power do little to answer the general question why certain conduct deserves to be stigmatised as criminal at all'.¹²

With no clear sense of the power's emergence and rationalization it is perhaps inevitable that it is generally reviled and considered mysterious today. Deprived of an understanding of the framework of thought within which it emanated, it is unsurprising that we should remain blind to alternative evaluations. Yet, as this article aims to show, through a deep appreciation of the power's origins and early use, informed by the intellectual climate in which it emerged, the power can be seen not only to have made sense, but also to have been considered potentially justifiable. Indeed, through recovering the body of philosophical thought that appears to have buttressed early understandings of the power – drawn from the works of Lord Kames, David Hume, Adam Smith and Dugald Stewart – it becomes clear that this form of judicial lawmaking was not necessarily as unconstrained as it might first appear.

The very nature of the declaratory power precludes the possibility that either legislation or previous cases might guide or restrain courts in its exercise but, at the time of its emergence, alternative limitations to judicial discretion existed in the form

¹⁰ For a doctrinal history of the power see M G A Christie (ed), *Criminal Law of Scotland* (3rd edn, Green 2000-2001) paras 1.30-1.42 and *Criminal Law* (n8) paras 2-20-2-33.

¹¹ *Criminal Law* (n8) para 2-24.

¹² *ibid* para 2-33.

of a divide between justice and expediency that was prevalent in philosophical writing.¹³ Whereas courts were considered unfit to decide issues of expediency (or utility, as it was sometimes called), they were thought well-suited to determining issues of justice. By adhering to the dictates of justice, the High Court might therefore attain the certainty, authority and legitimacy that could render exercise of the power justifiable.

In this way, the explanation of the declaratory power offered here contributes, in a jurisdictionally specific manner, toward more general debates about the often-maligned declaratory theory of law. The declaratory theory of law, which states that judges do not make law but only declare what it has always been, is considered by many to be an absurd fiction, but, as Beever has argued, it can make sense, and indeed can be seen to accord with contemporary judicial practice, when ‘law’ is understood to encompass more than legislation and decided cases.¹⁴ In the case of the declaratory power, this ‘something more’ was a sense of justice that was grounded in prevailing philosophical theories of morality, which were in turn rooted in the common sentiments, or common sense, of mankind. Despite endorsing a higher degree of novelty than the declaratory theory typically accommodates, the declaratory power therefore represents a distinctive example of the more general idea that courts might decide cases in accordance with law, whilst nevertheless departing from, or having no recourse to, posited law.

Throughout the nineteenth century, however, both Scots and English law moved towards the principle of *stare decisis*,¹⁵ and growing disdain for judge-made

¹³ Discussed in section 4.

¹⁴ Allan Beever, ‘The Declaratory Theory of Law’ (2013) 33(3) OJLS 421.

¹⁵ G Maher, ‘Judicial Precedent’ *The Laws of Scotland: Stair Memorial Encyclopaedia* (1986) paras 251-252.

law and increased concern with observing the separation of powers¹⁶ contributed to an intellectual climate in which the declaratory power increasingly began to attract disapproval. This disapprobation set the tone for the modern law's development, which is characterized by the combination of a more restrained, though still controversial, reliance on general principles and judicial adaptation of the law to reflect societal changes. Despite their peculiarities, these approaches share some important similarities with the declaratory power. In fact, as I suggest below, these two forms of judicial discretion represent the cleaving apart of two dimensions of the declaratory power that were previously unified: the notion that law incorporates more than decided cases and legislation and the idea that law depends for its legitimacy on a close association with the community.

The reliance on general principles amounts to a more contemporary iteration of the declaratory theory of law, which concedes the necessity of drawing on existing legal authority while preserving a conception of law that extends beyond legislation and decided cases. According to leading theories adjudication, such as Dworkin's theory of interpretation¹⁷ and some of its derivatives, this form of judicial lawmaking might be considered justifiable, thereby further exonerating the declaratory theory of law. By contrast, once shorn of its former philosophical underpinnings, the assertion that judges ought to innovate to meet the needs of the community is less easily characterized as an instantiation of the declaratory theory. Instead, this form of judicial lawmaking draws explicitly on extra-legal, policy considerations. Whilst this

¹⁶ E.g. Samuel Romilly, 'Papers Relative to Codification, and Public Instruction, including Correspondences with the Russian Emperor, and divers Constituted Authorities in the American United States. Published by Jeremy Bentham' (1817) 29 *Edinburgh Review* 217; 'On the Legislative, Judicial and Executive Powers' (1830) 2 *The Law Chronicle* 72.

¹⁷ For a discussion of Dworkin's theory of interpretation, the declaratory theory of law and common law development see Peter Jaffey, 'Authority in the Common Law' (2011) 36 *Australian Journal of Legal Philosophy* 1.

might appear illegitimate according to a practice-based model of common law authority, which requires that law be developed on the basis of existing legal authorities, it coheres well with a custom-based model of common law authority, according to which judicial lawmaking is legitimate insofar as it corresponds to the prevailing norms of the community.¹⁸

A close examination of the declaratory power's early use and origins can therefore explain and potentially vindicate both older and more recent examples of the commitment to flexibility within Scots criminal law. More generally, it provides a clear demonstration of the fact that there are multiple ways of conceiving of legitimacy and legality, and a stark reminder that failure to acknowledge this point is liable to give rise to unwarranted, because misguided, criticism. In short, its significance exceeds both its temporal and jurisdictional bounds.

2. The Study and Its Method

Those familiar with Scottish legal history might doubt the need to probe any further into the origins of the declaratory power. Existing research has shown that the power proved a useful resource at a time when Scotland lacked its own parliament and supplied powerful evidence of the purported 'native vigour' of the Scottish legal tradition.¹⁹ In addition, the political affiliations (and personal animosity) of important figures in the history of the declaratory power can help explain how it was used and

¹⁸ On these models of authority see Dan Priel, 'Conceptions of Authority and the Anglo-American Common Law Divide' forthcoming *American Journal of Comparative Law*.

¹⁹ Lindsay Farmer, "'The Genius of Our Law...': Criminal Law and the Scottish Legal Tradition' (1992) 55(1) MLR 25. Poor parliamentary representation of Scotland was also a concern during the nineteenth century (H T Cockburn 'Parliamentary Representation of Scotland' (1830) 52 *Edinburgh Review* 208).

regarded. Baron Hume, a conservative High Tory whose statement on the declaratory power is sometimes taken to be its genesis,²⁰ emphasized the merits of Scots criminal law, including the power, in his highly authoritative *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes*.²¹ One of his motivations for writing the text was to '[rescue] the law of my native country from that state of declension in the esteem of some part of the public, into which, of late years it seems to have been falling',²² an aim to which the Whig reformist Henry Cockburn attributed a desire to vindicate the infamous sedition trials of the 1790s.²³ Cockburn himself was a vocal critic of both the declaratory power²⁴ and what he saw as Hume's uncritical reverence for defects in the Scottish legal system.²⁵ However, although these political factors shed significant light on the existence, use and reception of the declaratory power, they are unable to explain *how* the declaratory power made sense: how it might have appeared innocuous and for what reasons.

As the following sections demonstrate, such an explanation depends on resuscitating the ideas and assumptions that underpinned the declaratory power and placing them in their wider intellectual context. In order to do this, this article examines Hume's description of the power and a selection of 'informations' – written

²⁰ M G A Christie, 'Criminal Law' (n 4) para 6; R Shiels, 'The Declaratory Power and the Abolition of the Syllogism' 2010 SCL 1, 4 (both referring to this impression).

²¹ Hume (n 3) lii-liii. Hume's *Commentaries* continue to be an important source of Scots criminal law (M G A Christie, 'Criminal Law' (n 4) para 2).

²² Hume (n 3) xli.

²³ Jim Smyth and Alan McKinlay, 'Whigs, Tories and Scottish Legal Reform, c. 1785-1832' (2011) 15(1) *Crime History and Societies* 111, 124.

²⁴ E.g. H T Cockburn, 'Remarks on the Administration of Criminal Justice in Scotland, and the Changes Proposed to be Introduced into it' (1825) 41 *Edinburgh Review* 450, 460-461.

²⁵ E.g. Cockburn 'Scottish Criminal Jurisprudence' (n 1) 198, 200-201.

arguments²⁶ submitted by advocates, at the request of the court, when difficult questions of law or relevancy arose²⁷ – taken from cases where the High Court’s creative power was in play. Few details survive²⁸ in respect of cases that occurred prior to the advent of serial case reporting in 1819,²⁹ so these informations are valuable, and underexplored, sources for this period. Furthermore, comprising detailed accounts of the arguments practitioners deemed appropriate (and presumably persuasive) when making their case to the court, they offer meaningful insight into how the declaratory power was understood at this time.

The cases discussed were chosen for their significance in understanding the origins and early use of the declaratory power. Pinpointing the precise origins of the power is challenging, for it is questionable how far the examples Hume provides when first describing the power³⁰ – of sending threatening letters³¹ and altering promissory notes³² – support its existence. According to the informations pertaining to the latter case, the main defence argument was that there had been no falsehood and forgery because the acts charged were committed in error and the pursuers had suffered no injury.³³ From this, it is unclear whether the court exercised the

²⁶ Contained in the High Court of Justiciary Books of Adjournal and Minute Books, the most detailed records of the court’s proceedings preserved by National Records of Scotland.

²⁷ William Bell, *A Dictionary and Digest of the Law of Scotland, with Short Explanations of the Most Ordinary English Law Terms* (Bell & Bradfute 1839) 444.

²⁸ Neither the Books of Adjournal nor Minute Books I have examined contain records of judicial opinions. Hume’s *Commentaries*, which were based on an examination of the Books of Adjournal, offer only short statements of the principles derived from each case (D M Walker, *A Legal History of Scotland*, vol 5 (T & T Clark 1998) 17).

²⁹ Although serial reporting commenced at this time, unbroken coverage only began in 1835 (D M Walker, *A Legal History of Scotland*, vol 6 (Butterworths LexisNexis 2001) 9).

³⁰ Hume (n 3) lii. Hume’s *Commentaries* is considered the first legal text to have mentioned the power (Cockburn ‘Scottish Criminal Jurisprudence’ (n 1) 216-217).

³¹ *James Gray* 27 June 1737 (Hume (n 3) vol 2) 278).

³² *Thomas Mathie* 10 March 1727 (Hume (n 3) 228).

³³ NRS JC 7/14.

declaratory power in holding the libel relevant and subsequently inflicting punishment. As for sending threatening letters, which has more often been cited as evidence of the Court's power,³⁴ this was arguably criminal prior to the alleged exercise of the Court's inherent power.³⁵ Indeed, counsel for the accused admitted as much.³⁶

Hume's description of the power is more obviously supported by the judgments in the 1794 trial of Charles Sinclair for sedition.³⁷ Though charges of sedition had previously been held relevant,³⁸ *Sinclair* was the first trial at which counsel were present to make objections on behalf of the accused. Significantly, the question of whether sedition was a crime at common law was not in contention; even defence counsel accepted that it was.³⁹ The issue to be decided was whether various statutes pertaining to sedition had abrogated the common law, thereby limiting the punishment that might be imposed. Notwithstanding this, the Court chose to proclaim its ability to 'punish every offence that can be denominated a crime on the principles of sound reason and morality'.⁴⁰

In Cockburn's view, the court had no warrant for assuming this 'extraordinary authority',⁴¹ but according to their Lordships it had been 'recognized in a variety of

³⁴ E.g. Lord Moncreiff in *Greenhuff* (1838) 2 Swin 236, 265.

³⁵ Cockburn, 'Scottish Criminal Jurisprudence' (n 1) 217.

³⁶ NRS JC 7/21. His argument was that the conduct could not infer capital punishment.

³⁷ Hume affirms the court's power using similar terminology to the judges, though he does not cite the case (Hume (n 3) vol 2) 487).

³⁸ See Henry Cockburn, *An Examination of the Trials for Sedition which have Hitherto Occurred in Scotland* (David Douglas 1888).

³⁹ Thomas Jones Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, vol 23 (T C Hansard 1817) 790.

⁴⁰ Lord Abercrombie (ibid 798)). Lord Esgrave and Lord Justice-Clerk Braxfield made comments to the same effect (ibid 795-796, 799).

⁴¹ Cockburn, 'Examination of the Trials for Sedition' ((n 38) vol 2) 37.

instances'.⁴² Just one example was given, however: the 1751 case of *Thomas Gray and others*.⁴³ In this case, the charge of forcible marriage was contested on the grounds that there was no such crime by the law of Scotland and that no one ought to be punished for doing that which neither the law of nature nor the law of his country had prohibited.⁴⁴ The prosecutor considered this argument too extravagant to require confutation, focussing instead on the degree of punishment that could be imposed. In doing so, however, he admitted there was neither statute nor precedent to support his case, arguing that just as the established common law crimes were first punished without precedent, it remained open to the court to punish previously unchecked conduct.⁴⁵

This argument illustrates the difficulty in identifying cases where the declaratory power was implicated: what appears to be a discussion about the permissible degree of punishment turns into a debate over the Court's capacity to punish new offences. For this reason, and as Farmer has argued, it is useful to consider the declaratory power as part of a broader system that emphasizes flexibility.⁴⁶ With this in mind, the informations discussed here are not limited to cases where the declaratory power was actually exercised. There are few instances where the power has unequivocally been used;⁴⁷ indeed, in the early period considered here, the only clear example is the punishment of workmen for combining

⁴² Lord Justice-Clerk Braxfield (Howell (n 39) 799).

⁴³ Lord Abercrombie (ibid 798).

⁴⁴ NRS JC 7/38.

⁴⁵ The libel was held relevant to infer arbitrary punishment and the accused were banished for fourteen years.

⁴⁶ Farmer (n 19) 28.

⁴⁷ See Farmer (n 19), referring to the High Court's more recent practice.

to raise their wages.⁴⁸ Yet arguments about the potential use of the power are important in determining how it was understood, so the two previous instances where similar prosecutions were attempted unsuccessfully have also been considered.⁴⁹ For the same reason, *Rachel Wright*,⁵⁰ which involved a charge of child stealing, has also been included. The case did not definitively involve exercise of the declaratory power, but the power was certainly mentioned and approved.⁵¹

In the interests of uncovering how the Court's creative power was understood, two cases where bribery legislation cast doubt on the parameters of the common law are also discussed.⁵² Reflecting the proliferation of penal legislation in the eighteenth century,⁵³ other cases concerning the relationship between such legislation and common law crimes arose, but from a survey of these⁵⁴ the bribery cases emerge as particularly suitable for discussion because their charges were suspected of attempting to extend a statutory offence into an area whose criminality at common law was dubitable⁵⁵ and because informations are available.⁵⁶

⁴⁸ *William Mackimmie & others* 12 and 13 March 1813 (David Hume, *Commentaries on the Law of Scotland Respecting Crimes: with a supplement by Benjamin Robert Bell* (Bell & Bradfute 1844) 495).

⁴⁹ *James Taylor & others* 12 May and 19 October 1808 and *Chalmers, MacDonald & others* January 11 1811 (ibid 494-495).

⁵⁰ 23 November 1808 (ibid 84).

⁵¹ See *Greenhuff* (n 34), where Lord Meadowbank describes the court in *Wright* as having acknowledged and acted upon the power (263) but Lord Cockburn describes it as having alluded to and assumed the existence of the power (276).

⁵² *McIntosh v Dempster* July 1751 and *James Stein* 19 August, 7 November, 4 and 5 December (Hume (n48) 408).

⁵³ David Lieberman, *The Province of Legislation Determined* (CUP 1989) ch 10.

⁵⁴ Conducted through a search of the final edition of Hume's *Commentaries* (n 48).

⁵⁵ Cf *Brown and MacNab*, 11 January 1793 (Hume (n 48) 169, NRS JC 3/46), where the main question was whether legislation pertaining to starch duty fraud had abrogated the common law of forgery and falsehood and *Thomas Hall*, July 20 1789 (Hume (n 48) 172, NRS JC 3/45), where the main question was whether penal legislation concerning obtaining goods by false pretences extended to Scotland.

⁵⁶ Cf *Caithness and Bissett*, 1 December 1788 (Hume (n 48) 492, NRS JC 3/45), concerning a charge of assaulting a revenue officer, and *Adam Johnstone*, 25 September 1780 and *Daniel Mackay*, 6 July 1781 (Hume (n 48) 67, NRS JC 12/16,

Chronologically, the cases discussed fall between 1767 and 1827, a period during which the sources relied upon in criminal cases were changing. By the end of the eighteenth century, the longstanding practice of founding libels on the law of God and the Civil Law, both sources drawn upon in *Thomas Gray*, was starting to wane.⁵⁷ Additionally, though natural law, which had prevailed during the late seventeenth century into the first half of the eighteenth century, remained important, new theories of judgment based on the moral sense and sentiments appeared during the course of the eighteenth century.⁵⁸ By situating the informations within the context of this shift, I show how these theories of judgment, which formed the basis of justice, provided a foundation for the common law at a time when its earlier sources were losing authority and its relationship with legislation demanded increasing attention.⁵⁹

At this time, philosophy held an important place in Scottish public life, so it is natural that these theories should be manifest within legal practice. Men seeking to improve themselves perused philosophical works⁶⁰ and metaphysical and moral

NRS JC 7/41), concerning post-office employees stealing from the mail, for which only brief notes on the libel's relevancy are recorded.

⁵⁷ Hume, *Commentaries on the Law of Scotland Respecting Trial for Crimes* (Bell & Bradfute 1800 vol 1) 264.

⁵⁸ John W Cairns, *Law, Lawyers and Humanism: Selected Essays on the History of Scots Law* (Edinburgh University Press 2015 vol 1) xix.

⁵⁹ Changes in the meaning of 'common law' also reflect these shifts. As early as the late seventeenth century, Viscount Stair argued that the distinction between statutes, common law and recent custom could be applied to Scots law, but recognized that the name was sometimes given to 'Equity, which is common to all Nations; or the Civil Roman Law, which in some sort is common to very many' (quoted in J D Ford, *Law and Opinion in Scotland During the Eighteenth Century* (Hart 2007) 427). With a note of frustration, one early nineteenth century commentator remarked that almost all writers had differing notions of common law, adding that the distinction between common law and statute was recent ('On the Sources of Scots Law, and the Rules of its Constitution' (1829) 1 *The Scots Law Chronicle* 259, 259).

⁶⁰ James A Harris (ed) *The Oxford Handbook of British Philosophy in the Eighteenth Century* (OUP 2013) 4.

philosophy was a central part of a Scottish university education.⁶¹ More specifically, it was common for law students to attend lectures delivered by philosophers at their chosen institutions⁶² and legal teaching had a distinctly jurisprudential bent.⁶³ Even advocates who did not attend university were likely to have become familiar with prominent philosophical ideas, either through their desire to cultivate a civilized mind or because, from the middle of the eighteenth century, the Faculty of Advocates regarded candidates with a broad, liberal education as increasingly desirable.⁶⁴ These factors all support the argument that the meaning of justice advanced by Scottish Enlightenment philosophers and other tenets of their thought, including the relationship between universals and particulars, and the nature of societal progress, help explain how the court's creative powers could appear both unexceptionable and justifiable.⁶⁵

3. Universals, Particulars and Societal Progress

A. The Perils of Speculation

⁶¹ George Elder Davie, *The Democratic Intellect: Scotland and her Universities in the Nineteenth Century* (Edinburgh University Press 1961) 7.

⁶² David M Walker, *The Scottish Jurists* (W Green 1985) 282, 294.

⁶³ Certainly this is true of the University of Glasgow, where Professor John Millar adopted a Smithian approach in his teaching. Smithian influences are also detectable amongst Edinburgh Law Professors of the late eighteenth century (see John W Cairns 'The Legacy of Smith's Jurisprudence in Late-Eighteenth Century Edinburgh' (forthcoming)).

⁶⁴ John W Cairns, 'The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates' in Neil MacCormick and Peter Birks (eds) *The Legal Mind: Essays for Tony Honoré* (Clarendon Press 1986) 253.

⁶⁵ The link between Scottish Enlightenment philosophy and the declaratory power has not been properly explored. Rahmatian makes a cursory comparison between the power, as he understands it, and Kames' idea of moral sense but does not develop the point, concluding that 'no influence can be suggested' (Andreas Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh University Press 2015) 309-311).

To begin understanding the declaratory power it is necessary to consider its description by Hume, for although the judgments in *Sinclair* mean it is implausible to describe Hume as having created the power, his role in documenting and championing it cannot be ignored,⁶⁶ particularly as his account is now considered authoritative.⁶⁷ On first reading, it may seem unlikely that Hume's *Commentaries* would disclose any philosophical commitments with which to contextualize his statement and endorsement of the power. In the book's introduction, Hume clearly states that he had 'no intention of bringing forward a Philosophical Treatise of Criminal Jurisprudence' or to ascertain the nature of specific offences or the application and proportion of punishments on 'abstract and universal principles'.⁶⁸ Rather, his aim was to set out the criminal law of Scotland as it stood.⁶⁹ As John Cairns has remarked, these comments suggest that the Enlightenment synthesis of Scots criminal law with moral philosophy that Hume's teacher John Millar had achieved was 'sundered by his pupil, who explicitly distinguished the provinces of the lawyer and the philosopher'.⁷⁰

⁶⁶ As Cockburn expressed it, '[w]hatever the root of this principle may have been, the first known public fruit that it bore, was in the trials of 1793 and 1794; and this was the fruit that Hume so carefully gathered and preserved...' (Cockburn 'Scottish Criminal Jurisprudence' (n 1) 217).

⁶⁷ Farmer (n 19) 26.

⁶⁸ Hume (n 3) lv, 3. Hume's uncle the philosopher David Hume shared a similar view of the effort to conjoin Scots law and abstract philosophical principles, stating in a letter to Lord Kames that '[a] man might as well think of making a fine sauce by a Mixture of Wormwood & Aloes as an agreeable Composition by joining Metaphysics & Scotch Law' (Raymond Klibansky and Ernest C Mossner (eds) *New Letters of David Hume* (Clarendon Press 1954) 52).

⁶⁹ Hume (n 3) lv.

⁷⁰ John W Cairns, 'John Millar's Lectures on Scots Criminal Law' 8(3) (1988) OJLS 364, 400.

Rather than rejecting a union of philosophy and law altogether,⁷¹ however, Hume appears merely to have been rejecting the deployment of one type of philosophical thinking. In the lectures he delivered while Professor of Scots law at the University of Edinburgh, Hume informed his students that a proper understanding of the law of any country required that close attention be paid to its specificities, adding that they ought to keep their ‘subtile reasoning’ and ‘generalising spirit’ in check, making use of it only when necessary in the circumstances.⁷² He did not dismiss the ‘generalising spirit’ outright, noting that it was an important talent for a young lawyer to develop,⁷³ nor did he deny that the search for a ‘universal jurisprudence’ could bear fruit.⁷⁴ His point was instead to caution against excessive reliance on a particular mode of thought when seeking to understand and practise law – one that prioritized subtle reasoning, generalizations, and abstract and universal principles, often at the expense of particular details.

In this regard, Hume shared some commonalities with eminent philosophers of his age, with whom he shared a bond. His uncle, the philosopher David Hume and overseer of his nephew’s education,⁷⁵ regarded justice, law and government as neither purposively designed nor rationally constructed. Instead, they emerged spontaneously over time through the course of numerous particular interactions and decisions. This was a view broadly shared by Adam Smith, a close friend of the philosopher Hume,

⁷¹ In more recent work Cairns has argued that the influence of Millar, Smith, and perhaps even Kames can be detected in Hume’s lectures (John W Cairns ‘The Legacy of Smith’s Jurisprudence in Late-Eighteenth Century Edinburgh’ (forthcoming)).

⁷² G Campbell H Paton (ed), *Baron Hume’s Lectures 1786-1822*, vol 1 (Stair Society 1939) 5.

⁷³ *ibid.*

⁷⁴ *ibid.* 6.

⁷⁵ Walker (n 62) 316.

with whom he shared many intellectual affinities,⁷⁶ and Millar,⁷⁷ with whom Baron Hume studied and lodged whilst a student at the University of Glasgow.⁷⁸ These philosophers differed from Hume in their ambitions to provide a universal jurisprudence but they shared with him a regard for particular decisions. As Millar explained to his students, ‘writers upon Jurisprudence have commonly taken up too much time in general discourses on the foundation of Natural Law and been too sparing of illustration by a detail of law cases’, an error that had led them frequently to confound ethics with jurisprudence.⁷⁹

Connected to this view of the spontaneous development of law and justice was a distrust of over-speculation, at least in respect of thinking about law prospectively and how it might develop. Hume’s warning to his students to keep their ‘subtile reasoning’ to a minimum and his caution against ‘contracting too great a fondness for speculative notions’⁸⁰ resonate with Smith’s belief that the ‘spirit of system’ was the hallmark of intellectual arrogance. Just as Smith believed that the best that could be achieved through law and policy was a piecemeal approach to remedying evils,⁸¹

⁷⁶ Donald Winch, ‘Smith, Adam (bap. 1723, d. 1790)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2007 [<http://www.oxforddnb.com/view/article/25767>].

⁷⁷ Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (CUP 1996) 163; Knud Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (CUP 1989) 7-21, chs 3 and 4. See generally Craig Smith, ‘The Scottish Enlightenment, Unintended Consequences and the Science of Man’ (2009) 7(1) *Journal of Scottish Philosophy* 9.

⁷⁸ John W Cairns, ‘Hume, David (bap. 1757, d. 1838)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2007 [<http://www.oxforddnb.com/view/article/14142>].

⁷⁹ John Millar: Course of lectures upon jurisprudence (student’s notes, 1793) Special Collections, University of Glasgow Library, MS Hamilton 117 30.

⁸⁰ Paton (n 72) 4.

⁸¹ Haakonssen, *Science of a Legislator* (n 77) 91-92.

Hume believed it was utterly impossible that a ‘uniform and complete theory’ could be applied to ‘the manifold transactions of everyday life’.⁸²

These deliberations on the relationship between universals and particulars and the limits of speculative reasoning are revelatory when it comes to understanding the declaratory power. One of the reasons why the power was perceived by Hume to be necessary and good was that it could more effectively repress an ‘evil’ in its beginnings than could legislation, which was likely to be ‘partial and defective’ in its ‘description of new offences’.⁸³ Given the perceived deficiencies of legislation produced at this time,⁸⁴ such remarks could be nothing more a slight on the Westminster parliament and indeed Hume refers to the multiple English Acts against theft to support his argument. Yet he also makes a point of contrasting the ‘testimony of experience’ with ‘the fallacious conjectures of human wisdom before the event’, concluding that the Scottish regime for repressing crimes gave no reason to envy any other part of Europe in that respect.⁸⁵ It is worth noting that this regard for experience did not necessarily imply, or require, reverence for the doctrine of precedent. To Smith, for example, while precedent was a valuable curb on judicial arbitrariness,⁸⁶ it was not the antiquity of law that lent it authority; this was supplied by its conformity with natural justice.⁸⁷ There was therefore nothing inherently contradictory about valuing the testimony of experience and supporting the declaratory power *per se*.

⁸² Paton (n 72) 4.

⁸³ Hume (n 3) lii.

⁸⁴ Farmer (n 19).

⁸⁵ Hume (n 3) lii.

⁸⁶ John W Cairns, ‘Adam Smith and the Role of the Courts in Securing Justice and Liberty’ in Robin Paul Malloy and Jerry Evensky *Adam Smith and the Philosophy of Law and Economics* (Kluwer 1994) 31.

⁸⁷ Haakonssen, *Science of a Legislator* (n 77) 132, 153. The idea of natural justice is discussed further in Section 4.

B. Societal Development and the Mutability of Law

Coexisting with this distaste for excessive innovation in developing the law,⁸⁸ there was an acute awareness of the need for law to develop in parallel with societal change and to ensure it could meet the requirements of a commercial nation. During the eighteenth century, a number of Scottish philosophers, beginning with Lord Kames and including Smith and Millar, adopted a ‘stages’ approach to explaining changes in law, presenting a narrative of progress from barbarism to civilization.⁸⁹ The declaratory power, as a mechanism for quashing novel forms of misconduct as they arose, clearly coheres with this idea of law responding to the changing circumstances and needs of the country. Of course, Hume distanced himself from attempts to construct universal accounts of laws’ history and development, and it is possible that he did so from a desire to resist the ambition to unify Scots and English law that underpinned some of his contemporaries’ efforts.⁹⁰ He was adamant, however, that there was a close association between criminal law and the ‘manners, and temper, and way of thinking of the nation’ and that its ‘general spirit...will always, in some measure, be bent and accommodated to the temper and exigencies of the times’.⁹¹

This view of the relationship between law and societal development is evidenced in the informations from two of the cases under consideration. In *Rachel*

⁸⁸ This applied to legislation too. For Smith and Millar, legislation presupposed a pre-existing idea of justice and to deviate from this too far, especially in service of political speculations, was problematic (Haakonssen *Natural Law and Moral Philosophy* (n 77) 163; Haakonssen *Science of a Legislator* (n 77) 93, 97).

⁸⁹ John W Cairns ‘Legal Theory’ in A Broadie (ed) *The Cambridge Companion to the Scottish Enlightenment* (CUP 2003) 232.

⁹⁰ E.g. Lord Kames and John Dalrymple before him (Farmer (n 19) 46; Ian Ross, ‘Quaffing the “Mixture of Wormwood & Aloes”’: A Consideration of Lord Kames’s Historical Law-Tracts’ (1967) 8(4) *Texas Studies in Literature and Language* 499, 501-502).

⁹¹ Hume (n 3) xxxix.

Wright,⁹² during a post-conviction challenge to the competency of punishing child stealing with death, the accused argued that the libel had been irrelevant: since a child was not property it could not be stolen. Although there was precedent supporting the charge,⁹³ and it was arguably too late to make the challenge, the court ordered informations on the matter, in which the prosecutor – Henry Cockburn⁹⁴ – portrayed this conduct as being of greater concern in a society that had advanced from its early rude and turbulent times. Of the three forms of non-violent injury to the person he identified – enslaving a freeman, unlawful detention and stealing an infant from its relations and natural protectors – the last was ‘more natural to a civilized and commercial state of society’. It was ‘perpetrated without violence’, ‘persisted without any visible guilt’ and could ‘only meet with its reward’ from the ‘refined humanity’ of the age.

Cockburn had also prepared the prosecution arguments in a case earlier that year in which a group of workmen were charged with unlawfully combining or striking to raise wages.⁹⁵ The criminality of such practices was unclear when the case came to court.⁹⁶ Early Acts of the Scottish parliament for regulating wages and the conduct of workmen were not used to suppress this sort of behaviour and the Westminster Anti-Combination statutes of 1799 and 1800 were regarded as inapplicable in Scotland.⁹⁷ In effect, there was nothing to suggest that combinations of

⁹² 23 November 1808 and 25 January 1809 (NRS JC 4/4).

⁹³ *Torrence and Waldie* 3 February 1752 (NRS JC 7/28) and *Margaret Irvine* 24 September 1784 (NRS JC 11/35). No debate on the relevancy is recorded in either case.

⁹⁴ Later Lord Cockburn.

⁹⁵ *James Taylor, James Thomson, William Dawson, John Russell* 8 March 1808 (NRS JC 4/4).

⁹⁶ The status of combinations of workmen at common law and according to statute was unclear in England too (see James Fitzjames Stephen, *A History of the Criminal Law of England* (first published 1833, CUP 2014 vol 3) ch 30).

⁹⁷ J L Gray, ‘The Law of Combination in Scotland’ (1928) 24 *Economica* 332.

workmen were criminal under Scots law, in the absence of some other offence such as rioting or violence.⁹⁸ One of the reasons Cockburn advanced for punishing such conduct, despite the lack of previous prosecutions, was that the practices had only emerged as a menace since Scotland had become a manufacturing nation. The same suggestion was made in another combinations case three years later,⁹⁹ in which Joshua Henry Mackenzie, the prosecuting advocate, claimed that it was ‘plain that the offence under discussion belongs to an improved period of society’ and that ‘its enormity and evil must increase with the improvement of skilled labour, and must be of deeper and more dangerous effects in proportion as labour subdivided’.

Assuming there was an acknowledged need to repress certain activities, however, an equally fundamental question remained: whether it was appropriate for a court to intervene. On this point there were mixed views. There was certainly support for judicial activism, with Kames, Smith and Millar commending the role of courts as agents of legal change,¹⁰⁰ but there were opponents too. Even where the court’s power to punish new offences was granted, this was sometimes accompanied by doubts as to its desirability.¹⁰¹ One source of criticism was a sense of embarrassment that Scotland was lagging behind other countries, particularly England, in neglecting to separate out the judicial and legislative functions of government fully. This criticism became increasingly apparent as the nineteenth century wore on, possibly in response to

⁹⁸ *ibid.* As Straka has shown, simple combinations of workmen were considered illegal, if not criminal, from the middle of the eighteenth century (W W Straka, ‘The Law of Combination in Scotland Reconsidered’ (1985) 64(2) *The Scottish Historical Review* 128).

⁹⁹ Francis Orr, *Matthew Chambers, John McDonald, George Emory* 11 January 1811 (NRS JC 4/5).

¹⁰⁰ Cairns, ‘Legal Theory’ (n 89) 232-234.

¹⁰¹ E.g. in *Rachel Wright* defence counsel (John Reid) suggested that ‘perhaps it would have been safer to have followed the example of the sister kingdom in withholding from judges every kind of arbitrary or discretionary power’.

reproof of judge-made law South of the border.¹⁰² Yet according to earlier works of Smith and Millar, the emergence of a legislative power as a complement to, and check on, judicial powers was the mark of civilized society.¹⁰³

The need for separate legislative and judicial powers is therefore only part of the explanation. The more important consideration was how the division of labour between courts and the legislature was conceived, and for a number of Scottish Enlightenment thinkers the division hinged on the distinction between justice and expediency. This qualitative distinction, which rested on the nature of the activity under consideration rather than the functional distinction between lawmaking and law-interpreting, provided the key to determining whether the court or legislature was the more appropriate body for imposing sanctions, and it is this distinction that helps explain the existence and contours of the declaratory power.

4. Justice, Expediency and Moral Evaluation

A. The Distinction in Theory

In the view of the Scottish philosophers under consideration, a theory of justice was part of a broader theory about the nature of moral evaluation. Moral evaluation was for some, including Smith and Millar, rooted in the moral sentiments – the feelings of approval or disapproval that arose when faced with an action.¹⁰⁴ Dugald Stewart, on

¹⁰² See n 16 and Cockburn ‘Scottish Criminal Jurisprudence’ (n 1) 216.

¹⁰³ Haakonssen *Science of a Legislator* (n 77) 132, 153, 170; Haakonssen *Natural Law and Moral Philosophy* (n 77) 162.

¹⁰⁴ Amy M Schmitter, ‘Passions, Affections, Sentiments: Taxonomy and Terminology’ in Harris (n 60) 197. Millar told his pupils that moral good and evil were ultimately distinguished by certain feelings or sentiments, citing Hume and mentioning Smith’s system of sympathy as the means by which we establish the

the other hand, followed his mentor Thomas Reid in holding that man possessed an inherent moral faculty – a complex of reason and feeling – that allowed him to perceive the real, immutable moral quality of different actions.¹⁰⁵ In spite of this important difference,¹⁰⁶ these theories shared a couple of common features: they were based on the idea of corresponding judgement¹⁰⁷ and they regarded moral evaluation as instantaneous. According to these philosophers, this latter feature distinguished assessments of morality from assessments of utility, for while the moral worth of an act struck the senses immediately, its remote tendency, its utility, was a matter for philosophical speculation. If anything, an action's utility merely served to strengthen the initial feelings of approval or disapproval.¹⁰⁸ As with the other virtues, justice was based on the exercise of moral judgment, but it was distinct in its sharpness and clarity. This precision made justice amendable to enforcement¹⁰⁹ and, more specifically, made breaches of justice appropriate targets for punishment.¹¹⁰

In light of this association between justice and punishment, it is essential to recall that the declaratory power grants the High Court the ability to *punish* conduct.

agreeable standard of human nature (John Millar: Course of lectures upon jurisprudence (student's notes, 1793) Special Collections, University of Glasgow Library, MS Hamilton 117 16, 20, 24).

¹⁰⁵ Haakonssen *Natural Law and Moral Philosophy* (n 77) 227-229.

¹⁰⁶ Which I return to in Section 5.

¹⁰⁷ Whether through the coincidence of sympathy culminating in an impartial spectator or a uniformly held moral sense, this commonly held point of view is crucial.

¹⁰⁸ Haakonssen *Science of a Legislator* (n 77) 72; John Millar: Course of lectures upon jurisprudence (student's notes, 1793) Special Collections, University of Glasgow Library, MS Hamilton 117 21; Dugald Stewart, *Outlines of Moral Philosophy: For the use of students in the University of Edinburgh* (William Creech 1793) 231.

¹⁰⁹ Haakonssen *Science of a Legislator* (n 77) 37, 86; MS Hamilton 117, John Millar: Course of lectures upon jurisprudence [Student's notes.] (1793) 27; William Hamilton (ed), *The Collected Works of Dugald Stewart*, vol 7 (Thomas Constable & Co 1855) 255.

¹¹⁰ Haakonssen *Science of a Legislator* (n 77) ch 5; Haakonssen *Natural Law and Moral Philosophy* (n 77) 161.

Its exercise is thus intimately connected with the realms of justice and the process of moral evaluation.¹¹¹ Hence, for Smith punishment was based on sympathy, and utility could only provide a supplementary justification for punishment that strengthened the resolve to punish in controversial cases.¹¹² For Millar, too, punishment for crimes was warranted on the basis of resentment and reciprocal indignation but also to preserve the peace of society, a distinctly utilitarian goal.¹¹³ Even Baron Hume, who avoided offering a theory of punishment seems to endorse a similar perspective when he states that laws should be directed at ‘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 public peace’.¹¹⁴ This was particularly true of the criminal law; whereas in the majority of civil cases ‘our moral feelings are altogether indifferent’ they ‘never can be on a question of whether a particular action or course of conduct is or is not a fit object of punishment’.¹¹⁵ In this, Hume appears implicitly to be relying on the same combination of abhorrence, based on moral feeling, and harm to the public peace, which animated Millar and Smith’s accounts of punishment, which had also underpinned the earlier account of punishment offered by Lord Kames.¹¹⁶

¹¹¹ This point is easily overlooked when the power is described as the power to ‘create new crimes’ (Rahmatian (n 65) 309). Where the doctrine of precedent is strictly observed, the power renders subsequent incidences of similar conduct punishable and in this sense can be considered a form of *de facto* criminalization, but the distinction between punishment, being liable to punishment, and other forms of legal intervention should not be forgotten.

¹¹² Haakonssen *Science of a Legislator* (n 77) 117-118.

¹¹³ John Millar: *Lectures on the Law of Scotland* (set of lecture notes taken by William Rae, 1790) Special Collections, University of Glasgow Library, MS Gen. 181/3 451.

¹¹⁴ Hume (n 3) xxxix.

¹¹⁵ Hume (n 3) xl.

¹¹⁶ For Kames, the immorality of an act and its tendency to undermine the peace of society were key to enforcing its prohibition (Michael Lobban, ‘The Ambition of

For those writers who discussed the issue, the power to punish injustices was located with the judiciary. Smith contrasted the work of courts, which dealt with specific cases of injustice, with that of the legislature, who were not so confined. Free of these constraints, the legislature could aim at the other great objects of law, namely police, revenue and arms.¹¹⁷ The first of these, police laws, aimed to enhance public utility¹¹⁸ and could therefore prescribe punishment for conduct that threatened the general interests of society although it did not immediately or directly hurt any individual, i.e. conduct that was not criminal according to natural justice.¹¹⁹ Since these statutes were not restricted to considerations of justice, their creation would often involve speculation in the abstract, a very different process than gauging justice through spectatorial sympathy in particular cases.¹²⁰ Following Smith, Millar advanced a similar view, according to which the rules of justice were to be determined by judges and the rules of police were to be established by the legislature, who could extend the law as its utility became increasingly apparent.¹²¹

To summarize, in punishing conduct that breached the rules of justice, utility had a role to play – it was important to prevent social disorder – but its pursuit would never be a goal in itself. The maximization of utility was always combined with a concern for justice and was, at least for Smith, Millar and Stewart, merely a

Lord Kames's Equity' in Andrew Lewis and Michael Lobban (eds) *Law and History* (OUP 2004) 112).

¹¹⁷ Haakonssen *Science of a Legislator* (n 77) 96 (the law of nations was later added to these four categories).

¹¹⁸ Haakonssen *Science of a Legislator* (n 77) 97, 120; Haakonssen *Natural Law and Moral Philosophy* (n 77) 252.

¹¹⁹ Haakonssen *Science of a Legislator* (n 77) 121-122.

¹²⁰ *ibid* 152.

¹²¹ John Millar: *Course of lectures upon jurisprudence* (student's notes, 1793) Special Collections, University of Glasgow Library, MS Hamilton 117 27; Haakonssen *Natural Law and Moral Philosophy* (n 77) 162. Kames also believed that courts were entitled to tackle injustice and that acting for the good of society was the province of the legislature (Lobban (n 116) 119).

supplementary consideration. When the sole aim of punishment was utility this was a matter for the legislature, and even then laws were only merited when necessary for the continued viability of society.¹²² According to these theories, if conduct could comfortably be described as an infringement of justice – as deplorable according to the precise, easily discernible sentiments of the community, or dictates of the moral sense – there would be little controversy in the court exercising its power to punish. But the farther conduct strayed from this paradigm, and the more it appeared punishable on the basis of utility or expediency, the more problematic would be the court’s use of its power.¹²³ This distinction can be seen at work in the cases under consideration here, in which prosecution and defence counsel tried to frame the conduct of the charge as falling on one side of the divide or the other, and where criticism of the power was most emphatic when it was considered to violate this distinction.

B. The Distinction in Practice

The first case in which the distinction between justice and utility was operationally significant is *Macintosh v Dempster*.¹²⁴ The pannel, a Member of Parliament, was accused of bribing local officials to further his prospects, and though there were various statutes for punishing election-related corruption, the libel against him was

¹²² Haakonssen *Science of a Legislator* (n 77) 122.

¹²³ Bentham’s proposals to found morals and legislation on utility and his rejection of the principle of sympathy (indeed utilitarianism more broadly) were received poorly in the *Edinburgh Review*. This was for various reasons, from their dismissal of sentiments and the testimony of good conscience to their banality see e.g. ‘Bentham, *Traité sur les Principes de Legislation Civile et Penale*’ (1804) *Edinburgh Review* 1; T B Macauley ‘Mill’s *Essay on Government*’ (1829) 49 *Edinburgh Review* 159; J Sortain, ‘Bentham’s *Science of Morality*’ (1835) 61 *Edinburgh Review* 365.

¹²⁴ 26 November 1767 (NRS JC 3/35).

founded, very generally, on the ‘Law of the Realm’. The prosecutor, Alexander Wight, maintained that this broad libel encompassed the relevant legislation, but counsel for the accused, Henry Dundas,¹²⁵ maintained it was essential to specify a particular statute; while vagueness of this kind might have been tolerable in the past it was, in his view, now unacceptable. Further reflecting shifting notions of authority, he argued that Roman law was no longer an appropriate source to rely on in criminal cases.

The advocates were similarly divided on whether the conduct was a crime at common law – a point that was significant since the statutes were not clearly applicable. Relying on an argument similar to that made in *Thomas Gray*, Wight contended that crimes without precedent might be punished at common law, since this was how various now-established offences had first been proscribed. Dundas rejected this view, arguing that in more advanced times it was incumbent on the legislature to intervene. Importantly, however, this was not because the courts were incapable of punishing new offences but because whereas early common law crimes had been ‘clear violations of the Law of Nature, or of moral rectitude’, more recent prohibitions, especially those already targeted by the legislature, were ‘political Evil[s]’.

Although it was inappropriate for judges to ‘create political offences’ ‘merely from their own notions of Expediency’, this left open the possibility that they might, without precedent, punish conduct that was sufficiently iniquitous. This explains why it was important for Dundas to refute the prosecutor’s assertion that electoral bribery

¹²⁵ Educated at the University of Edinburgh before being called to the Bar in 1763, Dundas was socially and politically highly influential in Enlightenment Scotland (Michael Fry, ‘Dundas, Henry, first Viscount Melville (1742–1811)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2009 [<http://www.oxforddnb.com/view/article/8250>]).

was a crime at common law on account of its ‘Immorality and evil Tendency’. He did so by challenging the alleged ‘Turpitude and Immorality’ of the conduct, ‘independent of that Inexpediency which has weighed down...Legislature to restrain it by such a variety of statutes’. According to Dundas, unlike bribing judges, which was a ‘Creature of Injustice’, electoral bribery did not violate morality or the law of nature and thus required ‘positive Law to make it criminal...upon reasons of Expediency’. In an attempt to comprehensively dispel the suggestion that the court might justifiably regard the conduct to be criminal, Dundas argued that even if electoral bribery could be considered immoral on account of its ‘Expediency and destructive Tendency’, some immoralities were purely a matter of conscience. This contention was in keeping the distinction between law and ethics that was observed by the Enlightenment philosophers.¹²⁶

Two decades later, similar questions arose in *James Stein*,¹²⁷ where the accused was charged with bribing a revenue officer. Again, there were statutes for punishing various offences against the revenue, but none clearly applied. As such, the prosecutor, Ilay Campbell, tried to argue that all bribery was criminal at common law, asserting that:

Common law is 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 one employed in offices of public trust...is a

¹²⁶ The libel was held relevant but too factually imprecise to be put to an assize. From Maclaurin’s self-confessedly ‘very imperfect’ notes, it appears the judges merely stated that the conduct was criminal at common law without giving reasons (John Maclaurin, *Arguments and decisions in remarkable cases, before the High Court of Justiciary, and other supreme courts in Scotland* (J Bell and E & C Dilly 1774) 425 ff).

¹²⁷ 2 October and 5 December 1786 (NRS JC 3/44).

crime of an heinous nature, and which therefore at common law must be the subject of prosecution.

Bribery, he added, was ‘evidently a moral wrong’ and could be contrasted with statutory offences such as usury or smuggling. Whereas it was doubtful whether one could ‘discover from the light of reason alone’ any impropriety in charging interest on money or importing spirits in contravention of revenue statutes, ‘every man’s Conscience must teach him that Bribing an officer of the Public...is an act of inherent turpitude, which by the Common principles of right and wrong must be punishable everywhere as a Crime’. The clear and universally accessible wrongfulness of this conduct meant that it could be punished without ‘express law or Statute...nor any series of judges [sic] cases’ and the additional injurious consequences of the behaviour merely strengthened the case for bringing the prosecution.

At the time these informations were prepared, Campbell had links with the University of Glasgow: he was made Doctor of Laws in 1784 and later became the University’s rector.¹²⁸ It was a period in which Smithian jurisprudence was thriving in the University¹²⁹ before which Reid had spent several years occupying the Chair of Moral Philosophy,¹³⁰ and signs of both men’s schools of thought are evident in Campbell’s arguments.¹³¹ His claims about the clarity, immediacy and universality of

¹²⁸ From 1799-1801 (Michael Fry, ‘Campbell, Sir Ilay, of Succoth, first baronet (1734–1823)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/4504>]).

¹²⁹ Millar, who was Regius Professor of Civil Law from 1761 to 1800, was heavily influenced by Smith in his lectures and writing (‘Craig’s *Life of Millar*’ (1806) 9 *Edinburgh Review* 83, 84).

¹³⁰ From 1764-1780 (Paul Wood, ‘Reid, Thomas (1710–1796)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2006 [<http://www.oxforddnb.com/view/article/23342>]).

¹³¹ The informations prepared by Campbell in the earlier case of *HM Adv v Calum MacGregor alias John Grant* 30 July and 3 August 1773 (NRS JC 3/38) hark back to

the principles of right and wrong replicate Reid's moral realism¹³² and their capacity to be known through conscience and the use of reason tally with Reid's beliefs about man's active powers.¹³³ As for the Smithian dimension, this comes out in the contrast between statutory offences, which are said to lack intrinsic iniquity, and the purported common law offence at hand.

Smith's influence was even clearer in the response of the defence advocate. Challenging the court's authority to punish, Henry Erskine, who was educated at the University of Glasgow while Reid and Millar occupied their respective chairs,¹³⁴ relied on a taxonomy of crimes that reflects very clearly Smith's account of justice, punishment and police powers. Accordingly, the first category of crime comprised those 'transgressions against the State or the life, limb or property of our neighbours' which, in addition to 'their own immorality' 'strike so strongly at the existence of Society that they are necessarily punished in the rudest States, even before the idea of any written law...has been recognised'. According to Erskine, as society improved, new crimes, also full of turpitude could 'excite sufficient resentment or threaten so much danger, as to be the object of punishment...by the Common consent of the Society without any special enactment'.

This connotes the idea of crime as an infraction against natural justice – the combination of immorality and danger to society described by Smith and Millar. The

earlier conceptions of natural law, as set out by writers on the law of Nature and Nations.

¹³² Cockburn employed similar arguments in *Rachel Wright* to determine not only the criminality of the conduct but also its appropriate label. He described the offence as 'notoriously and universally known by the name of theft' and the conduct as appearing 'to most people, the first time they perceive it, wonderfully like theft'.

¹³³ See Sabine Roeser, 'Reid and Moral Emotions' (2009) 7(2) *The Journal of Scottish Philosophy* 177.

¹³⁴ He commenced his Glasgow studies in 1764, before attending the University of Edinburgh in 1766, where he was taught by Adam Ferguson (Michael Fry, 'Erskine, Henry (1746-1817)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/8858>]).

second category of crime was '*leviora mala in se*'.¹³⁵ Offences in this category were not punishable at common law but could be the 'object[s] of Statutory correction' in virtue of the 'bad consequences that follow from them to Society'. In other words, when the immorality of conduct was small but its impact on society was negative, legislative repression was more appropriate than common law punishment. A third category of crime included acts that were *mala in se* but were not punished by common law or statute because of their 'small degree of criminality' or 'difficulty in making them the subject of judicial discussion'. These were 'offences against the moral sense' but punishable only by 'the operation of conscience'. This category gestures towards the aforementioned distinction between law and ethics, an interpretation supported by the examples offered of ingratitude, lying and dissoluteness of manners. The final species of crime was acts 'indifferent in themselves' that were insufficiently depraved to be the 'just objects of punishment', but which could be 'made punishable' by the 'force of Statute' in order to 'attain or enforce some end of Government, some regulation of police, or some object of Revenue'. The correlation between this last category and Smith's division of laws is obvious and the distinction between 'just punishment' and acts being 'made punishable' is significant. Noting the case of *McIvor v Dempster*, Erskine accepted that bribery was a crime at common law, but he disputed that the conduct labelled fell within its remit, instead characterizing it as belonging to the third or fourth category of offences.¹³⁶

Turning back to the cases involving combinations of workmen, these indicate reliance on a shared set of ideas about justice and utility, used in different ways with

¹³⁵ Of lighter evil in itself.

¹³⁶ The court found the indictment relevant but in the absence of recorded reasoning it is not clear on what ground.

different outcomes. In the first of these cases,¹³⁷ Cockburn argued for the prosecution that any injury done to the public intentionally was a crime at common law. This was to push the boundaries of the court's powers beyond those envisaged by the Enlightenment philosophers, for the requirement of wrongfulness or injustice is absent. Indeed, Cockburn went so far as to claim that the law was intended to promote the good of the people 'solely under the operation of the same principle of utility, which changes, according to circumstances, our views of the expediency or hurtfulness, and consequently the innocence or criminality, of actions'. He was careful to point out that a suspicion of prejudice to the community was insufficient to warrant the court's punishment, this being something for politicians to detect and the legislature to denounce, but he suggested that the court's jurisdiction should not be limited to simple cases of moral enormity. Unless it extended to more complex scenarios, crimes 'perhaps equally profligate, and certainly a thousand times more ruinous to society must escape from punishment, under the mere protection of their intricacy, or the apparent remoteness of their consequences'. Put differently, Cockburn was attempting to stretch the court's jurisdiction beyond the realm of justice and into the realm of pure utility.

This attempt was unsuccessful, though the judges recognized the power of the High Court to take cognizance of new crimes. According to the majority of the court, the conduct did not 'infer that degree of moral turpitude and depravity, or malignity, it [sic] renders that relevant for the jurisdiction of this court at common law'.¹³⁸

¹³⁷ *James Taylor, James Thomson, William Dawson, John Russell* 8 March 1808 (NRS JC 4/4).

¹³⁸ Lord Craig (Judgments recounted in Hutcheson's *Treatise on the Offices of Justice of Peace, etc, in Scotland*, as excerpted in *First Report from Select Committee on Artizans and Machinery* (1824), Appendix A). See also Hume's account of this case, which states that the majority held that while such combinations could be the proper subject of civil damages or redress, they did not 'imply that degree of baseness or

Three years later, Joshua Henry Mackenzie,¹³⁹ counsel for the prosecution in the second combinations case to come before the High Court,¹⁴⁰ adopted a different approach. He argued that a crime was an act that was mischievous to society, but added that the mischief must not be very ‘remote or recondite’ – it should be such that ‘ordinary men’, if ‘anxious to avoid injury’ to others, could abstain from doing so. Importantly, he equated this idea of damage to society to a moral wrong. In his words, ‘if an action be mischievous and manifestly mischievous to society, it must be immoral, unless moral sentiment be very grievously perverted, which in this country will not be pretended’. A further qualification was that, to be a crime at common law, the act must be capable of being punished, as distinct from the ‘*imperfect* obligations or duties’ that were matters of morality but not law.

In making these arguments Mackenzie portrayed the workmen’s actions as fitting squarely within the parameters of the court’s powers, according to prevailing philosophical opinion. In response, Cockburn, who was appearing for the defence this time, tried to argue that combinations of workmen did not fit this mould. He agreed that the criminal law was based on the ‘dictates of conscience and simple reason’ and stated that, where extension was necessary, this would never become ‘so deep, complicated or extensive that the voice of nature will not always be heard, approving of the use which has been made of her original suggestions’. Conduct that was fit to be declared ‘undoubtedly criminal’ was that which ‘the head and hearts of any

depravity...which were essential...to the notion of an indictable crime’ (Hume (n 48) 494).

¹³⁹ Eldest son of the lawyer and celebrated novelist Henry Mackenzie, author of *The Man of Feeling*, whose work has suggested links with Scottish sentimentalist philosophy (Harold William Thompson, *A Scottish Man of Feeling* (OUP 1931) 180, chs 1 and 4).

¹⁴⁰ *Francis Orr, Matthew Chambers, John McDonald, George Emory* 11 January 1811 (NRS JC 4/5).

ordinary man would...after a very little reflection, from the mere impulse of common sense and feeling, pronounce to be criminal’.

It is significant that Cockburn was educated by, and a great admirer of, Dugald Stewart, for his references to reason, conscience and the impulse of common sense chime with Stewart’s teachings, which followed those of Reid.¹⁴¹ Drawing on these philosophical notions of morality and justice, he contrasted the case against workmen’s combinations as being founded on political speculation. Unfortunately, only the outcome and not the substance of the judges’ reasoning is recorded but this indicates that they were more favourably disposed to the prosecution, holding that relevant material might be selected to infer criminal punishment but that the charges lacked the clearness, precision and simplicity that was necessary for criminal accusation and jury trial.¹⁴²

Eventually, by a decision in 1813, the libel of mere combination was held to be a crime.¹⁴³ The libel was similar to that in *Taylor* but limited information exists to explain why it was held relevant.¹⁴⁴ One suggestion is that Lords Craig and Cullen, who had held the charge in *Taylor* to be irrelevant, had by this time quit the Bench.¹⁴⁵ Broader economic and political pressures, including industrial unrest, are also thought

¹⁴¹ Henry Cockburn, *Memorials of His Time* (D Appleton & Company 1856) 26-31. Cockburn expressed similar sentiments about the admissibility of evidence, arguing that some rules of proof were arbitrary and relative but others ‘depend upon more fixed and universal dictates of reason’. The merit of these rules would depend on how closely they ‘coincide with, or are repugnant to, the opinions of ordinary men, in ordinary affairs’ (H Cockburn, ‘Jury Trial in Scotland, Improved, by being Extended: A Letter to the Lord Chancellor’ (1833) 57 *Edinburgh Review* 96).

¹⁴² As Hume commented, ‘the terms of this interlocutor were such as gave reason to believe, that, upon a libel not subject to the same exceptions, the Bench might be disposed to depart from the precedent in the case of Taylor’ (Hume (n 48) 495).

¹⁴³ *William Mackimmie & others*, 12 and 13 March 1813 (Hume (n 48) 495)). One explanation for this change was that Lords Craig and Cullen, who had held the charge in *Taylor* to be irrelevant, had quit the Bench (Gray (n 69) 342).

¹⁴⁴ No objections to the relevancy were made and no informations ordered (NRS JC 8/9). There is no record of the judges’ reasoning.

¹⁴⁵ Gray (n 69) 342.

to have played a role.¹⁴⁶ The decision was met with some criticism,¹⁴⁷ and when the parameters of the crime were called into question a few years later,¹⁴⁸ the defence advocate, Cockburn, continued to refer to it as an ‘artificial offence’. Warning the Court not to expand its limits, he cautioned that ‘it is not one of those simple crimes which cannot be committed without exciting in the breast, both of the criminal and the spectator, an instinctive & decided consciousness of its guilt’. This was conduct whose effects were extremely difficult to discern and predict, whose prohibition in previous years had set the court ‘afloat...in a sea of mere speculation’. It would be ‘infinitely better’, in his opinion, if ‘our criminal law books, instead of being loaded with reasonings which belong to the legislature alone had been allowed to retain some of their obvious morality and primitive plainness’. The prosecutor, Alexander Maconochie, condemned the impertinence of these comments, which insinuated that the judges’ previous opinions were ‘destitute of morality and simplicity’. Maintaining that the case at hand (which involved the mere threat to strike) involved no extension of the law, he invited their Lordships to sanction the judgment of their predecessors, which he described as ‘neither unjust nor inexpedient’.¹⁴⁹

Just six years later, by a statute of 1824, mere combination ceased to be a crime.¹⁵⁰ The ethos behind the legislation has been described as Benthamite

¹⁴⁶ *ibid* 348; Straka (n 98).

¹⁴⁷ E.g. J R McCulloch ‘Combination Laws’ (1824) 39 *Edinburgh Review* 315, which criticized the laws against voluntary combinations on grounds ‘both of justice and utility’, and questioned the ability of a court to determine the expediency of delicate principles of commercial policy (331, 336-340).

¹⁴⁸ *Wilson & Banks* 10 January 1818 (NRS JC 4/9).

¹⁴⁹ The indictment was held relevant but the prosecutor judged it to be against the public interest to continue the trial (First Report from Select Committee on Artizans and Machinery (1824), Appendix A1 499).

¹⁵⁰ Gray (n 69) 345-346. See also John V Orth, ‘English Combination Acts of the Eighteenth Century’ (1987) 5 *Law and History Review* 175. A number of acts relating to combinations of workmen amounted to criminal offences, however, and the

individualism,¹⁵¹ and concerns over the law's efficacy and its tendency to exacerbate disagreements between workmen and workers also go towards explaining its repeal.¹⁵² In practice, the charge of simple combination had scarcely been used in Scotland,¹⁵³ but the abrupt change was used by Cockburn to demonstrate the problems of judicial lawmaking. In an embarrassingly short period of time practices the courts had deemed dangerous had been determined by the legislature to be beneficial.¹⁵⁴ Cockburn referred to this unsuccessful foray into the domain of pure expediency in subsequent cases, counselling the court to beware of 'meddling with questions of expediency' and reminding them to 'employ those judicial lights which disclose laws that already exist' lest they stray into the realms of speculation, usurping the role of the legislature.¹⁵⁵

5. Conclusion

Cockburn's castigation effectively conflates two things: the power of the court to speculate on matters of what we might now call public policy and the power of the court to take cognizance of new crimes, and from this point on these critiques have frequently been run together. This is unsurprising, given that the frequently cited case

common law of conspiracy with regard to trade union action survived (see Stephen (n 96) 208-222).

¹⁵¹ A V Dicey, 'The Combination Laws as Illustrating the Relation Between Law and Opinion in England during the Nineteenth-Century' (1904) 17(8) Harv LR 511, 519-522.

¹⁵² See 'Resolutions of the Select Committee of the House of Commons on the Combination Laws, 21 May 1824 (Hansard's *Parliamentary Debates*, New Series, XI, 811-813)' in A Aspinall et al (eds) *English Historical Documents 1783-1832* (Routledge 1959) 865.

¹⁵³ First Report from Select Committee on Artizans and Machinery (1824) 487.

¹⁵⁴ Cockburn 'Scottish Criminal Jurisprudence' (n 1) 219.

¹⁵⁵ *James Crow* 4 June 1827 (NRS JC 4/17).

of *Bernard Greenhuff*, which confirmed the existence of the declaratory power,¹⁵⁶ is equally renowned for the emphatic dissent of Lord Cockburn. Though Cockburn accepted that the court might deal with old crimes committed in a new way and conduct falling within the spirit of a previous decision or established general principle, he denied that the court could create offences on the basis of implied wickedness and hurtfulness.¹⁵⁷

It is possible that Cockburn's unsuccessful appearances in the combination cases contributed towards his dissent, but it is clear that he was not alone in harbouring, or at least recognizing, discomfort over use of the declaratory power. For example, Lord Meadowbank, wrote that 'whatever individual opinions may be entertained as to the propriety' of the Court's power, the law should not be altered after being so 'deliberately settled'.¹⁵⁸ Similarly, Lord Moncreiff was unwilling to rely much on the combination cases, on account of the judges' differing opinions and the speed with which the law had been superseded, but he accepted that they affirmed the Court's power.¹⁵⁹ For his part, Lord Mackenzie confessed to feeling doubts about the case at hand but stated that he could not 'discard the power', adding that it was 'too late for me now to entertain any doubts, that we must sustain a jurisdiction of this nature, as inherent in this Court'.¹⁶⁰

In some ways it is easy to accept this shift of opinion as a natural development. The nineteenth century marked a sharp rise in the criminal law's regulatory function, and increased moral pluralism and cultural diversity threw doubt on the notion that a shared perception of wrongfulness could exist, even in cases of

¹⁵⁶ The Court held that it was an offence to open and keep a common gaming house, despite the absence of applicable statute or precedent.

¹⁵⁷ *Greenhuff* (n 34) 274.

¹⁵⁸ *ibid* 263-264.

¹⁵⁹ *ibid* 265.

¹⁶⁰ *ibid* 268.

alleged injustice.¹⁶¹ Indeed, at a more general level, the process by which the declaratory power lost favour reflects the decline of foundational thinking. In the modern age, widespread socio-historical contextualization of law has worked to demolish its purported atemporal foundations and alleged autonomy, leading to the tendency to see law as wholly reducible to (often illegitimate) politics. As Parker has argued, ‘the emergence of this particular law-politics problem...transcends the American politico-legal context, going more generally to philosophical concerns about the status of foundational thinking after modernism’. In a world that appears “‘ever provisional””,¹⁶² politics takes the place of metaphysics.

If law is regarded as nothing more than politics it is difficult to maintain the divide between laws of justice and other forms of legal regulation that underpinned the early uses of the declaratory power. Relatedly, the claim that only the latter involves the kind of speculation¹⁶³ that courts are ill-suited to perform is more difficult to sustain. If acts of injustice and administrative crimes are both regarded as politically contestable forms of offending then contemporary criticisms of the power can easily appear natural and justified. Yet while these criticisms demonstrate that the type of thinking that prevailed during the emergence of the declaratory power no longer enjoys the same prominence, they do not establish that either way of thinking is inherently superior or meritorious. Even acknowledging the difficulty, though not

¹⁶¹ Nicola Lacey ‘What Constitutes Criminal Law’ in R A Duff et al, *The Constitution of Criminal Law* (OUP 2013) 14.

¹⁶² Kunal M Parker, ‘Law In and As History: The Common Law in the American Polity, 1790-1900’ (2011) 1 *University of California Irvine Law Review* 587, 607-608, quoting Benjamin Barber.

¹⁶³ In either sense that the term was used pejoratively, i.e. to refer to abstract, *a priori* reasoning or to refer to empirical reasoning as to the long term consequences – the utility or disutility – of policies or modes of conduct.

impossibility,¹⁶⁴ of sustaining foundational thinking in the modern age, there are alternative ways of rendering the declaratory power, and the flexibility of Scots criminal law more broadly, comprehensible and potentially justifiable.

The first of these takes account of one important difference between some of the more recent declaratory-style cases and the early discussions of the declaratory power outlined above. In contrast to the early writers and advocates, who readily appealed to a sense of justice that was beyond posited law, the general principles relied upon in more recent cases, which follow Cockburn's distinction, come from *within* the legal system. These can be very general, ranging from 'wickedness' and the 'deceptive invasion of the rights of others',¹⁶⁵ to 'deceit that injures and violates the rights of another'.¹⁶⁶ In a similar vein, the court has held that acts that cause 'real injury' are criminal 'whatever their nature may be'.¹⁶⁷

This reliance on broad, general principles is seen as entirely unsuitable by some. As Christie expresses it, '[n]o Scottish court would now decide that particular conduct should be criminal on "general principles" or because that conduct was deemed wrong or hurtful'. Although 'it remains legitimately possible for the High

¹⁶⁴ As Helmholz has argued, although natural law is no longer dominant a distinguished minority of scholars promote its continued recognition (R H Helmholz, *Natural Law in Court* (Harvard University Press 2015).

¹⁶⁵ Qualities that falsely swearing an oath was said to share with perjury. Lord Cockburn described it as involving the same 'obstruction and contamination of legal proceedings, by the solemn asseveration of falsehood' (*John Barr* (1839) 2 Swin 282, 317). According to Lord Mackenzie, it was an offence 'of the same nature' as perjury, 'containing the same falsehood...injury to man, and...contempt for Almighty God'. The 'same principle of law' could be used to punish the offence, therefore (311).

¹⁶⁶ *William Fraser* (1847) Ark 280, 312 (Lord Cockburn). The majority of the court held that the conduct alleged – impersonating a woman's husband in order to have sex with her – was not rape but that it merited censure, being described by Lord Medwyn as 'sufficiently odious' and of 'extreme atrocity' (307).

¹⁶⁷ *Khaliq v HM Adv* 1984 JC 23, 32 (Lord Justice General Emslie). The accused was charged with selling solvents (glue) and containers (crisp packets, tins and bags) to children for the alleged purpose, and in the knowledge, that the children would inhale the solvents.

Court of Justiciary to discover common law crimes of whose presence even the general legal community had not been especially aware', this is limited to cases 'where such crimes have their source in prior authority'.¹⁶⁸ These comments suggest two things: that general principles do not constitute prior authority and that they are unsuitable fodder for adjudication. To that extent, even though these general principles are drawn from within the legal system, their acceptance as a valid source of law, that judges might rely upon, demands that law be considered to encompass more than statutes and decisions of previous cases.

As Beever's own examination of general principles has shown, there are good reasons to subscribe to such a view, not least that it helps make sense of many instances of common law development.¹⁶⁹ Furthermore, reliance on general principles accords with the theories of adjudication advocated by leading contemporary theorists. Allan, for example, has developed a modified version of Dworkin's account of legal interpretation, according to which judges ought to adhere faithfully to the first principles of the legal order in question – its larger scheme of just governance.¹⁷⁰ MacCormick, too, placed considerable importance on general principles, which were internal to the legal system, in his account of legitimate judicial lawmaking. He saw them as a source from which to develop, and extend, the law in an 'interstitial'

¹⁶⁸ M G A Christie, 'Criminal Law' (n 4) para 15.

¹⁶⁹ Beever (n 14).

¹⁷⁰ Allan suggests that the protection of fundamental rights is a condition of legitimate political authority in a liberal-democratic order (T R S Allan, 'Interpretation, Injustice and Integrity' (2016) 36(1) OJLS 58).

manner.¹⁷¹ On these views, declaratory-style cases that purport to draw on general, legal principles may be considered entirely justifiable.¹⁷²

The second way the declaratory power can make sense in a post-foundational age relies on another theme that has continued from the early cases into the more recent ones: the need to alter the common law to respond to changes in society. For example, in response to a disputed charge of unauthorized taking and temporary retention of another's property, which related to an alleged incident of joyriding, Lord Justice Clerk Acheson remarked that he was 'satisfied that our common law is not so powerless as to be unable to afford a remedy', adding that '[i]t would be very unfortunate if that [such conduct being permissible] were the state of the law'.¹⁷³ Eight years later, the court used its 'inherent power' to reverse an earlier decision,¹⁷⁴ which applied vicennial prescription to criminal prosecutions, in order to meet the requirements of justice. According to the Lord Justice Clerk (Aitchison), the changed spirit of the times was one of the reasons the rule should be abrogated.¹⁷⁵ To allow a notorious crime that was committed twenty years prior 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'.¹⁷⁶

¹⁷¹ When there are persuasive evaluative (including consequentialist) reasons to favour the law's development and no countervailing reasons shown (Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) ch 7).

¹⁷² It is not clear that the Scottish cases would in fact satisfy either of these theories of legitimate judicial lawmaking, either because the general principles are not sufficiently precise or the degree of uncertainty undermines some fundamental right – fair warning, for example.

¹⁷³ *Strathern v Seaforth* 1926 JC 100, 102.

¹⁷⁴ *HM Adv v Calum MacGregor* (see n 131).

¹⁷⁵ *Sugden v HM Adv* 1934 JC 103, 110. Two of the other judges refused to recognize the earlier court's decision because it lacked precedent (Lord Anderson (124) and Lord Blackburn (125)).

¹⁷⁶ *Ibid* 110.

These assertions posit a strong link between the community, its sentiments and the law – a conception of judicial lawmaking that draws support from beyond posited law but does not rely on atemporal or universal claims to authority. Similarly, the notion that non-consensual sex with a sleeping woman might go unpunished was described by the court as ‘too repugnant, not only to our moral nature, but to the plainest principles of our criminal jurisprudence, to be for a moment entertained’.¹⁷⁷ Perhaps most (in)famously, in 1989 the High Court determined that the status of women had changed such that it was no longer appropriate that there should exist a marital immunity, assuming one existed, from prosecution for rape.¹⁷⁸

Transformations in the rights of women and their place in society provided the High Court with further (alleged) justification to radically reform the law of rape twelve years later, when it re-defined the offence around the concept of consent.¹⁷⁹ According to Lord Cullen, ‘[t]he criminal law exists in order to protect commonly accepted values against socially unacceptable conduct’.¹⁸⁰ 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’.¹⁸¹

This way of conceiving of the common law’s development is markedly different from the view that endorses reliance on general legal principles. It is also, in

¹⁷⁷ *Charles Sweeney* (1858) 3 Irvine 109, 145 (Lord Deas). This conduct did not satisfy the definition of rape, as the court understood it, at the time.

¹⁷⁸ *S v HM Adv* 1989 SLT 469. There was some doubt over the origins and extent of the rule, as set down by Hume, but the court was clear that its decision to reject the rule was based on changed status of women (473).

¹⁷⁹ *Lord Advocate’s Reference (No 1 of 2001)* 2002 SLT 466, overruling *Sweeney*.

¹⁸⁰ *ibid* 475.

¹⁸¹ *ibid* cf Lord McCluskey (490). Chalmers, amongst others, was critical of this decision, commenting that it was inappropriate for the High Court to undertake such major legal reform as it had not, and was unable to, consult on important matters of policy (James Chalmers, ‘How (Not) to Reform the Law of Rape’ (2002) 6 ELR 388, 394-395).

an age of atrophied belief in the idea that law incorporates a sense of justice derived from beyond the legal system, less plausibly described as representing a declaratory theory of law. Rather, to borrow two categories developed by Priel,¹⁸² reliance on general principles can be described as embodying a practice-based model of authority, whereas altering the law to meet the needs and mores of society coheres with a custom-based model of authority. According to the practice view of common law, to which English law adheres, there is no need to appeal for justification to sources outside of law: although public policy has a small role to play, the law's development is governed by *legal* authorities.¹⁸³ By contrast, according to the custom view of common law, which blossomed in America,¹⁸⁴ a close association with the prevailing norms of the community is what justifies the law. Correspondingly, the law's authority is rooted in its capacity to reflect a society's contemporaneous norms, and this connection is thought to assuage shortcomings such as lack of notice, poor promulgation and alleged retroactivity. Adopting the custom view of common law, when judge-made law reflects a society's accepted norms it is less problematic, irrespective of whether those judges are elected.¹⁸⁵

¹⁸² Priel (n 18).

¹⁸³ *ibid* 16-21. Of course, describing reliance on legal principles as representing a practice-based view of authority depends on their being considered legal authorities.

¹⁸⁴ The connections between American and Scottish legal history here are intriguing. On the link between Scottish Enlightenment philosophy and early American statesmen and constitutional law see, *inter alia*, Arnaud B Leavelle, 'James Wilson and the Relation of the Scottish Metaphysics to American Political Thought' (1942) 57(3) *PSQ* 384; Samuel Fleischacker, 'Adam Smith's Reception among the American Founders, 1776-1790' (2002) 59(4) *William and Mary Quarterly* 897; James E Pfander and Daniel D Birk 'Article III and the Scottish Judiciary' (2011) 124 (7) *Harv LR* 1613.

¹⁸⁵ Priel (n 18) 22-24. Having institutional arrangements that support this link between the community and judges (such as their election) of course lends weight to custom-based claims of legitimacy.

Taking account of these two models of common law authority, it is clear that the contemporary declaratory-style cases¹⁸⁶ manifest a commitment to two different ways of thinking about judicial lawmaking and its justification. That this should be so can be explained, I would suggest, by the increasing convergence between Scots and English law during the nineteenth century, but also by the complex role of history and its place in Scottish Enlightenment thought, especially that of Smith and Hume. Unlike other Scottish Enlightenment philosophers who considered justice to be rooted in universal and stable conceptions of right and wrong,¹⁸⁷ for Smith and Hume justice was historically contingent and depended on the constitution of a society at a particular time and place. This did not mean that justice was entirely relative, however. The moral sentiments provided the basis for natural justice, which itself provided a benchmark against which to assess posited laws. The reason history was important was that it gave greater insight into the substance of natural justice.¹⁸⁸ It did not, of itself, supply either justice or law with authority. The same is true of the significance Smith ascribed to judges. He considered it appropriate for the judiciary to develop the law because it was the embodiment of the impartial spectator and thus provided the best measure of justice, as derived from community sentiment.¹⁸⁹ Its authority stemmed from these factors, rather than because it constituted an elite body with an enhanced understanding of legal materials, as per the practice model of

¹⁸⁶ There have been occasions where the court has refused to extend the boundaries of the criminal law, offering reasons including a desire to avoid opining on matters of public policy (*HMA v Semple* 1937 JC 41) and a more general concern with observing the separation of powers (*Quinn v Cunningham* 1956 JC 22; *Grant v Allan* 1987 JC 71).

¹⁸⁷ E.g. Reid (George Bragues, 'David Hume vs. Thomas Reid: Is Justice Socially Constructed or Natural?' (2008) 25(2) *History of Philosophy Quarterly* 137) and Stewart (Haakonssen *Natural Law and Moral Philosophy* (n 77) ch 7). This conception of justice comes out in some of the early declaratory power arguments, as discussed in Section 4.

¹⁸⁸ Haakonssen, *Science of a Legislator* (n 77) 43, 153.

¹⁸⁹ *ibid* 137.

common law authority. In the view of the Enlightenment philosophers, practice and custom were thus bound together in complex ways, which have tended to come apart only in the modern age.

This analysis sheds significant light not only on how and why the declaratory power made sense at the time of its emergence but also on why much of its contemporary criticism is misguided. For the most part, this criticism is founded on one of several views of legitimacy – the one Priel has dubbed the practice view – which is, to an extent, alien to the Scottish intellectual and legal tradition. This key point is missed if one remains ignorant of the history of the power but also if one is unaware of its philosophical context.

More generally, this study underscores the vital importance of being attuned to mismatches between critical and explanatory conceptions of law and legitimacy. As Dubber has argued, for critical analysis to acquire any force it must operate with a theory of legitimacy that is grounded in the relevant state of affairs – in the case of law, he argues, this must emerge from an analysis of laws and the legal system itself.¹⁹⁰ This is undoubtedly correct, but underplays the essential role of cultural and intellectual history. As Ibbeston has remarked, '[I]awyers accustomed to identifying legal rules by reference to statutes and decided cases can all too often slip into overlooking the sources from which the statutes and cases themselves derived the rules'.¹⁹¹ What is true of substantive laws is equally true of the standards with which we critique them: 'the horizontal connections between different institutions at the

¹⁹⁰ Markus D Dubber, 'New Historical Jurisprudence: Legal History as Critical Analysis of Law' (2015) 2(1) *Critical Analysis of Law* 1.

¹⁹¹ D J Ibbeston, 'Natural Law and Common Law' 2001 (5) *Edin LR* 4, 7.

same time...can often be of more importance than what appear to be the internal dynamics of particular areas of law...We ignore them at our peril'.¹⁹²

¹⁹² *ibid* 20.