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Criminal Law and Religion in Post-Reformation Scotland

*Chloë Kennedy**

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A. INTRODUCTION

In this article I assess how Scots criminal law was influenced by the Protestant theology that came to prevail in Scotland during the sixteenth and seventeenth centuries. Following the Reformation, which is generally accepted as having occurred in 1560,¹ Scotland officially became a Protestant nation and Calvinism was accepted as the Kirk's orthodox doctrine.² I argue that the content, administration and structure of the criminal law were all rendered characteristically moralistic by the prominence of Calvinism and its associated regime of social discipline. This argument discloses several important and under-appreciated points about Scots criminal law. Rather than simply confirming

* PhD candidate, University of Edinburgh. The author wishes to thank Lindsay Farmer for his support and comments.

1 H J Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003) 6.

2 Confession of Faith Ratification Act 1560. Acts were also passed to abolish Papal jurisdiction (Papal Jurisdiction Act 1560) and to criminalise various Roman Catholic practices, for example the Abolition of Mass Act 1560.

the well-documented link between law and religion³ or between religion and penology,⁴ it shows that the criminal law was responsive to specific religious changes that occurred in Scotland during the era in question, both at an ideological level and within the national Kirk.

Not only does this finding contribute a new dimension to our understanding of the criminal law of this age, it also has prospective implications for the way we understand contemporary Scots criminal law. The moralistic features of the law at this time could be the potential forbearers of certain aspects of contemporary Scots criminal law which are, at least nominally, peculiarly moralistic. Examples include the now-defunct power of the High Court to declare immoral conduct criminal,⁵ the use of normative language and conceptions of responsibility and guilt as evidenced by the continued reference to *dole* or some form of “general *mens rea*”⁶ and the *mentes reae* of “evil intent”,⁷ “wicked intention”⁸ and “wicked recklessness”.⁹ Of course, this speculative claim cannot be supported fully within the confines of this article, but the possibility of such a genealogical link is certainly suggested by the prominence of moralism within the law at this early period and the fact that there are terminological similarities with the contemporary law.

Given that the central claim of this article is that Scottish Presbyterianism made an impact on the criminal law as a whole, the analysis found herein aspires to a similar holism. Consideration is therefore given to the substantive law, the way it was applied in practice and various features of the attribution of criminal responsibility.

B. THE SUBSTANTIVE LAW

One of the key concerns of the post-Reformation Scottish Kirk was the Calvinist dictate that there should be “ecclesiasticall discipline uprightly ministred, as Gods

3 See, for example, H J Berman, *The Interaction of Law and Religion* (1974); J Witte and F Alexander (eds), *Christianity and Law: an introduction* (2008); P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (2008); R O’Dair and A Lewis (eds), *Law and Religion* (2001).

4 For example, J Witte and T Arthur, “The three uses of the law: a protestant source of the purposes of criminal punishment?” (1993) 10 (2) *Journal of Law and Religion* 433; L Throness, *A Protestant Purgatory: Theological Origins of the Penitentiary Act, 1779* (2008) and T Gorringer, *God’s Just Vengeance: Crime, Violence and the Rhetoric of Salvation* (1996).

5 G H Gordon, *The Criminal Law of Scotland*, 3rd edn by M G A Christie, vol 1 (2000) paras 1.15-1.45.

6 Gordon, *Criminal Law* (n 5) paras 7.02, 7.08, 7.47 and 7.60.

7 *Smart v HMA* 1975 JC 30. Cf *Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 43; Gordon, *Criminal Law* (n 5) para 29.30.

8 *Drury v HM Advocate* 2001 SLT 1013.

9 *Drury v HM Advocate* 2001 SLT 1013; Gordon, *Criminal Law* (n 5) paras 7.68, 23.12-23.13, 23.19 and 23.21; Lord Goff, “The mental element in the crime of murder” (1988) 30 *LQR* 30 at 51-59.

Word prescribeth, whereby vice is repressed, and vertue nourished".¹⁰ As shall be seen in the subsequent section, this concern led to an agenda of social control and moral discipline that had implications for the way that the secular criminal law was applied. In addition, it made a significant impact on the scope of the criminal law and the type of behaviour that was legally proscribed. The most obvious sign of this impact is in the wave of criminalisation that occurred in the aftermath of the Reformation. During this time, on top of the legislation enacted to outlaw Roman Catholic practices, a number of statutes were passed that declared various sins which offended against Church morality to be secular crimes.

Acts of Parliament were passed against blasphemy,¹¹ witchcraft,¹² incest,¹³ adultery¹⁴ and fornication.¹⁵ These Acts, and also those criminalising violation of the Sabbath,¹⁶ were passed at the behest of the General Assembly, the highest court of the Church of Scotland, which in 1562 made a supplication to the Queen for punishment of all vices commanded by the law of God to be punished and not yet commanded by the law of the realm.¹⁷ Clearly, the fact that the General Assembly could exercise such persuasive influence over the legislature indicates the secular authority's commitment to the Kirk's aim of creating a Godly state in which moral discipline was enforceable and sin and crime were concomitant. The influence of Calvinist ideology over the substantive criminal law, however, can also be perceived at a more subtle level. Close examination of two of the most authoritative texts on Scots criminal law of the era, Balfour's *Practicks* (1579)¹⁸ and Sir George Mackenzie's *Matters Criminal* (1678),¹⁹ reveals that both authors' conceptions of the principles of the criminal law and their discussions of particular crimes bear the mark of Protestant theology and Calvinist doctrine.

10 J Knox, *The Historie of the Reformation of the Church of Scotland Containing Five Books: Together with Some Treatises Conducing to the History* (1644) 226. *The Scots Confession of Faith* (ch XVIII) and *The First Booke of Discipline* contain similar provisions. (Church of Scotland, *The First and Second Booke of Discipline together with Some Acts of the Generall Assemblies, Clearing and Confirming the Same: and an Act of Parliament* (1621) 54).

11 1581 APS III 212 c 5, though there was an earlier statute criminalising blasphemy (1551 APS II 485 c 7).

12 1563 APS II 539 c 9.

13 1567 APS III 26 c 15.

14 1563 APS II 539 c 10. There was also a pre-Reformation act against incest (1551 APS II 486 c 12).

15 1567 APS III 25 c 14.

16 1579 APS III 138 c 70.

17 B A Peterkin (ed), *The Booke of the Universall Kirk of Scotland* (1839) 1:21.

18 P G B McNeill (ed), *The Practicks of Sir James Balfour of Pittendreich* (Stair Society vols 21 and 22, 1962 and 1963).

19 G Mackenzie, *The Laws and Customes of Scotland in Matters Criminal: Wherein it is to be Shown how the Civil Law, and the Laws and Customs of Other Nations do Agree With, and Supply Ours*, with a new introduction by J Chalmers, C Gane and F Leverick (2005).

(1) Principles of the criminal law

Balfour's *Practicks* provide a succinct digest of the law and materials which were recognised in Scots criminal law at the time of its publication²⁰ but unfortunately they contain little by way of general principles. For the most part the *Practicks* are simply a description of the customary law of Scotland and, where applicable, its statutory enactment. Notwithstanding this, the introduction to the *Practicks* harbours some resemblance to post-Reformation natural law theory, which had its roots in Scholasticism²¹ – the medieval school of philosophy that attempted to reconcile classical philosophy and Christianity. In the opening of his treatise Balfour writes:²²

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

This statement accords with the Scholastic philosopher Aquinas' division of law into the law of nature, the law of God and the positive law. As mentioned above, Scholasticism experienced a revival within Protestant natural law theory in the sixteenth and seventeenth centuries, so Balfour's adoption of this formulation shows that his general theory of law is in keeping with the theological philosophy of the age. Moreover, Balfour's taxonomy of law resembles Calvin's own writings on the matter. In his *Institutes of the Christian Religion*, Calvin states that man has knowledge of the natural law (which he believes is the basis of God's moral law) because it has been written on his heart.²³ Likewise he writes that the law of God is revealed in his word, specifically in the Decalogue,²⁴ and acknowledges and approves of man's temporal laws, so long as they complement God's law and ecclesiastical discipline.²⁵

Despite that Balfour's introduction displays a degree of conceptual affinity with Calvin's writings and Protestant theology, the rest of the *Practicks* is largely devoid of philosophical exposition. In contrast, Mackenzie's *Matters Criminal* contains many instances where Calvinist doctrine appears to have influenced his account of the law. Of course, the fact that *Matters Criminal* is so overtly moralistic,

20 D M Walker, *A Legal History of Scotland, Volume 3: The Sixteenth Century* (1995) 13.

21 K Haakonssen, *Natural Law and Moral Philosophy: from Grotius to the Scottish Enlightenment* (1996) 15.

22 Balfour, *Practicks* (n 18) 1.

23 J Calvin, *Institutes of the Christian Religion* book 2 ch 2.22.

24 Book 2 ch 8.1.

25 Book 3 ch 11.3, 20.

particularly in comparison to Balfour's *Practicks*, naturally raises the question of why this might be so.

Robinson has examined Mackenzie's works and their strong sense of morality and writes that "[f]or a natural lawyer under the influence of Calvinism the importance of established religion was fundamental".²⁶ For Robinson then, the dominance of Calvinist culture in Scotland is one of the reasons for Mackenzie's moralistic stance and his listing crimes against God and the church first. Of course, Balfour was also writing several years after the Reformation, but the influence of Calvinism is not so obvious within his work. A possible explanation for the ideological sparsity of the *Practicks* might be Balfour's apparently unsettled religious and political affiliations. Knox, who was a fellow galley slave of Balfour following their capture at the siege of St Andrew's castle, described him as "Blasphemous Balfour" and "a man without God".²⁷ It is possible that this trait, coupled with his wavering political allegiance,²⁸ meant that Balfour was unwilling to reveal any particular philosophical standpoint in his work.

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

Undoubtedly, *Matters Criminal* is in part merely a reflection of Mackenzie's personal beliefs about the law. He gives his opinions on several areas of the law, most notably in relation to the criminalisation of sins, and he invariably relies on theological authority when discussing their criminality. For example, he opines freely on the criminalisation of witchcraft, a phenomenon that he supported despite being a well-known defender of witches.²⁹ His endorsement of the law against witches is partly founded on the Bible; quoting excerpts from Exodus and Leviticus he concludes: "since it is expresly condemned in Scripture, and by many general Councils, such as *Aurelian*, *Toletan*, and *Anaciritan*, it should not be lawful for us to debate what the Law hath expresly condemn'd, by the same reason, that we should deny Witches".³⁰

26 O Robinson, "Law, morality and Sir George Mackenzie", in H L MacQueen (ed), *Miscellany VI* (Stair Society vol 54, 2009) 11 at 14.

27 Balfour, *Practicks* (n 18) xi.

28 Balfour, *Practicks* (n 18) xxxi.

29 See A Lang, *Sir George Mackenzie, King's advocate, of Rosehaugh: his life and times, 1636(?)–1691* (1909) ch 5.

30 Mackenzie, *Matters Criminal* (n 19) 83.

In addition to this, Mackenzie offers his view on the punishment of adultery. Again, his opinions are very plainly based on the idea that the law of God is a proper foundation for the secular law. Indeed, he writes that the statute defining the circumstances in which adulterers were to be condemned to death is “only a Brocard. . . but should not be extended in prejudice of the Law of God, which expressly ordains Adulterers to die”.³¹ He makes a similar argument against capital punishment for minor thefts, writing that according to God’s moral law a single theft is not punishable by death.³² These examples show that Mackenzie regarded the Bible as a laudable template on which to base the secular criminal law, an idea that was particularly Calvinistic. Unlike some of the earlier European Reformers, Calvin accepted that the moral principles of the Mosaic law were part of the natural law and should be binding.³³ Indeed, like Mackenzie, Calvin advocated the death penalty for adultery on that basis.³⁴

Even though these examples of theologically-based moralism in *Matters Criminal* are subjective judgments proffered by Mackenzie, there are nevertheless several factors which support the bolder claim that *Matters Criminal* can be taken as representative of the criminal law as a whole. First, Mackenzie’s reliance on God’s law as a source of law was followed in Scots legislation and criminal practice. The Incest Act 1567³⁵ punished with death whoever abused his body with persons in such degree as God’s word ordained in Chapter 18 of Leviticus, and the General Assembly was sometimes called upon to interpret the Act’s provisions.³⁶ Furthermore, though there was no legislation criminalising sodomy or bestiality, libels were drawn up stating that: “albeit by the Law of the Omnipotent God, as it is declared in the 20. c. of *Leviticus*. *As well the man who lieth with mankind, as the man who lieth with a beast, be punishable by death*”.³⁷ Therefore, unlike witchcraft, incest, adultery, fornication and blasphemy – sins that were criminal by virtue of specific acts of the Scottish Parliaments – sodomy and bestiality were criminal simply because they were sins as dictated by the Bible.

Moreover, Mackenzie very obviously intended to produce a text that was both authoritative and would be used by those in practice, claiming that it contained

31 Mackenzie, *Matters Criminal* (n 19) 173.

32 Mackenzie, *Matters Criminal* (n 19) 195-197.

33 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 7, 8.1.

34 P D L Avis, “Moses and the magistrate: a study in the rise of Protestant legalism” (1975) 26 *Journal of Ecclesiastical History* 149 at 163-164.

35 APS III 26 c 15.

36 In 1569 the Regent Moray asked the General Assembly to assist in the interpretation of this crime and to give its opinion on whether it was incest for a man to have sex with his uncle’s paramour. J I Smith, *Selected Justiciary Cases 1624-1650, Volume 2* (Stair Society vol 27, 1972) xlv.

37 Mackenzie, *Matters Criminal* (n 19) 162.

nothing that “is not warranted by Law, or Decisions, or in which, when I doubted, I did not confer seriously with the learned’st Lawyers of this Age”.³⁸ It seems that Mackenzie succeeded on both counts, since *Matters Criminal* is dubbed one of the institutional writings of Scots law³⁹ which are “contemporary authorities of the first rank on the understood state of the law at their several dates, quite apart from their importance as authorities containing statements which were influential on later courts and judges”.⁴⁰

Arguably, the fact that *Matters Criminal* contains Mackenzie’s personal views on the law shows that it provides us with valuable insight into his own apparently Calvinist sentiments. This is significant because as one of the country’s most prominent jurists, prolific writers, and formidable Lord Advocates his influence on the way the law was used and perceived was bound to be considerable.⁴¹ On top of this, because of *Matters Criminal*’s widely-accepted authoritative status the presence of Calvinist undertones throughout holds novel and important implications for the criminal law as a whole.

Having better established the significance of *Matters Criminal* in the context of the present argument, it is important to consider in more detail the various illustrations of Calvinist influence within the treatise. That Mackenzie was a lawyer under the influence of Calvinism is apparent from Title I which opens:⁴²

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

Mackenzie’s reference to man “who having ruined himself, doth little value, and is much inclined to ruine every thing besides” tallies well with the Calvinist doctrine

38 Mackenzie, *Matters Criminal* (n 19) The Design.

39 For example, see R White and I Willock, *The Scottish Legal System*, 4th edn (2007) 167 where *Matters Criminal* is described as being included in “all lists” of institutional works.

40 D M Walker, *A Legal History of Scotland, Volume 4: The Seventeenth Century* (1996) 3.

41 As well as authoring *The Laws and Customes*, Mackenzie wrote his *Institutions of the Law of Scotland* (1699), which is possibly his most famous legal publication. In addition to these works, Mackenzie wrote widely on political, religious and moral matters as well as dabbling in literary fiction. See biographical introduction to *Matters Criminal* iii-vii.

42 Mackenzie, *Matters Criminal* (n 19) 2.

of total depravity, which states that man's fall from grace not only deprived him of his ability to do good but made him a source of continual sinning.⁴³ This doctrine finds expression in the Westminster Confession of Faith, the document adopted by the Church of Scotland which sets out the orthodox Calvinist doctrine.⁴⁴ In chapter VI it is written that as a result of original sin "we are all utterly indisposed, disabled, and made opposite to all good, and wholly inclined to all evil".⁴⁵ As would be expected, this follows Calvin's assertion that from original sin man has inherited a "corruption and depravity of nature, extending to all parts of the soul" which mean that his nature "is not only utterly devoid of goodness, but so prolific in all kinds of evil, that it can never be idle".⁴⁶

Though this depravity extends to all aspects of the soul, Calvin teaches that man bears an inherent impression of civil society and an inherent understanding of man-made laws that mean he is naturally inclined to maintain public order.⁴⁷ This description is virtually identical to Mackenzie's account of the "common principles" imprinted on man's soul whereby he is led to love order. Mackenzie's conception of man's nature and his role in maintaining the civil order therefore appears to have been formed under the influence of the accepted doctrine of the national Kirk.

Taken in isolation this natural inclination towards "civil society" that Calvinism attributes to mankind might seem to undermine the need for tribunals and punishments; if man is naturally inclined to maintain the social order there is surely less need for laws to restrain his behaviour and for tribunals to enforce his compliance with these laws. In fact, the opposite is true. Calvinist reformers assigned great importance to the law, ascribing to it three primary functions: the civic or political use, which is to restrain people from sinful conduct in order to maintain community harmony; the theological use, which is to reveal to each man his inherent sinfulness so that he might seek God's grace; and the didactic use, which is to inform man how he could please God through his conduct.⁴⁸ The first use is most significant for present purposes for, despite the belief that man has God's law written on his heart and a natural propensity to maintain civic order, Calvinism nevertheless teaches that man is irresistibly inclined towards vicious actions and decisions. Man's postlapsarian corrupted will is thought to prevent

43 F Wendel, *Calvin: The Origins and Development of his Religious Thought* (tr P Mairet, 1963) 187.

44 It was ratified by the Scottish Parliaments in 1690 (APS IX 133 c 7).

45 Westminster Confession of Faith ch VI: IV.

46 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 1.8-1.10.

47 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 2.13.

48 Witte and Arthur (n 4) at 436.

him from following the dictates of natural reason, so written and promulgated laws are necessary to compel him to do so.⁴⁹

Written laws based on the law of God were therefore considered a kind of restraint over man's behaviour which, though doing nothing to redeem the internal impurity of man, provided the means for a "forced and extorted righteousness [that] is necessary for the good of society".⁵⁰ The existence and means of enforcing these laws were taken as evidence of God's providence. According to Calvinism, God is the ultimate sovereign and author of the natural law⁵¹ and he is also the provider of civil magistrates charged with the task of upholding these laws on earth. As the Westminster Confession of Faith states:⁵²

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

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

(2) Particular crimes

As has already been mentioned, Calvinist doctrine did not limit God's involvement with judicial punishment of evil-doers to providing competent secular judges on earth. We have seen how the General Assembly's entreaty for Scots law to be aligned with God's law led to the enactment (and re-enactment) of legislation against some of the key sins that gave offence to the church. This desire to conjoin the secular and sacred laws was a mainstay of Protestant philosophy, with Melancthon arguing that to be rational the civil law must equate to the natural law and with Luther insisting the same.⁵³ Calvin, too, insisted that the positive law by which civil magistrates adjudicated should be inspired by God's natural law.⁵⁴ In *Matters Criminal*, this enmeshing of the profane and the holy goes beyond the clear-cut criminalisation of sin represented by those Acts

49 Wendel, *Calvin* (n 43) 206.

50 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 7.10.

51 A P D'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (1951) 69.

52 Westminster Confession of Faith ch XXIII: I.

53 Berman, *Law and Revolution II* (n 1) 82-97.

54 Wendel, *Calvin* (n 43) 207.

of Parliament described above. Even crimes which are not specifically crimes against religion or sins according to the Bible are defined in a way that weaves in religious ideas and terminology. In his introduction to treason Mackenzie begins:⁵⁵

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

The familiar references to man's "laps'd condition", his "crooked will" and blindness of judgment allude once again to Mackenzie's Calvinist influences. Similarly, the "core" crimes of murder and theft which, though sins, had a long history of being criminal under the secular law and were depicted by Mackenzie in pointedly Calvinistic terms. He describes theft as contrary to God's moral law "being insert amongst the commands. . . like Murder, Incest, and these other crimes"⁵⁶ and he explains the prohibition of murder, another transgression of God's laws, thus:⁵⁷

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

Man's "natural horror" at defacing God's image by killing his fellow man re-affirms the idea that his heart has been inscribed with God's law, which of course includes an edict against killing. A similarly theistic rationale underpins the prohibition of suicide, which is punished⁵⁸ "because God hath forbid man to kill, without making a distinction of killing ourselves or others" and because "he who kills himself, kills Gods Subject".⁵⁹ By extending the horror of damaging mans' flesh from damaging others to our selves, Mackenzie mirrors Calvin's elaboration of the sixth commandment (thou shalt not kill). "[W]e must hold the person of man sacred", he writes, "if we would not divest ourselves of humanity we must cherish our own flesh".⁶⁰

55 Mackenzie, *Matters Criminal* (n 19) 38.

56 Mackenzie, *Matters Criminal* (n 19) 196.

57 Mackenzie, *Matters Criminal* (n 19) 110.

58 By escheat of property or, ironically, by death in cases of attempted self-murder (*Matters Criminal* (n 19) 150-151).

59 Mackenzie, *Matters Criminal* (n 19) 146.

60 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 8.40.

C. THE LAW IN ACTION

It should be clear from the analysis above that the influences of the Scottish Presbyterian Kirk and its orthodox doctrine, Calvinism, can be detected in the range of offences that were criminalised and the philosophy underlying both the law in general and specific crimes. To understand better the way in which the Kirk and its doctrine shaped the secular criminal law, however, it is necessary to consider how the law was applied and to identify the various ways in which it intersected with Kirk discipline in practice.

During the post-Reformation era a new hierarchy of Church courts was established which included, in ascending order of authority, Kirk Sessions, Presbyteries, Synods and the General Assembly.⁶¹ Amongst their other functions, these courts were charged with administering moral discipline upon the populace by imposing penance, fines or, in the most serious cases, excommunication.⁶²

On the whole the Kirk Sessions, which were the courts that dealt with the majority of disciplinary cases, were concerned with sexual offences like fornication, scandalous carriage and adultery. Their other main concerns were with Sabbath breach, drunkenness, “unseemlie behaviour” and miscellaneous moral offences such as failing to attend church.⁶³ Of course, some of these offences were also secular crimes following the introduction of legislation to that effect. This legislation was not merely enacted to pacify the General Assembly; it was actively enforced by the secular courts. Indeed, these offences were most intensely prosecuted in the early years of the Reformation and during the “Second Scottish Reformation” of the mid-seventeenth century,⁶⁴ a fact which illustrates the point that changes in the administration of moral criminal offences correlated with the prevailing religious climate.

Alongside the church courts was a complex network of lay courts whose main function was to administer the secular law. Despite their disparate remits there was a high degree of co-operation between the two court systems, mainly because in Calvinist Scotland moral discipline and the maintenance of law and order were regarded as complementary aims.⁶⁵ The church courts could rely on the civil authorities for support when investigating and punishing moral offences, which

61 General Assembly Act 1592.

62 J Goodare, *State and Society in Early Modern Scotland* (1999) 181.

63 S J Davies, “The courts and the Scottish legal system 1600-1747: the case of Stirlingshire”, in V Gatrell et al (eds), *Crime and the Law* (1980) 120 at 124-127.

64 B P Levack, “The prosecution of sexual crimes in early eighteenth-century Scotland” (2010) 228 *Scottish Historical Review* 172 at 173.

65 J Wormald, *Court, Kirk and Community: Scotland 1470-1625* (1981) 129; Goodare, *State and Society* (n 62) 211.

was one of the reasons they were able to exercise such pervasive and effective discipline.⁶⁶ In turn, the Kirk Sessions referred cases of serious moral depravity, such as incest or sodomy, to the lay authorities for trial. This ecclesiastical involvement in the lay courts' criminal caseload extended all the way to the Justiciary Court, the most senior criminal court in Scotland.⁶⁷ Merely referring morals cases to the secular authorities, however, was not the limit of the Kirk's involvement in criminal justice. Occasionally, the church courts transgressed their established remit to participate in the prosecution of purely secular offences.

*William Fraser*⁶⁸ is an example of a case in which the Kirk authorities played a dynamic role in criminal proceedings, rather than simply referring the offence to the civil magistrate for trial. Fraser was charged with "crewall slauchter and murthour" which, being a capital crime, was to be tried by the civil authorities.⁶⁹ However, in the Justiciary Court the prosecution relied on the findings of the Presbytery of Deir to support his case. The Presbytery had been charged to investigate the quality of the murder and had found the killing to be "wylde and wilfull" rather than accidental. This evidence and the testimonials of the ministers who conducted the investigation were key pieces of evidence against the accused which contributed to his conviction. The competency of this evidence shows that Kirk proceedings were given considerable credence by the Justiciary Court. It is remarkable that extra-judicial findings were given such prominence, especially in this instance because the Kirk investigations had not considered the accused's guilt of the crime (which was simply assumed) but only the nature of the killing.

The significance of this collaborative approach is that it shows that in post-Reformation Scotland there was direct ecclesiastical participation in the administration of secular criminal law. One reason for the Kirk's input is that via its courts, especially the Kirk Sessions, it had the kind of visible, controlling presence in the community that the state alone could not achieve.⁷⁰ This privileged position meant the Kirk could provide a supply of much-needed evidence to the criminal courts in an age when forensic evidence and modern modes of state detection were not yet available. Another reason it was considered appropriate for the Church to have such an involved role, however, is that both the criminal law and the Kirk, through its disciplinary regime, were seen as fulfilling a similar

66 M F Graham, *The Uses of Reform: 'Godly Discipline' and Popular Behaviour in Scotland and Beyond, 1560-1610* (1996) 345.

67 Dittays libelling moral offences were commonly submitted by ministers and elders. See Davies (n 63) at 149.

68 30 July 1641, see Smith, *Selected Justiciary Cases, Volume 2* (n 36) 443.

69 Church of Scotland, *The First and Second Booke of Discipline* (n 9) 50.

70 J Dwyer, R A Mason and A Murdoch (eds), *New Perspectives on the Politics and Culture of Early Modern Scotland* (1982) 125.

function: holding people to account for morally culpable behaviour. This similarity becomes even clearer upon examination of the way that criminal responsibility was attributed.

D. ATTRIBUTION OF CRIMINAL RESPONSIBILITY

The previous section drew attention to the ways in which the Reformed Kirk shaped the practice and procedure of Scots criminal law. It is submitted that one of the reasons why the church partook in the administration of justice is that both the criminal and Kirk courts were concerned with holding the accused responsible for morally culpable behaviour. This suggestion is supported further by the shared tendency of the criminal and ecclesiastical courts to attribute guilt and impose punishment on the basis of moralistic judgments about the accused's character and conduct. This similarity is important because it reveals how the attribution of criminal responsibility was especially moralistic at a time when its methods and purposes concurred with those of the Kirk. Scots law's particularly moralistic conception of criminal responsibility therefore appears to have been at least contributorily informed by the Presbyterian Kirk's practices and teachings.

(1) Moralistic assessment of guilt

The *Fraser* case demonstrates effectively the resemblances between the means and consequences of apportioning blame under the criminal law and ecclesiastical discipline. At Fraser's excommunication hearing the Presbytery asserted that "it is notourlie knawin" that the deceased "was schamefullie and crewallie mureidreist be Williame Fraser. . ." ⁷¹ Similarly, one of the main adminicles of condemnatory evidence at the criminal trial was Fraser's "common bruit and fame" – essentially hearsay evidence that was unfavourable to the accused. Notoriety of character was therefore a major indicator of guilt in both sets of proceedings, and the *Fraser* case was not unique in this respect. In fact, the case is broadly representative of the way that assizes (juries) functioned in criminal cases and the way that judgments were made at Kirk Sessions.

The Sessions operated on the basis of local knowledge which came into their possession via the elders who were the "eyes, ears and hands of the church". ⁷² For their part, the criminal courts drew assizers from the locality of the alleged offence who were familiar with the accused and the circumstances

⁷¹ Smith, *Selected Justiciary Cases, Volume 2* (n 36) 451.

⁷² B Lenman and G Parker, "Crime and control in Scotland 1500-1800" (1980) 30 *History Today* 13 at 16.

surrounding the charges.⁷³ Once selected, assize members were expected to fulfil two functions: to be “judges in so far as they consider probation led by others and judge whether proved or not proved” and to be witnesses “in so far as they may condemn, upon proper knowledge, without any other Probation”.⁷⁴

This second function is crucial. In essence the jury was entitled to return a verdict solely on the basis of its own knowledge, such as in the case of *Andro Wast* where the Lord Advocate led no evidence apart from the averments in the dittay.⁷⁵ Some case records suggest that the assize was actually encouraged to make convictions on this basis since “the maist pairt of tham [the assize] are cuntrie men and knaws the pannel his visciuous lyfe and conversatioun, and that his guiltiness of the particular thiftis contenit in his ditty is sufficientlie knowin to thame”.⁷⁶ The assize thus afforded the moral quality of an accused person’s lifestyle and character extraordinary significance, in striking contrast to the purportedly impartial assessment of the accused’s criminal responsibility that occurs today.

It is telling that both the secular and ecclesiastical authorities approached the question of the accused’s guilt in comparable ways. Of course, both were operating under the same socio-political conditions so a degree of similarity in procedure and ethos is perhaps unsurprising. Lacey has associated the use of character-based theories of responsibility with problems of co-ordination and legitimacy faced by early legal systems.⁷⁷ In these systems centralised criminal justice agencies were undeveloped and frequently unreliable, so members of the local community often judged the accused against the backdrop of character and previous behaviour. This account can explain partially the situation in sixteenth and seventeenth century Scotland where, until the High Court of Justiciary was established in 1672, the only non-local criminal tribunal was the justice-ayres, which were renowned for being irregular and unsatisfactory.⁷⁸

Unlike the criminal courts, however, the ecclesiastical courts were a paradigmatic system of centrally administered local tribunals in which national and local assemblies were strongly connected.⁷⁹ Yet these tribunals regularly assigned guilt and administered punishment on a character-driven basis. Clearly

73 I D Willock, *The Origins and Development of the Jury in Scotland* (Stair Society vol 23, 1966).

74 Mackenzie, *Matters Criminal* 4 (n 19) 98.

75 R Pitcairn, *Criminal Trials* vol 3 466. See Smith, *Selected Justiciary Cases, Volume 2* (n 36) xlvi-li.

76 Case against *George Wright*, S A Gillon, *Selected Justiciary Cases 1624-1650, Volume 1* (Stair Society vol 16, 1953) 222.

77 In respect of English law from the 18th to 20th century, see N Lacey, “Historicising criminalisation: conceptual and empirical issues” (2009) 72 MLR 936.

78 *An Introduction to Scottish Legal History* (Stair Society Vol 1, 1958) 46.

79 Wormald, *Court, Kirk and Community* (n 65) 40, 138.

co-ordination problems were not the only factor contributing to the prevalence of this mode of attribution of responsibility. There is another explanation for the shared use of character-based responsibility by criminal and ecclesiastical courts: both tribunals' chief tasks were regarded as different species of the same genus. That is, they were both seeking to hold the accused morally responsible for his actions and therefore, on this basis, attributing responsibility after an assessment of the respectability and character of the accused must have seemed entirely appropriate.

Strong parallels between the rationales for imposing Kirk penalties and criminal punishments support this conjecture. Public shame and humiliation were central to both criminal punishment and ecclesiastical discipline and, to differing extents, both practices were accompanied by displays of repentance. Such public shaming of the offender emphasised that what had been done was something rightly to be ashamed of; the act was not just an offence to social order and harmony, it was an offence to the community's moral sensibilities.

In addition to pecuniary fines, offences against the Kirk were predominantly punished by public humiliation, which could take a variety of forms including the repentance stool, the sackcloth, jugs and branks. Often the penitent was made to wear a paper hat or label bearing their particular offence whilst undergoing penance.⁸⁰ The humiliation and shame induced by these punishments should not be underestimated. In pleading to be spared the sackcloth, one offender argued that it was unduly harsh to punish him in such "shameful manner as was used to wilful murderers and raisers of fire".⁸¹

As is hinted at in this quotation, the civil authorities also used public humiliation as a means of punishing convicted criminals. Some of the lesser criminal punishments were the same as those used in Kirk discipline⁸² and the most severe penalty, execution, was a highly public affair. As in ecclesiastical discipline, the shame of the offender and the communicative force of deterrence were often enhanced by visible acknowledgement of the nature of the crime committed. For example, one of the conspirators to James I's murder, the Earl of Athole, was placed upon a pillory and a red-hot crown inscribed "The King of Traitors" was set upon his head.⁸³ In less dramatic punishments, too, a slip of paper disclosing the convict's crime was sometimes attached to his or her body or affixed to a nearby spot.⁸⁴ This practice reflected the moral nominalism of the

80 M Todd, *The Culture of Protestantism in Early Modern Scotland* (2002) 142-147.

81 Todd, *The Culture of Protestantism* (n 80) 145.

82 Walker, *A Legal History of Scotland: The Seventeenth Century* (n 40) 554.

83 Walker, *A Legal History of Scotland: The Sixteenth Century* (n 20) 440.

84 Smith, *Selected Justiciary Cases* (n 36) lix.

law at the time – naming the wrongdoing was considered an important element of bringing home to the convict and to the community the moral gravity of the crime committed.⁸⁵

A further commonality between Kirk and criminal punishment was the role of repentance. For the Kirk, remorse and repentance were essential steps to being readmitted to the congregation and any doubt as to the authenticity of repentance could result in excommunication.⁸⁶ It has been argued that, unlike the Church courts, the criminal courts had no interest in reforming the personal attitudes of offenders.⁸⁷ It might be true that they were less concerned with reforming than with chastising but repentance was still a notable feature of criminal proceedings. Since crimes were regarded as a manifestation of wickedness, confessions were often accompanied by words of contrition.⁸⁸ This contrition was even rewarded occasionally with mitigated punishment. For example, a sentence of death by beheading (apparently lenient) was imposed on *John Dick* and *Janet Alexander* on their conviction for murder by poisoning because of their voluntary confession and in response to their “trew and unfeinzit repentance with abundance of tears”.⁸⁹

These analogous attitudes towards attributing and punishing culpability disclose a unity between Scots Presbyterianism and Scots criminal law that betrays a common concern with moralism. This in turn enhances our understanding of the several noticeably moralistic attributes that the law possessed. In keeping with this emphasis on moral opprobrium, the mental requirements for criminal liability were also inherently moralistic and, once again, this moralism had clear associations with the Reformist theology of the national Kirk.

(2) Mental state

During Mackenzie’s time the maxim *actus non facit reum nisi mens sit rea*, which roughly translates as “an act is not criminal unless the mind is also criminal”,⁹⁰ seems in certain respects to have applied as it applies today. A criminal mind was essential because “the wickedness of the designe, makes only an action

85 On moral nominalism see J Horder, “Rethinking non-fatal offences against the person” (1994) 14 OJLS 335 at 339.

86 Church of Scotland, *The First and Second Booke of Discipline* (n 10) 51-53.

87 H Schilling, “History of crime? Or history of sin? Some reflections on the social history of early modern church discipline”, in E I Kouri and T Scott (eds), *Politics and Society in Reformation Europe* (1987) 289 at 302.

88 Smith, *Selected Justiciary Cases, Volume 2* (n 36) lvii.

89 21 March 1649, see Smith, *Selected Justiciary Cases, Volume 2* (n 36) lxi.

90 P R Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2009) 125.

criminal”.⁹¹ This “wickedness” was rooted in the actor’s will since “man can only offend what is volutar to him. . . the will is the only fountain of wickedness”.⁹² The importance of man’s depravity within Calvinism has already been mentioned, but the centrality of the will to this doctrine is made fully clear in Calvin’s *Institutes* where it is written: “if the whole man is subject to the dominion of sin, surely the will, which is its principal seat, must be bound with the closest chains”.⁹³ Holding the will to be the source of all wickedness is therefore a characteristically Calvinistic approach to conceiving of depravity. The fact that wickedness was considered the foundation of criminal liability is itself also significant.

Lacey has argued that evaluative terms such as malice, and indeed wickedness, were often used in legal systems in which lay actors could be expected to recognise wrongdoing when they saw it.⁹⁴ This coheres with the way that Scottish assizes determined verdicts and, moreover, it fits in with the standards of proof that applied in respect of *mens rea*. Unlike today’s differentiated *mens rea*, which must be proved by the prosecution, in Mackenzie’s time there was often no need to prove *dole* or “wicked designe” even though it was a requisite for liability.⁹⁵ *Dolus* was often inferred from presumptions and conjectures, with some acts considered so wicked that simple proof of their commission was sufficient for conviction.⁹⁶ In other words, especially in respect of the most blatantly immoral crimes such as sodomy and adultery,⁹⁷ assizers were trusted to recognise wrongdoing when they saw it, and when they saw it this was enough to convict upon without further inquiry into the accused’s state of mind.

Apart from confidence in the ability of assizers to identify wrongdoing, there was another reason that the criminal trial involved no subjective examination of the accused’s mental state. Design or intention was, according to Mackenzie, a “private, and conceal’d act of the mind, which escapes the severest probation”.⁹⁸ Similarly, Calvinism teaches that man is subject to two forms of separate governance: the spiritual, pertaining to the life of the soul and the temporal, pertaining to peaceable society. The spiritual jurisdiction was thought to reside in the mind and the temporal jurisdiction was thought to regulate man’s external

91 Mackenzie, *Matters Criminal* (n 19) 8.

92 Mackenzie, *Matters Criminal* (n 19) 8.

93 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 2.27.

94 N Lacey, “In search of the responsible subject: history, philosophy and social sciences in criminal law theory” (2001) 64 MLR 350 at 369.

95 Mackenzie, *Matters Criminal* (n 19) 9.

96 Mackenzie, *Matters Criminal* (n 19) 8.

97 The two examples given by Mackenzie, *Matters Criminal* (n 19) 9.

98 Mackenzie, *Matters Criminal* (n 19) 8.

behaviour.⁹⁹ Human lawgivers might consider the *animus* with which the act was done, but only to the extent that it was externally manifested.¹⁰⁰ A dichotomy between mind and act therefore pervaded Reformation theology and was mirrored in the criminal law which deemed it inappropriate and, furthermore, impossible to know the accused's mental state.

This acceptance that there could be no knowledge of man's inner state also provides a possible explanation for the fact that in Scots law at this time there was a single, overarching concept of *mens rea* instead of the psychological (and morally-neutral) forms of *mens rea* that now dominate the criminal law.¹⁰¹ It also goes some way to explaining why, with the exception of homicide, there was no differentiation between different levels of responsibility for the same act. If it was impossible to see inside the accused's mind it would be unfair to distinguish between instances of the same criminal act on the basis of the mental state which accompanied those acts.

A further theological explanation for the lack of differentiated mental states is that Calvinist doctrine rejected the Roman Catholic distinction between a spiritual elite and a sinful majority.¹⁰² Under this distinction there were certain sins whose avoidance was incumbent on everyone, and other more minor sins which only those called to lead a holy life were to avoid. This idea was incompatible with the egalitarian philosophy of Calvinism by which an equal expectation was placed upon all believers to lead a holy life, meaning that all sins were equally reprehensible.¹⁰³ According to the Kirk, all moral offences were objectionable to God in absolute terms, so there was little to be gained from assessing the mental state and intentions of the offender.¹⁰⁴

Despite this, Scots law did distinguish between different levels of culpability, both in respect of homicide (the distinction between "forethocht felony" and *chaudemellee*) and in respect of the conditions in which full criminal responsibility did not pertain. At first blush it seems as though this would be incompatible with Calvinist moral theory and its assertion that all sin is equally culpable. As Berman has argued, however, Calvinist moral theory could distinguish between different degrees of guilt according to depravity of the will rather than depravity of the act. Sinful acts committed with malicious intent were

99 T McNeill (ed), *Calvin: Institutes of the Christian Religion* (1961) 847.

100 Calvin, *Institutes of the Christian Religion* (n 23) book 2 ch 8.6.

101 Most commonly these include intention, recklessness and negligence though there remains a broader 'moral blameworthy' sense of *mens rea* in Scots law. See Ferguson and McDiarmid, *Scots Criminal Law* (n 90) paras 6.9.1- 6.11.1.

102 Berman, *Law and Revolution II* (n 1) 320.

103 Berman, *Law and Revolution II* (n 1) 320.

104 R Mitchison and L Leneman, *Sexuality and Social Control: Scotland, 1660-1780* (1989) 26.

thought to reflect a perversion of the actor's will and were unpardonable whereas sinful acts committed from a weakness of mind or spirit were less wilful and therefore pardonable.¹⁰⁵

This ties in with the way that Mackenzie described the general conditions for criminal culpability. Minors were excluded from punishment because they lacked "judgement and contrivance", unless *dole* could be proved or the act was against the law of nature.¹⁰⁶ Likewise, drunks were more mildly punished due to a lack of *dole* and malice, though a habitual drunk would be punished more severely than someone who was rarely drunk.¹⁰⁷ "Furious" (insane) persons were spared punishment too, being in want of judgment and "punished by their own fury".¹⁰⁸ Liability was therefore couched in terms of *dole* and capacity to judge, both of which were connected to the will of the actor. If an actor displayed a wicked will then punishment would be inflicted irrespective of mitigating factors such as age, but if the actor was found incapable of sound judgment and therefore incapable of exercising his or her will it was thought inappropriate to impose criminal liability.

E. CONCLUSION

This article has sought to draw out the connections between Scots criminal law of the sixteenth and seventeenth centuries and Calvinist Presbyterianism, which was the orthodox theology in Scotland at that time. In each facet of the law examined there is evidence of Calvinist associations or of the Kirk's influence. Moreover, these connections with the prevalent theology appear to have fostered the distinctively moralistic features that characterised the criminal law as a whole.

The substantive law noticeably reflected the teachings of the Bible and Biblical law was considered a valid legal source. As a result, punishment of sinful behaviour was regarded as the legitimate concern of the judicial authorities, who were assisted in this task by the Kirk authorities. This co-operation was partially borne of pragmatism but, in addition, the parallels between Kirk discipline and criminal punishment reveal a commonality which speaks to the moral, character-driven basis on which responsibility was attributed. On a deeper level the purposes and principles of the law exhibited clear philosophical links with natural law theories and religious creed that were prominent in Scotland at the time.

The endurance of these religious influences and their associated legal moralism in contemporary Scots criminal law remains to be examined in

¹⁰⁵ Berman, *Law and Revolution II* (n 1) 320.

¹⁰⁶ Mackenzie, *Matters Criminal* (n 19) 13-14.

¹⁰⁷ Mackenzie, *Matters Criminal* (n 19) 15.

¹⁰⁸ Mackenzie, *Matters Criminal* (n 19) 15.

future work. This article has shown, however, that during the sixteenth and seventeenth centuries Scots criminal law reflected fairly nuanced shifts in theological orthodoxy and so in this respect it operated as an important index to social change. This insight provides us with an augmented understanding of the criminal law of this time and a preliminary grounding on which to develop further our understanding of contemporary Scots criminal law.