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The Structure of Assault in Scots Law: A Historical and Comparative Perspective

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Abstract

This thesis reviews both the history and current comparative landscape of the law of assault with a view to determining the optimal approach to be taken by Scots law in structuring its crime of assault. There is very little in the current literature offering either kind of review, and equally there has been very little analysis of the desirability of a single offence versus other methods of structuring assault or non-fatal offences against the person generally. These issues are therefore addressed in this paper, starting with an extensive examination of the legal history surrounding breaches of physical integrity from the seventeenth century right up to the present day. The development of a nominate crime of assault from a *ius commune* understanding of ‘injuries’ is considered, along with the slow evolution of intention as the culpability element in modern cases of assault. This analysis is then utilised to critically assess the rationality and efficiency of the current approach to assault. From here, a comparative analysis of culpability and harm is undertaken, involving an in-depth study of the English law approach to gradation of offences against the person based on harm, and the Model Penal Code approach to gradation through variation of conduct in the commission of the same offence. This thesis concludes that the current approach to culpability is the correct one, but argues that an approach which utilises the conduct element of offences, such as that of the Model Penal Code, can offer a more principled approach to assault in Scots law.

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Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Grant Barclay

List of Abbreviations

1861 Act:	Offences Against the Person Act 1861
1995 Act:	Criminal Procedure (Scotland) Act 1995
CP(S)A:	Criminal Procedure (Scotland) Act 1887
GBH:	Grievous Bodily Harm
MC:	Matters Criminal
MPC:	Model Penal Code

Introduction

The *Scottish Crime and Justice Survey 2014/15 findings*¹ suggest that, where homicide is excluded, only four per cent of reported violent crime is not related to a charge of assault of some severity.² These assaults ranged from “minor assault with no/negligible injury” (64 per cent) all the way to “serious assault” (four per cent).³ Assault is therefore an extremely common occurrence in the criminal justice system. Additionally, assault is a single offence at common law in Scotland, defined as an intentional attack against another person.⁴ Assault is understood in the context of the application of force, and thus the physical consequences are absent from the offence definition, being confined to part of the factual narrative.⁵

As a result, assault has been described as “one of the most flexible terms”,⁶ capable of covering a range of conduct from threatening gestures that cause alarm in the victim,⁷ all the way to attacks which just fall short of causing death.⁸ Assaults can be aggravated in ways which seek to recognise factors increasing the seriousness of the assault, generally in respect of the injuries sustained or the special character of the victim.⁹ As assault is a common law offence, the penalties available to the court range from admonishment to life imprisonment.

It is therefore important to ensure that a meaningful and principled approach is taken to determining culpability for violent crimes in Scotland, yet the above facts suggest that the Scottish approach is in danger of being over-encompassing. This has the potential to offend our understanding of crimes as being necessarily narrow and specific to accurately reflect the various types of wrongful conduct in society and likewise provide

¹ The Scottish Government, *Scottish Crime and Justice Survey 2014/15: Main Findings* (March 2016). These numbers are based on face-to-face interviews with 11,500 people: p.10.

² Robbery made up the remaining four per cent: see *ibid* at p.18.

³ *Ibid*.

⁴ JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, 1948), p.115; see also *Lord Advocate's Reference (No. 2 of 1992)* 1993 JC 43.

⁵ J Chalmers, “Offences Against the Person” in *The Oxford Handbook of Criminal Law*, MD Dubber & T Hörnle (eds) (OUP, 2014) pp. 727-746 at 729.

⁶ Per Lord Justice-Clerk Hope in *Kennedy v Young* (1854) 1 Irv. 533 at 539.

⁷ *Atkinson v HM Advocate* 1987 SCCR 534.

⁸ E.g. *Kepple v HM Advocate* 1936 SLT 294 (holding someone's head underwater); *Atkins v London Weekend Television Ltd* 1978 JC 48 (blocking the air supply of patient in intensive care); and *Williamson v HM Advocate* 1984 SLT 200 (pouring petrol over someone then setting them alight).

⁹ Gordon, *Criminal Law of Scotland*, Vol II (4th edn, 2016), paras.33.04-33.29.

certainty to members of society on the conditions for liability.¹⁰ Other approaches involve splitting offences against the person generally (including assault) into a hierarchy of offences, as is done in England; or alternatively utilising a single offence which can be committed in several different ways, often involving different degrees of culpability, as adopted in the Model Penal Code (hereafter MPC).¹¹

The present thesis therefore seeks to provide a historical and comparative analysis of assault in Scots law to determine the optimum way for the Scottish legal system to approach structuring the law in this area. Chapters one to three provide an historical analysis of the law of assault, ranging from the time when the legal profession began to examine conditions of liability right up to the modern formulation. There is presently a gap in the current literature of any in-depth historical analysis of assault (and the offence's predecessors) through time,¹² and thus a historical analysis is worthwhile in its own right as a contribution to understanding legal history in Scotland.

This historical analysis shall help us understand how assault became what it is today, both in terms of structure and underlying rationale, and whether this approach is principled or would benefit from revision. Chapter one shall begin this exposition in the seventeenth century by analysing the works of Sir George Mackenzie, William Forbes and Sir Alexander Seton in relation to the piecemeal case law to understand how seventeenth century Scots law conceived of physical injuries and the protection of physical integrity generally. We shall look at the differences in terminology, and in particular how assault not being understood as a nominate crime at this early stage had an important role in the fragmented approach to how breaches of physical integrity were understood. The law in this area was as much concerned with reputation as it was with violence, owing to the heavy influence of Roman law and the concept of *iniuria*.

Chapter two then explores how this foundation developed, outlining the close relationship between defamation and minor physical injuries during the eighteenth century

¹⁰ A Ashworth & J Horder, *Principles of Criminal Law* (7th edn, 2013), pp.62-65 (principle of maximum certainty), pp.67-69 (principle of strict construction), and pp.77-79 (principle of fair labelling).

¹¹ MPC, §211.1(1).

¹² The closest examples are John Blackie's formidable works on rights in personality, which indirectly deal with assault owing to its historical closeness with defamation and other rights in personality: J Blackie, "Unity in Diversity: The History of Personality Rights in Scots Law" in N Whitty & R Zimmermann (eds), *Rights in Personality in Scots Law* (DUP, 2009) pp.31-146; J Blackie, "Defamation" in K Reid & R Zimmermann (eds), *A History of Private Law in Scotland*, Vol 2 (2000) pp.633-707. These sources shall be considered in this thesis. Also see generally DM Walker, *A Legal History of Scotland*, Volumes IV-VII, (1996-2004).

and how this came to wane by the nineteenth century when assault as a *nomen juris* became prominent, ultimately forcing the two types of *iniuria* to follow different paths. Particular attention shall be paid to the ground-breaking work of Baron David Hume during this time, and what it can tell us about the development of assault, as it transformed from a crime of reputation to one of violence. Further, we shall examine how the Roman concept of *stellionatus* came to be integral to understanding assault as an attack, rather than just violent behaviour. It is during this period that aggravations become a prominent way of varying the severity of assaults, and this shall be considered in depth.

In chapter three we shall conclude our historical timeline with a summary of the law from the late nineteenth century to present day, with particular attention paid to the solidification of two prominent elements in our understanding of assault: culpability and harm. These elements are given effect to through the first explicit mentions of an intention culpability requirement for assault, and equally by the streamlining and hardening on the rules on aggravations, giving assault a rudimentary method for distinguishing attacks based on the harm caused.

Finally, the fourth chapter shall take these principles of culpability and harm and analyse them from a modern, comparative perspective. Limited space precludes an in-depth analysis of multiple legal systems, but reference is made where appropriate. An examination of the culpability requirement in light of modern jurisdictions shall determine whether a focus on intention is still preferable for a modern approach to prohibiting physical injuries. The modern English hierarchical approach and proposals for reform shall be analysed in light of their focus on grading offences against the person through the resulting harm, to determine how Scots law should give recognition to this element, if at all. A brief discussion shall consider morality in the law in this context, and specifically how we can give appropriate substance to laws generally through the conduct definitions. Modes of commission shall then be considered more generally in relation to the MPC in America and how Scots law can utilise the concept of a single offence capable of multiple forms of commission to better give effect to the principles underlying the law of assault.

1. 1650 – 1750: Foundational Beginnings

1.1 Justifying the Historical Approach

The two centuries leading up to 1750 were a tumultuous time for Scotland, with great political and (to a lesser extent) legal changes happening throughout. The Scottish Reformation of 1560 was still relatively fresh in the minds of men, and the Union of Crowns in 1603 meant that the King now sat in London, with Scottish government “carried out by his instruments rather than men representing Scottish feelings and interests”.¹³ Scotland during this period was described by Cromwell as “a very ruined nation”,¹⁴ and, with the King down south, Scots law was being written with English interests in mind.¹⁵ Many doubted the argument that Scotland was “equal sharers with those of England” when much of the legislation was designed to suit the English economy.¹⁶

In this regard it is all the more fascinating that Scotland should eventually develop a different structural approach to the law of assault as compared with its heavily influential (and much larger) sister nation, England.¹⁷ Tracing this historical development is unfortunately hindered by a lack of systematic law reporting and, assault being a common law crime, consulting the case law is where one might hope to develop an understanding of how the crime looked in the seventeenth century. However, despite a lack of recorded judgments, we do have the first-hand accounts of eminent practitioners of the time. The work of Sir George Mackenzie is particularly useful as his seminal work, *Matters Criminal*, was written during the post-Renaissance Pre-Enlightenment period when Scotland’s legal system had begun to find its feet.¹⁸

¹³ Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678) (OF Robinson (ed) 2012, Vol. 59, The Stair Society) at p.xx. (hereafter referred to as MC; all references made are to Part I, unless specifically stated otherwise).

¹⁴ G Donaldson, *Scotland: James V to James VII* (1965, Edinburgh) at p.352; see generally from p.343.

¹⁵ Indeed, there were complaints of Sheriffs being “English sojourns” and Judges of the Supreme Court numbering “a few English”, see *ibid* at p.348.

¹⁶ *Ibid* at p.351.

¹⁷ “That Scots law survived at all as a separate system after the Union brought it into such close contact with England is, in itself, of course a minor miracle” - Lord Hope of Craighead, “The strange habits of the English” in HL MacQueen (ed), *Miscellany Six by Various Authors* (The Stair Society, 2009) pp.309-320 at p.313. Lord Hope states (*ibid*) that a convincing argument can be made for the strong tradition of Scots institutional writings being instrumental in preserving comprehensive accounts of Scots private law long before anything similar could be achieved for England.

¹⁸ The 1680s saw the publication of Stair’s *Institutions of the Law of Scotland* as well as the foundation of the Library of the Faculty of Advocates (of which Mackenzie played an integral part). See *supra* n.1 at p.xxvi.

Mackenzie's work offered the first real attempt by a scholar to examine the conditions of liability, how crimes differed from delicts, and how far dole or design were necessary; such issues were not considered before this time.¹⁹ Mackenzie's work is not without its critics: Lord Cooper argues that Mackenzie's failing as a jurist is that he relied too heavily upon the opinions of others rather than his own in his description of the law,²⁰ and he has been accused of being "exceedingly inaccurate" by Lord Hailes.²¹

Fortunately, however, in this time-period there are other authors whose work can be used to corroborate Mackenzie's account, helping to develop a more solid picture of the criminal legal landscape at the turn of the century and minimise the possibility of any inaccuracies. William Forbes is criticised as having merely carried out a 'copying' exercise in his *Institutes of the Laws of Scotland*,²² accused of failing to provide an original contribution to Mackenzie's work.²³ Of course with the benefit of hindsight we now know just how valuable having a second account of the legal landscape is, and despite claims of repetition (which are not completely unfounded), there are striking differences which help to illuminate those areas which Mackenzie gives either little or no detail, and Forbes' *Institutes* offers a structured approach to the topic which just does not exist in *Matters Criminal*.²⁴ Likewise, Alexander Bayne's *Institutions of the Criminal Law of Scotland*²⁵ tends to be overlooked due to its slender size, but has a great deal to say on the topic of assault and injuries, helping to improve our understanding of this hugely important topic. Written as a student textbook, it is likely a good representation of the law in practice at that time.

¹⁹ DM Walker, *A Legal History of Scotland*, Volume IV (1996) at p.489.

²⁰ Lord Cooper, *Selected Papers 1920-1955* (1957), at p.277.

²¹ *Trial of Deacon Brodie* at p.129, available at:

https://archive.org/stream/trialofdeaconbro00brod/trialofdeaconbro00brod_djvu.txt.

²² William Forbes, *The Institutes of the Law of Scotland* (1730) (Edinburgh Legal Education Trust, 2012).

Note must also be made of Forbes' much larger and unpublished work, *A Great Body of the Law of Scotland*, a seven-volume manuscript which can be viewed online at the Glasgow University Library Special Collections website: <http://www.forbes.gla.ac.uk/contents/>. MacQueen, in his introduction to the 2012 reprint of the *Institutes*, tells us: "Forbes' *Institutes* gives us, at least in part, a convenient way of seeing in advance and in brief what it is that we are likely to find when we turn to this enormous and as yet almost untapped resource." *Institutes* (2012) at p.vi.

²³ Hume had stated that the only valuable work on the topic of criminal law was MC (1678), completely ignoring Forbes' contribution: Baron David Hume, *Commentaries* (1797)(1986 Reprint with introduction) at p.iii.

²⁴ HL MacQueen, *Institutes* (2012) at p.xiii.

²⁵ Alexander Bayne, *Institutions of the Criminal Law of Scotland. For the use of students who attend the lectures of Alexander Bayne, J.P.* (1730).

A little should also be said on the choice of the seventeenth century as a starting point, addressing the claim that Scots criminal law as a whole does not have a history,²⁶ or indeed that it does have a history but that such history only begins in a meaningful sense in the modern period (i.e. late eighteenth to early nineteenth century).²⁷ Of course, in one sense this is true – the concept of ‘criminal law’ and the idea of crime as an object to be regulated in and of itself did not emerge until a much later period.²⁸ However, the content of these principles did not emerge from a vacuum; they were the direct result of fledgling jurisprudence heavily entrenched in the Roman legal tradition which we discover from the scattered cases and the practitioners who wrote about them. By discerning the origins of current principles, we can evaluate their relevance in our modern society.

Using the above sources we can therefore create a structured account of seventeenth century assault: determining how was it structured and in what ways offenders were punished. In the context of the structure employed, it will be of specific interest to learn: what constituted the crime then, as compared with now; and under what circumstances was an assault deemed to be aggravated in the modern sense, so that the charge and/or punishment were more severe? The purpose is to uncover the legal tradition of assault in Scots law and determine which underlying principles this area of law adheres to; we can then determine how appropriate the current law is, within an historical context.

1.2 Translating the Terminology

Before examining the Renaissance (and consequently Enlightenment) period law, one must overcome the initial hurdle of aligning the two sets of laws for comparison. This is not a straightforward task for three reasons. First, nomenclature such as ‘assault’ and ‘aggravations’ are often non-existent in seventeenth century texts; in early works the terms ‘injury’ or ‘invasion’²⁹ are used to denote an attack on a person; the former in a broad sense

²⁶ JF Stephen, *History of the Criminal Law* (1883).

²⁷ L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016), at p.63ff.

²⁸ Indeed, and in fairness, this is the sense in which both Stephen and Farmer are concerned.

²⁹ See, for example, both Mackenzie and Forbes on the topic of deforcement (assaulting a sheriff officer (or equivalent) in execution of their duty): Mackenzie, MC, Title 26, 2; Forbes, *Institutes*, Part I, Book V, Chapter III, Title II. Note that Hume, *Commentaries*, Book I, Chapter IX is entitled “Of real injuries” but uses the term ‘assault’ throughout. Cf. A Bayne, *op cit.* who uses the term ‘assault’ only when discussing hamesucken, Title on Injuries, pp.182-186, paras. 9-12. These terms are described as the “sub-categories of bodily injury based on the nature of the impact on the body” and also include “hurting”, “wounding”, “effusion of blood” and “mutilation” according to J Blackie, “Unity in Diversity” at p.47. ‘Assault’ as a nominate crime emerged in the 19th century, in part as a result of English influence, *ibid* at p.52-3.

which extended to the character of the victim.³⁰ Second, many offences which we would today label as aggravations of assault were, in the Renaissance period, treated as either separate offences, or parasitic to another crime. One cannot therefore simply read the title on injuries for each author and know what the totality of the law of assault at that time period was, and in fact to obtain a clearer picture one must analyse much of these writers' criminal treatises.

Finally, and perhaps most significantly, on a structural level it is difficult to align the seventeenth century understanding of aggravations with how we approach this concept in the modern era. In current law aggravations are understood as a way of recognising that certain circumstances which deviate from the standard commission of an offence can change the nature of the wrongful conduct.³¹ Offences which are aggravated often attract a harsher penalty to reflect this distinction. The idea of criminal offences being augmented by factual circumstances is recognised in the seventeenth century,³² but its treatment is unsatisfactory due to a lack of consensus between the authors as to what exactly is being discussed, and equally due to omissions and contradictions within their own works. The former problem is immediately apparent from each writer's introduction to the topic. Mackenzie tells us:

“The civil law... divides *crimes* in ordinary and extraordinary; extraordinary were those wherein the law had appointed no particular punishment, ordinary crimes were such as were punishable by a liquid pain, determined by the law”.³³

Thus for Mackenzie it is *crimes* which are to be regarded as being categorised as ordinary versus extraordinary. However, Forbes tells us:

“Punishments inflicted after trial [i.e. those where the offender did not plead guilty] may be divided into ordinary, and extraordinary, or arbitrary *punishments*... Ordinary punishments are those expressly determined by law... Arbitrary punishments

³⁰ Forbes, *Institutes*, Part I, Book IV, Chapter IX, I: “But the offence specially called an injury, is a malicious exposing one's reputation or character in the world to contempt and shame”; and Bayne tells us that the law “extends its care and protection to our reputation and good name, as well as to our persons and estates” all of which are to be considered types of injuries, *Institutions*, at p.174.

³¹ See Gordon, *Criminal Law*, paras. 33.04-33.29 generally.

³² See for example Bayne's treatment of Duels: “Homicide sometimes receives an aggravation from the manner of committing it”, *Institutions*, Title on Duels at p.103.

³³ Mackenzie, MC, Title 2, 2 (my emphasis added).

are those which are left to the discretion of the judge to determine, according to the cause or nature of the offence”.³⁴

Forbes therefore viewed crimes as being subject to different categories of *punishment*. Despite the inconsistencies, one can presume that both authors were making the point that offences either had a set punishment laid down in statute (i.e. ordinary), or would leave the punishment to the decision of the judge (extraordinary/arbitrary). This simple statement becomes confused, however, when one considers how each then approached the topic within the body of their work. Mackenzie, who made the distinction between ‘ordinary’ and ‘extraordinary’ crimes, made no further reference to the concept in *Matters Criminal*. The only references to punishment thereafter are bare statements that a particular crime was subject to either capital or an ‘arbitrary punishment’, something which he curiously omits to define until his *Institutions* published six years later, and then only to tell us that crimes are either punished “capitally, by death or pecunially, by a certain fine; or arbitrarily at the discretion of the judge.”³⁵

Likewise, Forbes, who had spoken of extraordinary punishment, curiously speaks of extraordinary crimes, and even includes a title on ‘extraordinary injuries’ which stands in stark contrast to his earlier comments placing the terms ‘ordinary’ and ‘extraordinary’ as categories of punishments.³⁶ In order to help us understand this curious inclusion he tells us only that injuries are considered extraordinary with respect to the place where they are committed; and in regard of the persons offended.³⁷ The ‘ordinary/extraordinary’ distinction therefore seems to unhelpfully refer both to the technical issue of whether the sentence of a crime has already been prescribed by law or requires judicial discretion, while simultaneously addressing the substantive issue of signifying those offences for which punishment can be made more severe.

It is equally confusing because it introduces a distinction between injuries where no such distinction exists as far as Mackenzie is concerned. For example, in the context of real injuries, i.e. injuries committed through actions, on the one hand we have Mackenzie telling us that all real injuries were to be punished arbitrarily (and were therefore all

³⁴ Forbes, *Institutes*, Part I, Book I, Chapter IV, §4 (my emphasis added), §4 [1.] and §4 [2.].

³⁵ Mackenzie, *Institutions of the Law of Scotland* (2nd edn, 1688), Book IV, Title 4, p.392.

³⁶ Forbes, *Institutes*, Part I, Book IV, Chapter IX, Title II; see also Book I, Chapter VI, 2.

³⁷ *Ibid.*

extraordinary),³⁸ while on the other Forbes tells us that some real injuries were extraordinary (punished arbitrarily) and others were not.³⁹ This would at least make sense if Forbes had then listed a category of ‘ordinary injuries’ which attracted fixed penalties, but this is clearly not the case as he tells us that both real and written ‘ordinary’ injuries were punished arbitrarily.⁴⁰ The title on extraordinary injuries is therefore a curious inclusion, especially given that the concept does not appear again in his work in relation to any other crime. It certainly appears short-sighted on the part of Forbes to use such terminology when it would clearly contradict the essence of the ordinary/extraordinary distinction.

It is possible that the title on extraordinary injuries was an attempt to introduce a separate concept of ‘extraordinary’ which is directly comparable to modern day aggravations. Indeed, Forbes seems to suggest a distinction between the terms ‘extraordinary’ and ‘arbitrary’. The initial statement, that “punishments... may be divided into ordinary, *and* extraordinary, *or* arbitrary punishment” may suggest a correlation of ordinary and extraordinary punishments with the use of ‘and’, and likewise isolation of arbitrary punishments as a separate entity (i.e. from extraordinary punishments) with the use of ‘or’. This is perhaps reaching, but becomes more credible when one considers the exposition which follows, detailing the different kinds of ordinary punishment, before curiously going on to discuss at great length the circumstances in which “[t]he ordinary legal punishments are aggravated”.⁴¹ This is important because it comes *before*, and consequently separately from, his discussion on arbitrary punishment, suggesting that the two are not synonymous.

The list of circumstances where ordinary punishments were ‘aggravated’ is exactly what one would expect a list of modern day aggravations to look like: where the crime was “very hainous”; in respect of the place where the crime was committed; by the “character and quality of the person injured”; where the accused is a repeat offender; and finally (a perhaps less modern example) depending on the time of day.⁴² Having gone out of his way to create this distinction, Forbes then, in a rather brief fashion, provides an identical list of

³⁸ Mackenzie, MC, Title 30, 4.

³⁹ Contrast Forbes *Institutes*, Part I, Book IV, Chapter IX, Title I (ordinary injuries) and Title II (extraordinary injuries).

⁴⁰ Forbes, *Institutes*, Part I, Book IV, Chapter IX, Title I, 7.

⁴¹ Forbes, *Institutes*, Part I, Book I, Chapter IV, §4 [1.].

⁴² *Ibid* at pp.15-17.

circumstances that the judge should consider when passing sentence,⁴³ a futile exercise if the two concepts are one and the same. There are therefore statements which could be interpreted as laying the foundations for a distinction to be drawn between the terms ‘extraordinary’ and ‘arbitrary’.

Bayne’s account confuses matters further. He notes that real injuries had to be ‘atrocious’ to attract liability, outlining the conditions under which such injuries gained this status.⁴⁴ Once again the listed factors appear very similar to those considered by a judge administering arbitrary punishment. Thus, whereas Forbes appeared to utilise these considerations to differentiate ordinary from extraordinary forms of real injury, Bayne treats these considerations as essential ingredients for liability. Put differently, under Forbes’ division of injuries, Bayne suggests that there were no ordinary real injuries at all.

In contrast, and on the basis of his title on the division of crimes, Mackenzie’s stance appears relatively clear: beyond being ordinary versus extraordinary,⁴⁵ crimes could either be capital or not capital,⁴⁶ and those cases where the guilt was “very great” could be described as “atrocious”.⁴⁷ Mackenzie therefore utilised an order based on atrociousness, moving from offences against God to those directly against the King or Commonwealth, followed by murder and sexual offences; essentially, capital crimes arranged in order of moral atrocity.⁴⁸ However, despite the clear categorisations outlined at the beginning, at no point is the word ‘extraordinary’ used in the title on injuries, or in *Matters Criminal* generally.⁴⁹ As aforementioned, Mackenzie neglects to tell us what the parameters of arbitrary punishment are, save for a note in his later work *Institutions* that arbitrary punishment cannot extend to the death penalty,⁵⁰ leading Robinson to say that arbitrary punishment is “something less than death”.⁵¹

⁴³ *Ibid* at §4 [2.].

⁴⁴ Bayne, *Institutions*, p.180, para.8.

⁴⁵ As clearly defined in Title 2, 2 (see above).

⁴⁶ Mackenzie, MC, Title 2, 3.

⁴⁷ *Ibid.* at Title 2, 5. He makes no mention of conduct requiring a certain degree of atrociousness.

⁴⁸ OF Robinson, “Law, Morality and Sir George Mackenzie” in HL MacQueen (ed), *Miscellany Six* (Stair Society, 2009) pp.11-27 at p.14; J Cairns, “John Millar’s lectures on Scots criminal law” (1988) 8 OJLS 364 at p.381 broadly seems to agree.

⁴⁹ Mackenzie, MC, Title 30. Reference is exclusively made to ‘arbitrary punishment’ throughout.

⁵⁰ Mackenzie, *Institutions of the Law of Scotland* (2nd edn, 1688) at Book IV, Title 4 (p.400).

⁵¹ OF Robinson, *supra* fn.46 at p.13.

Thus, the picture we are left with is one where aggravations to offences did not exist,⁵² save for those circumstances where conduct we would deem forms of aggravated assault are treated in their own right (e.g. attacking someone in their home) or as part of a separate crime (e.g. robbery). This account is mitigated by the inclusion, in the second edition of *Matters Criminal*, of an appendix by Sir Alexander Seton on the topic of *Mutilation and Demembration*. There he states that:

“Arbitrary punishment answers to arbitrary crimes. All crimes are divided in ordinary... such as leasemajesty, homicide, and other capital crimes; *and extraordinary, or arbitrary*; in which the law hath determined neither, but has left both, to the arbitriment of the judge... as matters of fact are more numerous than could be foreseen or comprehended in laws... being almost infinite... therefore the lawgiver behoved to give arbitrary power to the judge for determining in those emergencies, by the rules of equity and to *heighten or diminish* the punishment, as the circumstances of the fact require”.⁵³

Here the terms ‘extraordinary’ and ‘arbitrary’ are grouped together making it clear that one is synonymous with the other, and thus an injury subject to extraordinary punishment is merely one which has no set penalty and must be considered by the judge on a case by case basis.⁵⁴ Bayne makes a similar statement confirming the purpose of arbitrary punishment, stating that the punishment for real injuries “is arbitrary, and is governed by the circumstances of the case, according as they do either plead mitigation or severity”.⁵⁵ Far from merely indicating when the conduct was worse these statements reveal that arbitrary (and therefore extraordinary) punishment was as equally concerned with mitigation as with aggravation.

The above accounts are therefore at odds with the concept of there being any distinction between extraordinary and arbitrary punishment, as hinted by Forbes. Indeed, it is highly unlikely that Forbes intended to create such a distinction.⁵⁶ What then, was Forbes’ purpose? It may well have been his attempt to incorporate the idea of

⁵² In the modern sense: judicial discretion being of the nature of arbitrary punishment, this of course meant that there was perhaps a great deal of aggravating factors in the sentencing stage for such crimes.

⁵³ Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (2nd edn, 1699), Appendix on Mutilation and Demembration by Sir Alexander Seton of Pitmedden, at p.55, para. 161 and 162 (my emphasis added); see generally paras. 157-187.

⁵⁴ This is in line with Ulpian’s comments at D.48.19.13.

⁵⁵ Alexander Bayne, *Institutions*, Title on Injuries, para.18, p.191.

⁵⁶ This seems clear from Part I, Book I, Chapter VI, 2.

atrociousness, as referred to by Mackenzie. This theory maintains the idea that Forbes did intend to essentially highlight a category of aggravations, which would set him aside from his peers. This theory, however, struggles to explain why Forbes chose to use terminology which already played a prominent role in punishment and sentencing, of which he was likely well aware.

If, however, one follows the logic of Seton and Bayne then the title on extraordinary injuries should be viewed as a list of examples to illustrate the ways in which an arbitrary judge could be influenced by the circumstances to deliver a harsher sentence. Under this theory the title provides an explanatory tool for arbitrary punishment and how circumstances might inform punishment. This would appear to be supported by Seton's comments in *Mutilation and Demembation*, where he states that:

“the nature of this arbitrary punishment is not commonly understood, and the very nature of it is ready to give offence to some who may apprehend that an arbitrary judge may do what he pleases... I shall therefore crave liberty to describe the power of an arbitrary judge; and the nature of arbitrary punishment; for the benefit of those who do not well understand it.”⁵⁷

More generally, perhaps the best way to understand the apparent confusion is to consider those discussions where extraordinary punishments are treated as synonymous with ‘aggravations’ as akin to modern sentencing guidelines: the concept that circumstances in cases of arbitrary punishment could serve to either increase *or* decrease the severity of the sentence shares more in common with our notions of such guidelines than it does with our understanding of aggravations. This would help explain Bayne's apparent insistence on atrociousness for real injuries; the requirement represented the administrative practice at the time, rather than some guiding principle of the substantive law. Otherwise when Mackenzie tells us that all real injuries are subject to arbitrary punishment (and are therefore all extraordinary injuries),⁵⁸ one would expect to find such atrocious crimes placed much further up in Mackenzie's treatment, or at least at the beginning of the title on injuries.

⁵⁷ *Supra* fn.51 at p.55, para. 160.

⁵⁸ Mackenzie, MC, Title 30, 4.

1.3 ‘Injuries’ as Assault in the Seventeenth Century

What, then, constituted an ‘injury’ in the seventeenth century and under what circumstances did one commit the offence? Mackenzie explains that the term ‘injury’ has both a general and specific meaning: the former more comprehensive sense “may give a name to all crimes, for all crimes are injuries”; and the latter, specific meaning is that injuries are akin to “contumely or reproach”, being divided into those committed “by thoughts, deeds, words, and gestures”.⁵⁹ It is this second, more specific, sense of the word that we are concerned with. Forbes talks in similar terms of injuries in the specific sense being a “malicious exposing [of] one’s reputation or character in the world to contempt and shame”,⁶⁰ while Bayne states that every unjust action which “trespasses upon the right of another man, done designedly, may well be called an injury”.⁶¹ The language suggests a focus on rights in personality, specifically humiliation and harassment, and none of the definitions explicitly reference physical wellbeing, save that Bayne’s description of ‘rights’ is broad enough to include a right to physical integrity.

Each author details the different *types* of conduct which could constitute the offence. Mackenzie tells us that injuries were divided into those committed “by thoughts, deeds, words, and gestures... but the more received division is that injuries [were] either verbal or real.”⁶² Here Mackenzie gives us an exhaustive list of the types of conduct which would constitute the offence, before outlining the broader categories under which these types of conduct fall. The primary categories of verbal (*iniuria verbalis*) and real (*iniuria realis*) find their roots as sub-categories in the delict of injury (*iniuria*) in Roman law.⁶³ This tradition appears to have been unanimously accepted by all of the writers at this time and for some centuries after, up until Scots law started to recognise a distinction between delicts and crimes.

Mackenzie’s list shows a clear emphasis on attacks to reputation as only “deeds” suggests the possibility of physical altercations. Equally interesting is the inclusion of

⁵⁹ *Ibid*, Title 30, 1.

⁶⁰ W Forbes, *Institutes*, Vol 2, Part I, Book IV, Chapter IX, 1 (all references hereafter refer to Volume 2, Part I, Book IV unless stated otherwise).

⁶¹ Bayne, *Institutions*, Title on Injuries, p.175, para.2.

⁶² Mackenzie, MC, Title 30, 1; Forbes, *Institutes*, Chapter IX, Title I, 1 (verbal), 4 (real) & 5 (written); Bayne, *Institutions*, p.175, para.2.

⁶³ Justinian, *Institutes* IV, 4, 1; D.47.10.1.1-2. For an overview, see OF Robinson, *The Criminal Law of Ancient Rome* (1995) at pp.49-51; P Birks “Harassment and hubris: the right to an equality of respect” (1997) 32 *Irish Jurist* 1 at pp.5-14.

“thoughts” as a way of committing the offence. One would assume that “words” covered those both written and spoken, thus the reference to thoughts would appear to be an example of Roman legal foundations being augmented by religious overtones. Indeed, Mackenzie never expands on this concept so we never learn how thoughts were supposed to have been policed, leading one to assume that its inclusion was purely as a nod to spiritual, rather than actual, authorities. Mackenzie’s division gives us a flavour for how the Roman legal tradition was received into Scots law, but represents only his interpretation of the more respected division of real and verbal injuries. We shall therefore examine each of these in turn.

1.4 Real Injuries

Real injuries were those which could be described as deeds or gestures designed to harm the victim by Mackenzie. It included the type of conduct which constitutes the modern law of assault, but was not restricted to breaches of physical integrity. Mackenzie tells us that real injuries are committed by:

“hindering a man to use what is his own, by removing his seat out of its place in the church, by giving a man medicaments which may affront him, by arresting his stooks {seizing his stacked sheaves} unjustly, by wearing in contempt what belongs to another man as a mark of honour, by razing shamefully a man’s hair or beard, *by offering to strike him in public, or by striking him*, or riving [ripping] or abusing his clothes, or his house, and many other ways”.⁶⁴

Conduct which would be today described as either criminal damage to property or as a civil wrong appears to dominate Mackenzie’s understanding of real injuries. Blackie tells us that Scottish lairds often had grand lofts in the church which would be put at risk under social and religious tensions. The tearing down of these lofts was of course the breach of a property right but also a very public disparagement of status and dignity, viewed as equal in severity to the bodily injuries and harsh language that also occurred.⁶⁵ Indeed we only find the first instance involving physical contact with another person as the fifth item on Mackenzie’s list, and then it is merely the ‘razing’ of a man’s (facial) hair.⁶⁶

⁶⁴ Mackenzie, MC, Title 30, 3 (my emphasis added).

⁶⁵ Blackie, “Unity in Diversity”, at p.79.

⁶⁶ Which presumably means to cut outwith the context of a salon/barbershop. One example in this regard raises an interesting question: could a barber who had initially been given permission to cut a man’s hair be

Further, the next item is about *threatening* to do physical harm, before finally Mackenzie states that actually striking would also constitute a real injury. It is noteworthy that threats are treated here as comparable to the infliction of violence.

It is also interesting to note that threats were considered real, and not verbal, injuries. This is of importance because real injuries were always regarded as a state matter warranting treatment in the criminal courts, whereas verbal injuries were not.⁶⁷ Thus, even in the seventeenth century and despite, at that time, a lack of clear distinction between delicts and crimes, there still appears to have been some divergence between conduct which threatened bodily integrity versus that which merely caused offence. Forbes offers a similar account, giving the following examples of real injury:

“As by painting him in fools colours, or with asses ears; by fixing a gallows, pillory, horns, or any other shameful sign at his door; by using some indignity to his person, as the giving him medicaments to affront him, *spitting in his face, striking him with a cane*, or lifting up a cane to strike him; by hindering him to use what is his own, as the removing his seat in the church, wearing his coat of arms”.⁶⁸

Forbes’ account is far more structured than that of Mackenzie, and he offers us three main categories by which a real injury might be committed: by depicting the victim in an insulting fashion; by attacking him; or by hindering him to make use of property which was in some way linked to his standing in society (i.e. the Church and aristocracy).⁶⁹ Once again, the wrongfulness of a physical assault is presented amongst other, more trivial, acts classified as real injuries.

The above categorisations and examples given seem to be heavily influenced by a broader notion of honour and reputation, rather than respect to individual autonomy *per se*. There appears to be a shift in attitude, at least between authors if not time periods, as to what it meant to be insulted as removing the victim’s seat in church, previously the first

guilty of real injury if his customer decided that the cut was too short? Does ‘shamefully’ refer to a *dole* requirement, or did negligence suffice?

⁶⁷ Mackenzie, MC, Title 30, 4. Cf. *Hamilton v Blair* (1724): Hector, *Renfrewshire Sheriff Court* 105 at p.106 where it was open to argument that a mixture of threats with throwing stones should be classified as a verbal injury.

⁶⁸ Forbes, *Institutes*, Chapter IX, Title 1, 4 (my emphasis added).

⁶⁹ Bayne tells us that “Injuries were likewise understood to be done to the Living through the persons of the Dead, whose Representatives they were, as by disturbing their Ashes... which is thought would hold in our law”, *Institutes*, p.188.

example given by Mackenzie, is now much further down the list. It is unclear how strong an inference can be drawn here, but it is noticeable that both authors use many of the same examples, and Forbes was heavily influenced by *Matters Criminal*, yet they feature at different points.

Within the category of attacks, again threats are treated as comparable with physical assault. Both Mackenzie and Forbes' treatment of threats are thus woefully inadequate as they set no real parameters for how such threats might be treated as real injuries. For example, from the limited case law it seems that brandishing a gun at the victim would constitute an injury even where the weapon was not capable of being fired,⁷⁰ but there is no indication of whether the victim had to know this. However, similar threats appear to have been charged as real injuries⁷¹ or breaches of the peace,⁷² and thus examining Forbes' treatment of breach of the peace is illustrative in this respect, as he notes there that if the threat in question is one where "a man [shows] himself unusually armed, or [brandishes] a weapon, and thereby strikes a fear into those unarmed" he will be guilty of raising an affray.⁷³ A valid threat of violence therefore required causing apprehension in the victim. Thus, real injuries appear to have encompassed not just physical integrity but also fear and alarm caused in the victim.

Bayne offers a contrasting explanatory model for real injuries, and one which appears to give physical injury the level of gravitas that the modern law would expect. He begins by stating that real injuries were committed by "certain actions which inflict personal hurt, or which offer an indignity or insult",⁷⁴ which is not dissimilar to his peers. However, as aforementioned above,⁷⁵ he introduces a *de minimus* exception, stating that the law would only take notice of those indignities which were "atrocious"; anything less would not attract liability. An injury could become atrocious in the following ways: by the nature of injury, "as if a blow or wound is given"; by the character of the person offended, such as against a magistrate, parent or master; and by the circumstances of time or place, for example when it is committed in a public place or during a time of divine service.⁷⁶

⁷⁰ *Brown v Alexander* (1757) Hume, i, 443.

⁷¹ *Cochran* (1717) *Renfrewshire Sheriff Court* 215.

⁷² *Captain Andrew Nairne* (1712) Hume, i, 442.

⁷³ Forbes, *Institutes*, Book III, Chapter VIII, Title II, §2.

⁷⁴ Bayne, *Institutions*, p.180, para.8.

⁷⁵ See p17.

⁷⁶ *Ibid.*

The implication is therefore that all real injuries were atrocious, and thus the guilt was very great.⁷⁷ Bayne's account is also unique in its reference to physical injuries as a general category, standing in contrast to the arbitrary examples given by other accounts. It therefore provides the most emphatic support for physical attacks and their resulting injuries as being important in the seventeenth century. Both Mackenzie and Forbes seem to shy away from physical altercations in their treatment of real injuries and neither author says much other than that such injuries were to be punished arbitrarily. Only Bayne appears to think it worth recognising the severity of striking and/or wounding within his work, but even he only spends one paragraph on the topic.

It is clear from each account examined that physical altercations appear to have enjoyed no real significance within the real injuries category. Indeed, actions which attacked another's religion or reputation appear to have been of equal or greater importance. This can in part be explained due to more serious injuries being treated as separate offences entirely. It is worth considering them in greater detail.

1.4.1 Serious Injuries as 'Mayhem'

The sources indicate that serious forms of physical injury were treated under a separate offence in the seventeenth century. Despite this, the literature is perhaps the most inconsistent in this area. Forbes' *Institutes*, for example, includes a chapter on the 'mutilation'⁷⁸ (rendering useless) and 'dismemberation'⁷⁹ (removal) of body parts, known collectively as 'mayhem',⁸⁰ which comes before his treatment of injuries (presumably because it was more atrocious).⁸¹ Bayne however, probably influenced by Mackenzie (discussed below), does not recognise mayhem at all. Instead, in his treatment of real injuries, he states that of the three "foundations of atrocity", the nature of the injury is the most important:

⁷⁷ Mackenzie, MC, Title 2, 5.

⁷⁸ *Forbes* (1626) 1 JC 44; *Hamilton* (1628) 1 JC 82, 90. Prosecution for mutilation could not be brought before the expiry of one year and a day from the incident, in order to determine whether or not the injury would properly heal: Forbes, *Institutes*, Chapter VIII, 5; Seton on *Mutilation*, Part I, paras. 69 & 71-72; *Haliburton* (1640) 2 JC 389.

⁷⁹ Known more commonly as 'demembration'; *John Rogers* (1641) 2 JC 505; *Young* (1642) 2 JC 529.

⁸⁰ Mutilation and dismemberation/demembration shall be referred to hereafter collectively as 'mayhem'.

⁸¹ Forbes, *Institutes*, Chapter VIII.

“and with respect to wounds given, the atrocity of the injury is heightened, either by the greatness of the wound, or the place of the body where it is inflicted”.⁸²

Thus, for Bayne injuries could be aggravated by the level of harm caused. This is striking because his contemporaries treat serious injury as a separate crime, rather than as an aggravated form of the basic injury.

Rather curiously, Mackenzie does not appear to recognise serious injuries at all in his original treatment. Indeed, the short paragraph on real injuries in Title 30 contains the only reference to physical violence, and half of the examples do not involve any kind of injury to bodily integrity. However, this list is not intended to be exhaustive and Mackenzie refers the reader to the work of the Saxon jurist, Matthius Berlichius, as providing other examples.⁸³ Mackenzie appears to have taken much of his inspiration for real injuries from Berlichius’ work; many examples are direct transplants such as removing one’s seat (bench) from church⁸⁴ and unjustly arresting stooks.⁸⁵ Berlichius’ list is far more extensive, though it lacks any kind of structure, including a mixture of real, verbal and written injuries. Specifically, it does include further examples of physical injuries which were absent from Mackenzie’s work, so that striking someone with a hand, elbow or razor,⁸⁶ wounding,⁸⁷ or overpowering someone⁸⁸ would all count as injuries, and Mackenzie presumably accepted these within his own scheme of injuries. It does not, however, seem to deal with the topic of mayhem as we see discussed in Forbes or alluded to in Bayne.

Hume suggests in his *Commentaries* that Mackenzie omitted to take special notice of such injuries as distinct from other real injuries because they were not capital crimes,⁸⁹ but it certainly seems odd given that both his contemporaries recognised their distinction in works which were derivative of *Matters Criminal*. In any case, an appendix on mayhem was included with the second edition, written by Sir Alexander Seton of Pitmedden.⁹⁰ Seton writes at great lengths explaining exactly what constituted a ‘member’ – this was of great importance because if the body part injured was not considered a ‘member’ then a

⁸² *Ibid.*

⁸³ Mackenzie, MC, Title 30, 3 citing M Berlichius, *Pars Conclusionum Practicabilium* (Leipzig, Jena, 1651), Part 5, *conc.* 59 ss84-125.

⁸⁴ Berlichius, *ibid.*, s106.

⁸⁵ *Ibid.* s120.

⁸⁶ *Ibid.* ss. 87-90.

⁸⁷ *Ibid.* s.91.

⁸⁸ *Ibid.* s.95.

⁸⁹ Hume, i, 330.

⁹⁰ *Supra* fn.53.

charge of mayhem could not be brought.⁹¹ Seton’s treatment has been criticised by Blackie as giving “a false impression of the significance of the term ‘demembration’”, arguing that Seton misunderstood that the purpose of mutilation/demembration and other sub-categories of injury (such as invasion and effusion of blood) was merely to determine the sentence. This would conform with Bayne’s account. Thus, the distinction between demembration and mutilation was only relevant with respect to the rule that in cases of mutilation proceedings could only be brought after a year and a day, a time frame used to provide certainty that the body part was permanently damaged, which was unnecessary where the body part was removed completely.⁹² However, Blackie himself notes that by 1640 cases were being published with each term being averred separately, suggesting that it was not only Seton who recognised a distinction between the types of injury.⁹³ Thus, it is apparent that in the seventeenth century, serious physical injuries were treated separately from real injuries.

1.5 Verbal Injuries

Mackenzie explains that verbal injuries could be of two types: those that are patently “unwarrantable expressions” such as to call a man a cheat or a woman a whore; and those expressions which vary according to the intention of the speaker, described by Forbes as those “obliquely” spoken, and must therefore be proved as injurious in the context which they were received (such as ironically: “You are an honest man”⁹⁴), with the speaker being allowed to “purge his guilt by declaring his intention”.⁹⁵ It was therefore an essential characteristic of verbal injuries that the offender intended to commit the crime, known as the *animus injuriandi*.⁹⁶ The insult had to have a “manifest and visible tendency to defamation, and to lessen one’s character and reputation in the world”, and thus words may be insulting but nevertheless ignored by the law if they had no “tendency to defamation”.⁹⁷ Thus, more obscure comments or those that only held meaning to the

⁹¹ *Ibid.* Part I, at para.13. Seton’s account has been described as “tedious hair-splitting detail” by DM Walker in *Scottish Jurists* (1985) at p.181. See also *Cheyne v Mowat and Ors* (1641) 2 JC 463 which libeled only mutilation but would be considered a case of demembration by Seton as the destruction of a thumb or fingers amounted to this.

⁹² J Blackie, “Unity in Diversity”, at p.48.

⁹³ *Roger* (1641) 2 JC 505; *Young* (1642) 2 JC 529; and indeed see Erskine, *Institute* Part II at 4, 4, 50 who recognises a distinction.

⁹⁴ Forbes, *Institutes*, Part I, Book IV, Chapter IX, Title I, 1.

⁹⁵ Mackenzie, MC, Title 30, 2; Forbes, *Institutes*, Chapter IX, Title 1, 1.

⁹⁶ Bayne, *Institutions*, Title on Injuries, p.176, paras. 3-4.

⁹⁷ *Ibid.*, para.3.

parties involved might not have been recognised as valid injuries, suggesting an emphasis on public shame rather than personal offence to the victim.

Mackenzie tells us that verbal injuries between private individuals were punished only by the Commissars, who were Christian judges with the “least criminal jurisdiction of all other courts”.⁹⁸ Thus the Privy Council would remit cases of verbal injuries to the Commissars except where the victim of such an injury was a “person of quality”, such as a magistrate, and then the case could also be heard by the criminal courts. As aforementioned this exclusive jurisdiction came from the view that verbal injuries were scandals, and thus on top of the standard pecuniary penalty the court would also hand down church censures, such as being forced to stand at the church-doors to expiate a slander.⁹⁹

To make matters confusing, however, Mackenzie states that if the verbal injury was not deemed a scandal, but rather reflected upon the honour of the party injured (such as to call a man a “puppy or an ass”), it could become a matter for the Privy Council.¹⁰⁰ This would appear to create an intermediate level where some verbal injuries were dealt with more severely than others, but not enough to warrant the attention of the criminal courts. Indeed, from the examples given one could argue that any direct, or ‘patently unwarrantable’, expression that did not attack the piety of the victim should not be considered a scandal, depending on how one defines the word, and would therefore warrant the involvement of the Council.¹⁰¹ However, this argument, and indeed the statement by Mackenzie in general, appears to be at odds with the general consensus about terminology at that time: Blackie states that ‘slander’, ‘defame’ and ‘scandal’ were all synonyms.¹⁰²

⁹⁸ Mackenzie, MC, Part II, Title 10, 2. The Commissary courts succeeded the pre-Reformation episcopal courts and had jurisdiction over matters concerning familial relations, such as adultery, alimony, bigamy, divorce etc. Very few cases were recorded, but some are available from FP Walton (ed), *Lord Hermand's Consistorial Decisions 1684-1777* (1940)(Stair Society, Vol. 6).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Indeed one of the two most common definitions for the word ‘scandal’ is in religious use, used to describe something that hinders reception of the faith or obedience to the Divine law – it is at least questionable how liberally the word ‘scandal’ was interpreted by the law in the seventeenth century, and equally how eager the criminal courts were to take jurisdiction for such crimes:

<http://www.oed.com/view/Entry/171874?rskey=OCbx5w&result=1#eid> at 1.b.

¹⁰² J Blackie, “Defamation”, at p.642.

1.5.1 Written Injuries

A quick note should also be made of written injuries in seventeenth century Scotland. Mackenzie tells us that “infamous libels” are the “most permanent of all injuries, and therefore are most severely punished” as the offender “shows more design, and therefore is more guilty”.¹⁰³ Thus, one who wrote, dictated or affixed infamous libels or caused them to be so written, dictated or affixed in public was punishable. He tells us that punishment was arbitrary save for abuse of the Prince or where a capital crime was alleged against any man.¹⁰⁴ This appears to be the only instance of Mackenzie giving an example of how arbitrary punishment was to be utilised, stating that punishment could be lessened where the accused was a minor, was provoked, took it down before it was fully written or after it was affixed, confessed his fault and said that he did it only out of passion, or if what was said was true.¹⁰⁵

Bayne’s account supports this view of written injuries, emphasising the severity of publishing “defamatory libels or pasquils” as being the most permanent.¹⁰⁶ However, he distinguished between written injuries and ‘pasquils’; the latter imputed some crime or great offence which was more than contumely or reproach, it was published anonymously, and it was “industriously made public”.¹⁰⁷ He repeats the idea of arbitrary punishment for the majority of written injuries but states that capital punishment was given for *pasquils*¹⁰⁸ published against the King or where a capital crime was alleged against an innocent man (which, based on his definition presumably also qualified as a pasquil), although Bayne appears to disagree with this latter case, stating that the punishment was “too severe” and seemed to be “without foundation, at least, is not very consistent with the spirit of the said law”.¹⁰⁹

Forbes differs from the other accounts in that he makes no distinction between the severity of written injuries in comparison with verbal or real injuries, and the term ‘infamous libels’ is not to be found in Title I of chapter IX.¹¹⁰ Further, there is no mention

¹⁰³ Mackenzie, MC, Title 30, 5.

¹⁰⁴ *Ibid.* But sometimes the speaker was ‘only’ scourged and banished.

¹⁰⁵ *Ibid.*

¹⁰⁶ Bayne, *Institutions* at p.178, para.6.

¹⁰⁷ *Ibid* at p.179

¹⁰⁸ Not written injuries generally – Bayne perhaps confuses his choice of words since he cites Mackenzie as his source here: Bayne, *op cit* at p.179.

¹⁰⁹ *Ibid* at p.179-180.

¹¹⁰ He uses the terms ‘pasquil’ and ‘defamatory libel’ as synonyms for ‘written injury’: Forbes, *Institutes*, Chapter IX, Title 1, 5.

of capital punishment as he tells us that both written and real injuries were subject to arbitrary punishment (with no exceptions) within the same sentence.¹¹¹ Forbes also placed emphasis on the injurious writing being published, something that was mentioned by Bayne but is absent from Mackenzie. He tells us that a written injury was a print, writing or inscription which was “composed and published” and that the “ordering a printer to print a scandalous pamphlet [was] sufficient publication thereof”.¹¹²

The concept of a written injury is interesting for our purposes because it typifies how the concept of offences against the person was understood then as opposed to now. It is curious that for the likes of Mackenzie a written injury was considered the worst type of injury imaginable, although this perhaps makes more sense if one accepts that serious injuries (mayhem) were not considered ‘injuries’ during this time. Indeed, the idea of offences against the person being inextricably linked to the concepts of honour and reputation is arguably no better personified than by the idea of criminal liability for defamation, and thus when the influence of the English law of libel and slander results in such injuries being treated as delicts rather than crimes, we inevitably witness a shift in the underlying principles which guide this area of law.

1.6 Honour and Harm in the Seventeenth Century

None of the seventeenth century authors spend much time discussing real injuries, giving the impression that causing the victim embarrassment, especially amongst his peers, seems to have been of primary importance – perhaps more so than being struck outright. It is quite amazing, however, just how minimised the concept of minor physical injury was in seventeenth century accounts. Mackenzie wrote over five hundred words discussing verbal injuries; he wrote only eighty-nine on real injuries. Perhaps a longer discussion was necessary to justify the criminalisation of insults, precisely because they were treated as less serious, but there is virtually no discussion at all concerning physical injury – merely solitary, arbitrary examples. Indeed it is certainly curious that only Bayne should deem it necessary to make the point that “[t]he law extends its care and protection to our reputation and good name, *as well as to our persons and estates*, by the sanctions of those laws which chastise the contumelious and malicious reproaches”.¹¹³ Forbes’ chapter heading for

¹¹¹ *Ibid* at Title I, 7.

¹¹² See also *HMA v Lord Balmerino* (1634) 3 Cobbett’s State Trials 591 where the court rejected the view that being posted in public was an essential element of an infamous libel/written injury.

¹¹³ Bayne, *Institutions*, p.174, para.1 (my emphasis added).

injuries, “Of Crimes and Offences committed against one’s Fame or Honour, called Injuries”,¹¹⁴ is absent of any kind of reference to physical attacks, and Mackenzie states that the term ‘injuries’ is to be regarded as synonymous with contumely or reproach, words which refer to the acts of insulting or expressing one’s disapproval.¹¹⁵ The result is that the discourse at this time on the law of injuries is specifically concerned with actions which offend reputation.

One must therefore view the types of conduct which came under the ‘injuries’ heading not as offences of violence, but rather as infringements on rights in personality in the victim. Even so, it is still unclear why every author discusses verbal injuries in great detail and before discussions of real injuries. We know that Mackenzie structured the crimes in *Matters Criminal* on a descending level of atrociousness,¹¹⁶ and both Forbes¹¹⁷ and Bayne¹¹⁸ follow this pattern, suggesting that, as a rule of thumb, those that come before are the more severe. The implication is therefore that verbal injuries were at least as, if not more atrocious than real injuries (at least those which could not be classified as mayhem).

This apparent anomaly might be explained by the influence of the Church during this period: many of the courts were ecclesiastical in nature¹¹⁹ and Catholicism had been criminalised, punishable by death.¹²⁰ Despite the hierarchical nature of Scottish society in the seventeenth century, there was a shared religious culture which espoused the idea of restraint as promoting a godly life.¹²¹ Where real injuries were dealt with by the criminal courts, verbal injuries between private parties were exclusively dealt with by Christian Judges, scandal being a church censure.¹²² Blackie argues that this jurisdiction had a crucial effect on the development of the substantive law of both real and verbal injuries; for

¹¹⁴ Forbes, *Institutes*, Part I, Book IV, Chapter IX.

¹¹⁵ Mackenzie, MC, Title 30, 1. On “contumely” see P Birks *op cit*, at p.8.

¹¹⁶ OF Robinson, *supra* fn.46 at p.14.

¹¹⁷ Forbes, *Institutes*, Part I, Book I, Chapter VI, 3.

¹¹⁸ Bayne, *Institutions*, Preliminary Observations, p.7, para. 6.

¹¹⁹ The General Assembly was the governing body of the Church of Scotland in addition to being the supreme court at that time: *supra* fn.11 at p. xvii.

¹²⁰ Mackenzie, MC, Title 3, 5: “By our Act 21... blasphemy... or any of the Persons of the Blessed Trinity, shall be likewise punishable by death, if they obstinately continue therein”; see also Title 4, 3 on Heresy, where reference to Catholics as ‘heretics’ is made.

¹²¹ Blackie, “Unity in Diversity”, at p.35.

¹²² Mackenzie, MC, Title 30, 4. Note that the criminal courts could punish verbal injuries against magistrates.

example the marrying of the defamation¹²³ and scandal concepts made it natural to see such claims as penal.¹²⁴

Further, where compensation was sought *ad damna et interesse* it was understood that this aspect was not penal but rather civil in nature, however the records rarely made reference to this distinction, as the concept was seen as trite.¹²⁵ Thus, actions for patrimonial and non-patrimonial loss were often conflated, and real injuries in particular straddled both types of loss (verbal injuries causing patrimonial loss being an undeveloped concept). This in turn resulted in a minimisation of the distinction between verbal and real injuries with the focus being on the general concept of *iniuria*, or ‘honour and reputation’. *Iniuria* as understood by the Romans is described by Birks as being so tied to the concept of ‘contemptuous harassment’ that it necessarily dictated the types of conduct which were considered injurious, i.e. those acts calculated to cause distress in the nature of anger and humiliation to the victim.¹²⁶ Thus it was the *iniuria* that was important – not *how* the *iniuria* was committed. In other words – where the aim of the law was to punish actions calculated to cause anger and humiliation, it should make little difference as to whether this is done through actions or words.

Blackie’s work can also help explain the lopsided treatment of these injuries by seventeenth century writers; he suggests that the reason why, in contrast to ‘real injury’, ‘verbal injury’ is frequently found expressed is due to a lack of sub-categorisation.¹²⁷ Thus, there was no need to refer to ‘real injuries’ when terms such as mutilation, effusion of blood and wounding existed (categories which often had their own treatment within jurists’ work); the concept was trite.¹²⁸ This explanation, if accepted, would mean that the structure of physical injury did not lend itself to conceptualising more basic physical injuries where an appropriate sub-category did not exist.¹²⁹ Indeed in one case it was argued that where a charge did not contain slaughter, mutilation, demembration, or the drawing of blood, it should not be pursued criminally at all; this argument was rejected but clearly

¹²³ Understood here in its modern sense.

¹²⁴ Blackie, “Unity in Diversity” at p.36.

¹²⁵ *Ibid*, p.36-37.

¹²⁶ Birks, *op cit* at p.11; see also OF Robinson, *Criminal Law of Ancient Rome* at p.49: “the essence of the offence was the outrage suffered.”

¹²⁷ *Ibid*, p.77.

¹²⁸ *Ibid* and see D Daube, “The Self-Understood in Legal History” 1973 JR 126.

¹²⁹ And indeed there are not many cases. For a rare example see *Colqhoun* (1694) 2 *Justiciary Records of Argyll and the Isles* 60 (case 95) in J Cameron (ed), *The Justiciary Records of Argyll and the Isles 1664-1705*, Vol I (1949, Stair Society). It also does not help that many crimes of violence were frequently settled by out of court agreements, just as civil disputes are settled today: see M Wasser, “Defence counsel in early modern Scotland: A study based on the High Court of Justiciary” (2005) 26 *Journal of Legal History* 183 at p.194.

demonstrates the apathetic mood shared by some towards less serious (i.e. non-life-threatening) injuries.¹³⁰

1.7 Injuries as Intentional Acts

The seventeenth century sources provide very little analysis of the culpability element required for criminal liability. The totality of Mackenzie's discussion on culpability for injuries is within the context of verbal injuries, where he states that "injuries are estimated according to the design of the offender".¹³¹ He adds that fools, mad men, children and other such 'distracted persons' were not punishable for injuries, because "such persons are understood to have no evil design; and injuries are reckoned according to the offender's design".¹³² It is unclear why real injuries appear to be precluded from this discussion. It may have been an oversight as Forbes makes no mention of this distinction when he makes the point, although Bayne does not mention the defence at all despite discussing several other concepts which Forbes mentions, namely that verbal injuries may be retorted lawfully, and that one could be injured vicariously through their wife, children or servants.¹³³ Further, it is unclear how extensive this 'distracted persons' defence actually was as both Mackenzie and Forbes tell us, for example, that children may yet still be guilty of beating or cursing their parents,¹³⁴ and Mackenzie tells us further that drunken offenders will not be excused if it is clear that they became drunk with a view to offending.¹³⁵

The fact that the design had to be 'evil' suggests that something more than negligence was required to attract liability, but it is unclear whether recklessness would suffice. Generally speaking, Mackenzie talks of the "wickedness of the design" making an action criminal, and that it was the design of law-givers "only to punish such acts as were designedly malicious", but also noted that "because design is a private and concealed act of the mind... in some cases this *dolus* is allowed by law to be inferred from conjectures and

¹³⁰ *Howison* (1643) 3 JC 578. Panel argued against mutilation or demembration despite the fact that the victim was assaulted by 'a wedock' (garden hoe) which left them blinded in one eye. The resulting charge of mutilation was sustained. Cf. *Young* (1642) 2 JC 529 where blinding was considered demembration. Note that panel in *Howison* argued without legal representation, however a similar argument appears to have been pled by counsel of the day: *James Scrymgeuer* (1619) Pitcairn III, 467; *Patrick Martin and Ors*, (1647) 3 JC 759.

¹³¹ Mackenzie, MC, Title 30, 2.

¹³² *Ibid*; Forbes, *Institutes*, Part I, Book IV, Chapter IX, 2.

¹³³ Forbes, *Institutes*, Part I, Book IV, Chapter IX, 2 at (b), (h) and (i); contrast with Bayne, *op cit* at Title on Injuries, p.186-188, paras. 14-15.

¹³⁴ Forbes, *Institutes*, Part I, Book IV, Chapter IX, Title II, §2.4; Mackenzie, MC, Title 14, 6.

¹³⁵ Mackenzie, MC, Title 30, 2: "except the offender did become drunk upon design to offend, '*si non ex proposito sed ex impetu deliquit*'."

presumptions, where the act is such as of its own nature may be good or evil”.¹³⁶ Likewise, Forbes speaks of persons being “engaged or moved to commit a crime” either out of premeditation, impulse or imprudence.¹³⁷ Bayne states that “malevolent intention, is an essential ingredient” to crime, but that such intention might be inferred from negligence which was “extremely supine”.¹³⁸ The scope then for reckless injury appears to have been there, but the descriptive nature of the conduct rules, particularly for real injuries, seems to preclude such injuries in a majority of cases.

1.8 Aggravations

Aggravations of assault are an important concept for our purposes given that historically this is how Scots law has chosen to distinguish different degrees of harm in assault. As aforementioned, historically there was no clear-cut structure of aggravations that one could turn to begin determining any kind of grading function in the law. Instead, what we would call aggravating circumstances were peppered throughout the law under the guise of separate offences, or as parasitic to other crimes, and these examples shall be noted here.

Aggravations of assault which rely on an intent to commit a further crime, i.e. to rob or to ravish, did not exist in the same way we now understand them, although the wrongful conduct was criminalised in other ways. Robbery, for example, was considered to be a theft aggravated by violence, rather than violence aggravated by theft.¹³⁹ Likewise, rape or ravishing seems to have been more closely aligned with kidnapping than general violence *per se*, so that all instances of violence that occur were only considered part of the factual narrative and therefore a charge of ravishing could be maintained even where a woman was merely carried away and not subsequently sexually assaulted (although punishment was far less severe).¹⁴⁰ Only Bayne seems to recognise an affinity shared by assault and sexual assault stating that “[a]ll violence of what kind soever is criminal; but it becomes more so, when the persons upon whom it is committed are particularly taken into the protection of the law”.¹⁴¹ The rule of thumb therefore appears to have been that if an

¹³⁶ MC, Title 1, 4.

¹³⁷ Forbes, *Institutes*, Part I, Book I, Chapter I, 2.

¹³⁸ Bayne, *Institutions*, p.9, para.9.

¹³⁹ Mackenzie, MC, Title 34, 1; Forbes, *Institutes*, Chapter VII, §1: “It is a rape... where first attacked by the ravisher”; Bayne, *Institutions*, p.135, para.1: “Robbery is in effect a violent theft.”

¹⁴⁰ Mackenzie, MC, Title 16, 4; Forbes, *Institutes*, Chapter X, Title VII: “Robbery is, the taking away another man’s goods or money... by force and violence.”

¹⁴¹ Bayne, *Institutions*, Title on Rape at p.59.

assault involved the commission of a second, more serious offence, the conduct would be recognised as an example of that more serious crime.

However, it was not just assaults with further intent that were treated as examples of other crimes. Cursing one's parents, an injury which would later be categorised as an aggravated type of injury by Hume,¹⁴² was positioned at the beginning of Mackenzie's work as a form of blasphemy, retaining the function (if not the appearance) of an aggravated form of injury by virtue of being a capital crime.¹⁴³ Equally, the harassment or assault of officers of the state, such as any of the Session or Secret Council, far from being considered an assault aggravated by the character of the victim, was treated as an example of treason.¹⁴⁴ Mackenzie appears to contradict himself as he tells us that the crime is "punishable by death, but not as treason" for only killing such a person will amount to the crime of treason.¹⁴⁵

Mackenzie's title on injuries is silent on physically assaulting magistrates (or any other type of special person for that matter), the conclusion being that assaulting (or harassing) an officer of the state could be classified neither as an injury nor treason, thus existing in some kind of limbo as a quasi-treasonous act.¹⁴⁶ In one case the assault of a servant of a judge was regarded as 'treasonable wounding', the servant being considered an extension of the judge's person, and thus presumably assaults against magistrates themselves would be considered as such too.¹⁴⁷

Additionally, several instances of violence with peculiar circumstances, which in modern criminal law might readily be described as aggravated forms of assault, were treated as separate crimes altogether. It was noted earlier that serious injuries, i.e. those that maimed or amputated a body part of the victim, were generally treated as a separate offence and given their own, separate treatment. Likewise, deforcement made it a crime separate from injuries to attack any sheriff officer executing sentence whilst in their official

¹⁴² Hume, *Commentaries*, Book I, Chapter IX, 324.

¹⁴³ Mackenzie, MC, Title 3, 6; cf. Forbes (below).

¹⁴⁴ Mackenzie, MC, Title 6, 16; to be distinguished from deforcement which applied to assaults on sheriff officers/officers of arms in the course of carrying out their duties, see Title 26, 2.

¹⁴⁵ Mackenzie, MC, Title 6, 16.

¹⁴⁶ Many cases would be charged based on a description of the conduct, as opposed to some preordained offence, such as in *Grahame* (1603) II Pitcairn, 416 where the accused was charged with the "invasion of a minister, near the Tolbooth, where the Privy Council were sitting in judgement."

¹⁴⁷ *James Reid(Gray)* (1640) 2 JC 387.

capacity.¹⁴⁸ Some aggravations appear to have been treated more severely than others: in one instance the crime of deforcement appears to have been relegated to part of the factual narrative in a case concerning demembration and hamesucken.¹⁴⁹ Walker suggests that ‘riot’ was a term applied to violent and aggravated assault which did not require a group of people for its commission,¹⁵⁰ there being an instance where it was charged against two women who seriously injured (and consequently killed) a man.¹⁵¹ However, both Forbes and Bayne suggest that a minimum number of persons was required for a riot,¹⁵² and rioting, mobbing and serious breach of the peace were conduct dealt with by the Privy Council, being concerned with public order, so it seems that a charge of rioting (as opposed to mayhem) was likely the exception rather than the rule.

Hamesucken, or attacking someone in their own home, was an extremely common type of injury,¹⁵³ and although different variations make up modern aggravations, the *nomen juris* is still indictable today.¹⁵⁴ This offence was given its own title in *Matters Criminal*¹⁵⁵ and is said by Mackenzie to have been dealt with more severely because a man “expects more security and is least guarded against violence whilst he lives peacefully at home.”¹⁵⁶ Bayne equally states that hamesucken was a type of real injury “punished with the greatest severity”.¹⁵⁷ Peculiarly, both Bayne and Mackenzie refer to hamesucken as an “assault” in their treatment of the topic, but do not use the term elsewhere when discussing other types of injury, real or otherwise.¹⁵⁸ Blackie notes that the rare usage of the term assault was confined to the military sense of sieging a building until the seventeenth

¹⁴⁸ *Ibid.*, Title 26, 2; Forbes, *Institutes*, Book V, Chapter III, Title II; Bayne, *Institutes*, Title on Deforcement at p.35ff.; *Leith of Newleslie* (1648) 3 JC 795.

¹⁴⁹ *Hendersone* (1609) III Pitcairn, 58; cf. *Robert Angus* (1640) 2 JC 396 where the charge was for ‘deforcement and mutilation’. Hamesucken is discussed in more detail below.

¹⁵⁰ DM Walker, *A Legal History of Scotland* Vol IV (1996), at p.500.

¹⁵¹ *Symson and Cleuch* (1640) 2 JC 392, although ‘riot’ is described by JI Smith as meaning an “aggravated and prolonged assault” (my emphasis added) in *Selected Justiciary Cases 1624-1650* Vol. II (1972, Stair Society); see also *Johnnestoune* (1605) II Pitcairn, 461 at 462 where demembration was described as a “manifest ryote”.

¹⁵² Forbes states three minimum for a ‘petty riot’ and twelve for a ‘great riot’, *Institutes*, Part I, Book III, Chapter XIII, Title II, §2, 2; Bayne, *Institutes*, Title on Sedition, p.34 at para.3; Mackenzie is silent on the issue. See also *Campbell* (1678) 1 *Justiciary Records of Argyll and the Isles* 134 (case 60) in J Cameron (ed), *The Justiciary Records of Argyll and the Isles 1664-1705*, Vol I (1949, Stair Society) where the term ‘ryot’ is used to describe an assault by four men – the term is not used again in any other case of assault.

¹⁵³ Mackenzie, Title 21; There are many instances in the limited case reports: *Chene* (1602) II Pitcairn, 399; *Maxwell* (1605) II Pitcairn, 464; *Hendersone* (1609) III Pitcairn, 58; *Crombie* (1638) 1 JC 290; *Stewart of Ryland* (1643) 3 JC 588; *Scott* (1649) 3 JC 810 (an invasion of the Royal Palace, showing that ‘home’ was interpreted widely).

¹⁵⁴ *Walker v HM Advocate* 2014 JC 154.

¹⁵⁵ Although was capable of being pled as an aggravation to another crime: Title 21, 2.

¹⁵⁶ Mackenzie, MC, Title 21.

¹⁵⁷ Bayne, *Institutes*, at p.182, para.9; it was subject to capital punishment, *ibid* at para.13.

¹⁵⁸ *Ibid.* See in particular paras.9-12; Mackenzie, Title 21.

century, and suggests that the usage (by Mackenzie at least) was an extension of this definition – it certainly was not being used in the sense of identifying a nominate crime of assault.¹⁵⁹

Forbes' treatment of hamesucken formed part of what is perhaps the most structured approach to aggravations from this time period, offering the closest example to modern aggravations. As aforementioned Forbes posited a seemingly separate category known as 'extraordinary injuries'; those injuries made so with respect to the place they were committed or in regard of the persons offended.¹⁶⁰ A large part of Forbes' treatment of the former category discusses hamesucken in similar terms to his contemporaries,¹⁶¹ although he does provide other examples where an extraordinary injury of this kind would occur, such as starting a fight or disagreement in the church or church-yard the time of divine service; violating the tombs or sepulchres of the dead; or striking or hurting any person in the Justice Court or Outer House of Session while judges were sitting in judgment.¹⁶²

Whereas Mackenzie offered scattered points which recognised an injury could be aggravated in regard to certain persons being offended (such as situations involving the monarchy or specific officers of the state),¹⁶³ Forbes extends this to a succinct category of people of whom injuring, either physically or verbally, would be treated more severely.¹⁶⁴ Thus an injury done to the King,¹⁶⁵ his privy counsellors, judges, magistrates and officers, parents, ministers, peers or "great men" constituted an extraordinary one.¹⁶⁶ Of note, and in contrast to Mackenzie, Forbes included the capital crime of cursing *or beating* of parents by their children above the age of sixteen as an example of an extraordinary injury.¹⁶⁷ One can draw the distinction that Mackenzie only spoke of cursing, and did not include beating within his definition of this form of 'blasphemy'.

¹⁵⁹ Blackie, "Unity in Diversity" at p.53.

¹⁶⁰ Forbes, *Institutes*, Part I, Book IV, Chapter IX, Title II.

¹⁶¹ *Ibid*, Title II §1.

¹⁶² *Ibid*, Title II, §1, 4.

¹⁶³ Titles 3, 6; 6, 16; 26, 2; and 30, 4 discussed above.

¹⁶⁴ Despite this extensive category, Forbes still includes a separate entry on deforcement: Forbes, *Institutes*, Book V, Chapter III, Title II.

¹⁶⁵ And here leasing-making is mentioned, *Ibid*. Title II, §2, 1. Leasing-making also has its own chapter in the earlier entry covering crimes against the Monarchy and the State: *Institutes*, Part I, Book III, Chapter III.

¹⁶⁶ Forbes, Book IV, Chapter IX, Title II, §2.

¹⁶⁷ Forbes, *Institutes*, Chapter IX, Title II, Title II, §4.

In Forbes' structure it is interesting that the only examples of injuries made extraordinary by the place of commission are real in nature. This makes sense for written injuries as they have no *locus*; the logic is less clear for verbal injuries. One could argue that "raising a fray" during a church service might include a verbal injury, but the natural meaning of the word lends itself to a physical altercation rather than slander or insults.¹⁶⁸ Regardless, even if we are to include verbal injuries within the church example it still leaves them absent from the situation where judges are sitting in court. Thus, insulting someone in the presence of a magistrate would not be considered an aggravation, although striking them would. Given the emphasis on honour and reputation, it seems odd that there should be such an omission.

Finally, it should be noted that, aside from those aggravations which took the form of a separate crime or fell under the umbrella of a related crime, there was also the category of those circumstances which were considered aggravations, but are no longer considered so in modern law. Written injuries, discussed above, were treated as the most damaging type of injury by Mackenzie and Bayne, but now no longer feature as part of the criminal law. Additionally, Mackenzie highlights the related crime of 'leasing-making'¹⁶⁹ in his title on injuries; the crime of raising hatred and discord between the King and his people.¹⁷⁰ Mackenzie suggests that 'infamous libels' (written injuries) and 'leasing-making' are one in the same: the former was for injury to individuals and punished arbitrarily, whereas the latter was for injury to the King and punished capitally.¹⁷¹ Leasing-making appears to have been used as a heavy-handed form of censorship, one where any man engaged in political activities had to be ready to die for their views, and none were safe. This appears to have caused controversy, particularly in the political battle between Montrose and Argyll in 1639.¹⁷² The eventual Union of 1707 resulted in an Act to abolish the Scots law of treason, thereby blunting the efficacy of leasingmaking.¹⁷³ Indeed, by the 1730 publication of Bayne's *Institutions* the punishment for leasing-making had been reduced to arbitrary by statute.¹⁷⁴

¹⁶⁸ An earlier passage on affrays, frays and riots suggests that verbal injuries could not be included: "Quarrelsome or threatening [sic] words do not, in the judgment of the law, amount to an affray." Forbes, *Institutes*, Part I, Book III, Chapter XIII, Title II, §2, 1.

¹⁶⁹ Also referred to as 'leasingmaking', 'leasing making' or 'leesing making'.

¹⁷⁰ Title 30, 6; Forbes, Book IV, Chapter IX, Title II, §2, 1; *Lord Ochiltree* (1631) 1 JC 176.

¹⁷¹ Mackenzie, *ibid.*

¹⁷² See the circumstances surrounding the case of *Argyll v Mr John Stewart* (1641) 2 JC 423. See also *Lord Balmerino* (1634) 1 JC 230.

¹⁷³ Treason Act 1708.

¹⁷⁴ Bayne, *Institutions*, Title on Injuries, p.180, para.7.

When one considers the fractured nature of these precise legal rules, it becomes rather astounding to think that the entirety of this conduct should become subsumed within one simple offence. From a practical point of view the distinctions were relatively meaningless, since it was common for charges to set out a description of the conduct, as opposed to libeling a *nomen juris* as is done today. The categorisations here therefore served mainly to structure each writers' account. That they structured them in this way is particularly telling, because they *chose* to divide the conduct into quite different categories even though there was no underlying narrative of a requirement to use specific terms in libels.

1.9 Summary

Some concluding remarks can be made about the structure of assault in seventeenth century Scots criminal law. Using modern terminology, the above analysis demonstrates a 'hybrid' structure; one which utilises a single offence of 'injuries' to cover a plethora of conduct (including some which would today be classified as delictual, rather than criminal, in nature) supplemented by numerous offences which covered specific circumstances deemed peculiar enough to warrant separate consideration (such as hamesucken), or inclusion under the umbrella of a more serious offence (such as cursing one's parents being considered blasphemy). Within this structure, the base offence of injuries seems to have focused on harms to reputation, whereas most forms of violence were restricted to other offences, such as mayhem or hamesucken. There was an indication that intention was the culpability requirement for the offence, but most of the discussion was centred on each commentator's response to verbal injuries specifically. As a result, it seems that situations of contumely or slander were the driving force behind much of the basis of the law on injuries.

2. 1750 – 1850: Structural Development Under *Iniuria*

2.1 *Iniuria* Terminology and the Basis of Liability

The overt influence of the Roman legal tradition could be seen right up until the time of Hume. Indeed, even Erskine's *Institutes*, only fifty years removed from Hume's *Commentaries*, still spoke of *iniuria* as being the basis of liability, divided into the same sub-categories of verbal and real.¹⁷⁵ We can see that by this stage the notion of physical injury being trite had started to wane, now making up the primary example of real injuries as Erskine understood them.¹⁷⁶ Further, and conversely, verbal injuries are noted as carrying merely a pecuniary fine or, in some circumstances, penance. Of interest, there seems to be some theoretical shift towards the concept of 'aggravated assaults' by the inclusion of mutilation, demembration and hamesucken within one category of "crimes directed against a man's limbs... without any intention of killing".¹⁷⁷

Erskine relies heavily on the seventeenth century writers: for example, he appears to copy Mackenzie almost verbatim when he states that written injuries are "of all others the most public and permanent... it ought to be punished by the judge with greater severity than the slighter injuries".¹⁷⁸ However, and in contrast to other commentators of the *ius commune* tradition, Erskine tells us that: "Scandal, reduced into writing and published, may be considered rather as a real than a verbal injury".¹⁷⁹ This statement is peculiar as it suggests that injuries had to fall within either of the real or verbal sub-categories. This would, however, be at odds with the essence of the *ius commune* of which Erskine purported to follow, which maintained a clear distinction between written/printed material versus oral material and other physical acts which were 'real'.¹⁸⁰

It is also interesting when considered within the context of the next line, that because written injuries are "of all others the most public and permanent, [they] ought to

¹⁷⁵ Indeed, he almost copies Mackenzie verbatim when he states that written injuries are "of all others the most public and permanent... ought to be punished by the judge with greater severity than the slighter injuries." Erskine, *Institute*, IV, 4, 81; cf. Mackenzie, MC at Title 30, 5. Rather curiously, Erskine treats writing as an example of a real injury; Erskine seems to suggest that this is because real injuries are dealt with more harshly,

¹⁷⁶ Erskine, *Institute*, IV, 4, 81.

¹⁷⁷ *Ibid* at 4, 50.

¹⁷⁸ Erskine, *Institute*, IV, 4, 81; cf. Mackenzie, MC at Title 30, 5. See also Erskine's treatment of mutilation and demembration which seems to follow the work of Seton, albeit far more briefly: IV, 4, 50.

¹⁷⁹ Erskine, IV, 4, 81.

¹⁸⁰ Blackie, "Defamation" at pp.644-645, citing A Matthaecus's tripartite '*vel re, vel verbis, vel literis*' {'Either by act, words, or writings'}.

be punished... with greater severity".¹⁸¹ In other words, if injuries with more permanence in the world are to be considered more severe, and if writing (seen as the most permanent) is to be considered a real rather than a verbal injury, it therefore follows that real injuries generally must be more severe. The verbal/real categorisation therefore goes beyond natural meaning (i.e. the method used) to consider the resulting harm.

Blackie, however, would appear to disagree with this assessment. He argues that classification was by mechanism used and not by result; it is for this reason that real injury was not confined to physical injury at this stage.¹⁸² He states that there were three reasons for classification by mechanism: that the mechanism employed was relevant to the level of punishment; that the mechanism had implications for the relative relevance of truth;¹⁸³ and that it might determine matters of jurisdiction.¹⁸⁴

This analysis suggests that 'verbal' and 'real' were only to be understood by their natural meanings, and it is clear from the sources that the words formed part of a much more complex construct. To illustrate; if *iniuria* refers to the contemptuous harassment of another then it should be irrelevant how such harassment came about – both physical and verbal attacks can invoke the distress, anger and humiliation envisaged by the concept to a comparable degree, particularly where the benchmark is based in terms of an affront to one's fame or honour. That such a distinction was nevertheless present in the law and had an impact on the level of punishment shows this not to be the case.

Further, Blackie's reasoning for classifying by mechanism appears rather ingenuous – it can equally be used to demonstrate that it was the results which dictated the categorisation. For example, using the fact that real injuries were not confined to physical injuries as evidence of categorisation by mechanism is not very effective since a wide range of conduct could equally show that what was relevant was not the type of action committed, but rather the degree of seriousness – the argument for classification by mechanism would be more persuasive if the categories were strictly within those bounds. Further, each of the reasons he gives presupposes an understanding of the terms 'verbal' and 'real' which goes beyond their natural meaning. That categorisation by mechanism was

¹⁸¹ Erskine, IV, 4, 81.

¹⁸² J Blackie, "Defamation" at p.645.

¹⁸³ I.e. the truth of the defamatory statement only being a valid defence in cases of verbal injury.

¹⁸⁴ J Blackie, "Defamation" at p.645.

relevant to punishment necessarily entails that the words have some correlation with sentencing – a notion which does not exist beyond the nuanced realms of criminal theory.

Indeed, the idea that the mechanism employed was relevant to the level of punishment is not inconsistent with Erskine’s view at all; Erskine recognised that injuries committed via one mechanism (written words) were more serious than those committed by another (verbal), and therefore classified written injuries as a type of real injury, recognising that such injuries invoked harsher levels of punishment. The example Blackie gives himself, of Mackenzie distinguishing infamous libels from verbal injuries based on the former’s permanence and involvement of greater design,¹⁸⁵ impliedly recognises that verbal injuries were punished more leniently, once again providing evidence for a definition which goes beyond the mechanism which labels the category. Likewise, the notion that the category might determine matters of jurisdiction once again suggests a scale based on severity, rather than pure mechanism, as the Commissary courts had exclusive jurisdiction over verbal injuries,¹⁸⁶ and Blackie himself has noted that questions of jurisdiction were used as a way of roughly dividing according to the potential seriousness of the *iniuria*.¹⁸⁷

It should be stressed that the present argument is not an attempt to dismiss the clear link between the type of conduct and its resulting category. Rather, it is a rejection of the idea that categorisation by mechanism represented the only understanding of *iniuria*. It is disingenuous to ignore the clear correlation between the two categories and the resulting harm, highlighted by the fringe case of written injuries which could have justifiably fallen into either category – it is telling that both Erskine and Mackenzie thought it necessary to explain why written injuries should be considered separately from their verbal counterparts.

2.2 The Anglicisation of Scots law

Bankton, a contemporary of Erskine, also recognised the law of injuries as being “to the reproach and grievance of another, whereby his fame, dignity or reputation is hurt”,¹⁸⁸ thus echoing Ulpian’s tripartite of interests which make up the delict of *iniuria*:

¹⁸⁵ Mackenzie, MC, Title 30, 5.

¹⁸⁶ MC, Part II, Title 10, 2.

¹⁸⁷ Blackie, “Unity in Diversity”, p.76.

¹⁸⁸ Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights*, Vol I, Title X, 21.

corpus, fama, and dignitas.¹⁸⁹ Despite not referring to *corpus* explicitly in his definition he does include bodily invasions under injuries; it is likely that the concept of ‘dignity’ was taken to have been infringed in cases of physical injury. Assault, at a basic level, was still very much understood in *ius commune* terms. Unlike his predecessors, however, Bankton’s account was far less descriptive, relying less on arbitrary examples and more on basic principles of liability. He therefore provided no examples of verbal injury, instead outlining the results necessary to constitute the injury: thus words that affected the “life, liberty, estate, reputation, trade or profession”¹⁹⁰ of the victim would constitute the offence. This represents a substantial change from the seventeenth century, and a move towards a set of guiding principles rather than arbitrary commands.

Additionally, Bankton’s account appears to capture a turning point where Scots law started to feel the effects of anglicization, moving away from the civilian tradition of the *ius commune*. Indeed, Bankton distinguishes between an ‘assault’¹⁹¹ and ‘battery’ in much the same way that modern English law does, so that striking someone was considered battery and an assault, a word previously used exclusively in the military sense of a raid on a position,¹⁹² is here identified as making threatening gestures, such as raising a fist or any weapon.¹⁹³ Thus, ‘injury by facts’, otherwise known as real injuries, include striking someone which is a “high injury to his person”, capable of being “more or less atrocious” depending on the circumstances of the case.¹⁹⁴ The reference to real injuries being more or less atrocious is particularly interesting as he does not explicitly mention mutilation or demembration.¹⁹⁵ Instead he focuses on the concept of injuries being “increased, or diminished” telling us that an injury could be aggravated by the use of an instrument, from the character of the person, or from the place where the injury was committed.¹⁹⁶ Good intentions (such as a teacher scolding a pupil) could minimise the punishment.

Further, although verbal injuries were still considered in terms of *iniuria*, we start to see some development from its seventeenth century treatment; we are told that although usually heard in the courts of the Commissars, the damages may likewise be sought in the Court of Session where the injury is atrocious or where the victim was a person of

¹⁸⁹ D.47.10.2.

¹⁹⁰ Bankton, I, X, 24.

¹⁹¹ A word used very rarely in Scots law until this point.

¹⁹² Such as a fort or someone’s home, i.e. hamesucken.

¹⁹³ Bankton, I, X, 22.

¹⁹⁴ Bankton, I, X, 22.

¹⁹⁵ Although he does provide a paragraph on hamesucken: I, X, 26.

¹⁹⁶ Bankton, I, X, 36.

character.¹⁹⁷ By the end of the eighteenth century the normal civil courts had jurisdiction in defamation actions,¹⁹⁸ bringing the two types of *iniuria* yet further away from each other, and thus by the time Hume is writing he tells us that cases of slander, whether spoken or written, had “very seldom been prosecuted in the Criminal Court”.¹⁹⁹

2.3 Injuries and ‘Assault’ Under Hume

Baron David Hume, writing in 1797, stated his desire to rescue Scots law from being consumed and overwritten by English law and practice.²⁰⁰ Hume was an upholder of the distinctness and merits of Scots law, being critical of its English counterpart which, given his massive influence on the development of Scots law, perhaps goes some way to explaining how Scots law was able to maintain its uniqueness from the ever-looming threat of complete anglicization. The publication of Hume’s *Commentaries* marked a transition in Scots law as it finally reached maturity from the Romanistic approach of Mackenzie’s time, which had been followed by selective borrowing from English practice.²⁰¹

In Hume’s *Commentaries*, the term ‘real injuries’ was still being used as a categorical heading, but its meaning was now limited to varying ways in which the physical integrity of the victim was compromised. Thus, it is at this point in history that ‘real injuries’ moves from being a crime of reputation to a crime of violence. Blackie points out that the law still adopted a *ius commune* approach of understanding injuries in terms of *iniuria*,²⁰² illustrated by Hume’s recognition of cases involving “slighter acts of violence... more of contempt and indignity, than of a purpose to do bodily harm”.²⁰³ However, even contumelious injuries were now couched in terms of being, or alluding to, physical acts of harm, rather than merely affronting one’s honour.²⁰⁴ Thus, we are told that ordinary injuries were “various in kind and degree”, being broken down into the sub-categories of “assault, invasion, beating and bruising, blooding and wounding, stabbing, mutilation, demembration, and some others”, with Hume pointing out that the competency

¹⁹⁷ Bankton, I, X, 24.

¹⁹⁸ *Affleck v Gordon* (1755) Mor 7348; *Forrest v Crichton* 12 Dec. 1807 FC.

¹⁹⁹ Hume, *Commentaries*, p.340.

²⁰⁰ Baron David Hume, *Commentaries* (1797)(1986 Reprint with introduction) at p.iii-iv.

²⁰¹ TB Smith, *British Justice: The Scottish Contribution* (1961) at p.95.

²⁰² Blackie, “Unity in Diversity”, p.104.

²⁰³ Hume, *Commentaries*, Book I, Chapter IX, 7, p.332 (all references are to Book I, Chapter IX unless otherwise stated).

²⁰⁴ There was by now a firm distinction made between ‘real’ and ‘verbal’ injuries, with the main source for the latter category to be found in a separate chapter, titled ‘Of offences against reputation’ (Chapter X).

of a prosecution would nevertheless be unaffected if an injury either did not fall under one of those headings or could not be defined within a single phrase.²⁰⁵

2.4 *Stellionatus* as the Foundation for Assault as an Attack

Where none of the recognised terms of style were applicable, the injurious conduct would be libelled as ‘stellionate and real injury’. Hume states that “[w]e have... in our law, the general term of *stellionate*, borrowed from the Roman practice, which may be employed in such a case, along with the full description of the injury”.²⁰⁶ Thus, James Campbell was charged on 22 January 1722 with “*stellionate* and real injury” along with a description of the injury inflicted which involved stripping and tying down the victim when he was intoxicated and applying hot coals to his “privities”.²⁰⁷ There is no indication from Hume’s treatment that such an injury had to be severe, but Alison states that a charge of *stellionate* and real injury was a separate offence (from assault), and one that could be charged instead of an aggravated assault in cases of mutilation,²⁰⁸ and Anderson states that the term was used to denote a real injury “of a serious nature, such as severe burning, thrusting needle into the eye, or any grave injury which took effect internally, as through the operation of drugs”.²⁰⁹ Indeed, the limited cases noted in the literature suggest a trend towards its use in cases of more serious injury to the person.²¹⁰

What is most peculiar about this separate offence is that its origins appear rather obscure. Hume tells us that it is borrowed from Roman practice, but *stellionatus* was understood as ‘swindling’ in Roman times, the primary example being ‘double dealing’ where one disposes the same right twice.²¹¹ Ulpian hints that the term might be used in a more general sense when he states that: “in the absence of a specific offence, this charge can be brought, and there is no need to list the instances”,²¹² but if this is indeed the passage being relied on later by Hume it is certainly odd that he should contradict it by asserting the requirement to list the instances in the libel. Mackenzie described the need for

²⁰⁵ Hume, *Commentaries*, 5, p.328.

²⁰⁶ Hume, i,328.

²⁰⁷ *Ibid* at footnote 1.

²⁰⁸ Alison, *Principles of the Criminal Law of Scotland*, Chapter V, 12, p.196.

²⁰⁹ Anderson, *Criminal Law of Scotland*, p.81.

²¹⁰ Such as binding one’s limbs together and leaving them overnight, thereby causing paralysis (*Ogilvie & Ogilvie*, Perth, 14 April 1830, Bell’s Notes 89); administering drugs to the injury of the person (*Ferguson and Eadie*, Perth, 22 April 1822, Hume, Chapter VI, 3, p.237, b.; *Mitchell*, Aberdeen, April 1833; and *Buchan & Hossack*, 22 July 1840, both Bell’s Notes 90); or administering large quantities of alcohol to children (*Robert Brown and John Lawson* (1842) 1 Broun 415; Bell’s Notes 90).

²¹¹ D.47.20.

²¹² D.47.20.3.1.

a charge of *stellionatus* as a necessary response to the fact that “cheats... multiply and vary themselves into so many forms that legislators were forced to invent this general name” and stressed the requirement that the person charged must have done something fraudulently (*fecerunt*).²¹³ Forbes echoes Mackenzie, stating that it is a general term signifying “any crime committed by fraud wanting a more particular name”.²¹⁴ Both point out the etymology of *stellio*, which is a type of lizard with ‘starry spots’ and a subtle nature, presumably implying an emphasis on deception.²¹⁵

There was therefore precedent in Scots law for this term to be used in criminal situations where a prior existing term did not suitably cover offending conduct which had a fraudulent element. Despite this fact there is only one example, dated before Hume’s *Commentaries*, of the term *stellionate* being used in the Scottish courts in a context other than the traditional Roman sense of double dealing,²¹⁶ and that is the aforementioned Campbell case from 1722, as noted by Hume.²¹⁷ Likewise, there are only two (historical) instances of *stellionate* being used in a sense other than double dealing *after* the publication of Hume’s *Commentaries*, and neither are concerned with real injury.²¹⁸

Perhaps unsurprisingly, by the publication of Macdonald’s *Practical Treatise on the Criminal Law of Scotland* in 1867, the term had become “nearly obsolete”.²¹⁹ The term resurfaced briefly in 1984 when the passage from Hume was cited by Lord Avonside in response to an argument that the causing of real injury by supplying glue inhalation kits to young people was not a crime “which is known to the law of Scotland”;²²⁰ and then again much more recently in *Principal Reporter v N*²²¹ where the sheriff stated that *stellionate* “means deceit and was the name given to any crime involving dishonesty or real injury not covered by any recognised nominate crime... Some form of deceit is essential to the crime.”²²²

²¹³ Mackenzie, MC, Title 28, 1.

²¹⁴ Forbes, *Institutes*, Book IV, Chapter X, Title VI. See also Bayne, p.154.

²¹⁵ Mackenzie, MC, Title 28, 2; Forbes, *ibid*.

²¹⁶ Examples of *stellionate* as double dealings: *Alexander Arbuthnot of Knox v Straiton of Laureston* (1677) 3 Bro. Sup. 209; *James Gordon of Davach v William Duff of Dipple* (1707) Mor. 1078; *Archibald, Earl of Forfar v John Gilhagie* (1712) Mor. 7820.

²¹⁷ The only other reference is to be found in Alison at p.196 without citation (or even reference to Hume, but this is presumably where he acquired the case).

²¹⁸ One alludes to its use in the context of theft (*Richmond v Thomson* (1838) 16 S. 995 at p.1001) and the other suggests that it might have been an appropriate indictment for a case of taking a false oath (*John Barr* (1839) 2 Swin. 282 at p.307).

²¹⁹ Macdonald, *Criminal Law of Scotland*, p.162.

²²⁰ *Khalig v HM Advocate* 1984 JC 23 at p.26; cf. *Milne and Barry* (1868) 1 Couper 28.

²²¹ 2014 GWD 30-592.

²²² *Ibid* at para. 188-189.

We can conclude that, from the time of Hume onwards, in circumstances where the conduct was not an attack in the overt sense (i.e. a direct confrontation), prosecutors felt uncomfortable using ‘assault’ or similar terms in the libel, instead opting first to use ‘stellionate and real injury’, and later just ‘real injury’.²²³ It is interesting that prosecutors felt such a distinction was necessary despite Hume’s endorsement of assault as being a crime robust enough to include such conduct within its remit. The result is that the term ‘assault’ became more synonymous with a direct attack, whereas real injury was reserved for situations not quite fitting this description. Nevertheless, it is regrettable that the exact parameters of the real injury offence and its interaction with assault have never been fully debated. Indeed, when Gordon suggests that pouring poison down a sleeping man’s throat would be an assault, it might equally be charged as (stellionate and) real injury.²²⁴

2.5 The Prominence of Violence in Eighteenth Century Assault

An assault therefore had to be an overt attack against a person. As with Bankton, ‘assault’ in Hume’s definition of injuries was to be understood in a broader sense as a nominate term for an attack, as opposed to its specific lay meaning which limited its previous use to discussions of hamesucken.²²⁵ However, and unlike Bankton, Hume does not appear to have adopted wholesale an anglicised understanding of the term assault. The obvious difference is that the term ‘battery’ is scarcely used in Hume’s treatment,²²⁶ and thus ‘assault’ covered both the threat and infliction of harm.

It is also unclear how far insulting behaviour was recognised as an assault by Hume. As noted above, Hume’s approach to assault and real injury appears to have included the types of *iniuria* which would have been previously categorised as verbal injuries, so that slighter acts which were contumelious in nature, rather than violent, could still be charged as an assault. However, each of Hume’s examples includes violence as an essential element, seemingly contradicting the notion that an assault could be only ‘contumelious’ or undignified in nature. William Campbell was found guilty of a ‘slight

²²³ Which, in the examples of the drug administration cases is perhaps more understandable since historically poisoning was understood as a separate crime: see Mackenzie, MC, Title 8, in particular paras 4-5. Today, ‘drugging’ is still categorised under the heading ‘other forms of real injury’ (i.e. not assault) and now extends to supply of such injurious substances (administration is no longer necessary): see Gordon, *Criminal Law*, para. 33.47; *Khaliq v HM Advocate* 1984 JC 23; *Ulhaq v HM Advocate* 1991 SLT 614.

²²⁴ Gordon, *Criminal Law*, para. 33.01.

²²⁵ I.e. a military attack on a position.

²²⁶ Hume, i, 333 & 387.

assault' for threatening , before cutting her clothes off and taking her by the shoulders and pushing her down stairs;²²⁷ and at the trial of William Irvine of Gribtown, the Lords chose only to proceed to trial on a charge of beating, cutting, and blooding, finding that the remaining charges should be prosecuted in other “civil or criminal” courts.²²⁸ These were charges of “personal struggle and throwing to the ground, accompanied with scurrilous and threatening words”.²²⁹

Indeed, the only example of a contumelious assault at this time nevertheless involved physical contact with the victim, as where the victim was spat on.²³⁰ Even then there was still uncertainty as the victim was referred to as being either “assaulted or injured”.²³¹ There is authority to suggest that merely spitting *at* the victim could constitute an assault, but in that case the Lord President stressed that the jury should first be satisfied that “the parties were so near each other that it might have done so, or probably did do so”.²³²

There was therefore a focus on impending violence; but the infliction of harm was not essential. Thus, riding horseback towards a person causing fear and alarm could constitute assault even without physical contact,²³³ just as a missed shot from a gun could constitute an aggravated assault.²³⁴ The threshold was menacing or threatening gestures of violence, irrespective of how real the gesture was, so that levelling a gun which was not primed, and without any attempt to pull the trigger, was a good basis for a conviction for assault,²³⁵ but words alone were not.²³⁶

Indeed, if criminal assaults were intended to cover the types of contumelious approaches that slander and embarrass (rather than physically harm) the victim, then it would be pointless to include a separate chapter on offences against reputation.²³⁷ It seems

²²⁷ Hume, i, 332, *Lady Dun v Campbell*, 22 November 1714.

²²⁸ *William Irvine of Gribtown*, 29 December 1718 & 9 January 1719, *ibid* 332 at 333, fn.1.

²²⁹ *Ibid* at 333.

²³⁰ *Tullis v Glenday* (1834) Sc Jur 503; *James Cairns* (1837) 1 Swin. 597, per Lord Justice-Clerk Boyle at 610.

²³¹ *Tullis v Glenday* (1834) Sc Jur 503 at 504.

²³² *Ewing v Earl of Mar* (1851) 14 D. 314 at 315 per Lord President Boyle.

²³³ *Ibid*.

²³⁴ Hume, i, 329; see below.

²³⁵ *Procurator Fiscal of Edinburgh v Hog*, February 6, 1831, Alison, i, 175; *Robert Charlton* (1831) Bell's Notes 89; but note the victim had to be unaware that the gun was not loaded: *Walter Morison* (1842) 1 Broun 394.

²³⁶ *Lang v Little* (1826) 4 Mur. 82 at p.86; *Carnegie* (1672): Scott-Moncrieff, *Justiciary Records*, vol 2, 116 at pp.120-121.

²³⁷ Hume, i, 340ff. (Chapter X).

to the present author more likely that, against a historical background of the *ius commune* and *iniuria*, Hume was documenting a practical development in how assault was understood in the criminal legal system. As Blackie has pointed out, *iniuria* was always capable of encompassing physical acts not carried through to impact on the body,²³⁸ but the understanding of these acts within the context of criminal liability changed as the term ‘assault’ became the prominent category adopted within the legal system.²³⁹ In circumstances where the terms ‘*iniuria realis*’ and ‘assault’ were to be treated as synonyms and the procedural system had adopted jury trials, it became necessary to explain to the jury that non-impacting injuries were also an ‘assault’, because under ordinary meaning they were not.²⁴⁰

Non-impacting injuries were therefore understood as threats of violence rather than as insult or affront, and for the first time ‘assault’ gained its own technical meaning within the legal system. Under this specialised meaning, it was not necessary that the person be struck, it was sufficient that they had been “put in dread or apparent danger of bodily injury”.²⁴¹ The law in this area was therefore evolving to focus on the violence element over the disgrace or embarrassment caused to the victim, which was now seen as inherent, but not necessarily criminal. If this violent element was lacking from the pannel’s conduct there was either no criminal liability, or it was a crime or delict of a different nature.²⁴²

2.5.1 The Fusion of Assault and Mayhem

Perhaps the most important change which precipitated the move from assault’s focus on reputation to violence is in the development of mayhem from a distinct crime to an extension of assault itself. Blackie has suggested that by the early nineteenth century the use of old sub-categories based on the nature of the impact on the body had withered away, relying on a passage from Hume where he observed, in the context of mayhem, that “laying aside such idle debates... our judges now look to the degree of the injury”.²⁴³ In a discussion about whether mayhem was a capital crime, Hume concludes that the appropriate punishment was arbitrary, citing a case where the court rejected the argument

²³⁸ See also the above discussion on threats in the seventeenth century: pp.22-23.

²³⁹ Blackie, “Unity in Diversity”, p.106.

²⁴⁰ *Ibid.*

²⁴¹ *Hyslop v Staig* 1 Mur 15 at 22.

²⁴² Such as a civil assault: Bell, *Principles*, 2028; or a threat as a separate entity, treated by Hume in conjunction with extortion and breaches of the public peace generally: see Hume, i, Chapter XVII, 439ff.

²⁴³ Blackie, “Unity in Diversity”, p.104, quoting Hume at Chapter IX, 6, p.330.

for capital punishment for the “invading, wounding and mutilating of the Bishop of Orkney”.²⁴⁴ As a result, Hume states that it is “needless to engage in those numerous and minute controversies... respecting the several parts of the human frame, how far they are to be reputed distinct members of the body” and that we should lay “aside all such idle debates”, referring to the (arduous) process of determining what constituted a ‘member’ for the purposes of a valid charge of mayhem.²⁴⁵ This process was no longer necessary where injuries of mayhem were punished in line with other injuries, namely arbitrarily, with the judge looking to the degree of the injury to determine punishment.

However, suggesting that there was a reduction in the use of sub-categorical terms for degrees of harm, based on this evidence, seems a step too far. First, it is not altogether clear that arbitrary judges ever did anything other than look to the degree of injury when passing sentence. Second, if the degree of injury was all that mattered for constructing a libel, there would have been no need for use of the term ‘*stellionate* and real injury’ to cover those cases where the mode of committing the injury was unorthodox. Rather, it seems more likely to be evidence that the specific category of mayhem, which had until this point been considered a unique offence, was now subsumed within the general injuries offence.

From that perspective, Blackie is correct in the sense that the inclusion of mayhem caused ‘assault’ to become one over-arching offence ranging from relatively minor to serious injury. Mayhem aside, this is not entirely dissimilar to how the law in this area had been operating for centuries; before ‘assaults’ were varying types of ‘real injuries’. The inclusion of mayhem therefore presented an even greater incentive to utilise sub-categorical terms, particularly in the context of sentencing where a nebulous term like ‘assault’ would otherwise fail to distinguish different types of attacks. Indeed, it is clear from the case law cited by Hume that libels still regularly included terms like ‘invading’, ‘wounding’ ‘beating’ and ‘to the effusion of blood’.²⁴⁶

2.5.2 Culpability for Assault

Another archaic term which still found favour in the nineteenth century referred to the mental element in assault, which was, as with *iniuria*, understood to be the requirement

²⁴⁴ Hume, *Commentaries*, 6, p.330.

²⁴⁵ See Seton’s treatment above, at pp.25-26.

²⁴⁶ *MacDonnell v McDonald* (1813) 2 Dow 66.

of ‘*animus iniuriandi*’ or an intention to cause injury.²⁴⁷ There had been little attempt to review this principle in either the institutional writings or the cases since even before Mackenzie and such principles were recognised; it seems to have always been taken for granted that an injurious intention was required.²⁴⁸ Blackie highlights that the only case during this period which might have provided opportunity for analysis – as where a man was trampled by one rider after moving to avoid another – merely stated that if the facts as charged were established, there would be liability.²⁴⁹ There was therefore a focus on the act and any resulting consequences, from which intention could be inferred if the former were proved. Thus, when a boy whipped a horse causing it to throw and injure its rider, the court found little difficulty in repelling the argument that there was no “violence intentionally directed against the person”, holding that there could be “constructive intention”.²⁵⁰

2.6 Towards a Systemised Approach to Aggravations

There was also a theoretical development towards the modern understanding of aggravations and their relationship to assault as the simple crime (as opposed to injuries and other self-contained types of harm) in the nineteenth century. Alison confirms Scotland’s single offence approach by stating that assaults were of “various degrees of atrocity, according to the intent of the guilty party, the degree of injury which he [had] inflicted, and the quality or situation of the person assailed”.²⁵¹ Indeed, Alison tells us that it had become usual to charge assault in every case of personal violence that did not result in death, and to state the serious parts of the crime as aggravations of the simple crime.²⁵² Hume, by contrast, maintained a division between those attacks “subject to a precise and a severe punishment, in virtue of special statutes, which have raised them above their rank at common law” versus others which only warranted “some inferior correction”.²⁵³

There were therefore two types of aggravation – those specific instances created by statute, and those recognised by the arbitrary judge as increasing the severity of an attack. Hume therefore recognised the hybrid nature of Scots law during this time – ancient statutory offences maintained a hierarchy within an emerging single offence that

²⁴⁷ *Macnaughton v Robertson* 17 February 1809 FC.

²⁴⁸ *Roy* (1839) Bell’s Notes, 88.

²⁴⁹ Blackie, “Unity in Diversity”, p.110, citing *McLauchlan v Monach* (1823) 2 S 590.

²⁵⁰ *Keay* (1837) 1 Swinton 543 at 544 and 546 respectively.

²⁵¹ Alison, i, 175.

²⁵² Alison, i, 181.

²⁵³ Hume, i, 324.

increasingly viewed the theoretical starting point as any attack on a person. By 1832 Alison claimed that such statutes were no longer used in practice, a “beneficial consequence” of charging assault in cases of personal violence.²⁵⁴ This could explain why his approach is far more streamlined than that of Hume.

The residual statutory offences tended to deal with injuries aggravated by the character of the victim, including the beating or cursing of parents,²⁵⁵ the protection of judges from fear or harm,²⁵⁶ and for maintaining the personal security of the clergy.²⁵⁷ This latter aggravation represented a reaction to the on-going religious “schism” between the Presbyterian and Episcopal establishments who incited violence in their members. Additionally, ‘invading or pursuing’ any of the King’s officers in the exercise of their duty could aggravate an assault,²⁵⁸ and it seems that the same was true for any assault committed by a husband on his wife.²⁵⁹

Likewise an assault could still be aggravated by the *locus* if it involved the King; assaults in his presence or his chamber were still considered forms of treason under statute,²⁶⁰ and this seems to have extended even as far as a mile from the palace in the case of Walter Graham in 1603.²⁶¹ Hamesucken was still understood as a distinct, capital offence against the person and was therefore treated separately,²⁶² although in his discussion of assault Alison tells us that it was now common practice to include an alternative charge of aggravated assault in case of a failure to prove that the housebreaking was committed with intent to assault.²⁶³ In a similar manner it was a species of aggravated assault to attack a person in their home after first entering with no intention to do so, having then been provoked.²⁶⁴

²⁵⁴ Alison, i, 181.

²⁵⁵ Hume, i, 324; Alison, i, 196; *James Alves* (1830) 5 D. & A. 147.

²⁵⁶ Hume, i, 326; Alison, i, 193.

²⁵⁷ Hume, *Commentaries*, pp.324-326.

²⁵⁸ *Ibid* at 326 where Hume treats it is punishable by death, but cf. Alison, i, 194 citing the case of *David Barnet and John Brown* (1820) who were sentenced to eighteen months’ imprisonment. See also the treatment of deforcement in Hume, i, 386ff and Alison, i, 491ff.

²⁵⁹ Alison, i, 196; *John Shaw* (1823) & *Benjamin Ross* (1824), both Alison, i, 197.

²⁶⁰ Although considered under the heading of real injuries; *Ibid* at p.327: “punishable with the pains of treason”.

²⁶¹ *Ibid*.

²⁶² Hume, i, 330; Alison, i, 195.

²⁶³ Alison, i, 197; *David Robertson Williamson* (1853) 1 Irv 244.

²⁶⁴ *Ibid*. See also *Alex Macdonald and John Fraser* (1818) Hume, i, 318.

Other types of aggravations recognised around this time, namely those assaults made more severe either by the injury caused, the use of a weapon, or the intention of the accused to commit a further crime, were subject to arbitrary punishment²⁶⁵ and therefore discussed by Hume within the context of ‘ordinary injuries’. As aforementioned, crimes where the injury inflicted was severe, such as mutilation, were now treated as “an aggravation of the simple crime”²⁶⁶ (of assault), to be recognised by the judge administering arbitrary punishment.²⁶⁷ Likewise, the use of a weapon in and of itself could increase the severity of the offence; Alison gives examples where the resulting injury was serious, or the victim’s life endangered, but Hume points out that even in cases where no such bodily harm ensues, the use of a weapon could be used to infer an intent to kill which could aggravate the assault on the basis that the individual had suffered “in being put in fear of his life”.²⁶⁸

Perhaps the greatest development during this period is the recognition of assault with intent crimes. Before this point assaults were seen as factual elements to more severe offences such as homicide, rape or theft.²⁶⁹ By the nineteenth century, however, there emerged a trend of charging the lesser crime of assault with an aggravation, so that the accused might still be found guilty where the jury were not convinced of an intention to commit a further, more serious offence.²⁷⁰ Thus, an intention to kill, to ravish, to rob, or to extort a deed could all aggravate a simple assault.

The transition represented a procedural response to an inadequate substantive law: Scots law was yet to develop a working theory of attempts, so that in some cases the attempted crime was not indictable (as with theft),²⁷¹ and in others the completed crime would be labelled along with an assault with intent (as with rape).²⁷² Equally, and even after the development of attempt theory, the chances of securing a conviction were far

²⁶⁵ Not to be understood as lenient; arbitrary punishment could include scourging and banishment: see Hume, i, 331; Alison, i, 179 (transportation).

²⁶⁶ Alison, i, 196.

²⁶⁷ Hume, i, 324 & 330-331.

²⁶⁸ *Ibid*, i, 329; Alison, i, 179 & 181.

²⁶⁹ Blackie, “Unity in Diversity”, p.107.

²⁷⁰ Alison, i, 181.

²⁷¹ *Walter Duthrie Ure* (1858) 3 Irvine 10.

²⁷² *Walter Blair* (1844) 2 Broun 167; *Dennis Connor and Edward Morrison* (1848) J Shaw 5. This approach posed problems where the rape was non-violent (e.g. fraud or coercion): See *William Fraser* (1847) Ark. 280 (fraud); *John McArthur* (1830) Shaw 216 and Bell’s Notes 84 (coercion of a child). In this latter example an argument was led to distinguish between assault with intent to rape and an attempt to commit a rape, but there appear to be no examples of the latter indictment ever being led at this time. Attempts were not enshrined in the criminal law until the passing of the Criminal Procedure (Scotland) Act 1887 under s61. See also statements by Lord Hope in *HM Advocate v Forbes* 1994 JC 71 at 74.

greater when the jury could convict of a lesser crime if they were not convinced beyond all reasonable doubt of the greater crime, under the circumstances of the case.²⁷³ This procedural reality is present to this day in our criminal law.

2.6.1 Weapons, Intent and Underlying Harm

The close relation between an intention to kill and use of a weapon is perhaps revealing about the emerging understanding of resulting harm as a gradient. Hume never explicitly states that using a weapon would, in and of itself, aggravate an assault. He only discusses the use of weapons within the context of assaulting with an intent to kill, giving examples of missed sword thrusts and gun shots as being an aggravated species of assault,²⁷⁴ on the basis that they endanger life. Likewise, although Alison explicitly states that an assault would be aggravated “if it be committed with bludgeons or other offensive *and lethal* weapons, and still more so if to the effusion of blood and danger of life”,²⁷⁵ the focus appears to be on the weapon’s ability to endanger life. Indeed, under Alison’s heading of aggravations by use of a weapon, several of the examples do not feature any weapon at all; what seems to have been essential was the danger to life.²⁷⁶ Further, his understanding of fire-arms was such that he saw their discharge as being almost synonymous with an intent to kill.²⁷⁷ It should be pointed out that Hume does state that even an attack with a non-mortal weapon such as a cane, whip, or baton could be actionable in the Court of Justiciary,²⁷⁸ but here he is talking about the *de minimus* rule for simple assault – not aggravations. Thus, the implication is that what mattered was the preservation of life, and an emerging understanding that harm could be linked with severity.

²⁷³ Alison, i, 184.

²⁷⁴ Hume, i, 329 (“shooting at, or thrusting with a sword”).

²⁷⁵ Alison, i, 181 (emphasis added).

²⁷⁶ Alison, i, 182: *Neil Macilroy*, 21 November 1825 (kicking a pregnant woman in the belly and striking her on the back); *Peter White*, Perth, 1827 and *Robert Butter*, 7 December 1829 (seizing child by the neck and throwing them down stairs); *John Shaw*, Glasgow, 1823 (brutal assault on his wife causing haemorrhaging). In modern Australian law there are discussions about whether a clenched fist can be considered a weapon: J Schreiber et al, “Kings to Cowards: One-punch Assaults” (2016) 44(2) JLM&E 332 at 334.

²⁷⁷ Alison, i, 179.

²⁷⁸ Hume, i, 331. See also *Ewing v Earl of Mar* (1851) 14 D. 314 where riding horseback towards the victim so as to put him in danger and a state of alarm was held to be an assault.

2.7 Summary

We have seen that the turn of the nineteenth century marked a transition from the *iniuria* roots of injuries as a crime of reputation, to the new *nomen juris* of assault as a crime of violence. This paved the way for previously separate offences of serious injury, i.e. mayhem, to become subsumed within the assault definition. There was still very little discussion about the culpability required for assault, save that intention would be presumed if the facts in the libel were proved. Aggravations started to display a focus on resulting harm as a way of grading assaults, with many of the character based aggravations being based in archaism. We shall now consider Hume's legacy in the current law of assault.

3. Assault in the Modern Era of Scots law

From the mid-nineteenth century onwards the law of assault in Scotland became fairly settled, and an attempt shall be made here to summarise the most important aspects of this period, and how we understand the law of assault in the modern criminal justice system.

By the end of the nineteenth century ‘assault’ had become the preferred *nomen juris* for any intentional attack upon a person, either seriously threatened or accomplished.²⁷⁹ There was also now clear consensus that an attack could be indirect, such as where a dog was set on the victim, or frightening the horse he was riding to make it rear up or bolt.²⁸⁰ Other aspects have remained the same, so that menacing or violent gestures alone can constitute assault,²⁸¹ and both the act and result will be considered when evaluating the severity of the crime (e.g. where a slight push of the victim caused them to fall off a moving train).²⁸²

3.1 A Cohesive Structure to Aggravations

Procedural realities and legislative intervention meant that the structure of aggravations continued to evolve to become more linear from the late nineteenth century onwards. This was in large part facilitated by the Criminal Procedure (Scotland) Act 1887 (CP(S)A).

First, section 56 removed many offences, such as hamesucken, from the list of capital crimes. As a result, hamesucken proper was brought in line with the alternative forms of attacking a person in their home and no longer required to be charged as a specific crime.²⁸³ The *nomen juris* is still a competent libel today,²⁸⁴ but what is important for the aggravation (in contrast to the distinct offence of hamesucken) is that it takes place in the victim’s home, irrespective of the accused’s intentions when they entered.

²⁷⁹ Macdonald, p.153; Anderson, p.78; see now *Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 43.

²⁸⁰ *Ibid*; *Quinn v Lees* 1994 SCCR 159.

²⁸¹ *Atkinson v HM Advocate* 1987 SCCR 534; *Gilmour v McGlennan* 1993 SCCR 837.

²⁸² *Peter Leys* (1839) 2 Swin 337, although this kind of conduct might nevertheless be charged as recklessly causing injury: see *HM Advocate v Harris* 1993 JC 150.

²⁸³ For alternative forms, see Macdonald, p.159.

²⁸⁴ *Walker v HM Advocate* 2014 JC 154.

Beating and cursing one's parents presumably also lost its status as a capital crime, subsumed within the wider category of assaults aggravated by the character of the victim, but this is not altogether clear. The timeline reveals some inconsistencies: in 1867 Macdonald includes beating and cursing parents as a separate category (although he also recognises it as a form of aggravated assault);²⁸⁵ in 1887 the CP(S)A removes its status as a capital crime; in 1892 Anderson nevertheless includes a separate category for beating and cursing parents, still referencing the Act which gave its capital status, but uses past tense (“[t]he beating had to be violent”), before stating that it was “unlikely that an offence of this nature will ever again be indicted under the statute”.²⁸⁶ In addition to these facts, it seems that even before the introduction of the CP(S)A there was a tendency to administer lenient sentences in such cases despite the Act advocating the death penalty,²⁸⁷ and indeed many assaults would be too slight to fall under the statute.²⁸⁸ Finally, there does not appear to be an explanation as to why the crime is no longer a statutory offence.²⁸⁹ Despite these limitations, it is clear that from the mid-nineteenth century onwards that the Act ceased to operate other than to preface a charge of aggravated assault by providing background.²⁹⁰

Second, section 61 of the CP(S)A essentially introduced attempt theory into Scots law – it was now not only competent to libel an attempt to commit any indictable crime, but the Act also appears to have clarified that in cases of serious physical injury or death it was competent to lawfully convict the accused of both the underlying assault/injurious act, along with an aggravation that they intended to cause such serious injury or death.²⁹¹ In general there appears to have been a proliferation of assault with intent crimes; Macdonald lists ten different ways an assault may be aggravated by an intention to commit a further act.²⁹²

As a result, aggravations now formed a complete and coherent structure in Scots law, and this structure is still used today. An assault is capable of being aggravated in one (or more) of five ways: by the intent, by the ‘mode’ (such as fire-arms, stabbing, or throwing acid), by the extent of the injury, by the place of commission, or by the character

²⁸⁵ Macdonald, pp.162 and 159 respectively.

²⁸⁶ Anderson, *Criminal Law of Scotland*, p.81.

²⁸⁷ *John Beatson* (1836) 1 Swin. 254 at 255 per Lord Moncreiff.

²⁸⁸ Macdonald, p.163; Hume, i, 324-325.

²⁸⁹ Gordon, *Criminal Law*, para.33.19.

²⁹⁰ E.g. *John Beatson* (1836) 1 Swin. 254.

²⁹¹ Discussed also in Anderson, p.80.

²⁹² Macdonald, p.156-157.

of the victim.²⁹³ A sixth form of aggravation was recognised by Macdonald, aggravation by previous conviction,²⁹⁴ but this seems to have fallen out of favour by the time Anderson is writing as he makes no reference to it, and indeed Scots law now refuses to disclose previous convictions before conviction in a majority of cases.²⁹⁵

Of note, aggravation by use of a lethal weapon had, according to Macdonald, “properly fallen into desuetude” so that in current practice the use of any form of weapon constitutes an aggravation of assault, but cases involving firearms, stabbing or cutting, and/or corrosive substances (i.e. weapons that are very likely to cause severe injury) are treated as specially aggravated and are therefore not normally charged summarily. Similarly, cases where the injury is more severe are treated as aggravated irrespective of whether the accused intended to inflict such harm, but in practice their intention will be relevant in passing sentence.²⁹⁶

Further, some circumstances where assault is aggravated by the victim’s absolute character has been expanded on by legislation (as with officers of the law),²⁹⁷ whereas in others the protection appears to have eroded to the point where it may no longer offer a valid aggravation.²⁹⁸ Relative character is also still capable of aggravating assault as where the child, parent, husband or wife of the accused is the victim,²⁹⁹ or where an officer of law assaults his prisoner.³⁰⁰ Finally, assaults aggravated by an intent to commit a further crime continue to be competent so that where the actions committed beyond the assault are insufficient to warrant a charge of attempt for the more serious crime, an ‘assault with intent to X’ is nevertheless competent to charge.³⁰¹

3.2 Punishment and Sentencing

Punishment for assault continues to be ‘arbitrary’ in the sense that the judge shall consider the background or any other relevant circumstances when passing sentence.

²⁹³ Macdonald, p.156-162; Anderson, p.80.

²⁹⁴ Macdonald, p.162.

²⁹⁵ *Nelson v HM Advocate* 1994 SCCR 192; *Howitt v HM Advocate* 2000 SLT 449; ss101(1) and 166(3) Criminal Procedure (Scotland) Act 1995 (hereafter ‘1995 Act’).

²⁹⁶ Gordon, *Criminal Law*, para.33.07; 1995 Act, Schedule 3, para. 7.

²⁹⁷ Originally s42 of the Police (Scotland) Act 1967, now repealed and replaced by s90 of the Police and Fire Reform (Scotland) Act 2012.

²⁹⁸ As with judges and others within the legal process: *McDonald and Dustan* (1872) 2 Couper 174. This is probably also true of clergymen.

²⁹⁹ Gordon, *Criminal Law*, para.33.19.

³⁰⁰ *Findlater and McDougall* (1841) 2 Swin 527.

³⁰¹ See generally, Gordon, *Criminal Law*, paras.33.21-33.29.

However, with the development of distinct criminal courts and procedure, this discretion is ‘split’ with the Crown Office who, when bringing a case against an accused, determine which court and under what procedure the case shall be heard. Assault tried in the High Court of Justiciary can attract a maximum penalty of life imprisonment; a sheriff sitting under solemn procedure can impose a sentence of up to five years’ imprisonment or alternatively remit the case to the High Court for sentencing where they deem their sentencing powers inadequate;³⁰² and a sheriff sitting summarily can impose a sentence of up to twelve months.³⁰³ The prosecutor therefore has some degree of influence over sentence based on which court they decide to bring the case, and it is certainly questionable that this decision should be made by the prosecutor, rather than the guilty party. Taking all these competencies together, the punishment for assault therefore ranges from absolute discharge to life imprisonment.

3.3 The Culpability Requirement in Assault

We have seen that since its inception, an attack had to be intentional to constitute assault.³⁰⁴ However, the development of criminal liability was such that the mental element of the crime was now made explicit.³⁰⁵ This is perhaps the most interesting aspect of the law of assault as it stands today – *animus iniuriandi*, latterly intention, appears to have always been accepted as the necessary mental element, but there does not appear to have been any analysis, in the courts or otherwise, to determine why. This is particularly interesting given the historical closeness of physical injury and defamation as concepts in the law; one would assume that a dialogue would have emerged to determine the underlying principles of each as they evolved and the justification for punishment diverged.

This has not been the case, and thus due to this closeness and their origins in *iniuria* these concepts have evolved so that the rationale for one has clearly impacted on the other – namely the idea that we should only punish insults that were intentional (of evil design) has crept into our understanding of protecting bodily integrity. Arguably, beyond the cut off

³⁰² 1995 Act, ss3(3) and 195 respectively.

³⁰³ *Ibid*, s5(2). A Justice of the Peace Court may also hear cases of assault and can impose a maximum sentence of 60 days imprisonment under s7(6)(a) of the 1995 Act, but under s7(8)(b)(iv) they are unable to hear more serious cases of assault such as those causing fractures, involving stabbings or those to the danger of life, or assaults with intent to ravish.

³⁰⁴ Or at the least, the circumstances must demonstrate “constructive intention”: *Keay* (1837) 1 Swinton 543.

³⁰⁵ *Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 43 at 48 per Lord Justice-Clerk Ross; *HM Advocate v Harris* 1993 JC 150.

standard of negligence, intentionality is irrelevant: in society we seek to prevent physical injury irrespective of whether it was caused intentionally or not.³⁰⁶

This truth is recognised in modern criminal law, where a majority of advanced legal systems treat the protection of individuals' interests in physical integrity and personal autonomy as paramount, embodied by a system of offences against the person which penalises even negligently caused injuries in some cases.³⁰⁷ Some jurisdictions give effect to this by providing that an assault can be committed intentionally or recklessly,³⁰⁸ whereas others prefer to limit assault to an intentional attack, and deal with levels of harm caused, both intentionally and recklessly, in separate offences.³⁰⁹

Of interest, South African law also developed under the *ius commune* tradition, much like Scotland, and they also require intention as a prerequisite for assault.³¹⁰ South Africa has cultivated liability on the basis of *dolus eventualis*, which treats as liability only those who intended their conduct.³¹¹ By contrast, Germanic law postulated that all harm caused was subject to private vengeance or at least restitution, and thus drawing a distinction between wrongs done intentionally versus negligently was irrelevant.³¹²

The Scottish approach appears to occupy some hybrid territory between the two – it is linear in that it ignores any kind of division based on levels of harm and instead simply divides an attack on a person (of any degree) as either intentional or reckless: if the conduct is committed intentionally then it is an assault; if it is done recklessly then it is

³⁰⁶ Mackenzie's defence of 'distracted persons' was excluded from the remit of real injuries: see above at p.32; for a historical example of reckless injury see *HM Advocate v Phipps* (1905) 4 Adam 616, and more generally see Gordon, *Criminal Law*, at para. 33.56.

³⁰⁷ See the MPC in relation to negligent killing: §§211.1(1)(b), 210.4.

³⁰⁸ Eg. English law: *R v Venna* [1976] QB 421 (although technically the charge is for 'assault and battery', the term 'assault' is used regularly as an inclusive term); Victoria in Australia also allows assault to be committed recklessly under s31 Crimes Act 1958 (Vic); and US law where reckless injuring was prosecuted under then-prevailing battery statutes: *Wellons v State*, 77 Ga. App. 652, 48 S.E.2d 922 (1948), and now the MPC includes reckless modes of committing assault (§211.1(a) & (b)).

³⁰⁹ Canadian Criminal Code, Part VIII, section 221 (negligently causing injury); many States and Territories in Australia treat assault as an intentional act and include extensive treatment of reckless violence: s35 (reckless grievous bodily harm (hereafter GBH) or wounding) and s54 (causing GBH) Crimes Act 1990 (NSW); Division 7A of Criminal Law Consolidation Act 1935 (South Australia); s13 (crimes require intent) and s172 (wounding/causing GBH) Criminal Code Act 1924 (Tas); s297 (GBH), s301 (wounding and similar acts), and s304 (act or omission causing bodily harm or danger) Criminal Code Act Compilation Act 1913 (WA); Division 3A and s185 (causing harm) Criminal Code Act 1983 (NT); s20 (recklessly inflicting GBH), s23 (inflicting actual bodily harm), and s25 (causing GBH) Crimes Act 1990 (ACT); s23 (crimes require intent), s320 (GBH), s323 (wounding), and s328 (negligent acts causing harm) Criminal Code Act 1899 (Qld).

³¹⁰ J Burchell, *Principles of Criminal Law* (4th ed, 2014) at p.575.

³¹¹ Burchell, at p.350-351; at least *prima facie*, see below at p.62.

³¹² *Ibid* at p.407.

libelled as ‘recklessly causing injury’.³¹³ This deviation from the South African (and ultimately Roman) approach is perhaps down to earlier and more persistent Germanic influences coming to Scotland from England and Europe. An example of this internal struggle in Scotland appears as early on as the seventeenth century, as where Mackenzie implied that it was no defence to a real injury that the offender was a ‘distracted person’,³¹⁴ and later in circumstances where the court arguably warped the meaning of intentionality in order to find “constructive intention” in a boy who whipped a horse, causing it to bolt and eventually injure the rider.³¹⁵

³¹³ *HM Advocate v Harris* 1993 SCCR 559.

³¹⁴ See above at p.32.

³¹⁵ *Keay* (1837) 1 Swinton 543.

4. Comparative Lessons on Structuring Assault Offences

4.1 The Two-Axes Approach to Structuring Assault

How then, should Scots law give effect to this normative value that protects physical integrity? Normative values tend to be given expression in criminal law through the lens of guiding principles at the metaphysical level which society determines are necessary to ensure balance and fairness in the criminal justice system. On one axis are those principles which relate to the function of criminal law as a means of guiding the conduct of all members of society (including courts), known collectively as principles of legality, or alternatively ‘the rule of law’.³¹⁶ In contrast, those principles which relate to the conditions of liability can be seen as a second, often conflicting, axis; these principles are based on the premise that an individual should be held criminally liable only for the consequences that were knowingly brought about or risked.³¹⁷

An example of how these principles interact can be found when we consider the fair labelling required under the conditions for liability, and the maximum certainty required for adherence to the rule of law within the context of assault.³¹⁸ Starting from the premise that assault *should* include instances of unintentional violence against the person would provide a model example of conduct rules which conform to the principle of maximum certainty: it is clear and unambiguous that committing a voluntary act which harms another person, irrespective of intention, will attract criminal liability.

In contrast, however, having a single offence of ‘causing physical harm’ would fall foul of the principle of fair labelling: this is the belief that the widely felt distinctions between various kinds of wrongful conduct in our society should be respected and given effect to in law through the subdivision of offences by their nature and the magnitude of law-breaking.³¹⁹ Indeed, one potential criticism of assault in Scots law presently is that it is already too broad, so to include all types of violence within one offence definition would be inappropriate and offensive: offensive to the offender who recklessly causes someone to sustain a black eye who is then placed in the same broad category as someone who

³¹⁶ See A Ashworth & J Horder, *Principles of Criminal Law* (7th ed, 2013) at p.56ff.

³¹⁷ *Ibid* at p.73ff.

³¹⁸ See more generally A Ashworth & J Horder, *Principles of Criminal Law* (7th ed, 2013) at pp.62-66 and 77-79.

³¹⁹ *Ibid* at p.77. For a greater treatment see J Chalmers & F Leverick, “Fair Labelling in Criminal Law” (2008) 71 MLR 217.

intentionally maims their victim;³²⁰ and equally offensive to the victim and society as a whole who may feel that the severity of the wrong perpetrated by the latter offender is undermined by placing his conduct in the same criminal category as that of the former.

4.2 Variation based on Culpability

The above example certainly suggests that we *should* vary attacks based on culpability, in the pursuit of appropriately labelling our offences. There are two conventional ways in which this axis can be varied: either in the binary sense that reckless conduct is an assault or it is not; or one includes reckless conduct within assault' ambit and then uses culpability as a layering function to increase the severity of all forms of assault where intention is present.³²¹

However, the focus on intentionality in our understanding of culpability has resulted in an understanding of 'intention' in criminal justice systems that can be said to abuse the natural meaning of the word. Hadden notes that the current conceptions of intentionality in the legal sense are absurd when considered in the context of the word's natural, much stricter, meaning: the current legal requirements amount to little more than the negation of certain acquitting defences, along with some minimal notion of having foresight of the consequences.³²² Indeed, and as aforementioned, the South African offence of assault can only be committed intentionally, but their conception of 'intention' as the necessary *mens rea* in assault is not dissimilar to how many other legal systems conceive of *mens rea* broadly: as intention *or* foresight. The South African understanding of intention utilises the concept of *dolus eventualis* to hold that persons, in circumstances where no clear intention is present, should, as a matter of fact, have realised that the natural and probable consequences of their actions would occur;³²³ i.e. a textbook definition of recklessness.

The result is that intentionality operates less as a sliding axis, and more like a binary switch, where conduct which can be said to reach the minimum level of foresight required 'flicks the switch' to engage criminal liability. This, according to Hadden, is

³²⁰ J Horder, "Rethinking Non-fatal Offences against the Person" (1994) 14 OJLS 335 at 342.

³²¹ This is done to a limited extent in the MPC where, for example, negligently causing bodily injury to another with a deadly weapon will constitute simple assault, whereas doing the same "purposely or knowingly" will constitute aggravated assault: MPC §211.1(1)(b) and §211.1(2)(b) respectively.

³²² T Hadden, "Offences of Violence: The Law and the Facts" [1968] Crim LR 521 at 532-533.

³²³ Burchell, at p.350-351.

regrettable because intention is not an instantaneous state of mind, but rather operates through time, and so the current conception allows virtually no distinction to be drawn between cases of premeditation and impulse.³²⁴ As a result, Hadden believes that intentionality should take account of premeditation – including this concept in our understanding of culpability would allow this flick-switch to be replaced by degrees of liability, distinguishing those actions which were committed in the heat of the moment from those which were deliberated and calculated.³²⁵

Hadden's approach would therefore move the criminal law from an action-centred theory of criminal liability to one based primarily on culpability. Instead of being asked whether or not the accused intended to kill or to inflict an injury, the jury would be required to assess the extent to which their action was planned, impulsive or unintended, and equally whether they had been culpably reckless with respect to a specific result.³²⁶ To the criticism that the difference between planning and impulse is simply a question of degree (i.e. it would be hard to identify fixed, separate culpability categories), Hadden responds that the distinctions between intention, recklessness and negligence are no different.

Hadden's premeditation axis theory appears to base its strength on proposition that the current approach to culpability is ineffective at having regard to the full spectrum of intentionality that can be present in a sequence of events which attracts criminal liability. A man can foresee that his argument with another will turn into a physical fight, then be fully aware that he is punching someone but completely oblivious to the fact that they will thereafter fall and strike their head on the concrete, causing death. There certainly appears to be parallels with what Hadden perceives to be an issue with intentionality generally, versus the operation of constructive liability, particularly in cases of violence. This topic has featured heavily in English legal discourse on offences against the person. There is already a great discussion about how an actor should be treated for those results he did not intend, when he *did* intend a lesser injury. Currently s47 1861 Act offences operate in this way; the accused must have intended to assault the victim, but there is no mental requirement for the actual bodily harm: as soon as such harm occurs, the assault moves from the common law and enters the remit of s47. Likewise, the injury that must be foreseen in s20 offences can be relatively minor. Some believe this approach is

³²⁴ Hadden, *op cit.* at 523-527.

³²⁵ Hadden, *op cit.* at 534.

³²⁶ *Ibid.*

unprincipled,³²⁷ whereas others argue that persons who threaten or use violence cross a moral threshold which makes them responsible for any consequences that they then bring about.³²⁸

Constructive liability of course says nothing about the offender's state of mind before or after the conduct giving rise to liability, whereas premeditation would require consideration of the whole event to determine the overall culpability. If we take the constructive liability argument at first instance, and state that every conduct and result requirement should be met by an equal culpability requirement (which would presumably be the stance Hadden takes, based on his premeditation theory), then we are left to consider what determination of culpability before and after the conduct adds to the criminal process. How relevant is it that the offender specifically sought the victim out to confront them in the first place; or that they then left the victim to die after committing the attack?

On some levels these considerations are already taken into account when determining whether or not the accused had the relevant *mens rea* for the crime, so how precisely would Hadden's method result in a tangible change in how we approach culpability in the legal process? Hadden advocates an approach that focuses on the whole situation, rather than binary notions of intentionality and harm, but in his discussions of situational considerations being as important as harm considerations, he admits that it would be impossible to provide for every possible scenario and degree of legitimacy in the law; it is unclear how this would be any different for his expanded degrees of culpability under premeditation. Further, in the context of premeditation being a question of degree, it is no real answer to respond that the current system is no better – particularly when he thinks there is a problem with the current system precisely *because* intention versus recklessness is often treated as a matter of degree. Finally, the introduction of in-depth analyses of a person's state of mind before and after the crime cannot be seen as anything other than an assessment of their underlying motives – it is not the role of the law to determine whether an actor's reason for doing something is good or bad as this is purely subjective – their role must be confined to determining when they have objectively carried out prohibited conduct.

³²⁷ Law Commission, *Offences against the Person and General Principles* (1993), Law Com No 218, at para.12.26-12.27; J Horder, "A Critique of the Correspondence Principle" [1995] Crim LR 759; Ashworth & Horder, *Principles*, p.76. See also s22(2) of the Criminal Code Act 2002 in the Australian Capital Territory which precludes such constructive liability by requiring recklessness in the absence of a fault element for any physical element that consists of a circumstance or result.

³²⁸ Gardner, *op cit.* at 509.

The above analysis therefore suggests that the most effective way to vary the culpability axis in the assault structure is either by providing a distinction between intentional and reckless conduct as separate offences, or alternatively by making intentional conduct an aggravating factor of a base crime of reckless injury. It is in this respect that Scotland seems to fare relatively well; the clear division of assault from reckless injury provides a suitable moral distinction between the two types of conduct, and one which is readily understood by the layperson. It additionally avoids the mental gymnastics required to understand the concept of intentionality in South African law by providing clear separation of intention and foresight. The alternative option invites less of a distinction to be made between conduct which is intended versus committed recklessly, and this is an undesirable direction. The average person arguably does not think of reckless behaviour as being sufficient to constitute an assault.

4.3 Variation based on Results – Hierarchies and Lessons from English Law

We must now consider the utility of a second axis which varies assault based on the resulting harm, and see how this would fit within a conception of assault which only covers intentional conduct. As aforementioned, the Scots law of assault operates with a single offence of assault, which arguably runs contrary to both principles of fair labelling and maximum certainty espoused above, while also leaving much of the case to be decided at the sentencing stage.³²⁹ This is unsatisfactory. English law provides an example of a structure based heavily on grading via results. At common law,³³⁰ assault and battery occupy the first rung on what is essentially an ‘assault ladder’. The subsequent rungs (i.e. more serious offences) are occupied by statutory offences from the Offences Against the Person Act 1861 (hereafter 1861 Act), starting with assault occasioning actual bodily harm (s47), and followed by malicious wounding or inflicting GBH (s20) and finally malicious wounding or causing GBH with intent (s18). At the top end of the hierarchy, s18 utilises both intentionality and result as the harm inflicted could potentially be the same in comparable s18 and s20 cases, but s18 offences (which require intent) carry the much longer maximum sentence of life imprisonment, versus the five years under s20. Thus, in all but the last rung of the ladder, an assault and its variants can be committed recklessly.

³²⁹ Ashworth & Horder, *Principles of Criminal Law* (7th ed, 2013) at p.307.

³³⁰ Although see *DPP v Little* (1992) 95 Cr App R 28.

4.3.1 Problems with English Law

However, the English approach is far from perfect, and the 1861 Act has been described as “archaic” in its use of “redundant verbiage” while “essential specifications are left out”; it is preoccupied with “quaint, miscellaneous alternatives [which] are herded uncomfortably together with single definitions” leading to interpretations that are “forced to ever more absurd technicality in the struggle to maintain a semblance of applicability to modern circumstances”.³³¹ There have been numerous attempts to reform this area of law spanning nearly forty years, but none have been successful.³³² Perhaps the biggest issue with the 1861 Act is the lack of continuity in an Act which purports to deliver some semblance of structure to offences against the person, and this is caused, in large part, due to inconsistencies in terminology. For example, the initial impression is that offences under s18 are aggravated versions of s20 offences on the basis that, *ceteris paribus*, the offender intends the injury brought about. However, the offender need only *cause* GBH under s18, whereas under s20 GBH must be *inflicted*. Not only does this seem to defy common sense (an infliction surely imports some sense of intentionality on the act, whereas causing seems far more congruent with reckless behaviour), but “inflict” is narrower than “cause”,³³³ and thus while one may cause GBH by passing on an infection or poisoning, they cannot *inflict* GBH in such a way.³³⁴ The more culpable offence is therefore of wider scope than the less culpable version, with the latter seemingly requiring an element of violence not present in the more serious offence.

4.3.2 Reform Proposals

In their 1992 Consultation Paper,³³⁵ the Law Commission of England and Wales (LC) identified two key elements which made the 1861 Act deficient: ss18, 20 and 47

³³¹ J Gardner, “Rationality and the Rule of Law in Offences Against the Person” (1994) 53 *Cambridge Law Journal* 502 at 502.

³³² Criminal Law Revision Committee (CLRC), Fourteenth Report: Offences against the Person (1980) Cmd.7844; Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (1985) Law Com No 143; Law Commission, *A Criminal Code for England and Wales* (2 Vols) (1989) Law Com No 177; Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (1992) Law Com C.P.122; Law Commission, *Offences against the Person and General Principles* (1993) Law Com No 218; Law Commission, *Consent and Offences Against the Person* (1994) Law Com C.P.134; Law Commission, *Offences against the Person Scoping Consultation* (2014) Law Com C.P.217; Law Commission, *Reform of Offences against the Person* (2015) Law Com No 361.

³³³ CLRC, Fourteenth Report, para.153; although the difference is perhaps not so great after *Burstow* [1997] Crim LR 452 where it was held competent to inflict ‘psychiatric injury’.

³³⁴ Law Com. C.P.122.

³³⁵ *Ibid.*

individually offended the rule of law owing to their uncertainty and lack of clarity; the sections *collectively* offended rationality by seemingly eluding any kind of rational structure that would conceive of a logical progression in terms of severity.³³⁶ We saw an example of this lack of rationality above with respect to the relationship between ss18 and 20. With respect to the rule of law, the current structure has resulted in a series of inconsistent or contradictory decisions, based on the fact that the language used has to be translated in order to be understood.³³⁷ For example the word “maliciously”, found in ss18 and 20, has been said to add nothing and is best ignored by the Court of Appeal,³³⁸ and yet the House of Lords has since found that the *mens rea* of the crime is to be found in that very word.³³⁹

The LC therefore stressed that offenders be “punished according to the type of injury that he intended or was aware that he might cause.”³⁴⁰ As a result, they recommended repealing the 1861 Act provisions, and replacing them with a new structure that followed a simple and logical progression:

- a) A person is guilty of an offence if he intentionally causes serious injury to another;
- b) A person is guilty of an offence if he recklessly causes serious injury to another; and
- c) A person is guilty of an offence if he intentionally or recklessly causes injury to another.³⁴¹

Recently the LC completed another project on this topic and the proposals were substantially the same, save that under offence b), the accused must foresee the risk of causing serious injury, and likewise under offence c) the accused must foresee a risk of some injury occurring.³⁴² An additional offence of aggravated assault, meaning assault causing injury, was created to mirror the original offence c) under the 1992 proposals, which carries a lower penalty to reflect the lack of foresight required. The LC’s proposals

³³⁶ J Gardner, *op cit* at 502-503.

³³⁷ Law Com C.P.122. at paras.7.6-7.13.

³³⁸ *Mowatt* [1968] 1 QB 421 at 426B.

³³⁹ *Savage* [1991] 3 WLR 914 at 939F.

³⁴⁰ Law Com C.P.122. para. 8.5.

³⁴¹ Law Com No 218, para. 13.2.

³⁴² Law Com C.P.217.; Law Com No 361.

therefore represent a simple, “logically structured”³⁴³ approach to offences against the person based on an emphasis on two key scaling elements, culpability and resulting harm. The simplicity of this grading system means that harsher injuries will attract harsher punishments, and likewise those attacks which are intended will be treated more severely than those committed recklessly.

4.3.3 The Importance of Morality

It is, however, on this very simplicity that criticisms of the LC proposals have been focussed. Gardner, for example, argues that the LC’s reliance on a lack of rationality and respect for the rule of law as the main shortcomings in the 1861 Act structure are flawed.³⁴⁴ With respect to rationality, he argues that there is cohesion between sections 18, 20 and 47, but it requires thinking about these provisions beyond the reductionist viewpoint of only considering variations in the configuration of *mens rea* and resulting harm.³⁴⁵ Rather, per Gardner, we should consider the offences in the 1861 Act in separate clusters. Thus, ss18 and 20 are both crimes of violence, with s20 being the basic offence with infliction as the basic mode of causation.³⁴⁶

Gardner argues that by focussing on the wrong instead of the harm, one can clearly see the rationality between ss18 and 20; they are crimes of violence. Section 18 is therefore justified as being a ‘catch-all’ method for instances of intended violence, lest offenders “could otherwise enjoy a bizarre kind of mastery over their own normative situation”, capable of avoiding liability by adopting different means.³⁴⁷ Likewise, the requirement of actual bodily harm in s47 offences, viewed from the traditional perspective of resulting harm, gives the impression that such offences are less serious variants of s20 offences. However, under this analysis the requirement for an assault under s47 does not appear to have any cohesion with ss18 and 20, and Gardner states that this is precisely because the latter offences are concerned with violence, and “assault is not a crime of violence”.³⁴⁸ Assault is, at its core according to Gardner, the invasion by one person of another’s body space and so the LC can be accused of confusing the *harm* from the *wrong*.

³⁴³ M Gibson, “Getting their ‘Act’ Together? Implementing Statutory Reform of Offences against the Person” [2016] Crim LR 597 at 617, relating to the 2015 proposals.

³⁴⁴ Given that both Law Commission projects appear to be predicated on the same assumptions, Gardner’s criticisms remain relevant.

³⁴⁵ J Gardner, *op cit* at 507.

³⁴⁶ *Ibid* at 505.

³⁴⁷ *Ibid* at 506.

³⁴⁸ *Ibid* at 507.

Some elements of Gardner's reasoning are problematic. Firstly, he talks at length about the LC's misguided view that ss18, 20 and 47 represent a scale ranging from most to least severe, but recognises that s18 is a more serious offence than s20, which represents the base offence of violence. However, he is only able to justify the reliance on 'causes' in s18 by reference to recklessness theory; the concept that one should not be able to escape the probable and likely consequences of their actions, whatever the means. This might make sense if the harm required was greater than under s20 offences, but the harm requirement is the same. Thus, we are supposed to merely accept that s18 is the harsher crime, but it is wider in scope so that those intending such harm do not escape liability. Why should such persons not escape liability? Because the *harm* caused is so great. The wrong is essentially irrelevant in this crime, and Gardner admits as much when he highlights that s18 includes the words "by any means whatsoever".³⁴⁹

Likewise, the distinction he creates between ss18 and 20 on the one hand, and s47 on the other is pedantic: to exclude violence from our understanding of invading one's personal body space is to remove its meaning almost entirely, particularly when the concept of sexual assault already exists to cover those instances of bodily invasion where the violent element is missing. If inappropriate touching is correctly understood as a sexual assault, what then does that leave for the content of general assault if not violence? Indeed, an assault proper under English law is the causing of fear or apprehension in a victim of "immediate and unlawful *violence*",³⁵⁰ and it is difficult to see how this test could be met under circumstances where the victim feared not violence but some other kind of bodily invasion, without moving from the objective realm of rationality into the subjective, and often irrational, expectations of the particular victim.

At a more fundamental level, however, Gardner's argument about rationality is misconceived because it misinterprets the LC's broader argument: Gardner believes there is rationality in the 1861 Act because s47 belongs to its "own family of offences, namely those of assault";³⁵¹ the LC believes that no rational coherence exists precisely *because* these offences are split into different, seemingly arbitrary, categories which do not conform to our general understanding of offences graded by resulting harm. Even if Gardner is correct in his analysis then we still arrive at the result that the 1861 Act groups crimes into

³⁴⁹ *Ibid* at 506.

³⁵⁰ *DPP v K* [1990] 1 WLR 1067 at 1069 (my emphasis added).

³⁵¹ Gardner, *op cit* at 507.

‘families of offences’ by some arbitrary distinction based on distinguishing an assault from an injury. This is not to say that the LC is correct, but if a distinction is to be made between assaults and injuries, it must be based on something more than the artificial notion that assault is not a crime of violence.

Indeed, even if we were to concede the point that the 1861 Act has some kind of rationality to its provisions, and was not just a piecemeal attempt at summarising the law as it stood at the middle of the nineteenth century, it would still be an extremely ineffective structural foundation as it creates arbitrary distinctions between types of violent crime that cause harm in a legal system which is entirely predicated on the causing of harm: one can disagree with the causing of harm as a foundation for liability, but it is certainly ill conceived to then reject it for one area of the criminal law when it pervades so readily in every other.

Gardner would presumably respond that the above analysis, much like that of the LC, represents a misinterpretation of the harm principle. He notes that the harm principle states that the law should not be used to restrict or punish harmless activities, and even that the law should not restrict or punish harmful activities in ways disproportionate to the harm committed, but that the harm principle says nothing about how harmful activities should be dealt with by the law.³⁵² Such matters remain to be settled on “other grounds”, but what this amounts to is just that on some occasions the law declines to deal with certain harmful activities at all (presumably he is referring to instances like sporting activities, voluntary surgery, or even the refusal to criminalise alcohol which is a drug and can cause direct and indirect damage), or only on certain terms, attaching limitations and provisos and conditions to liability which have little to do with the nature or degree of harm.³⁵³ This analysis, however, is deceptive in that it completely ignores the many instances where the harm principle *does* inform how the law deals with certain activities. Homicide is treated more severely than injuries, rape is treated more severely than sexual assault, robbery is treated more severely than theft. Gardner’s analysis arguably does more to highlight that on some occasions there will be *exceptions* to the rule, where a competing interest can usurp the interest of preventing harm, such as how consent can vitiate certain assault charges on the basis that there is no ‘victim’ to be harmed.

³⁵² *Ibid* at 513-514.

³⁵³ *Ibid*.

4.3.4 Descriptions as Providing Substance

It is in Gardner's second argument, in relation to the rule of law, that one finds a more convincing argument. As noted earlier, the second basis that the LC use to justify their reforms is the idea that the 1861 Act provisions fail to provide clarity, requiring the language to be entirely translated to be considered useable.³⁵⁴ These translations are carried out judicially, creating an unacceptable degree of uncertainty in the law.³⁵⁵ Thus, plain language is regarded as preferable by the LC, and it is on this point that Gardner disagrees. Gardner states that we take it for granted that an interpretational problem for juries and magistrates equates to an equivalent problem for society generally in trying to follow these rules.³⁵⁶ In some circumstances this is certainly true, as in contract law where textual clarity enables parties to make, amend or terminate contracts with redress to the court, but Gardner suggests that in the general criminal law textual clarity is an irrelevance; what is relevant is moral clarity.³⁵⁷ The presumption that everyone can be said to know the law would become untenable if we insist that people can only know the law by its texts, and design the law accordingly.

Rather, the law should be designed on the basis of clear distinctions and significances which apply outside the law (moral norms, coined by Gardner as "popular moral imagination"³⁵⁸), together with clear labelling to inform which clusters of distinctions and significances people (moral distinctions) can expect to find replicated in the legal context.³⁵⁹ Reliance on the underlying morality of a legal system allows textual clarity to be abandoned in general crimes, in favour of concepts which more accurately reflect the wrong, or conduct, that the system is trying to prevent. This is because moral clarity makes legal rules accessible to the ordinary people who are to be guided by them. Phrases like 'grievous bodily harm' and 'actual bodily harm' represent justified departures from textual clarity in favour of moral clarity, because everyone has a shared understanding of what these words mean and the relative gravity each phrase imports.³⁶⁰ In

³⁵⁴ LC 218, para.12.9.

³⁵⁵ *Ibid* at para.12.11.

³⁵⁶ Gardner, *op cit* at 511.

³⁵⁷ *Ibid* at 513.

³⁵⁸ *Ibid* at 515; cf. B Francis, K Soothill & R Dittrich, "A New Approach for Ranking 'Serious' Offences: The Use of Paired-Comparisons Methodology" (2001) 41 BJoC 726 at 729-730 on the dangers of relying on public opinion.

³⁵⁹ *Ibid* at 513.

³⁶⁰ *Ibid* at 517-518.

some ways, this is more valuable than textual clarity since it is in this moral sense that the average person understands and interacts with the law.

Further, Gardner rejects the assumption that we must find definitions for these terms which specify all the necessary and sufficient conditions of their application, as it results in making the terms unnecessarily technical. This is unnecessary because even sound understanding does not dispense with grey areas which are not the product of any defect of understanding, but rather part of the concept trying to be understood as with ‘intention’ in all its incarnations in statute and at common law.³⁶¹ In their efforts to improve clarity then, the LC proposals minimise the number of elements in each offence to in turn minimise the possibilities of confusion or uncertainty. The words chosen are likewise formed from a limited vocabulary which are morally bland (e.g. causing (serious) injury; intentionally; and recklessly). This, of course, is no solution because it offends moral clarity in the law.

Undoubtedly the law should maintain its moral character; a feature of good law is that it reflects the goals and aspirations of the society it purports to regulate. Yet it is not wholly evident that this moral content must be displayed in such a prominent way in the dissemination of our legal rules. For example, Gardner asks us to consider that interpretational problems may exist for judges and juries without there being an equivalent issue for society in general. But this ignores the fact that our criminal legal process is, at its core, intended to be a cross-section of society involved in determining criminal justice. The jury *are* the society in any given case, and so any interpretational difficulties they may face are directly correlated to the difficulties faced by society generally. It is disingenuous to argue that a person does not have to know what the law is until he is sat on the juror’s bench, because at that stage the judge will still have to try and educate the jury on the terms relevant to the case before them.

Gardner also makes the mistake of equating moral terminology for moral substance. It does not follow that because laws are promulgated in clear, descriptive (and to Gardner morally vacuous) terms, that persons must suddenly have to know their exact contents before they can ‘know the law’. Indeed, as Gardner rightly points out, there is an underlying “popular moral imagination” which exists in society to know roughly what is and is not acceptable conduct when extrapolated to a legal context. How we then translate

³⁶¹ *Ibid* at 519.

this ‘moral imagination’ into “genuine moral distinctions” does not have to be so hard and fast. Many of the problems with the LC’s recommendations could be avoided by adding categorical titles to each offence, so that intentionally committing serious injury became a form of ‘serious battery’, for example, or including multiple ways, in clear descriptive terms, of committing an assault as is done in the MPC.³⁶² One can therefore retain morality in the law without jeopardising textual clarity.

4.3.5 Conduct as a Third Axis?

The argument is thus that there is something intrinsic in how we describe our offences, beyond the requirement of culpability and a resulting harm. Horder also takes issue with the LC proposals in relation to their moral content. Whereas Gardner believed in an underlying ‘popular moral imagination’ guiding our legal system from the bottom up, Horder suggests that it is the moral content of our laws which inform the importance of actions in our society, i.e. from the top down. Horder starts by affirming representative labelling as a true principle of criminal law that seeks to ensure that the offence definition will itself give us an accurate moral grasp of what the defendant has done in committing the offence. He states that this moral grasp is important as offence convictions stand as enduring features of moral and legal record, publicising exactly how the defendant failed in their basic duties as a citizen.³⁶³ It is therefore by ensuring that this moral nominalism shapes the definition of offences that one gives the law this necessary moral substance, but in the shaping of laws one must be careful of both particularism at one end of the scale, and moral vacuity at the other. Horder accuses the LC proposals of moving the law from the former end of the scale to the latter, rather than finding the right balance in the middle. In terms of the *actus reus* the only concession to representative labelling in the LC proposals is in the nebulous distinction of degree between injury and serious injury, and thus there are no longer any qualitative distinctions between kinds of *actus rei* whatsoever.³⁶⁴

There are obvious pitfalls with extreme particularism – very precise specification of the modes of responsibility opens up the possibility for exploitation based on technicalities; for example, if ‘infliction’ requires violence as Gardner suggests, then one can conceive of an argument that the throwing of acid cannot be considered infliction for the purposes of

³⁶² MPC, §211.1(1).

³⁶³ Horder, *op cit* at 339.

³⁶⁴ *Ibid* at 340.

s20, despite it being a suitable candidate for that section. Equally, extreme specification involving the distinguishing of injured body parts, as in Seton's treatment of mayhem, results in arbitrary distinctions between those parts included and those left out.³⁶⁵ However, Horder argues that a move away from detailed specification of modes by substituting the catch-all notion of 'causes', and from detailed specification of particular outcomes by substituting the catch-all notion of 'injury', moves too far in the opposite direction.

Horder states that there are three elements to offences which can impact on the moral nominalism we see in crime generally: mode of responsibility (action), outcome (results), and intentionality (culpability).³⁶⁶ Serious crimes may feature all three elements, as with torture, whereas less serious crimes might feature two out of the three, and less serious still might only feature one – as where there is a negative outcome with no reference to the required action or intentionality for bringing it about. Horder suggests that terms for the mode of responsibility like 'causes', and likewise those for the outcome like 'personal harm' or 'injury' say nothing of morally nominate import about any of the three elements.³⁶⁷ Thus, using both results in morally vacuous offences which can only be distinguished by the actor's culpability.

Horder states that no real argument has been given by the LC for rejecting the use of terms in the middle of the spectrum, those rich in detail about the outcome suffered, e.g. disable, disfigure, blind etc. Thus, under the LC's proposed offence of intentionally causing serious injury, someone who breaks their victim's nose is placed in the same category as someone who deliberately saws another's leg off or castrates them.³⁶⁸ He argues that it is the function of representative labelling to ensure that such distinctions are recognised in the offence committed and not merely at the sentencing stage. He admits that the argument is weaker at the lower end of the scale where the threat of technicalities burdening litigation has more force for less serious offences, but argues that the more serious an offence is, the more important it is, with respect to moral nominalism, to incorporate the relevant moral detail into the offence definition.³⁶⁹

³⁶⁵ See above at pp.25-26; Horder, *op cit* at 340.

³⁶⁶ *Ibid* at 341.

³⁶⁷ *Ibid*.

³⁶⁸ *Ibid* at 342.

³⁶⁹ *Ibid* at 342-343.

He highlights that the proposed offence of intentionally causing serious injury fails because it is broad enough to cover conduct such as rape and sexual assault; offences which are not just factual examples of causing an impact on the body, but also representations of unwarranted invasions of a victim's sexual autonomy, to be valued separately from bodily autonomy.³⁷⁰ The 'moral warrant' for creating a separate offence is that the offence protects an important value whose worth is not merely separable from other values, but is partly constituted by its separateness. One therefore diminishes the significance of sexual liberation if one treats it as nothing more than a freedom to do with one's body what one wishes.³⁷¹ There are other values whose worth lies partly in their separateness. He argues that there is no way of 'comparing' the loss of a leg to blindness, with a view to deciding which is more serious. Both losses represent different kinds of loss, loss of mobility versus the loss of sight, and the different values involved in each case are diminished if their worth is not separately recognised.³⁷² To avoid the pitfalls of particularism, focus should not be on particular body parts but on the value which that body part could be said to represent.

Horder therefore recommends a structure based on liability where the defender castrates, disables, disfigures, or dismembers any other person; or renders them deaf, dumb, or blind, damages or removes an internal body part, or "does" any life-threatening or potentially life threatening injury.³⁷³ Those injuries which do not impinge on any value, such as where the defendant breaks a rib or slashes someone's back with a knife, would be treated as qualitatively different and covered by a separate offence which is not dissimilar to the LC's proposal – again in less serious offences the requirement of moral clarity is less pressing – although Horder defines injury as including 'any impairment of physical condition' to explicitly tie those less serious crimes to the value of health and physical integrity.³⁷⁴ To accurately reflect those instances with multiple smaller injuries or wounds he creates a separate, reimagined offence of battery in an attempt to avoid acquittals for repeated, minor injuries and equally to inject some moral meaning into the term 'battery', which he argues is currently broad enough to include a tap on the shoulder.³⁷⁵

³⁷⁰ *Ibid* at 343.

³⁷¹ *Ibid*.

³⁷² *Ibid*. at 344.

³⁷³ *Ibid* at 345; see also the concept of a 'living standard' in A Von Hirsch & N Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11 OJLS 1 at 7ff.

³⁷⁴ *Ibid* at 347.

³⁷⁵ *Ibid*.

Finally, Horder argues that mental impairment should not be left to piecemeal development through the interpretation of existing offence categories, as would be the result of the LC proposals, and so creates a separate offence of ‘mental cruelty’ which takes ‘impairing another’s mental health’ out of the definition of ‘serious injury’ and gives the concept a morally nominative title.³⁷⁶

Horder’s approach has an obvious appeal because morality is so intrinsic to criminal law, but it is not immediately obvious that descriptive offences are the only way to adequately give recognition to morality in the law. We are merely supposed to take it for granted that representative labelling requires the offence definition to provide the necessary moral grasp of what an offender has done: this is not self-evident. As with Gardner, there is little discussion about the prominent role that offence titles have to play in disseminating the morality of the law. Despite Horder’s reliance on offence definitions, one doubts that he would argue that the word ‘murder’ alone is insufficient to impart the moral gravity of an intentional killing. One also doubts that he would reject that ‘assault’ is sufficiently morally charged, and yet an assault is, in many jurisdictions, merely defined as the application of force on a person, or causing fear that such force will be applied. There is nothing particularly rich in the detail of this offence definition, and yet it is still able to accurately impart the moral focus that Horder states is integral.

Indeed, far from enhancing the inherent morality of the law, his reliance on such morally rich words in the offence definition arguably diminishes its normative function. That is because by making the offence definition as descriptive as he does (in the valiant attempt to avoid unmeritorious argumentation in litigation), it becomes long and cumbersome, thereby becoming too impenetrable to be used in any meaningful way in guiding conduct. The layperson will continue to refer to being ‘assaulted’ or ‘battered’, which inevitably undermines the point of an approach which is designed to promote the individuality of different kinds of injury. However, he cannot divide the different types of injury into separate offences because, by his own admission, “[t]here is no way of ‘comparing’, say, the loss of a leg with blindness, with a view to deciding which is more or less serious.”³⁷⁷ There is a sense, then, that Horder wants to have his cake and eat it, because a judge will nevertheless create such comparisons over the course of deciding numerous cases on different kinds of injury all prosecuted under Horder’s proposed

³⁷⁶ *Ibid* at 349.

³⁷⁷ *Ibid* at 344.

offence.³⁷⁸ He therefore seeks to respect the uniqueness and moral content of different kinds of injury, but not in any meaningful way.

4.4 Utilising the Conduct Axis

Quite aside from the question of morality, however, there is something to be said for both Gardner and Horder's reliance on this third conduct element in the structuring of assault definitions. They are correct to think that a structure based solely on culpability and resulting harm is ill equipped to adequately reflect the plethora of conduct that a principled assault offence would seek to cover. Hadden notes the arbitrariness of grading offences purely based on result, stating that in its "crudest form this involves the classification of crimes according to what is often a purely fortuitous event."³⁷⁹ Indeed, the English experience is perhaps the most notorious example of a system which is focused on results to the point of being arbitrary, and of the approach it has been said that: "[a]ttempting to grade assaults on a scale of seriousness is inevitably a difficult and controversial exercise... Clearly the criminal law hierarchy of seriousness... was too crude to be of any utility."³⁸⁰

4.4.1 Legitimacy over Harm

As a result, he recommends an alternative axis which liability could be based on: legitimacy. He argues that almost any survey on violent crime reveals the wide range of situations in which violence may occur, and that the present law does not do enough to give adequate recognition to this fact (essentially the current law of defences is inadequate). Legitimacy would seek to grade the *situations* in which harm occurs in a way that is more realistic than can be gleaned from a simple determination based on the mental element in isolation; he points out that an impulsive killing during a robbery might rightly be considered more blameworthy than the premeditated murder of an abuser in a domestic situation.³⁸¹ He admits that it would be impractical to provide for every possible scenario and degree of legitimacy or illegitimacy in the law, and thus in most cases the assessment of the total situation would be left to the discretion of the court. But this, he argues, should

³⁷⁸ The comparisons would of course be justified owing to the specific circumstances of each case.

³⁷⁹ *Ibid* at 533.

³⁸⁰ CMV Clarkson, AL Cretney, GC Davis and J Shepherd, "Assaults: The relationship between seriousness, criminalisation and punishment" [1994] Crim LR 4 at 7.

³⁸¹ Hadden, *op cit.* at 535.

not prevent us from making specific provisions for those situations in which violence can rarely, if ever, be tolerated.³⁸²

However, the concept of legitimacy is a curious one because, at its core, it seeks to include the facts of the case as part of the offence definition. In Hadden's ideal world there would be an offence for every possible scenario, so that one might, for example, be charged with assaulting their partner while being a victim of domestic abuse and having first been physically assaulted by the abuser on a separate occasion. This is clearly untenable. It also undermines the (very valid) role of defences within our criminal legal system – defences are designed specifically to add a human element to what are otherwise bare model conduct rules. In the absence of such nuanced legal rules, requiring a jury to determine how much weight individual circumstances should add or detract from a given case is asking too much from a body of persons who too often have virtually no experience in the criminal justice process.³⁸³

The Canadian Criminal Code (CCC) provides an example of a system based on a descriptive approach similar to Hadden's concept of legitimacy – there are over sixteen individual offences for situations such as setting traps likely to cause harm, interference with transport facilities, assault, assault with a weapon or causing GBH, unlawfully causing GBH, assaulting a peace officer and disarming a peace officer.³⁸⁴ This seems unnecessarily convoluted. In the case of the latter two offences mentioned, it is unclear precisely what benefit is obtained (and to whom) from distinguishing the assault versus the disarmament of a peace officer. Likewise, the offence of assault causing GBH appears to be undermined by the fact that unlawfully causing GBH appears to cover the same conduct without the additional assault element, the maximum penalty for each being identical. The danger of proscribing in detail is that one inevitably over-proscribes and undermines the moral content that the law is supposed to represent.

4.4.2 Motives as a Layering Function

One quick point should be made in relation to the potential role of motives in any offence structure. English law permits offences against the person to be racially or

³⁸² *Ibid.*

³⁸³ For example, see SJ Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law" (1974) 122 *U.Pa.L.Rev.* 1497 at 1528.

³⁸⁴ CCC §§247, 248, 265, 267, 269, 270 and 270.1 respectively.

religiously aggravated, which might even be seen as a different axis which an assault structure must consider. Structurally, this ‘aggravation’ is unorthodox in that the legislation creates separate mirror offences of both the common law and statutory crimes with the added offence element that the defender was hostile to the victim based on their race or religion (a fact which must be proved at trial).³⁸⁵ At first blush the creation of separate, more serious, offences implies the corresponding creation of extra rungs on the assault ladder, but the offences created are really just duplicates of pre-existing rungs, save that prejudicial motives will result in a harsher punishment. It therefore provides a *layering* function to the existing scheme, rather than a *scaling* function in the way that intentionality and infliction of harm are used.

In theory, there is nothing to prevent a legal system from using such aggravations as an axis on which to scale their offences of violence, but there are strong arguments against using what essentially boils down to motives to determine criminal liability, one of the most convincing being that to do so moves away from an act-centred theory of criminal punishment to one based on character; i.e. one based on perfectionism.³⁸⁶ Further, the use of motives as an axis encounters the same problem as Hadden’s legitimacy axis – it would be impossible to give meaning to every motive within a workable structure.

4.4.3 In Defence of Harm

Hadden’s argument therefore represents a rejection of retributive justice theory, or punishment for harm caused (as opposed to what was intended by the accused). Even if we disagree with Hadden’s solution, he is certainly correct that a focus on harm presents a curious problem by differentiating offenders based on outcomes which they may have no control over. Nevertheless, this theory permeates many modern criminal legal systems, such as English law which Hadden was commenting on, but also the laws of several American States following the MPC law of assault.³⁸⁷ The American Law Institute (ALI) justifies their approach to this issue in the MPC by pointing out that “juries will not lightly find convictions that will lead to the severest types of sentences unless the resentments caused by the infliction of important injuries have been aroused.”³⁸⁸ Essentially, one should

³⁸⁵ Crime and Disorder Act 1998, s28.

³⁸⁶ HM Hurd, “Why Liberals Should Hate ‘Hate Crime Legislation’” (2001) 20 *Law and Philosophy* 215.

³⁸⁷ New Hampshire, §§631:1-2 & 4; New Jersey, §2C:12-1; Pennsylvania, tit.18, §§2701-2702; South Dakota, §§22-18-1-1.1; and Vermont, tit.13, §§1023-1024.

³⁸⁸ MPC §2.03, Comment at 1., p.257 in American Law Institute, *Model Penal Code and Commentaries*, Part I (1985).

not adopt rules which will be overridden by juries (Schulhofer labels this phenomenon “jury nullification”)³⁸⁹ and so harsher penalties should be limited to cases where harm occurs.

How important then, is a penalty structure based on harm to maintaining integrity in the law? Schulhofer suggests that a focus on retribution can be understood as a hangover of criminal law’s early role as an instrument of vengeance. The idea that an attempt was a crime in itself developed slowly.³⁹⁰ Thus, even today retribution remains a function of the criminal law, endorsed by the public in relation to many crimes despite the fact that it operates not dissimilar to a lottery, owing to its focus on distinctions based on fortuitous results. Schulhofer gives the example of two men shooting their wives, intending to kill; in one case the wife is miraculously saved. Is it fair to hold one more culpable than the other?³⁹¹ This is precisely the case under the MPC, where reckless conduct creating a risk of serious injury is a misdemeanour if no harm occurs, but is a felony of the second degree if death occurs.³⁹² Schulhofer points out that rules like this say, in effect, that the moral quality of an act is determined not only by factors within an actor’s knowledge and control, but also by unseen circumstances “by the invisible hand of Fate.”³⁹³

Schulhofer suggests that the popular tolerance of an emphasis on harm caused is due to a failure to perceive that a lack of success in certain cases was due to fortuitous rather than relevant factors.³⁹⁴ It is precisely in the fortuitous nature of harm that one can nevertheless find justifications for its emphasis. The random nature associated with covert lottery systems such as harm can provide equal protection because everyone involved is given precisely the same chance.³⁹⁵ If the lottery in question serves the goals of administrative convenience and efficiency, then it gains rationality by virtue of being related to a legitimate state interest.³⁹⁶ We do not, however, have to pretend that grading based on harm is a perfect system – it might still be the best option where the alternatives would result in less effective deterrence (when the extra penalty for harm caused is removed) or greater severity (when the extra penalty is applied in all cases).³⁹⁷

³⁸⁹ Schulhofer, *op cit.* at 1522.

³⁹⁰ *Ibid* at 1499.

³⁹¹ *Ibid* at 1515.

³⁹² *Ibid* at 1499; MPC §§211.1(1)(a), 211.2, 210.3.

³⁹³ *Ibid* at 1516.

³⁹⁴ *Ibid* at 1513.

³⁹⁵ *Ibid* at 1565.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

Further, within the specific context of assault harm as a grading factor is arguably not a completely arbitrary factor. We saw how rights in personality developed through the nineteenth century so that honour came to be regulated by defamation, and thus assault became a crime of violence. It is therefore hard to conceive of a law of assault where the structure is not based on harm caused by violence. To deny harm as an important factor of the crime is to essentially deny the quality which makes it unique in the first place.

4.4.4 Utilising Conduct

The MPC arguably avoids the issue of over-reliance on harm and culpability in their structure of assault by utilising a third, conduct axis to create a tiered approach to structuring assault. Horder alluded to utilising the mode of responsibility, but he was concerned with how this element could help give moral value to the law. Likewise, Gardner argued for a focus on the *wrong* committed rather than the *harm*, within a context which placed emphasis on its ability to improve the normative function of the law. We saw, however, the pitfalls of particularism and over-proscribing conduct, and how the moral function of the law could nevertheless be attained through offence headings rather than precise definitions.

The MPC gives effect to this conduct axis in a different way, by providing several, separate methods by which ‘simple assault’ can be committed. A person commits the offence if he:

- a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
- b) negligently causes bodily injury to another with a deadly weapon; or
- c) attempts by physical menace to put another in fear of imminent serious bodily injury.³⁹⁸

The ALI state that though the common law dealt with these wrongs separately, the categories of assault, battery, aggravated assault and mayhem had become so blurred that it better accords to modern understanding to treat them all under a single label.³⁹⁹ Of note,

³⁹⁸ MPC §211.1(1)(a)-(c).

³⁹⁹ MPC §211.1, Part II, Comment at 1., pp.174-183.

the MPC structure does away with assault with intent offences, opting for modern grading of attempt according to the gravity of the underlying offence.⁴⁰⁰ Likewise, the MPC dispenses with grading based on the status of the victim, on the basis of the ample severity of the general penalties against attacks upon a person, regardless of their identity.⁴⁰¹

The added conduct element allows the MPC to criminalise broad headings of conduct, while maintaining both the moral efficacy of the ‘assault’ offence heading, and the individual nature of the different forms of conduct. Utilising this structural method, Scots law could better outline the conduct which forms assault, while also dealing with more nuanced issues. For example, an assault structure which provides different methods of completion could allow for a category of minor assaults which would be vitiated by consent, while excluding consent from other, more serious, infringements of physical integrity which the law feels consent should not be capable of mitigating.⁴⁰² Likewise, Scots law might avoid the issues created by cases like *Ireland* and *Burstow*⁴⁰³ in relation to psychiatric injury by creating a separate offence with a suitable offence heading, such as ‘psychiatric trauma’. This might include lesser threats which currently exist under the heading of assault, creating a clear division between physical and mental attacks within the offences against the person framework.⁴⁰⁴

At a more general level, this new offence of assault should be used to separate and (therefore) simplify the current modes of commission for an attack on a person. Each mode could be subject to separate maximum sentences, to provide greater clarity on the relative severity of each method. Thus, an assault might be carried out as a basic attack, with a weapon, or on a specific class of person. Where the harm caused was more severe, a separate offence of ‘serious assault’ could outline similar modes, but with greater maximum penalties to reflect the severity of the harm.

⁴⁰⁰ *Ibid* at p.183; see also §5.05(1) and Commentary, Part I, pp.484-492.

⁴⁰¹ *Ibid* at p.185.

⁴⁰² This category may nevertheless be quite small, and limited to conduct of a more sexual nature: *Smart v HM Advocate* 1975 JC 30 (no defence of consent to a ‘square go’); *R v Brown* [1994] 1 AC 212 (consent to homosexual sadomasochistic activities no defence); cf. *R v Wilson* [1996] 3 WLR 125 (consent provided acquittal in case of branding flesh). See also the Scottish *Draft Criminal Code*, s111.

⁴⁰³ *R v Ireland*; *R v Burstow* [1998] AC 147.

⁴⁰⁴ On this point, see generally P Alldridge, “Threats Offences – A Case for Reform” [1994] Crim LR 176. Cf. J Horder, “Reconsidering Psychic Assault” [1998] Crim LR 392.

Conclusion

This thesis has sought to understand the structure of assault in Scots law from both historical and, subsequently, comparative perspectives. Inclusion of a historical account served two aims: first, a detailed, chronological account of the history of assault in Scotland served to add to an area of the literature which was previously lacking; and second, an analysis of the historical sources has enabled us to trace the development of assault as a nominate crime and determine how this sequence has impacted on the shape of assault as a crime today.

In chapter one we examined the period from the mid-seventeenth to mid-eighteenth centuries, focusing on the writings of Sir George Mackenzie, William Forbes and Sir Alexander Bayne to supplement the sporadic case law reports that emerged during this time. We saw how breaches of physical integrity were fragmented and treated under two, separate offences. Serious injuries were undoubtedly crimes of violence, and appropriately titled ‘mayhem’. By contrast, minor injuries were treated as ‘injuries’, a concept which had been transplanted from the Romans as part of the *ius commune* legal tradition upon which Scots law was heavily influenced.

‘Injuries’ themselves were sub-divided into two categories, those which were ‘verbal’ or ‘real’. Verbal injuries corresponded to what we now understand as the (civil) law of defamation, whereas real injuries criminalised any outward conduct (including actions not carried out on the body of another) which would amount to a similar kind of defamation, minor physical injuries included. Thus, some physical injuries were crimes of violence, whereas others were crimes of reputation. There was very little discussion of culpability in the seventeenth century, and thus it was often taken for granted that if the conduct was carried out then liability should follow. Mackenzie reveals that intention was a prerequisite for verbal injuries, whereas Forbes suggests that this was the case for injuries generally. Other than a distinction between serious and minor injuries, all other factors which we would today label ‘aggravations’ were treated as sentencing guidelines to be considered by the judge.

In chapter two we explored the transitional period leading up to the revolutionary work of Baron David Hume. We saw how ‘assault’ emerged as a *nomen juris* to categorise various ways one could attack another person, both directly and indirectly. This notion of

‘attack’ was solidified by the emergence of *stellionatus* (subsequently real injury) as an alternative libel for conduct which could not, on a natural interpretation, be considered an overt attack. The development of assault as a nominate term caused mayhem to be merged with other, lesser forms of attack, and thus for the first time real injuries became a crime of violence. Meanwhile, aggravating conduct became more structured and coherent, representing a focus on grading harsher assaults in terms of the resulting harm they caused, so that injuries to the danger of life (and mayhem, as discussed above) were now considered more serious forms of assault. Once again this period saw minimal discussion about culpability requirements, but there was nevertheless still an emphasis on intention, and the courts were willing to find constructive intention in cases where the violence was indirect.

Chapter three sought to briefly summarise the developments from the mid-nineteenth century and the current law of assault. There was a further move towards a more cohesive understanding of aggravations as the method by which Scots law graded the offence in terms of harm caused. Culpability requirements became explicit, and the modern law of assault requires the accused to intend to attack. An absence of this intention will mean either that there is no liability, or only liability on some other grounds (e.g. reckless injury). The foundation of assault in *iniuria* can be said to have played a part in this requirement, as injuries generally were understood in the context of defamation, which requires the accused to have intended to harm the reputation of another. This stricter culpability requirement represents the fact that criminal liability for slanderous remarks was, understandably, higher.

Finally, chapter four considered the two conventional axes on which assault can be varied: culpability and resulting harm. It was argued that the current culpability requirement, despite the apparent lack of historical development, was advantageous due to our natural understanding of the word ‘assault’ and the fact that a distinction based on culpability allowed for some element of grading which helps to satisfy the principle of fair labelling.

Variation and grading based on harm was then considered at some length in the context of the English experience. The problems with the current English law were outlined along with the Law Commission’s proposals for reform. It was argued that the criticisms based on an apparent lack of moral content in the Law Commission proposals

were misguided, although they bore out that one could not only look to the harm and culpability when assessing crime, both in a specific moral sense, and equally in a wider discussion of criminal law generally. Rather, one must consider the wrong holistically, through a third, separate axis of conduct or mode of application.

This involved a brief analysis of the approach taken to the conduct axis in the US with the MPC assault provisions, which allows the crime of 'simple assault' to be committed in several ways. It was argued that such an approach could allow for nuances in the law of offences against the person to be borne out, namely that consent could be considered in an isolated fashion, rather than as something broad that had to be considered in every case of assault. Likewise, this approach could lead to greater and more fulfilling distinctions in the harm caused, and in how we treat mental, rather than physical, attacks. It is hoped that a structure similar to that of the MPC can be adopted, taking account of the peculiarities of Scots law, to provide a more principled approach to this important offence in our criminal law.

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