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**Perverting the course of justice**

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LL.M by Research**

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## **Abstract**

This thesis is concerned with the Scottish offence of perverting the course of justice.

Perverting the course of justice is a well-established and commonly charged offence, but one which is poorly understood and whose development has been the subject of sceptical treatment in the major work on Scottish criminal law. This thesis traces that development, from the institutional writers to the modern day, and asks whether it was in accord with the norms of Scots law. It also asks whether that development has resulted in an offence, the elements of which can be described with confidence, or not. Drawing on comparisons with corresponding offences from other jurisdictions, this thesis sets out where the Scottish offence is unclear on certain questions and suggests possible answers.

This thesis concludes that the manner in which the offence developed in Scotland, rather than being notable for its abnormality, is best understood as a typical example of the development of Scottish criminal law, and as an offence which serves an essential function in upholding the rule of law.



## **Declaration**

I declare that this thesis is my own work, and has not been plagiarised. Where information or ideas are obtained from any source, this source is acknowledged in the footnotes.

Luke McBratney, 25 September 2018



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## INTRODUCTION

### 1. Perverting the course of justice

- 1.1 Perverting the course of justice is a surprisingly glamorous offence. It most often comes to our attention when it is alleged to have been committed by those involved in politics, media and the law. High-profile allegations have involved politicians like Jeffrey Archer,<sup>1</sup> Jonathan Aitken<sup>2</sup> and Chris Huhne,<sup>3</sup> journalists like Rebekah Brooks<sup>4</sup> and Mazer Mahmood,<sup>5</sup> and lawyers like Constance Briscoe<sup>6</sup> and Bruce Hyman.<sup>7</sup> The Australians have an even more thrilling story to tell about perverting the course of justice, having convicted a former attorney-general and sitting judge of their highest court.<sup>8</sup>
- 1.2 It is a familiar offence. Searches of broadsheet newspapers for the term reveal it to be used regularly, and typically without any further explanation of what is meant.<sup>9</sup> It is an evocative phrase: justice is good, and perversion bad.

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<sup>1</sup> Jeffrey Archer sued the Daily Star for libel when he knew the allegation to be true: 'The end: Archer goes to jail', *The Daily Telegraph*, 20 July 2001.

<sup>2</sup> Jonathan Aitken prepared false witness statements for his daughter as part of a lawsuit against the Guardian: 'Aitken jailed for 18 months', *The Guardian*, 8 June 1999.

<sup>3</sup> Chris Huhne arranged for his wife to claim she was responsible for his driving offence: 'Guilty, now for Chris Huhne the prison bell tolls', *The Times*, 4 February 2013.

<sup>4</sup> Rebekah Brooks was accused of concealing documents from police officers investigating phone hacking: 'Rebekah Brooks cleared but Andy Coulson guilty in phone hacking trial', *The Daily Telegraph*, 24 June 2014.

<sup>5</sup> Mazer Mahmood altered a statement made by his driver which formed part of the prosecution evidence in a trial: 'Fake Sheikh' Mazher Mahmood guilty of tampering with Tulisa trial evidence', *The Guardian*, 5 October 2016.

<sup>6</sup> Constance Briscoe concocted evidence during the investigation into Chris Huhne (see fn 3): 'Constance Briscoe found guilty of lying to police', *The Times*, 2 May 2014.

<sup>7</sup> Bruce Hyman, a barrister, fabricated precedents and sent them anonymously to a self-represented opponent for the purpose of discrediting him when they were used in court: 'Barrister jailed for trying to frame man with fake e mail', *The Times*, 20 September 2007.

<sup>8</sup> See para 7.36, *infra*, for more on this. The corresponding US offence, obstruction of justice, naturally has the most thrilling example of all, having been charged in the articles of impeachment against President Richard Nixon which led to his resignation. The articles of impeachment adopted by the House of Representatives Committee on the Judiciary on July 27, 1974 can be found at <http://www.presidency.ucsb.edu/ws/?pid=76082> (accessed 12 February 2018). Article 3 of the articles of impeachment against President Bill Clinton alleged that he "prevented, obstructed, and impeded the administration of justice" (H.Res.611, 105th Congress (1997-1998)).

<sup>9</sup> A Westlaw search of British broadsheet newspapers from 2015, 2016 and 2017 shows that the term was used 738 times in those three years: free text search of ("pervert! the course of justice") & (Between

## INTRODUCTION

- 1.3 But is its meaning really clear? This thesis asks that question of the offence as it is understood in Scotland. More than that, this thesis asks whether it matters. If I establish that the origins of the offence in Scots law are unclear and that what the offence means today cannot be stated comprehensively or with confidence, does any of this matter if there is no evidence of the offence causing difficulty in practice? How pure ought an offence to be and how capable of precise definition? Or does it matter more, and is it more in keeping with the traditions of Scottish criminal law, that it can be effectively and practically deployed in pursuit of a proper interest?
- 1.4 There has been no suggestion in any case, in Scotland or in England and Wales, that the offence needs reform. Nor has there been any attention paid to the offence recently by politicians or law reform bodies.<sup>10</sup> But it has been the subject of a challenge in Scotland which sought, unsuccessfully, to establish that the offence did not even exist.<sup>11</sup> The thesis will begin with this case, looking in detail at the challenge made and using it as the starting point for examining the offence's origins. After accounting for the offence's development, I will set out what can be said about its current form. What is the scope of the offence, what interests does it appear to protect, and what questions about it remain unanswered by Scottish authority?
- 1.5 The analysis is then widened, comparing Scotland's offence to the modern development of similar offences from comparable jurisdictions. If Scotland's offence is inadequately defined, is there anything to be learnt from other systems? If not, this might suggest that any imprecision is more likely a necessary flexibility.
- 1.6 I end the thesis by setting out conclusions, based on this comparative analysis. This is, in part, intended as an answer to the wider question I asked above: whether the adequacy of the law in principle matters if it works effectively in practice. But it also has a narrower scope. It is a straightforward attempt to understand an offence that has been insufficiently analysed in Scotland, and to ask and answer some interesting questions about it.
- 1.7 Because perverting the course of justice is an interesting offence, and this is the best reason to write about it at all. Horder cautions against studying the criminal law

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01/01/2015 AND 31/12/3017) in the Daily Telegraph, Financial Times, Independent, Independent on Sunday, Sunday Telegraph, Guardian, and the Observer.

<sup>10</sup> The Law Commission of England and Wales considered offences against the course of justice in 1979: Law Commission, *Criminal Law: Offences Relating to Interference with the Course of Justice (Law Com. 96)*, (London: HMSO, 1979).

<sup>11</sup> H.M. Advocate v Harris, 2011 J.C. 125.

simply because it is dramatic or excites our imaginations.<sup>12</sup> The fact that the stories involved in cases of perverting the course of justice – at least the ones that feature in the news and the case reports – often feature lurid activity or vivid detail is not itself a reason to study the offence. But that fact does speak to something about the offence that makes it so interesting: the very human stakes involved. It is tempting to think about the offence as involving matters of high principle, such as justice itself; or as relating to the impersonal institutions of the justice system: police, prosecutors, courts. For the perpetrator, however, there is something very human at stake. They are seeking to prevent justice being done when it should be, or to bend the system of justice into producing an outcome which it shouldn't. Often, they are just trying to get away with it. For society, the offence protects the fact that justice is done. It underpins every other aspect of the law that relies on the institutions of justice, including the rest of the criminal law. However much (or however rarely) an individual makes use of the justice system, we all benefit from living under the rule of law. Would this be the case if those laws weren't backed up by something to ensure their honest implementation?

- 1.8 This is why perverting the course of justice is worth writing about. Not because it has the colourful appeal of crimes of violence (though many of the cases described in this thesis are ironic, vivid, tragic or bizarre), but because it is utterly human despite being superficially dry. And not simply because it is under-examined, but because it is under-examined despite being so intrinsic to the protection of a value as essential as the rule of law.

*A note on terminology*

- 1.9 There is a preliminary – and potentially meaningful – question of terminology: what to call the offence. It has attracted a large number of alternative names, and most of the time no difference in meaning is intended. The offence is sometimes called *attempting to pervert the course of justice*, though the offence is not part of the law of attempt. Sometimes 'pervert' is replaced by 'defeat' or 'obstruct', and sometimes the thing being perverted or defeated or obstructed is the 'ends' of justice or its 'administration', rather than its course.
- 1.10 These are all, in Scots law, different ways of describing the same thing. A crime need not have a single recognised nomen juris to be understood as a single offence with a common set of principles attached. However, for the purposes of consistency and

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<sup>12</sup> Horder J., *Ashworth's Principles of Criminal Law* (8<sup>th</sup> ed), (Oxford: OUP, 2016), at p 42.

intelligibility this thesis will use a single term for the general offence. Except when directly quoting from a source, or where it is required for the purposes of textual analysis, the term 'perverting the course of justice' will be used, regardless of how the offence is referred to in any particular case or other source.<sup>13</sup>

*Scope of the thesis*

- 1.11 This thesis is focused on the common law offence of perverting the course of justice in Scotland. Despite the development of a number of ad hoc and specific statutory offences relevant in this area, this offence has proved resilient. Except where relevant to my argument, therefore, these statutory offences are outwith scope.
- 1.12 As is often the case with Scotland's common law offences, there is considerable overlap between perverting the course of justice and other related offences. These other offences will not be a focus of the thesis. In particular, many of the offences typically dealt with under the heading of 'administration of justice offences', such as perjury, contempt of court and prison-breaking will only be covered to the extent that they relate to the central analysis. Partial exceptions will be the offences of wasting police time and (attempted) subornation of perjury which, in Scotland, enjoy such a close relationship to perverting the course of justice that they need properly to be considered together.
- 1.13 This thesis is also not strictly or principally an exercise in comparative law. Other countries and jurisdictions' laws are considered only to the extent that they assist in addressing perverting the course of justice in Scotland, and answering my central questions.

*Literature*

- 1.14 Sir Gerald Gordon has been sceptical about the development of the offence of perverting the course of justice since at least 1959<sup>14</sup> with doubts about the propriety of the way the Scottish courts expanded the offence featuring in the general part of all three editions of Gordon's *Criminal Law*.<sup>15</sup> These doubts are also reflected in the

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<sup>13</sup> The same practice is adopted in the Law Commission, *Working Paper No. 62, Criminal Law: Offences Relating to the Administration of Justice*, (London: HMSO, 1975); para 10 contains their justification.

<sup>14</sup> Gordon G., *Criminal Responsibility in Scots Law*, PhD Thesis, (Glasgow: 1959), at pp 33 to 39.

<sup>15</sup> Most recently in Gordon, Sir G., *The Criminal Law of Scotland (3<sup>rd</sup> ed)* (ed: Michael Christie), (Edinburgh: W. Green, 2000) at paras 1.32 to 1.38. The core thesis – that the creation of perverting the course of justice was an unacknowledged exercise of the declaratory power – appears in Sir Gerald's PhD thesis and all three editions, with the text largely updated only to take account of new case law.

special part of the book, with the authors and editors only feeling able to describe the offence as “not fully crystallised” in all four editions, from 1967 to 2017.<sup>16</sup>

- 1.15 While the textbooks cover the offence, none engages with the questions Sir Gerald raises about its creation, and few attempt a direct definition.<sup>17</sup> There has been no academic treatment of the offence in Scotland nor any recent commentary on the corresponding offence in England and Wales.

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<sup>16</sup> Gordon, G., *The Criminal Law of Scotland*, (Edinburgh: W. Green, 1967) at para 48.01; Gordon, G., *The Criminal Law of Scotland (2<sup>nd</sup> ed)*, (Edinburgh: W. Green, 1980) at para 48.01; Gordon (3<sup>rd</sup> ed) at para 47.01; Gordon, Sir G., *The Criminal Law of Scotland (4<sup>th</sup> ed), Volume 2* (eds: James Chalmers and Fiona Leverick), (Edinburgh: W. Green, 2017) at para 55.01. Clearly, the offence’s crystallisation is a slow process.

<sup>17</sup> See paras 5.4 to 5.15, *infra*, for a discussion of the approach taken by the textbooks to defining the offence.

## WHAT WAS THE LAW OF PERVERTING THE COURSE OF JUSTICE?

### 2. Doubts over the origins of the offence

#### *The questions raised by Harris*

- 2.1 In May and June 2010, the High Court of Justiciary was asked whether, in Scotland, there was such a crime as perverting the course of justice. In *H.M. Advocate v Harris*, the Crown appealed against the sustaining by the sheriff at Dundee of pleas to the relevancy of charges labelling perversions of the course of justice.<sup>18</sup> The respondent's argument was bold: not simply that the facts averred did not amount to a perversion of the course of justice, but that there was no such crime known to the common law. If such a crime did exist, it was alternatively argued, its scope was limited to behaviour that involved "the destruction or concealment of evidence".<sup>19</sup> It was also argued that the scope of the purported offence was unclear enough to be incompatible with Article 7 of the European Convention on Human Rights, the Lord Advocate's insistence on the charges being accordingly unlawful. For the Crown, the Solicitor General argued that the crime's origins could be found in both *Hume* and *Alison* and that its scope was not restricted to the destruction of evidence. It was also submitted that the case law described the crime with a precision sufficient to satisfy the requirements of Article 7.
- 2.2 Even in the turbulent years for Scots criminal law following the incorporation of the ECHR into domestic law, challenging the very existence of an offence which had been charged, by that name, for at least 60 years<sup>20</sup> and which was covered without sceptical commentary in textbooks was unusual.<sup>21</sup> The Solicitor General noted in his reply that in 2008/09 2,500 charges of perverting the course of justice had been taken. It was the novel nature of the respondent's conduct that enabled the existence of the offence to be challenged in this case. He was alleged to have deliberately driven a car past a speed camera, aiming to cause the registered keeper of the vehicle to be

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<sup>18</sup> *H.M. Advocate v Harris*, 2011 J.C. 125. The appeal also concerned charges of breach of the peace.

<sup>19</sup> *Harris*, at 132.

<sup>20</sup> The earliest reported case in Scotland involving a discrete charge of "attempting to pervert the course of justice" is *Scott v H.M. Advocate*, 1946 J.C. 90, though the phrase does feature in the narrative of some earlier charges, e.g. *Galloway*, (1839) 2 Swin 465 (producing a forged bill in court, and illegally obstructing the administration of justice); *H.M. Advocate v Rae and Little* (1845) 2 Broun 476 (false personation, intended to defeat the ends of justice); *Millar* (1847) Ark 355 (falsehood, fraud and willful imposition committed for the purpose of perverting the administration of public justice); *Marr v Stuart*, (1881) 8 R(J) 21 (conspiracy to defeat the ends of justice by means of perjury).

<sup>21</sup> Though not without more successful precursors: *Webster v Dominick*, 2005 1 J.C. 65.



issued with a fine and points on his license. He was also alleged to have intimidated two police officers at interview and over the phone with a view to dissuading them from continuing investigations.<sup>22</sup>

- 2.3 There is a tension in the respondent's arguments. Were his alternative theory correct, and perverting the course of justice restricted to offences connected to evidence, then the crime is more precisely described than the Crown suggests, and the offence more likely to survive an Article 7 challenge. If, conversely, the Crown were correct that the offence had a broader description (with, as will become clear, a near-unlimited scope in conduct) then the argument that the offence is described with sufficient legal certainty would be harder to make. This would have mattered little to Harris who, it must be assumed, would cheerfully have been acquitted on either basis.
- 2.4 The challenge made to the existence of the offence was straightforward: it is not mentioned as a crime by the institutional writers, so must have its origins later. If it has its origins in the post-war case law cited by the Crown, then that development was an unacknowledged and illegitimate use of the declaratory power. The only aspect of the offence as commonly charged, the defence argued, that had historical support in the works of the institutional writers or the case law concerned the destruction or concealment of evidence.<sup>23</sup>
- 2.5 The High Court rejected this. Noting the bench's lack of surprise at a charge of perverting the course of justice in *Scott v H.M. Advocate*, a case from 1946, and the expanding scope of the behaviour charged as such in reported cases leading up to *H.M. Advocate v Mannion* from 1961,<sup>24</sup> the court concluded that "by not later than 1961 it had been authoritatively recognised that attempting to pervert (or to defeat) the ends of justice was a crime according to the common law of Scotland and that the commission of that crime might take various forms".<sup>25</sup> This was not an endorsement, however, of the respondent's theory that these cases were examples of a use of the declaratory power, nor any support for the idea that this was an

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<sup>22</sup> The two charges relating to intimidation of the police had originally been libeled as breaches of the peace, but a successful plea to the relevancy of those charges was upheld by a full bench of the High Court of Justiciary: *Harris v H.M. Advocate* 2010 J.C. 245, where the court suggested that alternative charges of an attempt to pervert the course of justice or threats might well be relevant. A second indictment was raised in respect of the same conduct, this time libeling attempts to pervert the course of justice.

<sup>23</sup> *Harris*, at 131 to 132.

<sup>24</sup> *H.M. Advocate v Mannion*, 1961 J.C. 79.

<sup>25</sup> *Harris*, at 136.

illegitimate use of that power. “It matters not”, the court concluded, whether the offence “originally came to be so through the operation of the ‘declaratory power’ of the High Court of Justiciary — although there is no express reference to that power in the authorities cited”.<sup>26</sup> And with that, the appeal was dismissed.

- 2.6 The decision in Harris raises more questions than it answers. It confirms only that the High Court is comfortable with the way in which the offence was being used in 2010, without providing a principled defence of it. The essence of the challenge was this: if the court cannot explain how an offence legitimately came into being, how can it explain the *current* nature of the offence? The only ways in which a challenge of that sort could be addressed would be (i) to set out the origin of the offence, (ii) to explain its development as satisfactory despite any uncertainty surrounding its origin, or (iii) to explain the basis on which an offence can be accurately described despite uncertainty surrounding its origin.
- 2.7 The court does not set out its understanding of the origin of the offence according to the practice or principles of Scots criminal law. The Solicitor General, in his reply for the Crown, raised the possibility that these crimes are presaged in the institutional writings. He identified certain passages in Hume and Alison that suggest an offence involving conduct falling short of subornation of perjury.<sup>27</sup> The opinion of the court does not discuss this argument, so we cannot know whether this was accepted. The respondent addressed the court on Gordon’s view that the development of the offence was an implicit use of the declaratory power,<sup>28</sup> and the court was addressed by both the Crown and the respondent on the modern law concerning the use of that power.<sup>29</sup> Despite this, the court refused to be drawn on whether the declaratory power was used.
- 2.8 The court is right that, from the perspective of legal certainty, it doesn’t matter. Whether the offence was created in 1946 or earlier, and how, scarcely matters to someone charged in the 21<sup>st</sup> century. Even if the exact basis for its creation is murky, all that matters in Article 7 terms is its predictability and certainty at the time it was being applied. But if this is the court’s answer to the Article 7 question, it does not

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<sup>26</sup> Harris, at 137.

<sup>27</sup> Harris, at 132. See paras 3.2 to 3.9, *infra*, for discussion of the institutional writers’ views on offences against the administration of justice.

<sup>28</sup> Harris, at 131 and 135.

<sup>29</sup> Harris, at 131 and 132. The cases cited to the court include *Webster v Dominick*, 2005 1 J.C. 65, *Strathern v Seaforth*, 1926 J.C. 100, *Khaliq v HM Advocate*, 1984 J.C. 23, and *Ulhaq v HM Advocate*, 1991 S.L.T.614.

explicitly set this out in the decision. There is no theory set out of how an offence's legitimacy can be 'cured' through regular use, or whether and why this might be fair. And if an offence has an uncertain starting point, then surely it is much more important that its development should be characterised by certainty if it is to be, at a later point, accurately and confidently described? This is the connection, not made in the judgment, between doubt cast over the offence's origins in the 20<sup>th</sup> century and arguments concerning its lack of specificity in the 21<sup>st</sup> century.

- 2.9 This part will attempt to address the questions left unanswered by the court's decision in Harris: when this offence was created, by whom and how, and whether that development was legitimate.

### 3. The origins of the offence

#### *The institutional writers*

- 3.1 The institutional writers are a source of law in Scotland, having collected, codified and commented on law in a way that has come to be regarded as authoritative in the courts as to the law at the time of writing.<sup>30</sup> It is not normally necessary to look behind an assertion made by an institutional writer to state what the law was at a particular time, particularly in respect of writing which is comprehensive in its treatment of a subject,<sup>31</sup> such as books by Mackenzie,<sup>32</sup> Hume,<sup>33</sup> Alison,<sup>34</sup> and Macdonald.<sup>35</sup>

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<sup>30</sup> For a "tentative analysis" of the authority of the institutional writers and their reception in Scottish courts, see Smith, T.B., 'Authors and Authority', (1972-1973) 12 JSPTL 3. Smith links, at p 10, the decline of the authority of jurists with the rise of the use of precedent in Scotland's courts. See also Walker, D.M., *The Scottish Jurists*, (Edinburgh: W. Green, 1985) at pp 329 – 333. I take the approach of starting my analysis with the institutional writings before, reflecting the rise in the use of precedent, moving on to the modern case law.

<sup>31</sup> Though see Cairns, 'Institutional Writings in Scotland Reconsidered', *Journal of Legal History* (1983), 4, pp 76 to 117 for a more sceptical view, and Ferguson, P.R. and McDiarmid, C., *Scots Criminal Law: A Critical Analysis* (2<sup>nd</sup> ed) (Edinburgh: Edinburgh University Press, 2014), pp 117 to 121 for criticism of the authority afforded to the institutional writers in the criminal law.

<sup>32</sup> Mackenzie, Sir G., *The Laws and Customs of Scotland in Matters Criminal* (2<sup>nd</sup> ed), (Edin: 1699).

<sup>33</sup> Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4<sup>th</sup> ed), (ed. B.R. Bell), 2 Vols (Edin: 1844).

<sup>34</sup> Alison, A.J., *Principles and Practice of the Criminal Law of Scotland* (Vol i, *Principles* (Edin: 1832), Vol ii, *Practice*) (Edin: 1833).

<sup>35</sup> Macdonald, J.H.A. (Lord Kingsburgh), *A Practical Treatise on the Criminal Law of Scotland* (5<sup>th</sup> ed), (eds: Walker, J. and Stevenson D.J.), (Edin: 1948).

- 3.2 Mackenzie covers crimes of falsehood in title 27 and perjury in title 29. While he accepts that there are categories of falsehood which are punishable though they fall short of amounting to perjury,<sup>36</sup> he nowhere catalogues a crime consisting of perverting the course of justice otherwise.
- 3.3 No crime called anything like perverting the course of justice is discussed by Hume. There are, however, in the section on offences against the course of justice, a number of comments which suggest that the criminal law captures a broader range of behaviour than simply the offences he names. Hume confirms, early in his discussion, that an attempt to suborn perjury is a crime.<sup>37</sup> It is clear that, to Hume, the subject of an attempt to suborn had to be of a trial or proof at which perjury was being encouraged.<sup>38</sup>
- 3.4 Having established the limits on the offence of subornation, in his next paragraph, side-noted “all practices to procure false evidence are punishable”, Hume goes further:

“It is easy to imagine other cases of the procuring of falsehood, in which, if there be some doubt of the propriety of a charge of *subornation*, there shall, however, be none, of competently and severely punishing the offence, as a falsehood, or a conspiracy and machination, or under some other more detailed description, such as may suit the circumstances of the case.”<sup>39</sup>

- 3.5 There is more than one way to interpret this.<sup>40</sup> If the side-note is correct, and the context provided by the preceding paragraphs taken into account, then even this observation is still confined to the procurement of *falsehoods*, and limited to falsehoods connected to *evidence* (that is, oral testimony at trial or proof). Does Hume mean to suggest that falsehoods that interfere in some other way with the

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<sup>36</sup> Mackenzie, at p 280.

<sup>37</sup> Hume, at pp 157 and 158. This pre-dates the rule that an attempt to commit any indictable crime was itself a crime: Criminal Procedure (Scotland) Act 1887, 50 & 51 Vict., c. 35, s. 61 (now found in the Criminal Procedure (Scotland) Act 1995, s. 294). He notes that, without evidence of actual perjury to support a charge of subornation, a charge of attempt requires to disclose behaviour of “such an overt and palpable shape, as testifies the earnest and serious determination of the panel to seduce”.

<sup>38</sup> The three examples given all concern false testimony intended to be given in customs prosecutions or criminal prosecutions.

<sup>39</sup> Hume, at p 160.

<sup>40</sup> The example given is the case of Campbell of Burbank, about which Hume offers no further detail. Alison tells us that the case involved the contriving of “deceitful evidence” against a married woman, with the aim of inducing her divorce, but we do not know at which stage divorce proceedings had reached or what it was intended should be done with the fabricated evidence. Mr Campbell was transported: Alison, at p 488.

course of justice are punishable, such as those where the falsehood was intended to be given outside of court (for example, to an officer of the law, as part of an investigation, or in contemplation of prospective proceedings)? Put another way, which part of the preceding idea is Hume expanding on here? Is a wider scope being given, in some way, to falsehood, or are we to read in a broader way the things that might be the object of such a falsehood? Which limit on the offence of subornation is being elided: the requirement of false testimony, or the requirement of a prospective trial? Perhaps the vagueness of the assertion is deliberate, and Hume means to suggest that both theories are correct. Hume may really be describing a residual category of offence here, one intended to capture behaviour which for any reason does not fall within the four corners of perjury or subornation, but which relates, more remotely, to falsehood. Hume considers that "other like proceedings, tending to corrupt the sources of evidence"<sup>41</sup> and "any evil practice, tending to mislead, constrain, or corrupt the witnesses, or to destroy, suppress, or alter evidence of any kind" are criminal examples of "an interference with the course of justice".<sup>42</sup>

- 3.6 There is no hook in Hume for an offence directed at perverting the course of justice, but unconnected to the procuring of falsehood. There are clearly a set of offences with a common theme: they protect the substance of a trial, and at the time of Hume a trial comprised almost exclusively oral testimony. But it does not follow from the fact that certain offences have a common theme, that the common theme itself is the subject of a criminal offence.
- 3.7 Alison repeats Hume's assertion that "all practices tending to procure false evidence are punishable, though not falling exactly under the description of subornation or attempt at subornation".<sup>43</sup>
- 3.8 Macdonald does not suggest any catch-all offence relating to the administration of justice.<sup>44</sup>

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<sup>41</sup> Hume, at p 382.

<sup>42</sup> Hume, at p 384.

<sup>43</sup> Alison, at p 486, where he regards the subornation of perjury as perhaps "more base, cowardly and detestable" than perjury itself, and accepts that attempted subornation is a crime. "Alison merely repeats Hume with the addition of a few English cases": Gordon (PhD thesis), at p v.

<sup>44</sup> Under the heading 'conspiracy', he suggests that as conspiracy requires an agreement to commit a separate, substantive offence, the crime of subornation of perjury is perhaps best understood as "being a

3.9 If the offence is to have its origins in and derive its legitimacy from institutional writing, then perhaps the most that can be said is that the writers support an offence which consists of behaviour similar to (but less than) that which can form a charge of subornation of perjury. Both Hume and Alison raise this possibility in relation to behaviour involving the destruction or concealment of evidence but which falls short of the destruction of a potential production or subornation of perjury. This submission was put to the court in *Harris*, but rejected. The court said that “the cases on analysis are not restricted to such a narrow scope. Attempting to pervert the course of justice can foreseeably take a number of forms”.<sup>45</sup> Given that the submission was that the later development of the offence to expand it beyond simple destruction of evidence cases was illegitimate, it is circular and question-begging of the court to point to subsequent examples of such a development as evidence of its legitimacy.

*The emergence of the offence*

3.10 The Solicitor General, in his reply in *Harris*, cited the case of *Rae and Little* from 1845 as an “even earlier example of” a charge of perverting the course of justice.<sup>46</sup> This characterisation is a little disingenuous, as the Lord Justice-General’s opinion acknowledges. The charge is long, narrating an inventive conspiracy involving *Rae and Little* pretending to be each other in order to avoid convictions. The instrumental parts of the charge however set out, in various different ways and with slightly different formulas each time, that the accused did “wickedly and feloniously conspire”, or “wickedly, fraudulently and feloniously personate” another.<sup>47</sup> The charge against the co-accused is that he “did aid and abet the said wicked and felonious personation; and did contrive and perpetrate, or assist in contriving and perpetrating, the said fraud”. Inasmuch as charges of this era can be scrutinised for technical evidence of individual offences,<sup>48</sup> the crimes labelled here

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special instance of criminal conspiracy, perjury being the object agreed upon”: *Macdonald*, at p 186.

“*Macdonald* is little more than a digest; and is confused and inaccurate”: *Gordon* (PhD thesis), at p v.

<sup>45</sup> *H.M. Advocate v Harris*, 2011 J.C. 125 at 137.

<sup>46</sup> *Rae and Little*, (1845) 2 Broun 476. He meant earlier than the case of *Scott v H.M. Advocate*, 1946 J.C. 90, which is typically identified as the first modern charge of perverting the course of justice.

<sup>47</sup> *Rae and Little*, at 478.

<sup>48</sup> The major premise of the indictment is not reported. The reporter describes the case as involving accused who “were charged with Illegal Conspiracy, particularly the wickedly and feloniously Conspiring, Confederating, and Agreeing to Defeat or Obstruct the Administration of Justice, especially when Justice is thereby defeated or obstructed”. The side-note in the report calls this “false personation” and the rubric describes it as “fraud”.

appear to be conspiracy (to commit fraud), and wicked and felonious personation (a particular way of committing fraud). Perverting the course of justice is narrated only as motive. The language, and the substance of the charge, are both redolent of Hume's categorisation of offences. This may be an "other case of the procuring of falsehood", not easily categorised but undoubtedly involving "conspiracy and machination", and it has been charged "under some other more detailed description [...] as may suit the circumstances of the case".<sup>49</sup> This is not necessarily an example of an early charge of perverting the course of justice, but an example of a sort of charge, falsehood, specifically contemplated by Hume. Alternatively, it is a straightforward fraud: the accused conspired (a mode of criminality) to commit fraud (an offence) with the intention to defeat the administration of justice (a doleful intent).

- 3.11 The reference to perverting the course of justice in the narrative part of the charge is about intention, not action: the accused did their wicked and felonious conspiring "for the purpose and with the intent of defeating or obstructing the administration of justice". It is not surprising in such a comprehensive charge and in that era that the purpose of the accused's conduct should be set out, and this might be expected in a charge of conspiracy anyway.
- 3.12 In *Harris* the court stated that *Scott v H.M. Advocate*<sup>50</sup> was the first time that perverting the course of justice had been charged as a separate crime.<sup>51</sup>
- 3.13 At first, the facts suggest that a charge of attempted subornation of perjury would be appropriate. A driver involved in a crash had tried to convince two women to claim to his lawyer that he was in their house at the relevant time.<sup>52</sup> The court in *Harris* commented that this "might, no doubt, have been charged as subornation of

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<sup>49</sup> See para 3.4, supra. Though see also the discussion of Rae and Little in Gill, B., *Crime of fraud: a comparative study*, PhD thesis, (Edinburgh: 1975) at pp 138 to 143, where the author considers that Rae and Little cannot be considered a form of fraud, since no economic interest was prejudiced.

<sup>50</sup> *Scott v H.M. Advocate*, 1946 J.C. 90.

<sup>51</sup> This claim is also made in *Criminal Law (Reissue)*, *Stair Memorial Encyclopedia* (Edin: Butterworths, 2005), at para 466. I have not found any earlier case featuring such a charge (but see fn 20). The headnote in the *Justiciary Cases* report categorises the case under the heading "attempt to pervert the course of justice by inducing to give false evidence" and narrates that the accused was "charged with attempting to pervert the course of justice by attempting to induce two women to give false evidence on his behalf".

<sup>52</sup> There is no requirement for an indictment to be served or a trial fixed before subornation can take place. If the object of the attempt to suborn was, ultimately, a trial then that is sufficient: Hume, i, 383; *Macdonald* p 167; *Angus v H.M. Advocate*, 1935 J.C. 1.

perjury”.<sup>53</sup> The indictment sets out the circumstances, concluding, “which evidence you knew to be false and this you did with intent to pervert the course of justice and you thus did attempt to pervert the course of justice”.<sup>54</sup> Up until the final words, it might still have been describing an attempted subornation of perjury, but the framer of the charge had a reason for choosing something different. His concern was probably about the evidence which would likely emerge in support of the charge. The two women whose evidence the accused hoped to influence were “inconsistent in regard to whether the false story was to be given in evidence or told to his lawyer or to the police”. Apprehensive that proving even an attempt to suborn would require evidence that the accused contemplated the ultimate commission of perjury (rather than misleading the police), the drafter of the charge has attempted to capture a wider class of behaviour. This was not necessarily an attempt to procure false evidence (using Hume’s phrase): evidence is oral testimony given on oath, and the accused may have intended the deceit to end when the women lied to police, avoiding the need to go to court at all.

- 3.14 There are two possible routes to this behaviour being criminal. The theory could be a bold one: that it is criminal to solicit a falsehood for use during any part of the criminal process, with no specific intention that false *evidence* should ultimately be given. Alternatively, it might simply be an expanded understanding of the *attempt* element of attempted subornation of perjury: the police gather information, in part, in contemplation of decisions about whether to prosecute, and for potential use in a prosecution. Behaviour which denies the police accurate information has an inevitable effect on whether a trial is held, and whether accurate evidence is led at it. Even if this charge represented an expansion of the law, it would be one made by analogy and one with some support in the institutional writings. Here there is, as Hume envisaged, a clear “doubt as to the propriety of a charge of subornation” and perhaps, as Hume recommended, therefore a charge was made “under some other more detailed description, such as may suit the circumstances of the case”.<sup>55</sup> The prosecutor may simply have used the phrase “attempt to pervert the course of justice”, an existing technique to describe a way of aggravating an offence or

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<sup>53</sup> Harris, at 135.

<sup>54</sup> Scott, at 91.

<sup>55</sup> Hume, at p 160.



describing intention,<sup>56</sup> as an appropriate descriptor (or, to be uncharitable, a convenient cloak) for either proposed wider understanding of an existing offence.

3.15 It was argued for the appellant that the charge was actually one of subornation of perjury, and therefore the trial judge's direction that the appellant could commit this crime by intending for the two women to give false statements to his lawyer was a misdirection.

3.16 The Crown's case at appeal on this point rested on two propositions, which are best understood as alternatives. Firstly, it was argued that the solicitation of false statements as part of the criminal process was itself illegal (and that therefore the judge had properly charged the jury about a crime that existed, rather than improperly charged a subornation of perjury). Secondly, it was argued that in any event it was reasonable to infer from the accused's behaviour an intention that false evidence might ultimately be given at trial: that the evidence disclosed behaviour that was preliminary to such conduct (and that therefore, even if procuring false statements to be made to the police was not a crime, the judge had properly charged attempted subornation). The second is best understood as a fall-back position: that there was a clearly demonstrated intention on the facts sufficient to engage the law of attempt in relation to a known crime, subornation.

3.17 Lord Carmont had no difficulty with the term used in the indictment:

“two [of the charges] were attempted murder, and the third an attempt to pervert the course of justice”<sup>57</sup>

The lack of surprise in these words was later interpreted as evidence of the existence of the offence at that time.<sup>58</sup> This was perhaps over-interpretation, given that Scott involved an explicit challenge to the offence as charged, and in the first reported charge of its kind. It is therefore difficult to use anything in Scott to support the proposition that the offence was uncontroversial: how many genuinely uncontroversial charges are the subject of a challenge of this sort, so early in their

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<sup>56</sup> See fn 20.

<sup>57</sup> Scott, at 93.

<sup>58</sup> Harris, at 135.

recorded use?<sup>59</sup> It also fails to account for the more flexible methods used to describe offences then, when adherence to an explicit *nomen juris* was less common.<sup>60</sup>

- 3.18 The conviction was quashed, though principally for reasons relating to the fairness of the way in which the trial judge's charge to the jury presented prosecution evidence. Only Lord Carmont addressed the relevancy of the charge. He accepted that the Crown's first theory of the case might in principle be right:

“I do not suggest that attempts to pervert the course of justice, as a crime, might not be constituted by inducing persons to make false statements outwith the witness box – to the police or even in certain circumstances to others ...”<sup>61</sup>

He does not explain why the crime might be constituted in this way, and does not explicitly reject the idea that it is because procuring a statement to be made falsely to the police satisfies the legal requirements of an attempt to suborn. He avoids having to answer the question by restricting his judgment to the facts of the case: the indictment itself libelled an intention that false *evidence* should be given while the facts disclosed only that false statements were made to officers. This particular charge was therefore flawed on either theory (but a differently-worded charge might not have been). It was, as a result, unnecessary for the court to reach a concluded view on any contended-for wider understanding of the crime.

- 3.19 Later in his opinion, and perhaps inconsistently, Lord Carmont absolves the trial judge of having misdirected the jury in the way argued for by the appellant. We are told that the judge's charge did make clear that it is “a different matter” to induce falsehoods in a court of law and outwith one.<sup>62</sup> The nature and relevance of that difference is unexplored, since the conviction was quashed on other grounds. But that difference is the key to this case. If they are different because one is a crime and the other not, then we know what the ratio of this case is and Harris is misleading. If they are different for some other reason – perhaps because one is a crime in its own

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<sup>59</sup> And how often are the decisions in those challenges themselves challenged within five years? See para 3.21, *infra*.

<sup>60</sup> See, for example, the view of Lord Clyde in *McLaughlan v Boyd* 1934 JC 19 at 22: “It would be a mistake to imagine that the criminal common law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime. It has been pointed out many times in this Court that such is not the nature or quality of the criminal law of Scotland. I need only refer to the well-known passage in the opening of Baron Hume's institutional work, in which the broad definition of crime – a doleful or wilful offence against society in the matter of ‘violence, dishonesty, falsehood, indecency, irreligion’ is laid down.”

<sup>61</sup> Scott, at 93.

<sup>62</sup> Scott, at 95 and 97.

right, while the other engages the law of attempt – then it is a difference left unanalysed by the court’s opinions.

- 3.20 Scott may be the first reported case where the charge is one of perverting the course of justice, but it is hard to interpret it as a meaningful development of the law. It asks two questions: is it criminal in general to solicit false statements during any part of the criminal process, or should our understanding of attempted subornation be expanded to include false statements made earlier in the criminal process? It answers neither. The practice of charging this behaviour as perverting the course of justice is accepted, but it is nowhere suggested that the behaviour libelled might be criminal purely because of an intent to pervert the course of justice (or even that such intent is required). The phrase might simply be an example of the flexibility afforded to the prosecution to describe a crime however they like, as long as a crime known to Scots law is, somehow, properly described.<sup>63</sup> The tone of the charge and the judgment still focus on falsehood and evidence. The administration of justice is only the background against which falseness is analysed, rather than the core concern.
- 3.21 *Dalton v H.M. Advocate* was heard on appeal in March 1951.<sup>64</sup> Dalton was charged with attempting to dissuade a witness from identifying at a police parade a person accused of theft. The charge originally narrated that he had threatened the witness that she would be assaulted if she made the identification, and ended with the words “and you did thus attempt to intimidate her and pervert the course of justice”. He was convicted, but under deletion of the threatened assault and the words “intimidate her”. The conviction was therefore for a bare charge of perverting the course of justice by attempting to persuade a witness not to cooperate with an investigation.
- 3.22 One of the grounds of appeal was that the accused had not been convicted of a crime under the law of Scotland, either because the offence did not relate to a “course of justice” which existed at the time – no trial being in active preparation – or because the facts did not amount to a crime, Scott being unclear on this point.

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<sup>63</sup> See Hume, p 155, describing the second part of the pre-1877 style syllogistic indictment: “the major or leading proposition states the appellation of the crime meant to be charged, or, if it have no proper name, describes it at large, and characterises it as a crime that is severely punishable”. The requirement to describe or name a crime in the major premise of an indictment was ended by the Criminal Procedure (Scotland) Act 1887, 50 & 51 Vict., c. 35, s. 2.

<sup>64</sup> *Dalton v H.M. Advocate*, 1951 J.C. 76.

- 3.23 The Lord Justice Clerk barely completes his summary of the facts before proclaiming, "I have not the slightest hesitation in saying that these facts do constitute a crime". The accused was "charged with and found guilty of taking steps to destroy in advance evidence which might lead to the detection of a serious crime".<sup>65</sup> His analysis ends there.
- 3.24 Lord Mackay gives an opinion more interesting as a case study in Parliament House Kremlinology than as a principled decision about relevancy. It was his own charge in Scott which was held to have been defective and he relishes the opportunity to subject Lord Carmont's judgment on it to a similarly withering brand of judicial analysis. He claims that, whatever other criticisms there might have been, he was "emphatically" absolved of misstating the law. The passage from Scott he cites in support of this makes a different point: that it was unnecessary to settle the question in that appeal. Referring to the distinction made in Scott between the evidence led and the conviction obtained, Lord Mackay concludes that he "cannot appreciate what Lord Carmont meant, if indeed he meant to indicate a distinction between cases". This misunderstands the judgment, an impression which is bolstered when later in his opinion, after conducting a detailed (and irrelevant) defence of his charge in Scott, Lord Mackay concludes that his "decision ... on the law was ... really affirmed".<sup>66</sup> It was not.
- 3.25 Lord Patrick echoes the Lord Justice Clerk's judgment; the accused's behaviour:
- "amounted to an attempt to eliminate evidence which might tend to incriminate a person in a future criminal charge, and that is quite clearly a crime, and a serious crime, in the law of Scotland."<sup>67</sup>
- 3.26 "Amounted to an attempt to eliminate evidence" is an admission that this case did not involve a classic elimination of evidence or procurement of falsehood. Yet the only justification offered for why this behaviour amounts to a crime is the reference to it being criminal to eliminate or destroy evidence. Confirming that the evidence is that which "*might tend* to incriminate a person in a *future* criminal charge" would seem to endorse the second theory identified above about what Scott v H.M. Advocate meant: there is no separate offence involved when an attempt to suborn or pervert takes place at the investigative stage. Instead, such behaviour can be

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<sup>65</sup> Dalton, at 79.

<sup>66</sup> Dalton, at 80.

<sup>67</sup> Dalton, at 81.

legitimately interpreted as an attack, ultimately, on the justice which might take place at a trial – and therefore as engaging the law of attempt.

3.27 Even if we assume that Dalton is a further step in the development of a discrete offence, traceable through the institutional writings and Scott, all it is authority for is that:

- by analogy with it being criminal to procure false evidence, it is criminal to attempt to dissuade someone from giving evidence,
- that the requirements of attempt are met both in respect of a trial immediately in contemplation and in respect of a criminal investigation which might lead to a trial, and
- that this behaviour can be properly charged as an attempt to pervert the course of justice.

3.28 Understood in this way, the development of this offence by these cases is presaged by propositions in institutional writings, but is restricted to the destruction or alteration of evidence and behaviour analogous to that. As unsatisfying as the analyses in the cases considered so far might be, this is a defensible expansion of the scope of the offence. These decisions might – even at this point – simply be clarifications of the way that the law of attempt interacts with the offence of suborning perjury.

3.29 Pausing at this point, it seems as if the words “attempt to pervert the course of justice” has been used in these charges only as a narration of the intention at play, or the relevant type of dole, much as they were in Rae and Little. Neither case is a satisfactory foundation for a discrete crime of perverting the course of justice, with the principal element being specific intent, as suggested by Harris.

*The development of the offence until 1961*

3.30 In *Kenny and Kenny v H.M. Advocate*, in June 1951,<sup>68</sup> two men were charged with threatening someone with violence with the “intent to intimidate him and to deter him from giving evidence” against them. This, the charge concluded, meant that they “did thus attempt to pervert the course of justice”. The jury deleted the references to the upcoming trial, no evidence having been led of a reference by the men to the trial. The men were therefore convicted of a bare threat.

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<sup>68</sup> *Kenny and Kenny v H.M. Advocate*, 1951 J.C. 104.

3.31 The convictions were quashed, it not being an offence in Scotland simply to make a threat. But Lord Russell did suggest that it would have been an offence had the deleted words remained:

“the verbal threat libelled [...] was clearly serious and criminal by reason of the purpose or intent with which the threat was alleged to have been made, that purpose being to intimidate the victim so as to deter him from giving evidence”.<sup>69</sup>

3.32 The charge here ends very similarly to the charges in *Scott and Dalton*: “... and you did thus attempt to pervert the course of justice”. This is not, though, treated by the court as an aspect of the law of perverting the course of justice: it is treated as a species of threat. A threat is only criminal of itself if it is highly serious; otherwise it needs to be done with a particular sort of intention to be criminal.<sup>70</sup> One sort of intention that will render a threat criminal, this case tells us, is a threat made to dissuade a witness from giving evidence. In these sorts of cases “the charge will probably be one of attempt to pervert the course of justice”.<sup>71</sup> Even for threats which are criminal in and of themselves, the case of *Margaret McDaniel* suggests that it is an aggravation to make that threat to prevent a victim from giving evidence.<sup>72</sup>

3.33 *Kenny and Kenny* supports the idea that, early in its development, perverting the course of justice was not necessarily a description of behaviour being criminalised. Instead, it was a sort of criminal purpose, a standard of wrongdoing or an aggravation. In modern terms, it might form part of the mens rea of an offence otherwise described by reference to a type of action. In the language of the period, it is a sort of dole, an unlawful intention capable of transforming otherwise non-criminal acts into criminal ones.

3.34 It is not only in the penumbra of subornation of perjury that we see the emergence of perverting the course of justice. In *H.M. Advocate v Martin*,<sup>73</sup> prisoners escaped from custody while being escorted to work in the admiralty yard in Peterhead. The charge was not prison-breaking, a known offence, but that “having conceived the felonious intention of defeating the ends of justice by escaping from legal custody ...

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<sup>69</sup> *Kenny and Kenny*, at 106.

<sup>70</sup> *Gordon* (4<sup>th</sup> ed), at para 48.01.

<sup>71</sup> *Gordon* (4<sup>th</sup> ed), at para 48.02.

<sup>72</sup> *Margaret McDaniel*, (1876) 3 Couper 271.

<sup>73</sup> *H.M. Advocate v Martin*, 1956 J.C. 1.

[Martin] did abscond from legal custody and remain at large ... and ... did attempt to defeat the ends of justice."<sup>74</sup>

3.35 A plea to the relevancy was taken, following a by-now familiar formula: the actions of the appellants fell outwith the scope of the established crime of prison-breaking (because the prisoners were not within the prison walls when they absconded), a bare charge of perverting the course of justice did not in these circumstances disclose a crime known to the law of Scotland, and the court could not now declare it to be so. The court rejected these arguments: the charge was, to use the categorisations in Lord Cockburn's dissent in *Bernard Greenhuff*,<sup>75</sup> an old crime being committed in a new way, falling within an established general principle of Scots criminal law:

"the offence of escaping from lawful custody, as lawful custody is nowadays defined in section 12 of the Prisons (Scotland) Act of 1952 (15 and 16 Geo. VI and 1 Eliz. II, cap. 61), is an offence which falls within an established general principle, even although there might not be a precise precedent directly in point."<sup>76</sup>

3.36 The judgment is therefore confirming that there is a new way of committing the old offence of prison-breaking. After establishing that it is not necessary to use a discrete nomen juris in a charge, as long as the behaviour narrated reveals a crime, Lord Cameron explains why it is acceptable to bring this novel behaviour within the ambit of the older offence:

"It is significant that [the institutional writers] were writing at a time when modern ideas of places of confinement for persons under sentence had not been developed and when prisons, in the words of Alison, were in the main "gloomy abodes."<sup>77</sup>

3.37 It should not be surprising, as a society's understanding of what a prison is develops, that its law of prison-breaking should (within reason) adapt alongside it.

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<sup>74</sup> Martin, at 1.

<sup>75</sup> *Bernard Greenhuff*, (1838), 2 Swin. 236.

<sup>76</sup> Martin, at 3.

<sup>77</sup> Martin, at 2. The extract from Alison is worth setting out in full: "The act of prison-breaking, however natural to the inmates of those gloomy abodes, cannot be overlooked by the law, as being a violation of the order and course of justice, and a direct infringement of regulations essential to the peace and well-being of society." (Alison, vol i, p 555). I am sure that by modern standards, prisons in 1950s Scotland were fairly gloomy themselves.

It would be absurd if we required to understand the penal law of Hume's time in order to describe the substance of the modern offence of prison-breaking (or if, say, the law of murder did not capture weapons invented after its crystallisation). All this judgment is authority for is that (i) it is competent to charge the behaviour caught by the offence of prison-breaking as an attempt to defeat the ends of justice by escaping lawful custody, and (ii) that the behaviour caught includes prison escapes taking place outwith prison, it not being necessary to actually breach prison walls.<sup>78</sup>

3.38 Though this is the only case where the court was directly confronted with the question whether it was exercising the declaratory power, it does not take the law any further towards the pure intention, any-act theory of perverting the course of justice. Lord Cameron accepts as much:

“What is libelled in this indictment is very plainly an attempt to hinder the course of justice and frustrate its ends by seeking to assist a sentenced criminal to escape or evade the penalty of his crime. That is an offence against public order and against the course of justice. ... what is libelled here is but one species of a well-recognised and undoubted genus of crime.”<sup>79</sup>

3.39 The underlined sentence is descriptive, not normative: this is a crime *because* it offends against public order and the course of justice, not a crime *of* offending public order and the course of justice. The approach adopted by the court in Martin could easily have been applied to the task in Scott or Dalton. The relevant general principle might have been the offences concerned with the procurement of falsehood, and the adaptations required those needed to ensure that the offence of subornation of perjury responded to contemporary developments in the investigation and prosecution of crime.

3.40 For all of the judgments discussed so far, the case could be made – convincingly or otherwise – that they involved only the application of existing principles, the clarification of the elements of an offence or the logical extension of identified crimes. None is authority for a proposition that *anything* done in order to pervert the course of justice is criminal. Each involves a reference to falsehoods, a suggestion of misleading evidence being ultimately led, or a direct analogy with prison-breaking. In fact, by discussing the behaviour of the accused in the context of existing modes

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<sup>78</sup> See also *Turnbull v H.M. Advocate*, 1953 J.C. 59, cited by Lord Cameron in his judgment. In *Turnbull*, the charge was of “effecting an escape to the hindrance of the course of justice”.

<sup>79</sup> *Martin*, at 3. My emphasis.



of criminal behaviour (subornation of perjury, threat, procurement of falsehood, escaping lawful custody), these cases strongly suggest that the judges deciding them did not believe that they were doing anything peculiar.

3.41 In 1961 something peculiar did happen. *H.M. Advocate v Mannion*<sup>80</sup> involved two accused charged with going into hiding to avoid being cited to give evidence. The indictment does not mess around and its drafter was not afraid to repeat for emphasis: it narrates that they “did form a criminal purpose to hinder and frustrate the course of justice”, that when they hid they did so “with intent to hinder and frustrate the course of justice” and that by doing so they “did attempt to defeat the ends of justice”. A plea to the relevancy was taken.

3.42 The Lord Justice Clerk’s opinion is short. It congratulates the “ingenious”<sup>81</sup> argument of counsel for the accused but holds that the charge was sound:

“It seems to me clear that if a man, with the evil intention of defeating the ends of justice, takes steps to prevent evidence being available, that is a crime by the law of Scotland.”

3.43 Again, two features are present: perverting the course of justice is analysed in terms of intention, and there is an attempt to describe the relevant conduct by analogy with the elimination of evidence. We are not told that taking *any* step is criminal; only a step which would prevent evidence from being available. Here, though, the facts are particularly remote from any physical destruction of evidence or intimidation of witnesses such that their evidence would be denied to the course of justice. The two accused wished to avoid being cited. Had they been cited, they would have become obliged to give evidence and (while one might speculate about what their attitude to being cited would have been) there is no suggestion – there could not be – that they would not have conformed to any citation. It is not a crime to be unavailable to be cited; is it a crime to make yourself unavailable?<sup>82</sup> There is no

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<sup>80</sup> *H.M. Advocate v Mannion*, 1961 J.C. 79.

<sup>81</sup> *Mannion*, at 80. The word is used in its judicial sense, meaning ‘nice try’.

<sup>82</sup> Consider *Vaughan v Griffiths*, 2004 S.C.C.R. 357, where the accused refused to consent to an invasive medical examination and was charged with attempting to “defeat the ends of justice”. In terms of the warrant, however, the appellant’s cooperation was irrelevant: an attempt to enforce it despite his lack of consent should have been made before the offence was properly made out, so refusing to cooperate in the execution of a warrant could not be a crime, if your cooperation was irrelevant under the terms of the warrant. It is hard to reconcile this with *Mannion*. It would be extraordinary if an accused was entitled to be tested under an existing warrant before an offence was committed; but where no warrant had yet been enforced, speculation about an accused’s attitude to it was sufficient.

link to an existing crime here: this behaviour does not sit in the shadow of perjury, threat or prison-breaking. The steps by the accused taken related only to themselves. They were entitled, in general, to go into hiding. The criminal act was going into hiding for *this* purpose, in *this* situation. Here is the first hint of an any-act, pure-intention understanding of perverting the course of justice.

- 3.44 Yet even this decision, expansive though it might seem to be, does not claim to be authority for a novel idea. In fact, the Lord Justice Clerk specifically disclaims this: “I do not think I am doing anything revolutionary”.<sup>83</sup> He is careful to get in a reference to preventing evidence being available. Though no authority is cited in the decision, this is presumably an attempt to link the behavioural element of this charge to the line of cases discussed above. And although the decision is short, the case is strong support for the idea of an intention to pervert being a form of dole which can be attached to a criminal action, rather than a free-standing description of criminality:

“Evil intention, of course, is of the essence of the matter and must be established. This indictment clearly narrates the evil intention of the accused to avoid being called upon to give evidence, and that is sufficient to make the indictment relevant.”<sup>84</sup>

We are still talking about evidence here, and still reasoning by analogy. Previous cases involved a person doing something wrong to another in order to prevent evidence being given. This case involves a person taking steps which could not, of themselves, harm anybody.

- 3.45 Although the behaviour caught by the offence is expanding and the analogy with false evidence straining at the seams, we have not yet reached a position where *anything* done to pervert the course of justice – however “evil” or otherwise – is established as an offence. There is still only authority for that proposition in relation to behaviour that is itself threatening, behaviour that might eliminate evidence or, at the reaches, behaviour that would deny evidence to a court which ought to have been entitled to it.
- 3.46 The decision in Mannion was identified in Harris as the point by which the offence had cohered. By the date of this decision two things were clear, the court said: that attempting to pervert the course of justice was a crime (and it is clear that what was

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<sup>83</sup> H.M. Advocate v Mannion, 1961 J.C. 79 at 80.

<sup>84</sup> H.M. Advocate v Mannion, 1961 J.C. 79 at 80.

meant was a *distinct* crime), and that the crime could be committed in many different ways. Given that the argument being rejected in Harris was that the scope of the offence was limited to behaviour which prevented evidence from being led, the court might be expected to explain why the Mannion decision was inconsistent with this argument. It did not. In the context of the challenge made to the offence, the conclusion that the offence can be committed in many different ways must mean that it can be committed in ways which have nothing to do with the destruction or concealment of evidence. But the court in Mannion was scrupulous in describing the offence, at each point of its analysis, in terms of the destruction of evidence.

3.47 By 1961 then, far from the offence having settled as described in Harris, there was no support in the case law for any understanding of the crime that involved non-evidence-related conduct. Similarly, there is nothing in the cases which is an analytic departure from Hume's conception of it being criminal to procure falsehoods. Every case is only one leap or development away from an attempt to suborn perjury or another established offence against the administration of justice.

*The modern development of the offence*

3.48 By the 1980s, however, it is clear that a broad understanding of the crime had become common. In *Fletcher v Tudhope*,<sup>85</sup> the Appeal Court dismissed without giving reasons a plea to the relevancy of a charge of perverting the course of justice. Fletcher had been charged on that he did "encourage and assist" a man in evading officers who had been summoned to a public house to arrest him. The charge ends by explaining that Fletcher did this "with the intention of perverting the course of justice and [he] did attempt to pervert the course of justice".

3.49 All we have is Sheriff Lockhart's report to the Appeal Court on the plea to the relevancy, which he repelled at trial. The argument for the appellant was that, it not being a crime to run away from the police – Gordon was cited as authority for this<sup>86</sup> – and it not being a crime to induce someone to do something non-criminal – again, as if it were needed, Gordon was cited as authority<sup>87</sup> – then it could not be a crime to assist someone to run away from the police. The Crown Office library had a copy of Gordon's *Criminal Law* as well, however, and the prosecutor cited his statement

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<sup>85</sup> *Fletcher v Tudhope*, 1984 S.C.C.R. 267.

<sup>86</sup> Gordon (2<sup>nd</sup> ed), p 1084, although the footnote to this paragraph does mention the "protean crime" of attempting to pervert.

<sup>87</sup> Gordon (2<sup>nd</sup> ed), p 1076. It is a testament to the scope of the text and the imagination of its author that such an axiomatic proposition can be supported by citation from it.

that “in recent years, [...] attempt to pervert or defeat the course of justice has come to be regarded as a particular known crime”.<sup>88</sup> This is only barely authority for the idea that attempting to pervert the course of justice is a crime and tells the court nothing about the central question of whether the facts in question amount to that crime, however described. It also ignores the doubts about this development expressed by the author earlier in his book.<sup>89</sup>

- 3.50 From this statement and, apparently, without any analysis of the case law discussed above, the prosecution felt able to submit that the *nomen juris* which had become attached to this offence during the middle years of the 20<sup>th</sup> century was now to be regarded as a complete description of the elements of the offence, with nothing more needing to be said:

“It was submitted that it is now recognised as criminal to attempt to pervert the course of justice and the question here was whether the facts specified amounted to such an attempt.

[...]

The procurator fiscal submitted that there were two questions here, namely, (1) was there a course of justice, and (2) was there an attempt to pervert it being followed?”<sup>90</sup>

This is undoubtedly true, but does not take us far: the question whether someone has attempted to pervert the course of justice can be answered by examining whether that person attempted to pervert the course of justice.

- 3.51 It is regrettable that the Appeal Court did not produce a decision in this appeal since the reasoning of the sheriff in repelling the plea is nowhere set out in his note. A number of questions are left unaddressed. Is this decision intended to conflict with or adjust the principle that an accused is entitled to evade the police? If it does not, is this scenario an exception, somehow, to the rule that it is not criminal to assist someone in a non-criminal act? Most of the previous judgments suggested at least some connection with the crimes relating to evidence that might (or might be able to be) one day be led at trial. Is this any element of this decision? It is hard to see how it could be, since whether the accused was arrested or not, he would be entitled to

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<sup>88</sup> Gordon, (2<sup>nd</sup> ed), p 1063.

<sup>89</sup> See para 1.14, *supra*.

<sup>90</sup> *Fletcher v Tudhope*, at 269; from Sheriff Lockhart’s report to the Appeal Court.

stay silent, both during investigation and at trial: no *evidence* is at stake. His being arrested, or not arrested, strikes at the possibility of a trial entirely, rather than at any particular piece of evidence involved in that trial, or at the range of possible outcomes at trial. Only the procedures of criminal justice are disrupted, not the substance of a trial or proof. Why is there no reference to the offence of wasting police time? If a person is entitled to attempt to evade arrest, then the worst that perhaps can be said for that person's assistants is that they have seriously inconvenienced the police.

- 3.52 A decision was given by the Appeal Court in *McElhinney v Normand*.<sup>91</sup> The appellant was charged with assisting a man to evade apprehension, knowing that he was being pursued by police officers. No evidence of the petition warrant under which the police were pursuing the man was led at trial and so *McElhinney* appealed. The court focused on the question of when the course of justice began, and whether answering this question properly required the presentation at trial of the warrant. They concluded that it did not. The only analysis of the content of the charge is to note the similarity with the facts in *Fletcher* and to observe that the court felt able to dismiss that appeal without giving a decision. The focus is on whether there was a course of justice and, if so, whether it has been deliberately interfered with, not whether the sorts of interference that are criminal are in any way limited by behaviour, or whether the facts of the case fell within those categories of behaviour.
- 3.53 In *McFarlane v Jessop*,<sup>92</sup> an appeal was taken against a charge of perverting the course of justice which narrated that two police officers had falsely charged someone with a breach of the peace and prepared a false report to the procurator fiscal relating to this. The appropriateness of the charge was not commented on. Obviously, any attempt to frame a person for a crime, particularly one made by police officers, would perforce involve the fabrication of evidence or the preparation of false testimony.
- 3.54 *Johnstone v Lees*<sup>93</sup> from 1995 contained the most explicit confirmation yet that this is a crime of pure intention, with no requirement for the acts involved to relate to evidence. *Johnstone* was charged with attempting to pervert the course of justice by replying to a summary complaint not simply by pleading not guilty (as he was

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<sup>91</sup> *McElhinney v Normand*, 1996 S.C.C.R. 86.

<sup>92</sup> *McFarlane v Jessop*, 1988 S.C.C.R. 186.

<sup>93</sup> *Johnstone v Lees*, 1995 S.L.T. 1174.

entitled to do) but also – and falsely – stating in his reply that he knew nothing about the offence. The court clearly had some sympathy for the indignant Johnstone, calling the charge “unusual” and hoping that “some latitude” might be given to people who complete such forms without legal advice. But the court was nevertheless clear that the charge amounted to an offence in Scotland:

“[T]he assertion that somebody who puts information on the form with the intention of dissuading the prosecutor from taking further proceedings against him cannot be guilty of the crime of attempting to pervert the course of justice seems to us to be untenable.”<sup>94</sup>

3.55 On one reading the court has shown its hand here: it seems to be saying that because lying to prosecutors is bad that this simply must be a crime, no reasoning required. But it cannot be that simply seeking to dissuade a prosecutor from charging you is criminal: people are entitled to a defence and to put a prosecutor to the test, and a range of behaviour is protected by (in some cases, positively required by) the law to facilitate this. The Lord Justice General concludes that “it all depends what the intention was with which the form was completed, and that in the end depends upon the inferences which can properly be drawn in the light of the evidence.”<sup>95</sup> It is the intention of the accused that is all-important. But nowhere does the court address, as might be thought to be necessary in a plea to the relevancy, *what* that intention must be. If “it all depends” on a certain type of intention, one would expect the court to be able to describe that intention. The reference, common in earlier cases, to *evil* intention has disappeared, replaced with what seems like a bare but specific intention to commit the crime in question. However, the statement that “it *all* depends” on intention confirms what we suspected: the only necessary element of the offence is intention.

3.56 The only two cases that appear to have been cited to the court – Dalton and Waddell v MacPhail<sup>96</sup> – are not exactly on point, both having the sort of connection to the gathering and preparation of evidence for investigation or trial that was typical of earlier charges of perverting the course of justice. It is hard to see how stating that you “know nothing” of a charge could ever colourably be connected to evidence which could be given at trial. Johnstone would have been entitled not to give evidence. Simply saying that you know nothing of a charge is hardly much of an

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<sup>94</sup> Johnstone v Lees, 1995 S.L.T. 1174 at 1175.

<sup>95</sup> Ibid.

<sup>96</sup> Waddell v MacPhail, 1986 S.C.C.R. 593.

advance on the bare denial that a plea of not guilty amounts to, and the court accepted that the accused was entitled to plead not guilty.<sup>97</sup> It is scarcely even a false alibi, containing no specific alternative claims. It would not have wasted the police's time for more than the second it took to read, since it was incapable of providing any misleading lines of enquiry that they might feel required to pursue. In his commentary on this appeal, Gordon says that "we have virtually created a crime of making false statements to officials with intent to pervert the course of justice".<sup>98</sup> This is a comment that only makes sense if you don't already think that *anything* done with such an intent is, in law, criminal.

3.57 All we are left with is the centrality of intention and the name of the crime. Since no opinion was produced in *Fletcher*, this case is the best candidate for leading authority for this proposition: the crime of attempting to pervert the course of justice can be committed by doing any act with the intention to pervert the course of justice, whatever is meant by that.

*Wasting police time*

3.58 The offence of wasting police time has such a close relationship to perverting the course of justice that it is necessary to consider its development alongside these cases.

3.59 Hume considered it a crime to make a false accusation that a particular, named individual had committed a crime. He considers it not in his chapters on offences against the course of justice but in the chapter 'of offences against reputation'.<sup>99</sup> It is clear from his discussion of the offence, and especially the focus given to the naming of an identifiable individual, that the calumny involved in the crime was damaging someone's reputation, not misusing the institutions of criminal justice. The chapter covers other offences with the same justification, including the slandering of judges, casting aspersions on the King's character, and moving jealousy between the King and his nobles.

3.60 Hume recognises that there are wrongs involved in a false accusation of criminality that go beyond damage to reputation. Of calumnious pursuit (meaning 'prosecution') of a crime, he says:

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<sup>97</sup> If Johnstone had written "I am not guilty" on the form instead, what would the decision have been?

<sup>98</sup> The commentary to *Johnstone v Lees*, 1994 S.C.C.R. 687 at p 690.

<sup>99</sup> Hume, at pp 333 to 359.

## WHAT WAS THE LAW OF PERVERTING THE COURSE OF JUSTICE?

“The wrong in such a case is not a pure slander, or injury to fame, but also in some sense a real injury, as tending to endanger the accused in law, and put him in fear of the issue.”<sup>100</sup>

- 3.61 When the offence simply consists of an accusation, orally or writing, rather than an attempted prosecution, Hume calls this calumnious information of a crime and accepts that it is a “sort of slander” often better suited to being pursued in the civil courts.<sup>101</sup> The relevant part of the major proposition in an indictment narrated by Hume describes an offence of “the wilful and malicious slandering and detracting from the fame, good name and reputation of any of her Majesty’s lieges”.<sup>102</sup> Writing before anything resembling modern policing existed in Scotland,<sup>103</sup> it would have been impossible for Hume to justify the offence by reference to a waste of police time, but there is no focus even on the improper use of the courts or the waste of their time, or on the conception of the course of justice he relies on in his later chapters on perjury and subornation of perjury.
- 3.62 The modern offence, by contrast, is uninterested in the identity of the person wrongfully accused, or even if there is a person wrongfully accused at all. It is committed by giving the police any false information, the mental element is the knowledge that the story is untrue, and the justification is the need to protect the police from wasteful investigations into false stories. It is hard to see the connection with the offence as described by Hume.
- 3.63 To start with, there is no need for an individual to be named, and therefore for there to be the possibility of any injury to their reputation. In *Kerr v Hill*<sup>104</sup> a bus driver falsely alleged that a rival company’s bus had hit a cyclist. No person was named, and on appeal it was argued that “a false accusation against *someone* was essential for the commission of the offence”. Lord Morison tried his best to square the facts with the offence, telling the petitioner that:

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<sup>100</sup> Hume, at p 335.

<sup>101</sup> Hume, at p 335.

<sup>102</sup> Hume, at p 335.

<sup>103</sup> The City of Glasgow police were established three years after Hume published the first edition of his *Commentaries: the Glasgow Police Act 1800*.

<sup>104</sup> *Kerr v Hill*, 1936 J.C. 71.



“I do not agree with that argument, because it sufficiently appears that the suggested criminal or criminals could easily have been ascertained.”<sup>105</sup>

It is true that a category or description of person who did exist was identified (drivers of rival buses) and may have fallen under suspicion.

3.64 The Lord Justice General had no such qualms about adherence to principle, and provided an entirely new justification for the criminalisation of this behaviour. He stated:

*“In my opinion, the giving to the police of information known to be false, for the purpose of causing them to institute an investigation with a view to criminal proceedings, is in itself a crime.*

Great injury and damage may be caused to the public interest, which is mainly to be regarded, by a false accusation, although no individual is named or pointed at by the informer. A charge which is perfectly general, and leaves the public at large open to suspicion, does nevertheless constitute a crime if it is falsely made.”<sup>106</sup>

The interest protected by this offence has moved from being the reputation of the individual to the risk caused to the public at large by the making of a false accusation. A false accusation, though general, could lead to the system of justice producing an incorrect or unjust outcome: what if someone ended up being prosecuted for the invented crime? The justification for the offence is based on the importance of the course of justice following its proper path, but because of the risk to the public of an incorrect outcome, not necessarily because of the risk of waste or misuse of institutional actors in the justice system following from their being misled.

3.65 Lord Fleming is even bolder:

*“The case might perhaps have been charged as a false accusation of crime. It was, however, charged as making a false statement to the police, and so causing them to devote their time and service to the investigation of that false statement. The nomen juris of a charge is, however, immaterial. I am prepared to hold that, if a person maliciously makes a statement, known to be false, to the police authorities, with the intention and effect of causing them to make inquiries into it, he*

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<sup>105</sup> Kerr v Hill, 1936 J.C. 71 at 75.

<sup>106</sup> Ibid. My emphasis.

commits a criminal offence. It is immaterial that no particular person or persons are pointed at in the false statement.”<sup>107</sup>

This justification for the offence does not mention the risk to the public of coming under suspicion from a non-particularised accusation of criminality. The offence is committed when the criminal authorities are set in motion, regardless of any risk of causing an unjust outcome.

- 3.66 By the time that *Gray v Morrison*<sup>108</sup> was decided, in 1954, it seems that the crime could be committed by almost any lie given to the police, regardless of the riskiness or possible consequences of the lie. Mr Gray refused a lift home from a friend by pretending that he had a bicycle.<sup>109</sup> When his persistent friend could find no bicycle, Mr Gray ended up reporting a theft to the police in order to maintain his story. For this, the sheriff-substitute at Berwickshire sentenced him to 14 days’ imprisonment.
- 3.67 Mr Gray pled guilty, and the appeal was against sentence alone. The complaint had alleged that our hero:

“did cause officers of the Berwick, Roxburgh and Selkirk Constabulary, maintained at the public expense for the public benefit, to devote their time and service in the investigation of said false story told by you and did temporarily deprive the public of the services of said officers, and did render the lieges liable to suspicion and to accusations of theft.”

- 3.68 There are three wrongs described, two of which (devoting police time to a folly; denying police resources to more productive efforts) are focused on the protection of justice institutions, and one of which (rendering others liable to suspicion) is concerned with the risk of unjust outcomes. The Lord Justice General confirms that the core of the crime is giving information, known to be false, to the police causing them to begin an investigation. The risk to others of falling under suspicion is not essential.
- 3.69 The investigation embarked on in *Gray v Morrison* was, presumably, nugatory rather than wasteful and even the Lord Justice General describes the lie involved as “more foolish than malicious”.<sup>110</sup> Mr Gray even tried to dissuade the police from

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<sup>107</sup> *Kerr v Hill*, at 76. My emphasis.

<sup>108</sup> *Gray v Morrison*, 1954 J.C. 31.

<sup>109</sup> The report does not disclose whether this was because his friend’s company was intolerable or because he was looking forward to the walk home.

<sup>110</sup> The appeal was against sentence only. He substituted a fine of £10 for the sentence of imprisonment.

conducting an investigation. The only thing we are left with is that the appellant knew his words to be false and – even without a specific intention that they should result in an investigation – the police investigated. There need not even be a theoretical possibility of suspicion falling on someone. Unless we assume that there are some falsehoods which the police would entirely ignore – a claim of an alien invasion perhaps (though presumably even these would require some minor effort on the part of officers to consider, and dismiss) – then have we effectively criminalised knowingly lying to the police for any purpose, however blameless or understandable the motive?<sup>111</sup>

- 3.70 The offence – if indeed we are dealing with the development of the criminal law, rather than a distinct criminalisation – has moved from being one of damaging reputation by making a false accusation of crime, to risking injustice by making a false accusation, to wasting the police’s time by lying. This is not simply the justification for an offence evolving in accordance with society’s expectations of the criminal law; as we can see from *Kerr v Hill* and *Gray v Morrison*, behaviour that would not be criminal under one justification is caught by another.

*Relationship between perverting the course of justice and wasting police time*

- 3.71 While the offence of making a false allegation, or wasting police time, may not always have shared a character with offences against the course of justice, it now does so. In *Harris*, the appellant drove another’s car past speed cameras with the intention of causing the registered keeper to be prosecuted: a charge which might have been one of wasting police time by making a false accusation. Again, it seems likely that the prosecutors chose the wider charge rather than the more specific one out of anxiety about the novelty of the method employed by *Harris*: did fabricating a scenario where another would likely be charged amount to a false accusation? Could you waste the police’s time in the way you choose to commit an offence yourself?<sup>112</sup> The pattern identified in *Dalton* and *Martin* repeats itself: rather than confront liminal questions about the proper scope of a nominate offence concerned with the course of justice, the broader proposition that everything which obstructs the course of justice is criminal is preferred.

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<sup>111</sup> See also *Bowers v Tudhope*, 1987 S.L.T. 748 (falsely reporting a missing item, with no specific accusation of criminality); *Robertson v Hamilton*, 1987 S.C.C.R. 477 (lying about the behaviour of a police dog).

<sup>112</sup> Perhaps not – you are not obliged by the law to commit offences in ways which make police work most efficient: see para 6.21, *infra*.

3.72 Wasting police time is now typically covered in the literature as one of the offences against the course of justice.<sup>113</sup> This is right. There are two concerns expressed about behaviour which wastes police time which we also can see in perverting the course of justice: the public interest in protecting justice institutions from waste and effort caused by falsehood, and the possibility of those justice institutions being used to secure an improper outcome, in this case the conviction of an innocent person.

#### 4. The development of the offence

##### *Answers to the questions raised by Harris*

- 4.1 The decision in *Harris* raised three questions about the development of the offence of perverting the course of justice: when was it created, by whom, and how? The court's incomplete and unsatisfying answers were: before 1961, we do not know, and it does not matter. In fact, the court's overall conclusion was that *none* of these questions mattered when answering the principal challenge before it, that the offence did not exist.
- 4.2 Turning first to the answer 'before 1961', if the position set out in the decision is that the offence can be committed in ways which have no relation to the prevention of evidence being properly led in court, then that answer cannot be correct. The four main cases before that year – *Scott*, *Dalton*, *Kenny*, and *Mannion* – all concerned behaviour which sought to prevent evidence being known to the prosecution or led at trial. *Scott*, *Dalton* and *Kenny* concerned attempts made to threaten, intimidate or otherwise dissuade someone who should give evidence or give statements to the police from doing so. Parallels with the subornation of perjury can be made. In an investigation or trial, silence in the face of a duty to speak to a fact is as false (in a relevant sense) as an explicit lie. Attempting to induce that silence, even by bringing about the absence of the person with a duty to speak, is qualitatively indistinguishable to attempting to induce a lie. In each case a different technical reason was advanced for the argument that the charge could not be attempted subornation. In *Scott* and *Dalton*, the attempts related to criminal investigations that could lead to a trial, rather than a trial. *Kenny* went further, the threat being made there without a trial even being in contemplation. In each case, however, the courts produced opinions that focused on the elimination of prospective or possible evidence, and that being done for the purpose of perverting the course of justice.

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<sup>113</sup> See, for example, chapter 14 of Ferguson, P. and McDiarmid, C., *Scots Criminal Law: a Critical Analysis*, (Edin: Edinburgh University Press, 2014) or chapter 55 of Gordon (4<sup>th</sup> ed).

- 4.3 Even in Mannion, which did not relate to the possible evidence of another (so there could be no question of subornation) but rather to the evidence of the accused themselves, the court was at pains to explain the offence using the elimination of evidence as the central idea: it was taking steps to prevent evidence being available that was the crime, and perverting the course of justice the intent required by law.
- 4.4 So up until 1961 there are two principal extensions of the criminal law demonstrated by the cases. The first is that as well as it being criminal to induce people to give false evidence at trial it is criminal to induce people to give false testimony to officials in the investigative processes leading up to trials, or potential trials. The second is that as well as it being criminal to take steps to prevent the evidence of others being led as trial, it is criminal to take steps to prevent yourself being required to give evidence. Both of these developments are consistent with Hume's proposition that that all practices to procure false evidence are punishable. Even to the extent that they amount to the imaginative or unexamined development of the law in this area, they are not the sort of bold or unpredictable development that requires the declaratory power of the High Court of Justiciary to have been engaged.
- 4.5 While the Crown submitted – and the court accepted – in 1984 in *Fletcher v Tudhope* that *any behaviour* intended to interfere with a course of justice was sufficient,<sup>114</sup> the first reported case where the accused's conduct lacks any connection to the elimination of evidence (with a decision of the court which analyses that conduct in such terms) is *Johnstone v Lees*, from 1995.<sup>115</sup>
- 4.6 It is therefore suggested that, if it is possible to identify when the offence of perverting the course of justice expanded in the way addressed in *H.M. Advocate v Harris*, it is probably better to identify that as having occurred some time between 1961 and 1995, rather than earlier.
- 4.7 Turning to the question of by 'whom', if we accept that an expansion did take place between the time of the institutional writers and either 1961 and 1995, there can only be one answer: the criminal courts of Scotland, and more specifically the High Court of Justiciary Appeal Court. Whether the declaratory power was used or not, in the

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<sup>114</sup> *Fletcher v Tudhope*, 1984 S.C.C.R. 267.

<sup>115</sup> *Johnstone v Lees*, 1995 S.L.T. 1174.

absence of legislative intervention the development of the criminal law is the responsibility of that court.

- 4.8 The only question left is the legal basis for that development: was this normal maturation of the criminal law in Scotland, something more radical, or even something in some way illegitimate? As far as 'how' is answered by 'it does not matter', we must accept that this is correct for the purposes of an Article 7 challenge. Article 7 only requires that the criminal law conform to the principle of legality, that offences are capable of description with sufficient precision, and that any development of the law by the courts is foreseeable and principled.<sup>116</sup> In this respect, then, no challenge to the legitimacy of an offence's creation matters, if at the time of the accused's conduct, the use of the offence in the way it was applied to the offender was foreseeable. Even an abnormal development in the criminal law, or one illegitimate ab initio, can be cured by use, as far as an Article 7 challenge is concerned.<sup>117</sup>
- 4.9 It is nevertheless worth analysing what we can say about the offence's development, and how it fits within the norms of criminalisation in Scots law, since it would assist our understanding of the offence as it is currently constituted. If the development of the offence does not amount to an unacknowledged use of the declaratory power, then we must be looking at new ways of committing old offences, at expansions (to fit a changing society) of existing modes of criminality. I should therefore begin with the content of, and justifications for, these old offences: how has the law of evidence changed, and what effect should that have on the ways in which a person can commit subornation? Which of the new forms of criminal disposal have the characteristics required to engage the law of prison-breaking? Conversely, if we are satisfied that the court was, in cases like Mannion and Martin, criminalising new categories of behaviour altogether, the questions would be different: what characteristics do these new forms of behaviour (which we know can be charged as

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<sup>116</sup> See, for example, *SW v United Kingdom*; *CR v United Kingdom* (1995) 21 EHRR 363 (challenge to 'retrospective' criminalisation of marital rape).

<sup>117</sup> See also *H.M. Advocate v L*, 2009 S.L.T. 127 at 132 per Lord Wheatley, where the challenge was to the accessibility of the law of incest, which dated from the 16<sup>th</sup> Century and, ex facie, required the interpretation of Verse 17 of the 18th Chapter of Leviticus: "... we were satisfied that there was no difficulty in understanding either the law or the text. There was clear authority in the textbooks available at the material time this offence was committed, and the appropriate legal advice from a competent source would have presented no difficulty to the respondent had he inquired about the legitimacy of his conduct."

perverting the course of justice) have, and what does that tell us about the elements of this new offence and therefore the exercise of the power?

*An unacknowledged exercise of the declaratory power*

- 4.10 There have been, since the time of the institutional writers, a range of offences which protect the course of justice. Each has a separate historical origin, and each protects a different part of the course of justice in a different way. As the justice system developed in Scotland, each responded in a different way. The primacy of parole evidence in Scottish courts, for example, has been resilient throughout the 20<sup>th</sup> century, even against considerable statutory law-making in this respect. The development of the law of perjury therefore, has been relatively measured: as the rules on competency and relevance changed, the law of perjury adapted to those changes.<sup>118</sup>
- 4.11 In respect of other offences against the course of justice, such flexibility has proved more difficult. What a course of justice looked like in Hume's time is very different to what a 20<sup>th</sup> century course of justice looked like.<sup>119</sup> In the 1790s, the role of publicly-funded official investigators, with special powers of investigation and arrest, was almost non-existent; the forms and forums of criminal procedure very different; the range of disposals available to the court less numerous but more severe. It seems that, without police investigators and with criminal trials consisting exclusively of parole evidence, the range of crimes described in Hume was, at that time, sufficient to provide complete, start-to-finish protection to the course of justice, from its initial stages to its determination and execution. By the mid-20<sup>th</sup> century however the form which the course of justice could take, and the range of human activity caught by the course of justice, had expanded. In particular, the role of the police and public prosecutors in the investigation and prosecution of crime had become central. How was the criminal law of Scotland to respond to this?
- 4.12 In his dissent in *Bernard Greenhuff*, which at least in part contains a sound exposition of the law concerning development of offences absent the use of the declaratory power, Lord Cockburn described the role of the criminal courts when presented with exactly this problem: how to adapt old law to new facts and to

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<sup>118</sup> See Gordon (4<sup>th</sup> ed), at paras 55.13 to 55.16 for an account of the offence of perjury's relationship to the law on relevancy and competency.

<sup>119</sup> See paras 6.1 to 6.38, *infra*, for what is meant by a 'course of justice'.

ensure that obviously criminal behaviour didn't escape the scope of the law simply because of its novelty:

"I may only say at present, that I am far from holding that the Court can never deal with any thing as a crime, unless there be a fixed nomen juris for the specific act, or unless there be a direct precedent. An old crime may certainly be committed in a new way; and a case, though never occurring before in its facts, may fall within the spirit of a previous decision, or within an established general principle. And such is the comprehensiveness of our common law, that it is no easy matter for any newly invented guilt to escape it."<sup>120</sup>

- 4.13 The courts could have responded to the challenge of the 20<sup>th</sup> century by adapting the range of existing offences to the rapidly-developing criminal justice system, by identifying the broader "spirit" of the decisions concerning subornation or by more creatively analysing the "general principle" lying behind the offences against the administration of justice. They could even have done so with a mind to maintain the "comprehensiveness of our common law", it being obviously desirable that the offences designed to protect the course of justice should keep pace with the development of, and expanded understanding of, the course of justice. If the totality of the course of justice was protected by the offences set out by Hume, should the reach of the criminal law not expand to ensure that this remains the case?
- 4.14 It would have been in keeping with such a principle for the courts to decide in *Scott*, *Dalton*, or *Kenny* that the offences of destroying evidence, procuring false evidence or of attempted subornation of perjury could be committed in respect of police investigations. The premise could have been that the purpose of such investigations was to establish whether court proceedings should be initiated, to gather evidence for use in court and to provide prosecutors with the evidence they might expect to come out at trial. This would not have done any particular damage to the law of attempt, or to the offences concerned. Similarly, *Martin* might only be a recognition that the offence of prison-breaking was intended to ensure that sentences were seen through in full, not evaded, and as the manner in which a sentence was served evolved, so too did the ways in which prison-breaking could be committed.
- 4.15 In this way, the virtue of the "comprehensiveness" of Scots criminal law, which in this context means the comprehensive protection of as much of the course of justice

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<sup>120</sup> Bernard Greenhuff, (1838), 2 Swin. 236, at 274.



as the law has an interest in protecting, might have been achieved. But this is not what happened.

- 4.16 Instead, a new crime was created to cover new behaviour; the bases of the criminal law expanded, not simply its breadth. Perhaps in Hume's time the criminal law did catch *everything* which was then capable of perverting the course of justice, but it was not a crime to do *anything* which perverted the course of justice. That X and Y are criminal because Z does not make it criminal to seek Z:

"To treat an act as a species of genus of crime is not, it is submitted, the same as to treat it as a new way of committing an old crime.

Hypnotising someone to drown himself would be a crime because it would be a new way of committing murder [a crime against the person], not because it would be a species of the genus of crimes against the person."<sup>121</sup>

- 4.17 Of course, the expanded ways of obstructing the course of justice that became possible as our justice system developed might have been protected in other ways. If a general offence of misleading the police, for example, is to be created, the logical place to find it, and the appropriate way to do it, would be in the legislation establishing the police and regulating the public's interaction with the police. Certain specific falsehoods are criminal when given to the police in certain contexts: Criminal Procedure (Scotland) Act 1995, s. 13,<sup>122</sup> an offence that looks a little bizarre if even the most trivial lie told to the police is otherwise criminalised. A general offence of lying to police could easily have been created at the same time, but wasn't: "where Parliament fears to tread it is not for the courts to rush in".<sup>123</sup> It might be seen as a usurpation of the function of Parliament for the courts to step in to complete the task of reflecting changes to the justice system in the criminal laws; to prevent gaps occurring in the law's protection of the course of justice when the nature of that course is itself changed by legislation.

- 4.18 The traditional critique of radical judicial expansion of the scope of the criminal law, and of the declaratory power specifically, is that it does not conform to the principle of legality.<sup>124</sup> The principle of legality might have been compromised by the

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<sup>121</sup> Gordon (3<sup>rd</sup> ed), para 1.36.

<sup>122</sup> Containing the power of a constable who has reasonable grounds for suspecting that a person has committed or is committing an offence to have certain questions answered.

<sup>123</sup> Lord Reid's dissent in *Shaw v D.P.P.* [1962] A.C. 220 at 275.

<sup>124</sup> For example, Gordon (3<sup>rd</sup> ed), para 1.16.

development of perverting the course of justice, if what we are dealing with is truly retrospective criminalisation. But is it really the case that the High Court was declaring things to be crimes which weren't criminal at the time they were done? Or is the objection more subtle: that the *manner* in which the High Court declared them to be crimes seems doubtful, rather than the fact that certain behaviour was criminalised at all? I have shown how Scott, for example, might have been understood as a decision concerning the law of attempted subornation and how Martin is really a decision concerning the offence of prison-breaking. Instead, they have come to be considered decisions about a discrete offence of perverting the course of justice. In many cases of perverting the course of justice what we are considering is not truly a case of non-criminal behaviour being retrospectively declared to be so; it is a case of behaviour which might have been criminal on one basis being declared to be criminal on a different, at that point unknown, unnamed basis. As far as the most common methods of committing the offence of perverting the course of justice – evidence tampering, or witness intimidation – there is no reason to conclude that the declaratory power was used. The court was resolving a grey area in the law. That it did so by adopting a new *nomen juris* rather than utilising existing means of describing crimes does not change the substance of what was being done: behaviour already arguably contemplated by the criminal law was confirmed to be within its scope.

- 4.19 But the High Court has held explicitly that the offence is not restricted to the elimination of evidence. What is the basis for criminalising *this* behaviour? Gordon calls this an extension of the criminal law “without explicit reference to the declaratory power”.<sup>125</sup> I have set out the case for there being an unacknowledged use of the declaratory power, at some point between 1946 and 1995, in respect of acts intended to pervert the course of justice but which do not involve tampering with or destroying evidence, or intimidating witnesses. If Mannion is not the first demonstration of this in 1961, then *Johnston v Lees* demonstrates that it was orthodoxy by 1995. That the court in *Harris* was directly asked whether the declaratory power was used and refused to answer the question seems almost to confirm that it was. Presumably, if there were a clear basis for criminalising non-evidence-related conduct that could be traced backwards through the case law without resort to the declaratory power, then the court would have articulated it.

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<sup>125</sup> Gordon (3<sup>rd</sup> ed), para 1.32.

4.20 But does the extension of the criminal law even in this way really contravene the principle of legality, as it may have applied before the incorporation into domestic law of Article 7 and since? Gordon acknowledges that the principle of legality “has much less cogency when applied to acts which arouse wide and strong disapproval. A good part of the strength of the principle relies on the assumption that had the accused known his act was criminal he would not have acted as he did”.<sup>126</sup> Is perverting the course of justice the sort of thing that people should not do, therefore it is against the law, or is it the sort of thing that people should not do *because* it is against the law? It is hard, to put it plainly, to feel particularly sorry for any of the accused who were the subjects of the criminal law’s extension into non-evidence-related perversions of the course of justice.<sup>127</sup> The course of justice is worth protecting from harm, and people who decide to interfere with it will have difficulty claiming that they had no expectation that their behaviour was the subject of the criminal law. Even the declaratory power, it is worth reminding ourselves, was in law limited to being used where behaviour was obviously “wrong”, “wicked”, or “grossly immoral and mischievous”,<sup>128</sup> or at least to whatever behaviour met that test in the eyes of the High Court at any particular point.

4.21 We may now regard the declaratory power as itself an infringement of the principle of legality, and it is considered to be unusable in practice following the incorporation of Article 7 into domestic law.<sup>129</sup> But it was part of our law during the period I have identified as most likely containing the creation of the new offence. It would have been best for the court to explicitly acknowledge that the power was being used, if for no other reason that this might have encouraged them to set out more clearly the elements of the offence, but there is no authority for the proposition that the court must state that it is using the declaratory power in order for it to be

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<sup>126</sup> Gordon (3<sup>rd</sup> ed), para 1.16.

<sup>127</sup> With the exception, in relation to wasting police time, of the over-polite Mr Gray (para 3.66, *supra*), whose offence Sir Gerald calls “perhaps the least heinous in the whole history of the common law”: (Gordon (3<sup>rd</sup> ed), para 1.37.

<sup>128</sup> Bernard Greenhuff, (1838) 2 Swin. 236. Consider also the reasons given by the court in John Ballantyne, (1859) 3 Irv. 352 at 359 to 360 for not invoking the declaratory power to criminalise the celebration of a clandestine marriage: “it is difficult to imagine anything less answering the description of *malum in se*, than the mere non-observance, or wrongful and unauthorised use, of a form or ceremony which is required for the sake of decency and order, but the omission or wrongful and unauthorised use of which is followed by no injurious consequences to person or property, and constitutes no distinct or palpable violation of public morals.”

<sup>129</sup> Gordon (3<sup>rd</sup> ed), para 1.43.

lawfully used. In *Strathern v Seaforth*,<sup>130</sup> for example, clandestine temporary taking was declared criminal, though clearly outwith the elements of theft, without the court admitting to the use of the power. In fact, it is more common in the 20<sup>th</sup> century for the court to maintain a prudential ambiguity over its use of the power than to face up to it.<sup>131</sup> We may prefer that the court tell us what it is doing, but it cannot infringe our rules of recognition to give legal effect – even retrospective legal effect – to a power that the court lawfully has.<sup>132</sup> It is hard to categorise completely the complaint Gordon makes about the development of perverting the course of justice: is it that the declaratory power was used incorrectly; or that the declaratory power was used without being acknowledged; or was it simply that the power was used at all?<sup>133</sup> If Gordon thought that acknowledging the power was being used was a condition precedent of its legitimate use he would have said so; but did not.

4.22 Despite the amount written about the declaratory power, it is difficult to find many cases where judges have described what they are doing as a use of the declaratory power.<sup>134</sup> Farmer identifies three modes adopted by the Scottish courts other than an explicit use of the declaratory power: implicit criminalisation while denying the use of the power, declining to use the power explicitly, and “perhaps also the most common” saying nothing about it “although giving rise to a strong presumption that it is using the power”.<sup>135</sup> There is a common, normative claim that the Scottish courts may declare things to be crimes and a resulting tendency to try to categorise developments in Scots criminal law into two discrete categories: (normal) incremental, gradual development by analogy and principle, and (abnormal) use of the declaratory power, acknowledged or unacknowledged. But a descriptive account of the development of the criminal law over the last 150 years would

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<sup>130</sup> *Strathern v Seaforth*, 1926 J.C. 100.

<sup>131</sup> For example, *McLaughlan v Boyd*, 1934 J.C. 19, *H.M. Advocate v Wilson*, 1984 S.L.T. 117, or *Khaliq v H.M. Advocate*, 1984 J.C. 23.

<sup>132</sup> Called “legality within the system” in Farmer, L., *Criminal Law, Tradition and Legal Order*, (Cambridge: CUP, 1997) at p 25, where the author seeks to describe the Scottish approach to the principle of legality rather than impose an external idea of legality on Scots criminal law, and inevitably find it wanting.

<sup>133</sup> Gordon regards the objection as logical, not legal: “there is in fact no sign of any dangerous setting up by the Court of itself as the guardian of the public interest; its bark in this matter is worse than its bite, and even its bark is not very explicit. But the practice of exercising the declaratory power while not appearing to do so – and indeed disclaiming the intention of doing so – by confusing specific crimes with the groups to which they belong, or with the reasons for their being made crimes, is logically objectionable and contains in itself the seeds of abuse”: Gordon (PhD Thesis), p 39.

<sup>134</sup> *Bernard Greenhuff*, (1838) 2 Swin. 236 is the best (and perhaps the only) modern example.

<sup>135</sup> *Criminal Law, Tradition and Legal Order*, p 24.

provide few examples of developments that fall neatly into these two categories. Far more common is the sort of story shown by the development of perverting the course of justice, which falls in a third, intermediate category of development: expansion that is not quite a full-throated or undeniable new criminalisation, but nor is it a cautious or incremental application of precedent.

4.23 The way in which perverting the course of justice developed is not exceptional in Scottish criminal law, and may even represent the core of the tradition.<sup>136</sup> For example, the trial judge in *Stallard v H.M. Advocate* specifically denied that the declaratory power was required to criminalise rape in marriage, but the celebrated judgment of the appeal court did not engage with the question, presumably deliberately.<sup>137</sup> The disapplication of the marital rape exemption was justified by the court as reflecting a change in society relevant to the definition of the offence: “by the second half of the twentieth century [...] the status of women, and the status of a married woman, in our law have changed quite dramatically”.<sup>138</sup> The “index of change”<sup>139</sup> was the developments in the law of marriage, which (to maintain the coherence and comprehensiveness of our laws) must, the court held, in some way flow through into the law of rape, as far as it concerns marriage: “a live system of law will always have regard to changing circumstances to test the justification of any exception to the application of a general rule”.<sup>140</sup> Given these changes to the law of marriage, certain changes were necessary to the law of rape: “Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse”.<sup>141</sup> What could easily, in other systems, have become a principled question of the rules governing the development of the criminal law is

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<sup>136</sup> See generally the argument in *Criminal Law, Tradition and Legal Order*, chapter 2, ‘The genius of our law: legality and the Scottish legal tradition’.

<sup>137</sup> *Stallard v H.M. Advocate*, 1989 S.L.T. 469.

<sup>138</sup> *Stallard*, at 473. For a discussion of the judicial criminalisation of marital rape compared with its legislative criminalisation, see Fus, T., *Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches*, 39 *Vand. J. Transnat'l L.* 481 (2006); for a discussion of the criminalisation of marital rape as an exemplar of the development of the criminal law in Scotland, see *Criminal Law, Tradition and Legal Order*, at pp 49 to 53.

<sup>139</sup> *Criminal Law, Tradition and Legal Order*, p 50.

<sup>140</sup> *Stallard*, at 473.

<sup>141</sup> *Ibid.*

instead transformed into a practical one of how the law *must* have already changed.<sup>142</sup>

- 4.24 The same logic has been applied by the High Court to the development of perverting the course of justice; the “index of change” in this case being an expansion in the ways in which the justice system interacts with people and the development of the ways people can obstruct or interfere with it. Before the law gave special rights and status to those officially investigating crime on behalf of the state, there may have been very little risk to a trial involved in making misleading statements outwith court. But (to use the language of Stallard) “nowadays it cannot seriously be maintained that”<sup>143</sup> trying to persuade someone to lie to the police doesn’t meaningfully involve the procuring of false evidence.

*Conclusions about the development of the offence*

- 4.25 The development of the offence of perverting the course of justice in Scotland is hard to account for definitively. It contains examples of both judges claiming to be doing something they are not,<sup>144</sup> and claiming not to do something which they are.<sup>145</sup> Despite this indeterminacy, perverting the course of justice is best understood as a paradigmatic example of the way that the criminal law of Scotland responds to change:

“By the application of our native methods to our native principles it has proved possible ... to keep the law sufficiently flexible and elastic to enable a just discrimination to be applied to the ascertained facts of each case, and sufficiently rigid to prevent proved guilt from escaping the just consequences on any mere technicality.”<sup>146</sup>

- 4.26 Rather than seeking to separate out the parts of the offence that were the product of an unacknowledged exercise of the declaratory power from those that were not – an artificial and unsatisfying exercise – we should instead locate the development of

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<sup>142</sup> What Farmer calls the elevation of “judgment or adjudication over [...] legality or rules”: *Criminal Law, Tradition and Legal Order*, p 42.

<sup>143</sup> See fn 141, *supra*.

<sup>144</sup> For example, Lord Mackay’s opinion in *Dalton*: para 3.24, *supra*.

<sup>145</sup> For example, the claim not to be doing something revolutionary in *Mannion*, which cannot be right if Harris is right: see para 3.44, *supra*.

<sup>146</sup> Lord Cooper, from the *Memorandum of Evidence to the Royal Commission on Capital Punishment*, (1949 – 1953), p 428.

perverting the course of justice alongside the rise and fall of shameless indecency<sup>147</sup> and the expansion and contraction of breach of the peace<sup>148</sup> as normal examples of the practical flexibility of Scottish criminal law, and a demonstration of that flexibility promoting modernity rather than being counterpoised to it.<sup>149</sup>

4.27 The challenge in Harris was doomed to fail; not because the assertions made were not accurate – they all were – but because they were beside the point. It is almost meaningless, under the Scottish approach to the flexibility of the criminal law, to attack a crime as having an ‘illegitimate’ origin. That presupposes rules of legitimacy which can be applied after the fact to a criminalisation. However the rules of legitimacy, as we can see them applied in even modern Scottish criminal law, allow broad spectrum of types of development to take place: even explicitly allowing (at one point) formal retrospective criminalisation to take place. When a system’s own rules take this approach to the principle of legality, what value is there in imposing an external standard of legality on individual expressions of the system?

4.28 There would be no difference between saying that the development of perverting the course of justice was illegitimate, but nevertheless part of our law, and saying that it was not illegitimate. The court in Harris therefore had good reason to say, as sententious as it sounds, that “it matters not” whether perverting the course of justice’s expansion into non-evidence-related conduct was an unacknowledged exercise of the declaratory power. Accepting that the courts have a latitude in respect of developing the criminal law that extends to the point of declaring things to be offences, it would seem churlish to object to that power being used in the way set out. But it can still be regretted that the Lord Justice General’s opinion in Harris was short on principle. This was an opportunity to set out why, according to the standards of the Scottish criminal common law, developments such as those that had been put before the court were mainstream, rather than abnormal. It was an opportunity to explain the logical error that had been adopted in trying to challenge an offence on the basis that the court had (i) created it, using (ii) a power it had to create offences. The judgment is flawed. The same end point could have been

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<sup>147</sup> See the cases from *Watt v Annan*, 1978 J.C. 84 to *Webster v Dominick*, 2005 1 J.C. 65, and Chalmers, J. and Gane, C., *The aftermath of shameless indecency*, S.L.P.Q. 2003, 8(4), 310-315, and Burchell, J. and Gane, C., *Shamelessness scotched: the domain of decency after Dominick*, Edin. L.R. 2004, 8(2), 231-248.

<sup>148</sup> See, for example, *Young v Heatly*, 1959 JC 66; *Wilson v Brown*, 1982 SLT 361; and *Smith v Donnelly*, 2001 SLT 1007.

<sup>149</sup> See *Criminal Law, Tradition and Legal Order*, pp 28 to 34.

reached without pretending that the law had not substantially expanded over the relevant period; and the identification of 1961 as the point at which the offence crystallised cannot be reconciled with the cases up to that point, all of which relate to the procurement of falsehood.

- 4.29 Any doubts about the journey taken could be excused if the destination were good once we got there. The decision in *Harris*, as unsatisfying as parts of its reasoning are, at least usefully brings finality to vexing questions about the origins and scope of the offence: the court of appeal has authoritatively decided that the offence exists and that it can be described to the standards expected of the law. We should therefore expect to see, at least in the literature post-dating the decision in *Harris* and (if *Harris* were right) in much of the post-1961 literature as well, a consensus about the elements of the offence. We should expect to see the offence and its elements described in both a detailed way and in a way which accords with the decision in *Harris*. If that consensus exists, and if we are able to describe the offence as comprehensively as *Harris* suggests we ought to, then we could conclude that the offence has matured, despite a troubled adolescence: we may regard the offence as having, finally, crystallised.<sup>150</sup> If, however there is no such consensus, or if there remain significant and unanswerable questions about the elements of the offence in Scots law, perhaps the reason for that is connected to the offence's difficult birth.
- 4.30 I shall therefore now turn to asking what the offence presently is, rather than asking how it came to be.

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<sup>150</sup> See fn 16, *supra*.



## WHAT IS THE LAW OF PERVERTING THE COURSE OF JUSTICE?

### 5. The modern consensus on the offence

#### *Introduction*

- 5.1 I have set out some aspects of the development of the offence of perverting the course of justice in Scotland that are hard to account for. That is to be expected in a system with a largely judge-made criminal law, with only a relatively modern tradition of criminal law scholarship and in a jurisdiction whose size means that relevant questions about criminal offences (in contrast to questions about criminal procedure, perhaps) arise only infrequently.<sup>151</sup>
- 5.2 In this part I will address the consequences of this. The most relevant question is whether that sort of development has resulted in any contemporary problems in the law. It does not follow that piecemeal development leads to incoherence any more than it follows that a comprehensive reconsideration necessarily leads to principled and coherent law; but when a system has developed gradually there is more need for a comprehensive description of it before such questions can be answered. You might expect to see gaps in the questions answered by the law, or features that appear to conflict. You might see aspects reflect principles which aren't applied to other parts, depending on the period in which the courts addressed them. Again, it does not necessarily follow that coherent law is good law, but incoherent law is more likely to demonstrate undesirable features such as a lack of predictability, arbitrariness, discriminatory characteristics, or opacity.
- 5.3 In this part, I will therefore try to describe, comprehensively, what we know about the scope and content of the crime in Scotland today. There is a broad consensus on the elements of the offence to be found in modern writing. This consensus can be analysed. Is a complete or predictable description of the offence; does it disclose any coherent principle? Is it clear which interests are (and are not) protected by the offence? Does the offence, however described, have a sensible place in the wider suite of offences concerned with the course of justice, and why has the offence proved so resilient? If there are things we cannot say with confidence about the scope or content of the offence, do these matter? To the extent that these questions

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<sup>151</sup> In 1967, Gerald Gordon noted that “[t]here has been no extended discussion of the principles of Scots criminal law since Hume’s Commentaries.”: Gordon (1<sup>st</sup> ed), at pp 3 to 4. The publication of the first edition of Gordon marked the beginning of the serious academic consideration of Scots criminal law: Gane, C., ‘Sir Gerald Gordon: an Appreciation’, in Chalmers, J. Leverick, F. and Farmer, L. (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edin: 2010), pp 1 to 11.

are answerable, I shall set out my conclusions in this part; to the extent that they are not, I am only able to raise them, and ask whether a fair criminal law requires them to be capable of answer.

*The draft criminal code and the Stair Memorial Encyclopaedia*

- 5.4 The authors of the Draft Criminal Code for Scotland did not intend radical changes to the law.<sup>152</sup> When they considered that their draft provisions reflected the existing common law, they said so. Of their offence of perverting the course of justice, they said, “[it] is an offence at common law to pervert (or to attempt to pervert) the course of justice. Section 97 reflects the current law.”<sup>153</sup> Their proposed section 97 read:

“A person who obstructs or perverts the investigation or prosecution of any offence, or does any act calculated to pervert the course of justice, is guilty of the offence of perverting the course of justice.”

- 5.5 This proposed codification suggests two different (but presumably overlapping) ways of committing the offence: obstructing or perverting an investigation or prosecution or, separately, doing “any act” with the intention of perverting the course of justice. You might have expected these words to read “any other act” given that the behaviour caught by the first leg is (possibly entirely) contained within the second. The second leg of the proposed offence is not limited in any way by reference to the accused’s behaviour: “any act calculated” to pervert is sufficient. Precisely what is meant by the verb ‘pervert’ in this context is considered, by the authors, to be clear; it is used twice, and with no further definition. What the intended distinction between ‘pervert’ and ‘obstruct’ is, if one is intended, apparently does not need to be spelt out.
- 5.6 In the Stair Memorial Encyclopaedia, the paragraph headed ‘Conduct amounting to attempt to pervert the course of justice’ begins:

“The crime may consist in any conduct that tends to obstruct or hinder the course of justice.”<sup>154</sup>

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<sup>152</sup> Clive, E., Ferguson, F., Gane, C., McCall Smith, A., *A Draft Criminal Code for Scotland*, (Edin: Scottish Law Commission, 2003), at p 3.

<sup>153</sup> Draft Criminal Code for Scotland, p 169.

<sup>154</sup> Criminal Law (Reissue), para. 470; see paras 7.18 to 7.42, *infra*, for more on the meaning of ‘tend’ in this context, and its applicability to the offence in Scotland.

- 5.7 No case is cited as authority for this proposition, the author instead relying on a narration of some of the “wide variety of forms of behaviour” which have been the subject of charges.
- 5.8 The same is said in the Jury Manual,<sup>155</sup> the text prepared to assist the Scottish judiciary with the task of charging juries, which notes the practice of charging perverting the course of justice in situations where another nominate offence appears insufficient.<sup>156</sup>

*Gordon*

- 5.9 In his commentary on Harris, Gordon said that this is “an offence with no defined actus reus – all that matters is the mens rea”.<sup>157</sup> Ten years earlier, in the third edition of his book, Gordon was more circumspect.<sup>158</sup> While in the introductory remarks, he concedes that “attempt to pervert or defeat the course of justice has come to be regarded as a particular known crime”,<sup>159</sup> in the parts of the chapter which deal with offences against the course of justice<sup>160</sup> Gordon never directly addresses the elements of the crime in the way he does other common law crimes in the same book. He scrupulously avoids making the bare claim that any conduct intended to pervert the course of justice is sufficient to amount to this crime. Instead, he addresses a number of categories of action, each of which is a common subject of a charge of this type: destruction of real evidence, procuring false evidence, inducing persons to give false information to the police, failure to attend as a witness. For each he comments in turn about the extent to which this particular form of behaviour amounts to (or is now charged as) an attempt to pervert the course of justice.
- 5.10 It is striking that the constitutive elements of the offence were addressed only inferentially in the major text on the criminal law of Scotland, forty years after the crime, according to *Harris v H.M. Advocate*, cohered. The reason for this may be connected to reservations about the development of the offence, which Gordon

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<sup>155</sup> Judicial Institute for Scotland, *Jury Manual*, (Edin: Scottish Courts and Tribunals Service, 2017).

<sup>156</sup> *Jury Manual*, at part 40.

<sup>157</sup> *H.M. Advocate v Harris*, 2010 S.C.C.R. 931 at 944 (commentary).

<sup>158</sup> Gordon (3<sup>rd</sup> ed), chapter 47.

<sup>159</sup> Gordon (3<sup>rd</sup> ed), para 47.01; “has come to be regarded” is an atypically oblique way of introducing an offence, for the author.

<sup>160</sup> Gordon (3<sup>rd</sup> ed), paras 47.33 to 47.40.

expresses in the general part,<sup>161</sup> and to the relatively recent development of the offence, which he called “not fully crystallised”.<sup>162</sup> Certainly at some point between his first writing the chapter on perjury and allied offences and 2010 when, in his commentary on Harris he wrote that “there is no dispute that attempt to pervert the course of justice is a common law crime”,<sup>163</sup> Gordon’s view developed. The only thing that changed in the intervening years was the decision in Harris, which does not claim to, and cannot be read as, an advancement of the law in any way. It explicitly locates the development in the law as having occurred “by 1961”: so what is behind Gordon’s change in tone?

- 5.11 The challenge made by the appellant in Harris was effectively that the scepticism expressed by Gordon in 2000 was right; that the offence’s purported development was an unacknowledged and improper use of the declaratory power which should be disregarded; that it had a more limited actus reus than the modern cases suggested (that is, it required the elimination of evidence). This proposition was tested and rejected by the High Court on appeal, in a decision given by the Lord Justice General. The questions Gordon asked were answered, and authoritatively. There is resignation in his comments about Harris in 2010; an acceptance of something unwelcome to the author. But even the fact that Gordon’s acceptance of the inevitable took place between 2000 and 2010 is a demonstration of the flimsiness of the High Court’s claim that the offence had definitively settled “by 1961”.
- 5.12 The fourth edition of the special part of Gordon was published in 2017. The chapter on perjury and allied offences has been rewritten, though its opening paragraph still calls the development of the offence of perverting the course of justice “not fully crystallised”.<sup>164</sup>

#### *Textbooks*

- 5.13 The views of the textbook writers are broadly the same, though few authors address the subject head on and most couch their discussion in qualifications: there is a crime (or there might be a set of crimes) called something like “attempting to pervert the course of justice”, constituted by an act the purpose of which was to pervert the course of justice, and in practice a wide range of behaviour is. The

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<sup>161</sup> Gordon (3<sup>rd</sup> ed), paras 1.32 to 1.38; see para 1.14, supra.

<sup>162</sup> Gordon (3<sup>rd</sup> ed), para. 47.01.

<sup>163</sup> Harris, at 943.

<sup>164</sup> Gordon (4<sup>th</sup> ed), para 55.01.

treatment by Gane, Chalmers and Stoddart in their Casebook on Scottish Criminal Law is typical.<sup>165</sup> The section on “perverting or attempting to pervert the course of justice” begins, “[t]his is an offence which is capable of covering a wide range of conduct” and goes on to discuss the “commonest examples” of ways to commit the offence, without attempting a direct, comprehensive statement of the elements of the offence.<sup>166</sup> The reader must infer that the offence can be committed by any conduct accompanied by the required intention (if the text is intended to demonstrate that proposition).

5.14 In the third edition of his book, in 2011, Sheriff Cubie considered that perverting the course of justice was “still coalescing into a crime in its own right” but accepted that it was “charged as an offence in a number of circumstances”.<sup>167</sup> By 2016 any qualms held had evaporated in the face of the decision in Harris: “There can now be no doubt about the existence of a nominate crime of attempting to defeat the ends of justice”.<sup>168</sup> He summarises the substance of the offence:

“The essence of such a crime is as much the hindering or obstruction of justice as it is in the actual defeat or perversion”<sup>169</sup>

5.15 Jones and Taggart wonder whether a separate offence of this sort exists at all,<sup>170</sup> but it is hard to reconcile this statement with the authorities cited: Bernard Greenhuff<sup>171</sup> and H.M. Advocate v Martin.<sup>172</sup>

### *Legislation*

5.16 Perverting the course of justice is increasingly commonly dealt with in legislation as a nominate offence. The Double Jeopardy (Scotland) Act 2011, s. 2, makes reference to the category of “offences against the course of justice” when establishing the grounds on which an acquittal may be considered tainted. It defines an “offence against the course of justice” as:

<sup>165</sup> Gane C., Stoddart C. and Chalmers J., *A Casebook on Scottish Criminal Law* (4th ed), (Edin: W. Green, 2009).

<sup>166</sup> *A Casebook on Scottish Criminal Law* (4th ed), at p 619.

<sup>167</sup> Cubie, A., *Scots Criminal Law* (3rd ed), (West Sussex: Bloomsbury Professional, 2011), at p 312.

<sup>168</sup> Cubie, A., *Scots Criminal Law* (4th ed), (West Sussex: Bloomsbury Professional, 2016), at p 310.

<sup>169</sup> *Scots Criminal Law* (4th ed) at p 309.

<sup>170</sup> Jones, T.H. and Taggart, I., *Criminal Law* (6th ed), (Edin: W. Green, 2015), at p 357.

<sup>171</sup> Bernard Greenhuff, (1838) 2 Swin. 236.

<sup>172</sup> H.M. Advocate v Martin, 1956 J.C. 1.

## WHAT IS THE LAW OF PERVERTING THE COURSE OF JUSTICE?

an offence of perverting, or of attempting to pervert, the course of justice (by whatever means and however the offence is described) and –

(a) includes –

(i) an offence under section 45(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (aiding, abetting, counselling, procuring or suborning the commission of an offence under section 44 of that Act),

(ii) subornation of perjury, and

(iii) bribery,

(b) does not include –

(i) perjury, or

(ii) an offence under section 44(1) of that Act (statement on oath which is false or which the person making it does not believe to be true).

5.17 This definition almost treats perverting the course of justice as the umbrella offence, of which the others are only examples,<sup>173</sup> however it is also clearly drafted on the basis that a bare reference to perverting the course of justice would be insufficient or at least would give rise to doubt. Subornation of perjury needs to be specifically included within the definition and perjury itself specifically excluded, for fear that it would be caught if it were not. An offence may even fall within the definition without being described as such in the charge.

5.18 The International Criminal Court (Scotland) Act 2001 takes the approach of grouping perverting the course of justice with other inchoate modes of offending. The definition of ‘ancillary offence’ includes art and part involvement, incitement, attempt and:

“(d) perverting, or attempting to pervert, the course of justice in connection with an offence; or

(e) defeating, or attempting to defeat, the ends of justice in connection with an offence.”<sup>174</sup>

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<sup>173</sup> See paras 6.1 to 6.16, *infra*, for more about the relationship of the offence to other offences against the administration of justice.

<sup>174</sup> Article 23.5 of the Statute of the International Criminal Court, which was adopted on 17 July 1998 at Rome, requires conduct ancillary to genocide to be subject to the jurisdiction of the International Criminal Code.

5.19 It is now common for lists of offences, often required in legislation, to include a reference to perverting the course of justice.<sup>175</sup> Lawmakers plainly recognize the offence as a discrete one, but one that very considerably overlaps with – or has a special relationship with – other common law offences against the course of justice.

*The modern understanding*

5.20 The accepted modern consensus on perverting the course of justice in Scots law seems to be that:

- it is a separate nominate offence, warranting particular treatment, albeit that it overlaps considerably (and in some cases perhaps totally) with other offences concerned with the administration of justice;
- the offence is committed when a person does any act (or at least one of a very wide range of acts) with the intention to pervert the course of justice;
- it can therefore be committed in a near-unlimited number of ways: the law may impose no requirements on the character of the conduct capable of amounting to the offence;
- what is meant by perverting the course of justice (and what the required intention must be) is, as a result, best demonstrated by giving examples, rather than by comprehensive description.

5.21 The phrase ‘attempt to pervert the course of justice’, I suggest, has no natural or ordinary meaning, in the way that the words ‘theft’ or ‘murder’ do. It is not obvious what the central idea is; each part requires elucidation before you know what it means. Without wanting to adopt too reductive or literal an approach to analysing what we know about the offence in Scotland, it is worth looking at each part of the phrase separately: what it means to attempt; what a perversion is; and when there is, and is not, a course of justice. I will, however, address these slightly out of order.

## 6. What is a ‘course of justice’?

*Offences against the administration of justice*

6.1 We can learn about what a course of justice is by examining the structure of the offences said to be concerned with protecting it. There is nothing unusual about

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<sup>175</sup> For example, Rehabilitation of Offenders (Exclusions and Exceptions) (Scotland) Amendment Order 2013 Sch B1, para 3; Criminal Procedure (Scotland) Act 1995, s. 19A; the Procurement (Scotland) Regulations 2016, reg. 8(1)(e); or the Licensing (Relevant Offences) (Scotland) Regulations 2007, Sch 1, Part 3, para 47.

criminal offences overlapping, nor with an individual criminal offence appearing to be only a particular way of committing another, more broadly defined offence. But it has been suggested that perverting the course of justice has a special relationship to the other offences concerned with the administration of justice. Ferguson and McDiarmid wonder if it is a sort of umbrella offence, sitting behind every other offence protecting the course of justice:

“There is some uncertainty in Scots law as to whether there is, in fact, a category of crimes against the course of justice or whether there is really only one such crime – attempting to pervert the course of justice – and all offences which would otherwise fall into this category are really just examples of this. A crime like perjury, for example, is also an attempt to prevent the course of justice from running its proper course”<sup>176</sup>

- 6.2 The suggestion is bolder than simply that these other offences might all be charged as perverting the course of justice, given the apparent breadth of that offence. It is that perjury and subornation of perjury, deforcement and prison-breaking – all treated separately by Hume and the other institutional writers, before there was any suggestion of there being a general offence of perverting the course of justice – are merely modes of committing the proto-offence of perverting the course of justice.
- 6.3 It does not necessarily follow that because there is a broader offence which captures all of the conduct criminalised by any narrower offences that the latter are “examples” of the former.<sup>177</sup> To the extent that it is meaningful to talk about individual criminal offences with discrete qualities (rather than just identifying behaviour that has been, through one means or another, criminalised) it is hard to agree with Ferguson and McDiarmid’s suggestion. Firstly, it does not seem to account for the history. I have shown that a range of nominate, discrete offences concerned with protecting the administration of justice existed since at least the time of Hume, each with different and particular elements and principles applying to them. Later, during the mid-to-late 20<sup>th</sup> Century, these were supplemented or complemented by an offence of perverting the course of justice, developed by analogy with (among other offences) the subornation of perjury, but capturing a range of behaviour ultimately much wider. The gaps between the nominate offences were filled by perverting the course of justice. To suggest that offences which pre-

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<sup>176</sup> Ferguson and McDiarmid, at p 399.

<sup>177</sup> Consider the structure of the Sexual Offences (Scotland) Act 2009. Is rape (s. 1) simply an example of sexual assault by penetration (s. 2), which is itself an example of sexual assault (s. 3)?



date the advent of perverting the course of justice are simply species of it does not properly account for the decisions of the last 70 years.

- 6.4 The better account is given by Gordon, who addresses the emergence of the offence in the interstices of the other offences against the administration of justice:

“Perjury and the like have not *yet* been entirely relegated to the status of being only modes of the crime of attempting to defeat the course of justice, and must still be considered as separate crimes.”<sup>178</sup>

Even Gordon, however, contemplates a future where offences like perjury are subsumed into perverting the course of justice.

- 6.5 The criminal law proscribes behaviour. It proscribes behaviour for reasons (though those reasons may sometimes be opaque, and are often disputed), and it often proscribes groups of things for common reasons. Where categories of proscribed behaviour share a characteristic or a justification, we may look to that characteristic or justification to inform our answers to questions about individual offences within that class. So, for example, perjury is an offence because it perverts the course of justice by misleading courts and risking them producing incorrect outcomes, or outcomes tainted by falsehood. Prison-breaking is an offence because it perverts the course of justice by preventing one common type of justice outcome, a custodial sentence, from being completed. Both offences are therefore concerned with protecting the course of justice. But identifying a shared justification for a group of offences is not the same as identifying proscribed behaviour:

“The common feature which distinguished the group of offences against the course of justice was that they all constituted attempts to defeat or pervert the course of justice. It does not follow logically from that that any attempt to defeat or pervert the course of justice is necessarily a crime”<sup>179</sup>

- 6.6 We cannot reason back from the offences of malicious mischief and fire-raising (criminal because they damage property) to a general offence of damaging property. In individual cases, the elements of each offence require to be satisfied, and singling out particularised modes of behaviour, rather than general or purposive ones, is an important way in which we ensure that the criminal law does not over-reach. We do not regard murder, culpable homicide, drugging or reckless endangerment as mere modes of committing assault, simply because the crime of assault, on one view, is

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<sup>178</sup> Gordon (4<sup>th</sup> ed), para 55.01. My emphasis.

<sup>179</sup> Gordon (4<sup>th</sup> ed), para 55.01.

broad enough to encompass the behaviour also caught by them. There are distinct, though connected, reasons for the criminalisation of each, which are reflected in the elements of the offence and the body of case law that has built up around each offence.

- 6.7 The same is true for the offences against the course of justice: the differences between the offences matter. The essence of perjury, for example, is wilfully giving false evidence on oath or affirmation in judicial proceedings.<sup>180</sup> If perjury were merely a mode of committing the offence of perverting the course of justice, we would expect one of the elements of the mens rea of perjury to be an intention to pervert the course of justice. Motive, however, is irrelevant to perjury: a lie told wilfully in court for an intention unconnected to the course of justice (for example, to cover up embarrassment) would be perjury as much as one told specifically in order to influence the outcome of a trial or proof. Unless we consider that the fact of intending to lie in court is itself conclusive of an intention to pervert the course of justice, there must be modes of committing perjury that are not also attempts to pervert the course of justice. In the U.S., where a specific intent to obstruct justice is required, it has been held that the simple act of giving false evidence cannot amount to obstruction of justice since “the function of a trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses”.<sup>181</sup>
- 6.8 Conversely, there may be lies told in court that are not perjury but *are* attempts to pervert the course of justice. Whether perjury can be committed by giving knowingly false but legally incompetent testimony is a difficult question.<sup>182</sup> But if perverting the course of justice is a crime of pure mens rea, then a person who gives false evidence in court with that intention, even if their testimony was irrelevant and incompetent, would commit the offence.<sup>183</sup>

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<sup>180</sup> *Angus v HM Advocate*, 1935 J.C. 1, per Lord Morison at 6; *Hume*, i, 366; *Alison*, i, 465.

<sup>181</sup> *In re Michael*, 326 U.S. 224, at 227 to 228, 66 S. Ct. 78, 80 (1945); see also *United States v Williams*, 874 F.2d 968 at 980 (5<sup>th</sup> Cir. 1989).

<sup>182</sup> See, for example, *HM Advocate v Coulson*, 2015 S.C.C.R. 254 and the discussion in *Gordon* (4<sup>th</sup> ed) at paras 55.15 to 55.19.

<sup>183</sup> The accused in *H.M. Advocate v Smith*, 1934 J.C. 66, for example, probably had the intention to pervert the course of justice when he denied, during the trial of two men for corruptly soliciting a bribe, that he had been informed of the attempted solicitation and had expressed “that it was a ghastly state of affairs”. Nevertheless, he escaped the charge owing to the rule that “statements made by complainants outwith the

- 6.9 If perjury were only a mode of perverting the course of justice, there would be no way of committing perjury that did not also amount to its parent offence. Alternatively, if the offences are instances of the same thing, might we not expect to see some of the case law that applies to individual offences, such as perjury, also apply to the proto-offence of perverting the course of justice? Suppose that a person went into hiding to avoid a citation to give evidence, as in *Mannion*, but in fact had no evidence to give which could ever have been relevant at trial. The intent sufficient for perverting the course of justice is present, but the analogy with the law of perjury is not. Does the principled basis for not criminalising those lying when invited to give incompetent evidence not apply in relation to perverting the course of justice? If not, why not: incompetent evidence cannot (or should not) form part of the course of justice, so why should destroying or preventing it from reaching court ever pervert that course of justice, whatever intention is present?
- 6.10 Rather than try to craft a unified theory of the administration of justice offences, tying them together in principle and in substance, the more satisfying and historically sound thing to do is to recognise and account for their similarities and their differences. Perverting the course of justice is neither an umbrella offence, sitting behind and informing the other offences against the administration of justice (as Ferguson and McDiarmid suggest); nor are the other administration of justice offences inevitably becoming subsumed by perverting the course of justice (as Gordon fears). Rather, I consider that the case law describes a sort of residual offence.
- 6.11 There are individual offences against the administration of justice which are specific enough and resilient enough to have survived, and which have a central idea strong enough to be easily adapted to the changing procedures and principles of the justice system. Consider how, in *Logue v H.M. Advocate*,<sup>184</sup> the court concluded that the offence of bribing judges was sufficiently broad to include bribing a member of a licensing board. The court specifically rejected the idea that it might have to have deploy the declaratory power: the common law offence could be easily adapted by analogy, there being no principle applying to judges that should not also apply to

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presence of the party accused are never evidence against that party, except in certain very exceptional cases.”

<sup>184</sup> *Logue v H.M. Advocate*, 1932 J.C. 1.

board members. The offence of bribing judges proved resilient, and there was no need to have recourse to the gap-filling offence of perverting the course of justice.<sup>185</sup>

- 6.12 Perjury may be the best example. Though the rules of evidence changed significantly during the 20<sup>th</sup> century, in both civil and criminal contexts, the central idea that testimony given in court should be protected from deliberate falsehood has never been seriously doubted, and there has never been any real difficulty in adapting it to the changing rules of evidence.<sup>186</sup> The offence is also clearly distinct enough to have generated a number of appeals on questions unique to the law of perjury. Its proven flexibility protected it from prosecutors who might otherwise have felt that they had to have recourse to a more general charge of perverting the course of justice; and its uniqueness has protected it from being otherwise subsumed into the more general offence.
- 6.13 In other parts of the law, less flexible or less unique offences have not demonstrated such resilience. I have shown that early appeals on perverting the course of justice might easily have been interpreted as judgments on the elements of attempted subornation of perjury. Instead they became understood as judgments on a new offence, which filled the gaps between offences or, perhaps, occupied the grey areas that existed at the edge of offences. This can be seen most clearly in *Martin*, a decision which can be read as either an expansion of the offence of prison-breaking or a case about perverting the course of justice. Which it is doesn't matter, of course, to the would-be absconder, though it matters to later courts seeking to identify limits in the offence of perverting the course of justice.
- 6.14 There are a variety of statutory offences concerned with protecting specific aspects of the justice system. In *H.M. Advocate v Keegan*,<sup>187</sup> a charge of perverting the course of justice by giving a false name to the police when detained was accepted without comment: at the time, this was a specific offence under s. 1(5) of the Criminal Justice (Scotland) Act 1980.<sup>188</sup> Sections 44 to 46 of the Criminal Law

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<sup>185</sup> Though it is hard to imagine any bribe to a judicial official that would not have the purpose of intending to pervert the course of justice.

<sup>186</sup> Cf. *John Barr*, (1839) 2 Swin 282, where the declaratory power was used to criminalise false oaths in election declarations (though Lord Cockburn considered that it was a crime already, falling under the principle that the obstruction of legal proceedings "by the solemn asseration of falsehood" was criminal); see *Gordon* (3<sup>rd</sup> ed) at para 1.23 for a discussion.

<sup>187</sup> *H.M. Advocate v Keegan*, 1981 S.L.T. (Notes) 35; see also *H.M. Advocate v Davies*, 1994 S.L.T. 296.

<sup>188</sup> Now found in s13(6) of the Criminal Procedure (Scotland) Act 1995.

(Consolidation) (Scotland) Act 1995, containing offences of making false oaths, are rarely used, with charges under the common law of perjury apparently preferred.<sup>189</sup>

- 6.15 In *Waddell v MacPhail*,<sup>190</sup> the court confirmed the legality of choosing a charge of perverting the course of justice where a statutory alternative was possible. In this case the two accused had misled the police about the identity of the driver of a vehicle.<sup>191</sup> The reasons why general charges of perverting the course of justice might be preferred to specific statutory offences are the same as the reasons for preferring them to more specific common law offences.
- 6.16 Perverting the course of justice is a residual offence, occupying the edges of and the spaces in-between the other offences against the course of justice. When the definition of one of these offences is too strict or ambiguous, or where the behaviour in question is too novel, perverting the course of justice is there to fill the gaps. It is true that plenty of (but by no means all) behaviour caught by the individual offences against the course of justice is also caught by perverting the course of justice. But it is not the case that these offences have lost their separate existence as a result. Perverting the course of justice keeps pace with and avoids gaps created either by the expansion of the system of justice into new areas, or by limits on existing offences proving unsuitable to modern methods.

*The course of justice*

- 6.17 If perverting the course of justice were the background offence behind every other offence concerned with the course of justice, then it would be essential to know precisely what was meant by the offence, since its elements would also necessarily be part of the elements of the other offences. There would, for example, be no perjury without an intention to pervert the course of justice. Conversely, if the alternative theory is correct, and perverting the course of justice is a residual offence, filling the gaps in between a suite of more specific offences, then it is essential to understand what those offences have in common, where their boundaries begin and end, and what is required to stitch them together and protect the course of justice when the other, more specific offences are insufficient. Either way, it is necessary to identify the theme or story told by a consideration of all of

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<sup>189</sup> Gordon (4<sup>th</sup> ed), para 55.23.

<sup>190</sup> *Waddell v MacPhail*, 1986 S.C.C.R. 593.

<sup>191</sup> An offence under the Road Traffic Act 1972, s. 168.

these offences together: given what we know, and what we know about the scope of perverting the course of justice in particular, what is the 'course of justice'?

6.18 A perverted or defeated or un-administered course of justice must be the harm sitting behind the wasting of police time, subornation, perjury, deforcement and prison-breaking. This invites us to imagine an un-perverted or undefeated or fully administered course of justice: in "all cases, the essence of the charge is the interference with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case."<sup>192</sup> A *good* course of justice is one where no offences against the course of justice are committed: an act which is the subject of the law occurs, and the consequences envisaged by the law follow:

- only honest allegations are made to investigating authorities (therefore, no offence of wasting police time occurs);<sup>193</sup>
- those who might be required by the authorities make themselves available (therefore, no attempt to pervert the course of justice occurs);<sup>194</sup>
- no one influences the facts told to the authorities or the evidence which might emerge (therefore, no attempt to pervert the course of justice occurs);<sup>195</sup>
- no one influences the evidence that is to be given in court (therefore, no subornation of perjury occurs);
- the truth is told in court (therefore, no perjury is committed); and
- the court's decision is given effect: either by a sentence being served in full (therefore no prison-breaking occurs), or diligence being executed on the decree (therefore, no deforcement occurs).

6.19 This is to take a pure or complete approach to what a course of justice consists of. Many things which might or should be the subject of the law in some way are taken no further: an offence is not reported to the police by the victim, or a delict not pursued by the injured party. But it would not necessarily pervert the course of

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<sup>192</sup> Hanley v H.M. Advocate, [2018] HCJAC 29.

<sup>193</sup> See paras 3.58 to 3.72, *supra*.

<sup>194</sup> As in Mannion; see paras 3.41 to 3.44, *supra*.

<sup>195</sup> As in Scott; see paras 3.12 to 3.20, *supra*.

justice to fail to report an offence. The law allows for considerable discretion on the part of various actors in the justice system: the police who can drop an investigation, or the prosecutor who can decide not to pursue a charge. These decisions are part of the course of justice and may result in an outcome other than that which could lawfully follow: an un-investigated offence or an un-prosecuted offender. Clearly, therefore, while the law protects every stage of the process of justice, the law does not expect every stage to be followed in every case. There must be a sort of lawful discretion exercisable without committing an offence. The *good* course of justice I invited us to consider can properly be interrupted at any point, as long as it does so in an ordinary way, positively contemplated by the law.

6.20 An intention to pervert can only exist where the subject of the intention is a course of justice recognised by the law. If I mistakenly believed that, for example, my application to extend a deadline for submission of a thesis was the subject of possible criminal investigation, this would not make it a perversion of the course of justice for me to lie in that application. The courts have held that the existence of a course of justice is required for the offence to be committed.<sup>196</sup> It has always been clear that attempted subornation can take place in respect of a trial which is only ever in prospect or a possibility.<sup>197</sup> It would be reasonable to infer that a course of justice, in general, may be prospective or speculative, as long as what is in prospect or what is speculated does in fact amount to a course of justice. Scott and Dalton made it clear that the investigative stage of a criminal inquiry which might lead to a trial is part of the course of justice (and, therefore, that prospective or speculative investigations are caught). Martin confirmed that the course of justice extends past a trial, and encompasses the orders of the court disposing of the trial, including orders of imprisonment. Harris, confirming that engineering a wrongful driving record is perverting the course of justice, established that the *creation* of a course of justice is itself part of the course of justice. The things that may be the subject of a charge of perverting the course of justice are broad.

6.21 Two questions arise: to what extent does a course of justice have to be in place, or in prospect, for the offence to be committed; and to what extent does the offender have to have adverted to it or be aware of it? If in the knowledge that the police are investigating an offence, a person seeks to prevent someone from giving the police relevant information (for example, by intimidating a witness), then there is an actual

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<sup>196</sup> See *Fletcher v Tudhope*, 1984 S.C.C.R. 267 at 269, quoted at para 3.50, supra.

<sup>197</sup> *Hume*, at p 383; *Macdonald*, at p 167.

course of justice in motion. If, having committed an offence, a person takes steps to prevent it from being discovered (for example, by destroying a murder weapon) then there is a prospective or contingent course of justice. What if a person simply takes prudent steps in the actual commission of an offence to minimise their chances of discovery (for example, by taking the murder weapon with them, rather than leaving it at the scene): are we really implying some sort of duty on criminals not to minimise their chances of conviction? What if, before the commission of a planned offence, a would-be criminal takes perfectly lawful steps to prevent their later exposure (for example, by blocking the view of a security camera): if apprehended at that point, without an offence having been committed, is there even a prospective course of justice? What if, without any particular offence planned, a habitual criminal takes steps designed to minimise their risk of ever being detected (for example, by having their fingerprints burnt off): is a general intention sufficient, or does the offender have to have a particular course of justice in mind?

*England and Wales*

- 6.22 Other jurisdictions have devoted a great deal of judicial effort to the question of when a course of justice exists. In *R v Vreones*,<sup>198</sup> the defendant was convicted of perverting the course of justice by altering samples which were to be used as evidence in an arbitration. On appeal the defendant argued that no crime had been committed, since there never was an arbitration established and the samples were never led in evidence. The conviction was upheld, the court having no difficulty with the idea that the crime could be committed in respect of proceedings which were in active contemplation but which never materialised.
- 6.23 In *R v Selvage and Morgan*,<sup>199</sup> the Court of Appeal quashed the convictions of the defendants, one of whom worked at the DVLC and had improperly purged from its records endorsements on the driving license of the other. Rather than prosecute under a specific statutory provision, s101(6) of the Road Traffic Act 1972, the Crown charged them with attempts to pervert the course of justice and they pled guilty, following preliminary rulings by the trial judge concerning the nature of the offence.
- 6.24 Their convictions were quashed for a number of reasons, principally because of the Crown's failure to demonstrate the necessary intention. The court, though, took the opportunity to resolve the question whether this offence could be committed where,

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<sup>198</sup> *R v Vreones*, (1891) 1 QB 360.

<sup>199</sup> *R v Selvage and Morgan* [1982] Q.B. 372.



as in this case, “there was not the slightest suggestion that criminal proceedings were pending or imminent or being investigated”.<sup>200</sup> The court was satisfied that the existence of a course of justice was necessary for the offence to be capable of commission. It called this “one of the vital tests or principles” of the offence,<sup>201</sup> but settled on a broad definition of what constituted a necessary course of justice:

“[A] course of justice must have been embarked upon in the sense that proceedings of some kind are in being or are imminent or investigations which could or might bring proceedings about are in progress”<sup>202</sup>

- 6.25 A course of justice, therefore, existed not only when proceedings were active or pending, but when investigations preliminary to those proceedings were active or pending also. However, this test does not permit speculation. It is not sufficient that the offender did something with an intention that, should there be a relevant course of justice, it would be perverted. Whether proceedings are “in being” or “imminent” and whether investigations “could or might” bring those proceedings about are both testable facts.
- 6.26 In *R v Rafique*,<sup>203</sup> the court cast the net further back in time, catching conduct that took place before any investigation had even begun. Rafique had accidentally shot a friend then immediately hidden the shotgun. On appeal, he contended that, no investigation having yet begun, the offence could not be committed. The court was not impressed by this submission, holding that “whether an act has a tendency to pervert the course of justice cannot depend upon whether investigation of the matter which may become the subject of court proceedings has begun”.<sup>204</sup> Instead, the court held, what was relevant was that “the possibility of judicial proceedings must have been in the contemplation of the appellants”.<sup>205</sup> This returns us to the idea of a sufficient intention on the part of the offender, rather than a sufficient real-world possibility of there being a course of justice. Even in situations where no investigation of judicial proceedings was likely, a person might take actions with a

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<sup>200</sup> *Selvage and Morgan*, at 381C.

<sup>201</sup> *Selvage and Morgan*, at 381G.

<sup>202</sup> *Ibid.*

<sup>203</sup> *R v Rafique*, [1993] Q.B. 843.

<sup>204</sup> *Rafique*, at 850G.

<sup>205</sup> *Rafique*, at 851A.

view to ensuring they were perverted should they come about; and under the Rafique test, that would suffice.

- 6.27 In English law, therefore, while it is necessary for there to be a course of justice for the offence to be capable of commission, the definition of 'course of justice' has been expanded such as to provide no real or temporal limit on the offence at all. Consider the scenarios of the person apprehended blocking security cameras or burning off their fingerprint: these would be perversions of the course of justice because of the contemplation, by the offender alone, of something that would be such a course of justice.

*Australia*

- 6.28 In Australia, the requirement for an existing course of justice remains a meaningful limitation on the scope of the offence. In *R v Rogerson*,<sup>206</sup> the High Court of Australia held that "police investigations do not themselves form part of the course of justice"<sup>207</sup> and therefore attempts to mislead an investigation alone do not amount to the offence. The reason for this was that "neither the police nor other investigative agencies administer justice in any relevant sense".<sup>208</sup> This does not, however mean that interfering with a police investigation cannot amount to perverting the course of justice if that interference was "an act which has a tendency to deflect the police from prosecuting a criminal offence",<sup>209</sup> the logic being that affecting a police decision whether to prosecute invokes institutions which administer justice in a relevant sense.
- 6.29 The practical effect of this is to require the Crown not simply to prove an intention to deceive the police, but also to prove that the accused believed that further proceedings were possible and that their actions were likely to affect those proceedings, rather than just the investigation:

"it is necessary, in a case involving alleged conduct to divert or frustrate police inquiries, to identify some actual or potential relationship between the alleged

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<sup>206</sup> *R v Rogerson* (1992) 174 CLR 268.

<sup>207</sup> *Rogerson*, per Mason CJ at para. 4.

<sup>208</sup> *Rogerson*, per Brennan and Toohey JJ at para. 8.

<sup>209</sup> *Rogerson*, per Deane J at para. 9.

conduct and some pending, probable or possible curial proceedings whose course the accused intended to pervert.”<sup>210</sup>

- 6.30 This is a different from the English law on this subject and in particular from *Selvage* where an investigation was specifically identified as a stage by which “a course of justice must have been embarked on”.<sup>211</sup> The High Court specifically disclaims that passage in *Selvage*, stating that there is “no historical support for an extension” of the concept in that way.<sup>212</sup> But the High Court’s differences with the Court of Appeal are more principled than practical. The extension of the law in *Selvage* is limited to “investigations which could or might bring proceedings about”. What difference there is between this position and the High Court of Australia’s concession that investigations might be caught when there is an “actual or potential relationship” with “pending, probable or possible” proceedings is perhaps more a matter of focus and approach than end result. Whether we choose to define a course of justice in terms which include potential investigations or whether we adopt a more limited definition but concede the attempt can relate to a “potential relationship” with “possible” proceedings, the net result is likely similar.
- 6.31 This decision might therefore seem like it conflicts with *Rafique*, but its effect on the question whether a course of justice is on-going is similar. Both decisions invite us to focus first on the offender’s reasons for doing what he did. In both cases the relevant intention can be present even where the behaviour involved is directed at pre-proceedings investigations.
- 6.32 *Rogerson* did not settle the question in Australia. In *R v Beckett*,<sup>213</sup> the appellant’s case included a challenge to the prosecution on the grounds that no course of justice existed when interviews took place, at which falsified cheques were produced. The argument, considered “jejune” by the High Court,<sup>214</sup> was that one effect of *R v Murphy*<sup>215</sup> was to establish a “universal principle” that a course of justice must have been embarked on and that the incorporation of the offence into the Crimes Act 1900 (New South Wales) in 1990 post-dated the decision in *Murphy*. The High held that the definition in the Crimes Act of a perversion of the course of justice included

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<sup>210</sup> *Ibid.*

<sup>211</sup> *Selvage and Morgan*, at 381G.

<sup>212</sup> *Rogerson*, per Brennan and Toohey JJ at para. 8.

<sup>213</sup> *R v Beckett*, [2015] HCA 38. See paras 7.40 to 7.41, *infra*, for more on *R v Beckett*.

<sup>214</sup> *Beckett*, at para. 33.

<sup>215</sup> *R v Murphy*, [1985] HCA 50. See paras 7.36 to 7.37, *infra*, for more on *R v Murphy*.

“preventing ... the course of justice”, which was “eloquent of a legislative intention that liability extend to acts done with the proscribed intention in relation to contemplated proceedings”.<sup>216</sup>

*United States*

- 6.33 In the United States, obstruction of justice is a federal offence under sections 1501 through 1520 of Title 18 U.S.C. As well as setting out a host of specific ways in which justice can be obstructed,<sup>217</sup> there is a “catchall” omnibus clause,<sup>218</sup> in section 1503, which criminalises “whoever [...] endeavours to influence, obstruct or impede the due administration of justice”.<sup>219</sup> It is a requirement of the offence that there should be pending judicial proceedings.<sup>220</sup>
- 6.34 The general rule is that an investigation does not amount to a pending judicial proceeding, though there are a number of specific offences in Title 18 which criminalise the obstruction of certain forms of investigation.<sup>221</sup> However, the courts have been clear that there is no “rigid rule” governing when a judicial proceeding can be said to be pending,<sup>222</sup> and have held that where an investigation is capable of “ripening” into a judicial proceeding the requirement can be met.<sup>223</sup> So, for example, in *United States v Vesich* there was a pending proceeding where the defendant sought to encourage false testimony from a witness who had not yet been

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<sup>216</sup> Beckett, at para 35.

<sup>217</sup> Including “assault on a process server,” (§ 1501), “resistance to extradition agent,” (§ 1502) “influencing or injuring officer or juror generally,” (§ 1503) “influencing juror by writing,” (§ 1504) “obstruction of proceedings before departments, agencies, and committees,” (§ 1505) “theft or alteration of records or process; false bail,” (§ 1506) “picketing or parading,” (§ 1507) “recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting,” (§ 1508) “obstruction of court orders,” (§ 1509) “obstruction of criminal investigations,” (§ 1510) “obstruction of State or local law enforcement,” (§ 1511) “tampering with a witness, victim, or an informant,” (§ 1512) “retaliating against a witness, victim, or an informant,” (§ 1513) “obstruction of Federal audit,” (§ 1516) “obstructing examination of financial institution,” (§ 1517) “obstruction of criminal investigations of health care offenses,” (§ 1518) “destruction, alteration, or falsification of records in Federal investigations and bankruptcy,” (§ 1519) and “destruction of corporate audit records” (§ 1520).

<sup>218</sup> The structure of the sections and nature of the ‘omnibus clause’ is discussed in *United States v Aguilar*, 515 U.S.593 at 598, 115 S. Ct. 2357 (1994).

<sup>219</sup> 18 U.S.C. § 1503 (2000).

<sup>220</sup> *United States v Simmons*, 591 F.2d 206 at 208 (3d Cir. 1979).

<sup>221</sup> *Simmons*, at 208; *Aguilar*, at 599.

<sup>222</sup> *United States v Vesich*, 724 F.2d 451 at 454 (3d Cir. 1984).

<sup>223</sup> *Simmons*, at 210.

subpoenaed.<sup>224</sup> The court analysed the likelihood that there would, ultimately, be false testimony generated by the defendant's conduct, and though the conduct in this case was "perhaps at the outer edge of the required pendency", the fact that the defendant and witness expected the witness to testify satisfied the requirement for a pending proceeding.<sup>225</sup> There are two similarities with the Australian approach: first, an insistence that the rule is a limited one, followed by qualifications which, in practice, may render the limit less meaningful than it first appears. And second, the requirement for a pending course of justice can be satisfied, at least in part, by an examination of the mental state of the accused. An intention relating to a thing that is properly part of the course of justice can overcome inconvenient facts about whether such a course has actually begun.

*Whether a course of justice is necessary*

- 6.35 It seems common to begin the analysis of this question by insisting that the existence of a course of justice is a necessary element of the offence, but end it by having defined existence in terms so broad as to make it a hardly meaningful limitation on the offence. The course of justice can cover all stage of proceedings, including any preliminary stages; and it can exist even though it might only be prospective, contingent or possible.
- 6.36 This must be right. It would be absurd for the existence of criminal liability to depend on whether steps had or had not been taken by particular justice institutions (the police, prosecutors, the courts), steps which take place entirely outwith the control of the accused. A perverted course of justice is every bit as much risked by someone conspiring against it before investigations begin as after; and whether the offender knows about investigations, or not. The only meaningful limit identified is the one implied by the decision in *Selvage*: that there had to be a factual possibility of a prospective course of justice, rather than a speculative one. This standard would, for example, catch the man who adjusted security cameras before

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<sup>224</sup> Vesich, at 455.

<sup>225</sup> Vesich, at 456. For a more colourful example of an interference with an investigation being held to be sufficient to obstruct possible or likely proceedings contemplated by those involved, see *Commonwealth v Kelly*, 369 A.2d 438 (Pa. Super. Ct. 1976), where the defendant – a police officer – arranged for the arrest of an undercover officer who was investigating an illegal gambling operation, which was being run by the defendant.

committing an armed robbery, but might not catch the man who erased his own fingerprints, if he had no specific criminal act in mind to follow.<sup>226</sup>

- 6.37 In U.S. law, knowledge of the pending proceedings is essential.<sup>227</sup> Federal law also has a more developed approach to ascertaining whether proceedings are pending or not; their version of the question whether a course of justice exists. The question is whether there was a prospect of a course of justice ultimately arising, and it is relevant, in answering this question, to look at the expectations of the participants in the possible obstruction.<sup>228</sup> In other words, the relevant question is whether the subject of the actions of the defendant was something that was, would be, or could be a course of justice, regardless of the actual stage of development of the proceedings (or prospective proceedings) in question. This is a useful way to analyse the question, and perhaps only amounts to a more principled way of reaching the same conclusion as the English and Australian courts have. Answering the question whether a course of justice exists (or whether judicial proceedings are pending) by reference to actual procedural steps would very quickly risk becoming arbitrary, distinguishing between equally culpable acts based on the irrelevant factor of whether, for example, a particular notice had been filed by a prosecutor.
- 6.38 Analysed in any of the ways set out, this question quickly becomes subsumed in the wider issue of what sort of intention is sufficient to amount to the offence. Where that intention exists – where the subject of the criminal desire to pervert is something that would be a course of justice – it is immaterial whether that course has begun, or is in prospect or is likely to come about or not. Even the distinction between actions taken in contemplation of a general (fingerprints), rather than a specific (security cameras), course of justice could be answered by reference to the required intention: is the offender required to have a specific course of justice in mind, or not?
- 6.39 Ultimately, this too becomes a question of whether the offence is truly one of pure intention.

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<sup>226</sup> See para 6.21, *supra*.

<sup>227</sup> Aguilar, at 599.

<sup>228</sup> Vesich, at 455; and para 6.34, *supra*.

## 7. What sort of ‘attempt’ is required?

*Whether part of the law of attempt*

- 7.1 In *Hanley v H.M. Advocate*,<sup>229</sup> the appellant argued for the inclusion of elements of the law of attempt as part of perverting the course of justice. He had tried to convince two associates to intimidate a witness who was likely to identify him. It was argued that this was not an “overt act” that could “of itself” interfere with the course of justice, and that therefore his actions were not “sufficiently proximate” to amount to perverting the course of justice.<sup>230</sup> The court concluded that it was “unhelpful to look beyond offences against the course of justice in seeking to identify the character of” the offence. It did, however, endorse a passage in *Docherty v Brown*,<sup>231</sup> holding that it was sufficient to do “an act, or a part of that act, by which [a person] *meant* and *expected* to perpetrate” an offence.<sup>232</sup> The argument rejected by the court was that we should be concerning ourselves at all with the potential of any action to actually be able to pervert the course of justice. The court held instead that the intention and expectation of the accused was conclusive. The question raised by *Hanley* concerns the extent to which we should reason backwards from the principles applied to the law of attempt to ‘attempts to’ pervert the course of justice.
- 7.2 The word ‘attempt’ commonly features in the name of the offence. Perverting the course of justice is, however, a completed offence – albeit an offence that is completed as soon as some sort of attempt is embarked on. In *R v Rowell, Ormrod LJ* called the use of the word attempt “misleading”.<sup>233</sup> The general law of attempts does not apply.<sup>234</sup> In *R v Machin*,<sup>235</sup> it was said that:

“the word is convenient for use in the case where it cannot be proved that the course of justice was actually perverted but it does no more than describe a substantive offence”.

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<sup>229</sup> *Hanley v H.M. Advocate*, [2018] HCJAC 29.

<sup>230</sup> *Hanley*, at paras 6 to 7.

<sup>231</sup> *Docherty v Brown*, 1996 JC 48, a case concerned with the law of attempt.

<sup>232</sup> *Hanley*, at para 15. My emphasis.

<sup>233</sup> *R v Rowell*, (1977) 65 Cr App 174 at 177.

<sup>234</sup> See *R v Williams*, (1991) 92 Cr App Rep 158, where it was decided that the Criminal Attempts Act 1981 did not apply to a charge of attempt to pervert the course of justice.

<sup>235</sup> *R v Machin* [1980] 1 W.L.R. 763.

- 7.3 The suggestion seems to be that the word is, or should be, used where the attempt in question was ultimately unsuccessful.<sup>236</sup> Though this is an attractive idea, it rests on slightly circular reasoning: if the authorities have identified the alleged perversion and taken steps to prosecute it, it must be the case that the attempt was ultimately unsuccessful anyway, since it has been exposed. On this justification, could there ever be a prosecution for a plain, non-attempt, perversion of the course of justice? Perhaps only in a situation where the perversion was directed to an outcome which was irreversibly achieved: if a police officer fabricated evidence which was only exposed after a prosecution and a sentence served in full. Even in that scenario, however, other legal mechanisms would be available to rectify or correct the course of justice: appeal, the prosecution of the relevant offender, reference to the SCCRC, public exculpation, damages.
- 7.4 The fact that the general law of attempts does not apply does not mean that this is not an inchoate offence. Perverting the course of justice has an inherently inchoate character: the harm being prevented would not necessarily be achieved by the commission of the offence. Inchoate modes other than attempt are encompassed by the offence: conspiracies to pervert the course of justice are caught, as are incitements.<sup>237</sup> In *Hanley*, the court held that “the primary offence may be characterised as a form of conspiracy”.<sup>238</sup> On one view, perverting the course of justice is an offence of endangerment. Where the offence of culpable and reckless conduct protects the public at large from the *risk* of physical injury, perverting the course of justice addresses itself to the *risk* of justice being perverted by someone’s actions. The harm is complete when that risk is created.<sup>239</sup>

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<sup>236</sup> See, for example, *Lockhart v Massie*, 1989 S.C.C.R. 421, where a husband falsely claimed to be driving a car involved an accident. That his wife was really the driver was not exposed until it was too late for her to be prosecuted, and the charge was for a plain ‘perversion of the course of justice’. See also *Raymond Murphy*, Criminal Appeal Court, Oct 1977, unreported (referred to in *Gordon* (3<sup>rd</sup> ed), para 47.39, fn 11).

<sup>237</sup> See, for example, the series of cases which might have been charged as subornation of perjury, itself a form of conspiracy or incitement: *Scott v H.M. Advocate*, *Kenny and Kenny v H.M. Advocate*, *Dalton v H.M. Advocate*.

<sup>238</sup> *Hanley*, at para 14. See also *Nimmo Smith, W.A. and Friel, J.D., The Report on an Inquiry into an Allegation of a Conspiracy to Pervert the Course of Justice*, (Edin: HMSO, 1993) for an account of an alleged “conspiracy to pervert the course of justice which has resulted in decisions being taken by the Crown ... for the improper motive of preventing the public exposure of prominent members of the Scottish legal establishment as being practising homosexuals” (para 1.2).

<sup>239</sup> *Duff, R.A., ‘Criminalizing endangerment’*, in *Duff, R.A and Green, S.P. (eds), Defining Crimes: Essays on the Special Part of the Criminal Law*, (Oxford: Oxford University Press, 2005), p 43.



- 7.5 Instead of pointing to the applicability of the law of attempt, the use of the word ‘attempt’ reveals something about the essence of the crime. It is irrelevant whether the attempt is highly successful and a person, for example, evades criminal responsibility completely, or whether the attempt is immediately exposed: “an attempt to pervert the course of justice is *in itself* a punishable misdemeanour”.<sup>240</sup> The crime is completed by the commission of acts that attempt or risk the perversion of the course of justice, whether successful or not. This is not a description of a particular physical action, such as assaulting a person, nor is it an adjectival description of a type or class of action, such as sexual touching without consent. It is a description of action with a particular quality, or particular *potential* quality. It catches conduct that might, according to a legal test, lead to the perversion of the course of justice.
- 7.6 But what legal test? We are still left with the question of how to distinguish between the criminal and non-criminal: when is an action sufficiently advanced, or when is an intention sufficiently demonstrated, to engage the criminal law? Is there any type of action so remote from a real-world possibility of perverting the course of justice, that it cannot be transformed into a criminal act, no matter the intention? Even on the broadest understanding of the any-act theory of perverting the course of justice, we are surely not dealing with a crime of *pure* intention: forming a momentary plan in your head to pervert the course of justice, and doing no more, is not an offence. *Something* – though maybe any act at all – needs to be done. We know that the law of attempt is not the complete answer, but this problem is the central question behind the case law and literature on the law of attempt.<sup>241</sup> If the criminal law, as a whole, is to reflect a common set of principles or express truths about human behaviour and our standard of justice, then there seems no reason why rules that apply to a system of criminal law’s rules of attempts ought not also to apply to rules regarding attempting to pervert the course of justice – if the question being asked is the same. Unless there is some feature of the offence that distinguishes it from the general law of attempt, why should the law produce two different answers to the question ‘when has a person taken sufficient steps to bring about a proscribed result that they should become subject to criminal penalties?’. Without wanting to make too glib a point, when the criminal law uses the word ‘attempt’ in two places,

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<sup>240</sup> Vreones, at 367 per Lord Coleridge. My emphasis.

<sup>241</sup> Which, according to Gordon, “is so extensive as to be excessive”: Gordon (3<sup>rd</sup> ed), para. 6.01, fn.

should we not assume it means the same thing unless we have a good reason to think otherwise?

- 7.7 It is not unusual for an offence to be both substantive and have an inchoate or preliminary character: for example, the offence of making or supplying articles for use in frauds,<sup>242</sup> the offence of engaging in any conduct in preparation for giving effect to an intention to commit terrorism,<sup>243</sup> or the offence of being concerned in the supply of a controlled drug.<sup>244</sup> Each of these offences – sometimes known as pre-inchoate offences<sup>245</sup> – and perverting the course of justice, share common characteristics. The behaviour criminalised is not necessarily harmful of itself, but rather is criminalised because it is likely to cause harm further down the road, and it is better that the criminal law steps in early (being concerned in the supply of drugs) or because there is no good reason for the behaviour other than prospective criminality (making articles for use in frauds). The actions being criminalised are not limited or described, other than by reference to a type of character or intention (is their purpose use in a fraud? Are they doing this action in order to try to supply controlled drugs?). They are capable of being committed in an extremely wide number of ways. The only limit on the actus reus of making articles for use in frauds is ingenuity.
- 7.8 Is there a common theme behind the criminalisation of these inchoate-substantive offences? In some cases, it is required because the conduct involved would not have been criminal already under the general law of attempt: for example, the preparation of an article for use in frauds. For particular reasons, it is argued that the law is justified in reaching back further into the chain of causation than it typically would. A similar rationale underpins many possession offences where, for example, possessing a knife in public would not of itself demonstrate a criminal attempt to commit an offence, but we have decided that it should be criminal regardless, there being no good non-harmful reason to possess such an object.<sup>246</sup>

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<sup>242</sup> Fraud Act 2006, s. 7. See also the Criminal Justice and Licensing (Scotland) Act 2010, s. 49.

<sup>243</sup> Terrorism Act 2006, s. 5.

<sup>244</sup> Misuse of Drugs Act 1971, s.4.

<sup>245</sup> See, for example, Ramsay, P., *Democratic Limits to Preventive Criminal Law*, in Ashworth, A., Zedner, L., and Tomlin, P. (eds), *Prevention and the Limits of the Criminal Law* (Oxford: OUP, 2013), at pp 214 to 234.

<sup>246</sup> For a criticism of such offences, see chapter 6, 'The Unfairness of Risk-Based Possession Offences', in Ashworth, A., *Positive Obligations in Criminal Law*, (Oxford: Hart, 2013).

- 7.9 In other cases, the conduct caught may often be caught by the law of attempt: for example, many things a person does to be concerned in the supply of drugs might amount to a criminal attempt to supply drugs. Criminalisation there probably has reasons of efficiency or completeness behind it. The law of attempt has been considered and found wanting, either because it would too commonly present technical problems or because the proof requirements would be too laborious. We have decided to dispense with the protections of the law of attempt, with a view to comprehensiveness.<sup>247</sup>
- 7.10 All of these offences are concerned with behaviour with a certain character and therefore, perhaps, offenders of a certain character. Parliament wants to criminalise the sort of person who would become involved in the drugs trade, whatever they actually do (so it creates an offence simply of ‘being concerned’); it wants to criminalise the sort of person who assists a terrorist, whatever they actually do (so it creates the unusually remote offence of engaging in any conduct in preparation for giving effect to an intention to commit terrorism).<sup>248</sup> These are special rationales for criminalisation separate from any general justification that might be given for the criminalisation of attempt.<sup>249</sup> Whether the criminal law means something different by attempt in the context of perverting the course of justice therefore depends on the rationale for its criminalisation. Is the law trying to do something different with this offence or – if we were able to describe a complete offence of ‘perverting the course of justice’ – would it suffice to apply our general law of attempts to it? Or are we trying to criminalise the sort of person who would (whatever they actually do) try to pervert the course of justice? Is it so important that we should protect the course of justice, that we are justified in dispensing with the protections and technicalities applied to attempt? These questions inevitably arise when the law moves from

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<sup>247</sup> This was explicitly done in the U.S. with the offence corresponding to perverting the course of justice, where U.S.C. § 1503 requires an “endeavour”, rather than an attempt: “The word of the section is ‘endeavor’, and by using it the section got rid of the technicalities which be urged as besetting the word ‘attempt’, and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent”, *United States v Russell*, 255 U.S. 138 at 143 (1921).

<sup>248</sup> Lacey, N., *State Punishment*, (London: Routledge, 1988), at pp 58 to 73, discusses criminalisation founded in an evaluation of character. See also, Duff, R.A., ‘Choice, Character and Criminal Liability’, 12 *Law and Philosophy* (1993) 345-383 for a criticism of character theories as the basis of criminalisation.

<sup>249</sup> There is no consensus about the rationale for criminalising attempts, nor of the consequences for the criminal law of the model chosen. However, there is broad agreement about the range of possible rationales and their merits: see, for example, Duff, R.A., *Criminal Attempts*, (Oxford: OUP, 1996), Chapter 5, ‘Why Have a Law of Attempts?’; Ashworth’s *Principles of Criminal Law* (8th ed), pp 470 to 472; Gordon (3rd ed), para 6.02; Yaffe, G., *Attempts*, (Oxford: OUP, 2010), at pp 21 to 46.

criminalising a type of act to a state of mind. What are we trying to achieve, and why?

- 7.11 It is probably impossible to answer this question by reference only to the Scottish authorities. The case law has not yet produced challenges to the offence which tease out questions about what does and does not amount to the 'attempt' element of perverting the course of justice.

*An offence of pure intention?*

- 7.12 Duff suggests three categories of inchoate offence: offences of intention (where the intention to cause a harm is punished), offences of explicit endangerment (where the risk of causing a real harm is being punished) and offences of implicit endangerment (where there is no actual risk of harm, but the behaviour might contribute in some other way to harm).<sup>250</sup> The best we can probably say of the offence in Scotland is that it shows signs of belonging to all three categories. The offence is clearly concerned with a particular sort of criminal intention on the part of the accused, and it may be that any conduct at all, combined with that intention, is enough. That would mean that the conduct in question could have no – or a very low – risk of actually causing a perversion in the course of justice, but would be criminalised regardless. Is there danger in anything done with the purpose of perverting justice in the same way that there is implicit danger in every act of drink-driving, even where the facts may disclose no risk of harm to anyone at all? If we are truly concerned with criminalising the sort of people who would seek to pervert the course of justice, that would suggest a harm-blind or risk-blind approach to working out when an attempt was sufficient to engage the criminal law; the actual risk of causing a perversion would be immaterial.
- 7.13 The law of attempt is concerned with where to draw the line: the point at which an action becomes subject to the criminal law. But if the proper analysis of perverting the course of justice is that it is an offence of pure mens rea, then there is no line to draw. Any action suffices, even those that would not amount to an attempt in relation to other crimes. Can this be right? If I make notes on a plan to pervert the course of justice and leave them on my desk, I have done an act with the required intent, but have I really committed the offence? Can I really be said to have intended or risked harm when by my own actions I have both raised the possibility of perverting the course of justice, and also (by doing nothing further with my notes)

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<sup>250</sup> Criminal Attempts, at p 129.

ensured that no perversion of the course of justice could ever be committed? There are certain positive things that an accused is entitled by our law to do, such as pleading not guilty to something they did in order to test the prosecution's case, that are presumably often done with the intent to pervert the course of justice but which are not caught by the offence. These questions are perhaps better answered by an analysis of what precisely the required intention is – what does it mean to 'pervert'? – rather than by reference to the requirement for some sort of attempt.<sup>251</sup>

7.14 There are difficulties caused if the offence is truly constituted by any action whatever. The traditional account of attempt requires deliberateness in the sense of someone intending to do *something* that is a crime, rather than intending to do *a crime*: an offender has to intend to [do a thing] which in law is murder; not intend to [do murder]. But this account cannot be applied to perverting the course of justice if the offence consists solely of mens rea, with no conduct-limited principal offence to refer to. There is a difference between intending to do [a thing] which would pervert the course of justice, and intending to [pervert the course of justice] by doing a thing. A parent who washes a child's blood-stained jumper following the commission of an assault, unworried about any explanation for the blood, would be deliberately doing something which would pervert the course of justice, but she would have no intention to do so. Suppose that a person was aware that a diary was required to be produced as evidence in a trial but – unconnected to the subject of the trial – the diary also contained evidence of their having an affair. They destroy the diary, not with the intention of obstructing the trial or affecting its outcome, but in order to prevent the exposure of their (irrelevant) affair, out of a sense of shame. This person has deliberately done something which would pervert the course of justice, recklessly as to whether the course of justice was so perverted. But you can deliberately do something which would pervert the course of justice while reckless about whether it would. When the law requires specific intent, you cannot both intend an outcome and be reckless as to its occurring: if this is a crime of pure intention, can it criminalise someone for the potential quality of an act that they had not adverted to?<sup>252</sup> This would require a theory which divided acts into those with the capacity to pervert the course of justice, and those without. We do not have such a theory in Scotland: it would be supererogatory since the law is that *any act* can constitute the crime, with the required intention. But why should people who do

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<sup>251</sup> See part 8, *infra*.

<sup>252</sup> In Scotland, attempted murder can be committed recklessly, since wicked recklessness is sufficient mens rea for the completed crime: *Cawthorne v H.M. Advocate*, 1968 J.C. 32.

things deliberately, but are reckless as to whether their actions pervert the course of justice escape criminal sanction? If the person who destroyed the diary was aware of its relevance to the trial in prospect, then regardless of their specific intention, should their disregard for the integrity of the trial and their risking the course of justice not be punishable?

- 7.15 The opposite point is worth considering: should an act with no prospect of ever causing a perversion of the course of justice be punishable? This would include both impossible attempts (for example, seeking to avoid conviction for something that is not actually an offence, or trying to use magic to pervert the course of justice) and hopeless attempts (for example, seeking to bribe an honest officer, or to destroy an inconsequential piece of evidence). The submission by the appellant in Hanley that there had to be an act “capable of achieving” a perversion of the course of justice was not accepted by the court.<sup>253</sup> Instead the test was whether the steps taken were “designed to frustrate” the course of justice.<sup>254</sup> If we were truly trying to criminalise the sort of person who would commit a perversion of the course of justice, then the potential for an act to actually affect the course of justice would be irrelevant. This would suggest that entirely private acts are caught, as are acts tainted by legal or factual impossibility. It also suggests that there is no *de minimus* or contextual limit to be applied in law. This comes very close to a position where every single offence committed would almost inevitably amount in law to an attempt to pervert the course of justice, since it is only in very few cases that offenders commit crimes in the expectation of being convicted. Every step taken to minimise the risk of a crime’s exposure would amount to an attempt to pervert the course of justice.
- 7.16 Even if the any-act theory is correct, therefore, there are questions about the required standard of attempt that are not answered by the Scottish case law. If we take literally the courts’ insistence that the application of the general law of attempt is not apt, then we may have to construct a new body of principles to apply to the special circumstances of this offence.
- 7.17 Many of these questions could be addressed, without having to have recourse to an entirely new theory of attempt, if there were a logical way of limiting the *actus reus* of the offence by reference to some standard or description of behaviour. In other jurisdictions, the courts have developed a body of law concerned with separating

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<sup>253</sup> Hanley, at paras 7, 15 and 16.

<sup>254</sup> Hanley, at para 13.

out those acts which have the relevant potential quality – of being capable of perverting the course of justice – from those that do not.

*A tendency to pervert the course of justice*

- 7.18 In England and Wales the offence “consists of conduct which has a tendency and is intended to pervert the course of justice”.<sup>255</sup> In a large proportion of cases it will be obvious that the conduct alleged, if proved, had such a tendency. There are categories of conduct that so commonly charged as perverting the course of justice that they can be assumed to be good examples of such a tendency: concealing the commission of an offence, obstructing police investigations, or interfering with witnesses or evidence. But these categories are not closed.<sup>256</sup> *R v Rowell*<sup>257</sup> involved the making of a false complaint to the police which did not specifically incriminate another, about which the Court of Appeal conceded that there was “no reported English case where such conduct has been held to be an attempt to pervert the course of justice”.<sup>258</sup> It was, however, the “nature of the conduct” not previous practice which mattered and the court was satisfied, after examination of both English and Scottish authority,<sup>259</sup> that a false report to the police, though not identifying any particular person, had the required tendency.
- 7.19 In *R v Britton*,<sup>260</sup> the quick-thinking defendant had been stopped on suspicion of drunk-driving, but delayed the taking of a sample until after he had been able to find and drink a beer in front of the police, frustrating their efforts to use the sample in evidence. He argued that the offence of perverting the course of justice involved well-established categories of conduct, largely concerned with “deception of some kind”, which ought not to be extended. He argued that his ingenious actions were the product of a statutory loophole he was entitled to exploit and did not fall into one of these existing categories.<sup>261</sup> The appeal was not successful, the court

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<sup>255</sup> *R v Machin* [1980] 1 W.L.R. 763 at 767. See also the definition of the Scottish offence used in the Stair Memorial Encyclopedia (fn 154), which uses the “tends to” formula, but without citing Scottish authority for it.

<sup>256</sup> See the failed *eiusdem generis* challenge to the prosecution of un-enumerated actions under section 1503 of Title 18 U.S.C.: *United States v Howard*, 569 F.2d 1331 (5<sup>th</sup> Cir. 1978).

<sup>257</sup> *R v Rowell*, (1977) 65 Cr. App. R. 174

<sup>258</sup> *Rowell*, at 178.

<sup>259</sup> See paras 3.58 to 3.72, *supra*.

<sup>260</sup> *R v Britton* [1973] R.T.R. 502.

<sup>261</sup> *Britton*, at 506.

preferring the view that any action which “tampers with [...] or interferes with” the course of justice was sufficient.<sup>262</sup> This appeal is interesting, since there is no suggestion that the sample produced would be false; on the contrary, it was that it would truthfully reveal the defendant to have drunk alcohol that was the problem. Without deceit or falsehood involved, the defendant had taken an otherwise lawful step that denied the authorities evidence they would normally expect to be able to secure. That this was done in order to avoid the consequences of normal legal process, and did avoid those consequences, was enough.

- 7.20 The Oxford English Dictionary defines ‘tendency’ as “the fact or quality of tending to something; a constant disposition to move or act in some direction or toward some point, end, or purpose; leaning, inclination, bias, or bent toward some object, effect, or result.”<sup>263</sup> This is not quite the law of attempt, but it involves the same ideas. The act must have a disposition towards the perversion of the course of justice or it must suggest a course or direction that leads to such a perversion. But the English courts have only occasionally attempted to describe in detail what is meant by ‘tendency’.
- 7.21 In *R v Murray*,<sup>264</sup> the defendant tampered with a blood sample provided to him by the police in connection with prosecution under the Road Traffic Act 1972. His tampering was discovered when he gave the sample to his solicitor who, noticing the discrepancy with the police’s sample, alerted prosecutors. He was convicted and appealed on the grounds that to commit this offence a person has to do something more than “mere private action”.<sup>265</sup> Mr Murray had not yet taken any positive steps to introduce the sample into the investigation and his clumsy actions were discovered before he could have. The defendant contrasted his situation with that of the defendant in *Vreones* on the basis that in that case there were no further steps that needed to be taken by *Vreones* before samples which he had tampered with would be introduced into evidence. Having taken the steps that *Vreones* did, the false evidence becoming part of the proceedings was inevitable.

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<sup>262</sup> *Ibid.*

<sup>263</sup> “tendency, n.” OED Online. Oxford University Press, March 2016. Web, 16 April 2016.

<sup>264</sup> *R v Murray* [1972] 1 W.L.R. 475.

<sup>265</sup> *Murray*, at 477.



7.22 The court did not accept this “attractive” argument<sup>266</sup> and gave some guidance about the meaning of tendency:

“To establish a tendency or a possibility, you do not have to prove that the tendency or possibility in fact materialised. If it did, and if there is evidence of that, then of course that is powerful argument to show that there was a tendency; but it is not necessary.”<sup>267</sup>

7.23 It might be thought that the court understates things here. If something materialises, that is more than an “argument” that the thing was possible. But instead of something actually happening, the court held that what mattered was whether the prosecution established:

“that the appellant has done enough for there to be a *risk*, without further action by him, that injustice will result. In other words, there must be a possibility that what he has done ‘without more’ might lead to injustice.”<sup>268</sup>

7.24 In this case that possibility or risk was created by the prospect of the sample being sent by the laboratory that analysed it to the prosecution or police. There are two points to take from this. First, tendency is defined as a risk, without reference to a particular threshold. Second, the risk is created when it no longer requires further action by the defendant for that risk to occur. The risk has to be present, absent any suppositions that might be made about the defendant’s motives or likely further actions. In this case the court was satisfied that the risk existed because the defendant had put the sample outwith his control when he sent it to his solicitor. But what if further action was required by the defendant for the risk to be outwith his control: what if Mr Murray had tampered with the sample but then never sent it to anyone else?

7.25 In *R v Firetto*,<sup>269</sup> the court reduced the importance of the “without more” qualification. The facts were similar to those in *Murray*, but in discussing the presence of the required tendency, the Court of Appeal said that:

“There was, to say the least, a *likelihood that*, having taken the trouble to adulterate the sample and pay the not inconsiderable cost of analysis, the

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<sup>266</sup> ‘Attractive’ is used here in the same sense as ‘ingenious’ in *Mannion*: see fn 81.

<sup>267</sup> *Murray*, at 479.

<sup>268</sup> *Ibid.* My emphasis.

<sup>269</sup> *R v Firetto* [1991] Crim.L.R. 208.

appellant would endeavour to use the analysis to his own advantage or it would find its way into the judicial system by other means.”<sup>270</sup>

- 7.26 This represents at least an expansion on Murray and possibly even conflicts with it. If the fact-finder is entitled to speculate about the defendant’s likely further actions, this decision is an exception to the general position that acts preparatory to the commission of a crime do not amount to a crime. Are fact-finders entitled to infer from the purchase of a gun alone that a person has attempted murder, because there is a “likelihood” that they will go on to use the gun? Particularly given that an intention to pervert the course of justice also needs to be established, it seems unfair that that intent can then be also used against the defendant in speculating about what their further actions might have been. If intent is enough to imbue an action with the quality of ‘tendency’, then why consider the mental elements of the crime separately from the physical ones at all? The test instead ought to be whether the acts in question exhibit that tendency, not whether a person intended at any point for such a risk to arise. In *Vreones*, part of the offence was that “all that the defendant could do to commit the offence he did”,<sup>271</sup> a qualification which is not effective if speculation about further steps is permissible. The *Firetto* approach is indistinguishable from an any-act, pure-intention approach to the offence.
- 7.27 The law of England and Wales requires the demonstration of a tendency, meaning a level of risk, but has said little about the level of risk required. Is any risk at all sufficient, no matter how remote or theoretical?

*Tendency: practical and theoretical risk*

- 7.28 *Foord v Whiddet* involved a district judge in New South Wales who it was alleged had tried to influence the decision of a magistrate in committal proceedings.<sup>272</sup> Judge Foord had, however, approached the wrong magistrate: one who was not actually involved in the case and would have never had any intention of being influenced by the Foord’s approach anyway. Foord was charged under section 43 of the Crimes Act 1914, federal legislation which provided that an offence was committed by “any person who attempts, in any way not specifically defined in this Act, to obstruct, prevent, pervert or defeat the course of justice in relation to the judicial power of the

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<sup>270</sup> *Ibid.* My emphasis.

<sup>271</sup> *Vreones*, at 367.

<sup>272</sup> *Foord v Whiddet*, [1985] 16 A Crim R 464. For more information about this scandal and connected controversies, see Lee, H.P., and Campbell, E., *The Australian Judiciary* (2<sup>nd</sup> ed), (Melbourne: Cambridge University Press, 2013), pp 210 to 215.

Commonwealth". The court accepted that English authority on the meaning of tendency was relevant to the interpretation of this offence.<sup>273</sup>

7.29 It was argued, in a judicial review of the decision to commit Foord, that no tendency had been demonstrated by the evidence since the magistrate involved never in fact had any intention to further communicate with the magistrate who was actually hearing the case which Foord intended to interfere with. Even if the evidence involved showed behaviour that *could* have had the sort of tendency identified in a case like Murray, the actual risk involved was nil. There was never any possibility of a miscarriage of justice resulting from the steps taken.

7.30 The court rejected this argument, holding that despite the inevitable failure of Foord's attempt to exert his influence, an examination of his conduct revealed that, when he finished his attempt to corrupt the magistrate:

"at that moment in time, however momentary it was, there was the possibility or risk that what the applicant had asked might lead to injustice. Until [the magistrate]'s reaction to the applicant's words became manifest, the risk was there."<sup>274</sup>

7.31 What sort of possibility is the court talking about here? It cannot be an actual possibility, since the magistrate gave evidence, which was accepted, that he would never have acted in the way he was asked. But by identifying the relevant moment as being between the judge concluding his plea and it becoming clear that it would never be relied on, the court appears to be suggesting that the tendency is to be identified in one of two places: in the mind of Judge Foord, who did not know whether and must have hoped that he would be successful; or in a speculative reality, since the judge had created a state of affairs where a less scrupulous magistrate might well have been convinced to alter his decision-making. Neither is a particularly satisfying explanation for this decision. If seeking to corrupt a corruptible judge is an attempt to pervert the course of justice, should seeking to corrupt an honest one be *an attempt to attempt to pervert the course of justice?*<sup>275</sup>

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<sup>273</sup> Foord v Whiddet, at paras 17 to 23. See also Sungrave Pty Ltd v Middle East Airlines SAL, (1975) 134 CLR 1 at 22, per Mason J.

<sup>274</sup> Foord v Whiddet, at para 33.

<sup>275</sup> In United States v Atkin, 107 F.3d 1213 (6<sup>th</sup> Cir 1997), an attorney accepted money from a defendant, not his client, in order to bribe the defendant's judge. This was held to be a criminal endeavour despite it never being capable of success.

- 7.32 The first option, that the possibility or risk existed subjectively in the mind of the judge, should be rejected for the same reasons that I criticised the decision in *Firetto*. If we mean to have an effective conduct limit on the offence, the intention of the accused should not be both determinative of the characterisation of his actions and the necessary mental element of the offence. The second option, which suggests that the possibility or risk both existed and did not until the magistrate made it clear that he was not to be so convinced, can also be rejected. It amounts to little more than a more abstracted way of looking at the intention of the accused, since in many cases – including this one – it will be established in evidence that an attempt was never going to be successful. Without wanting to raise questions of determinism, the fact that a person is being prosecuted for the attempt to pervert suggests that it did not, ultimately, succeed and – on one view – never could have. To pretend otherwise and to pretend not to have established something, for the purpose of confecting risk, involves taking account of the accused’s subjective ignorance and preferring it to a state of affairs that has been evidentially established.
- 7.33 It would, however, be unsatisfactory if the accused, in situations like this one, were able to benefit from the fact that he had selected an honest would-be conspirator. The difficulty has been caused by the court focusing too much on risk as the sole determiner of tendency. Risk is an incident of tendency, but not the only way that it expresses itself. An assessment of risk involves the weighing up of information about the act itself (i.e. improperly asking a magistrate to change his decision) and information about the context or environment (i.e. the fact that the magistrate was honest). Both need to be given weight. In *Firetto*, the assessment also involved information about the state of mind of the accused (i.e. the fact that he had the intention to pervert the course of justice meant that he was likely to take further steps to do so). But is this a coherent way to achieve our aim of describing and limiting an *actus reus*?
- 7.34 Rowell encouraged an analysis of the “nature of the conduct”, not a probabilistic assessment of likely success. The OED defines tendency in terms of a “fact or quality” or a “disposition”. The assessment of tendency should not concentrate on either the possible actions or motive of the accused or on the likely responses of anyone else. The focus should be on the quality or nature of the conduct alleged, looked at objectively. Is it behaviour that could, absent any speculation about future actions, lead to a perversion of the course of justice? Is it the *type* of behaviour that, without the accused doing anything further and with a reasonable set of assumptions about the way the world works, could create the possibility of a

perversion of the course of justice? The question should not be whether a risk was in fact caused – that ought to be as irrelevant as whether the course of justice was perverted, and for the same reasons – but whether the behaviour of the accused was by its nature risky. On the facts of *Foord v Whiddet*, therefore, the court should not have asked whether a perversion of the course of justice was actually risked, if only for a moment. It should instead have asked whether the act of pressuring a magistrate to change a judicial decision is a description of behaviour that, generally speaking, risks perverting the course of justice. Which, of course, it is.

*Tendency: whether a necessary element*

- 7.35 There is a line of Australian authority that has doubted the existence of a requirement to demonstrate tendency. In these cases, the court has either disputed whether this is an element of the crime at all, or has identified the relevant tendency as being demonstrated by the accused’s intention to pervert the course of justice when doing the act charged.
- 7.36 In *R v Murphy*,<sup>276</sup> the High Court of Australia had to deal with another allegation of judicial misbehaviour, of the most serious kind. One of their own judges, Lionel Murphy, was convicted of perverting the course of justice by seeking to influence the same committal proceedings that were the subject of *Foord v Whiddet*.<sup>277</sup> For Justice Murphy it was argued that tendency should be equated with likelihood and that likelihood, here, meant a real possibility.<sup>278</sup> The court did not accept this and, quoting the parts of the OED definition of tendency which require a “leaning [...] or bent towards some object, effect or result”, the court concluded that tendency did not mean “tending to achieve the end of perverting but tending to fulfil the purpose of perverting”.<sup>279</sup> Any act, the court held, which has as its purpose the perversion of a course of justice had the required tendency. The High Court considered that support for this approach could be found in the English authority on the common law offence. In *Of Vreones*, it said that “the conduct [...] was sufficient to support the conviction [...] not primarily because of any relation it bore to possible or probable

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<sup>276</sup> *R v Murphy* [1985] HCA 50.

<sup>277</sup> Justice Murphy’s conviction for perverting the course of justice was overturned on appeal. He was acquitted at a second trial. He died before an official investigation into his fitness for judicial office reported. Lionel Murphy was a celebrated judicial radical and a former Attorney-General of Australia. For more details of this extraordinary saga, see Cowdery, N., *Reflections on the Murphy trials*, (2008) 27 *University of Queensland Law Journal* 5.

<sup>278</sup> *R v Murphy*, at 58.

<sup>279</sup> *R v Murphy*, at 59.

consequences but because of its relation to the accused's intentions or purposes."<sup>280</sup> The court cited Machin in support of this, but the quote used does not accord with Machin.<sup>281</sup> The High Court concluded:

“conduct will amount to an attempt if it has a tendency to fulfil the guilty intention, that is to say if it is a step directed to or aimed at fulfilling that intention. Whether the conduct has a prospect of producing a perversion of justice is not a necessary element of the offence.”<sup>282</sup>

- 7.37 This defines the requirement for tendency all but out of existence. If there is no requirement for the behaviour to produce a prospect, even a theoretical one, of the course of justice being perverted then this is an any-act crime: the position is indistinguishable from that in Scotland. If the mental element is present then the conduct element perforce must be as well. The most factually or theoretically impossible attempt would, if made in earnest, be sufficient.
- 7.38 Australian cases on perverting the course of justice, the reader might notice, themselves demonstrate a tendency: they are more exciting than domestic ones. In *R v Meissner*, the appellant had been convicted of improperly seeking to influence a sex worker to plead guilty where she was accused of making a false statutory declaration in connection with photos that allegedly existed of her and a state Minister naked together on a boat.<sup>283</sup> One of the questions for the court concerned whether the charge was properly made in circumstances where there was no evidence of what the 'correct' result would have been: a plea of guilty or not guilty. The tendency which the court identified here was present whether or not the person being influenced ought properly to have pled guilty or not guilty. Does trying to convince a guilty person to plead guilty tend to pervert the course of justice? It is hard to say, but the requirement for tendency, the court held, was met by the nature

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<sup>280</sup> Ibid.

<sup>281</sup> “The gist of the offence is conduct which may lead and is intended to lead to a miscarriage of justice”: *R v Machin*, [1980] 1 W.L.R. 763 at 767, quoted in *R v Murphy*. My emphasis. The underlined words direct us to an assessment of capacity or capability, rather than an analysis of purpose.

<sup>282</sup> *R v Murphy*, at 61.

<sup>283</sup> *R v Meissner*, 130 ALR 547 (1995). The case arose from the 'love boat' scandal. Joe Meissner, a former karate world champion and professional poker player, was an infamous figure in 1980s New South Wales politics, with convictions for theft of machine guns and assaulting a footballer. His boat, the *Kanzen*, was at the centre of a number of connected scandals that embroiled the NSW Labor party: see 'The Virginia monologues: Virginia Perger, the prostitute who sparked the 'Love Boat' scandal, tells the truth about the politicians, sex romps and photos', *Sydney Morning Herald*, 26 November 2005, and 'Lid Lifted on the Ugly 80s', *Sydney Morning Herald*, 25 November 2005.

and quality of the conduct, absent any analysis of whether it would factually lead to a perversion of the course of justice. To this extent, this decision accords with Murphy: it is not necessary for there actually to be a “prospect” of the course of justice being perverted. Obviously that prospect could not exist if someone was being influenced, even improperly, to plead guilty in a situation where guilty was the ‘correct’ plea. But where this decision departs from Murphy is in its analysis of tendency:

“The course of justice that was put at risk by the alleged conduct of the appellant was not the entry of a plea of guilty by someone who was not guilty but the entry of a plea of guilty otherwise than by exercise of a free choice in the interests of the person entering the plea. If the conduct of the appellant had the tendency to produce that result, the actus reus was established. The mens rea was simply an intention to induce the entry of the plea of guilty when Ms Perger would not or might not have entered that plea if she had exercised a free choice in her own interests. The motive of the appellant – to protect his political associates, for example – is not an element of the offence, but it is material to the ascertainment of the intention with which he engaged in the conduct he did.”<sup>284</sup>

7.39 What the court seems to be doing here is reconciling the risk-based approach to tendency in *Foord v Whiddet* and the intention-based approach in *Murphy*. The court does not attempt a probabilistic enquiry into whether and for how long a risk was created of the course of justice being perverted, nor does it really ask what the nature of the perversion would have been had the tendency materialised. Instead, it analyses the character of what was done and asks whether that *sort* of conduct has the potential to pervert of the course of justice. When the court talks of a “tendency to produce that result”, the relevant result is not a perversion of the course of justice but “the entry of a plea of guilty otherwise than by exercise of a free choice”. This is perhaps a two-stage analysis of what ‘tendency’ means. First, you categorise the behaviour that the accused is charged with in terms of what it might mean for the course of justice. This is done objectively, without reference to the particular facts of the case: for example, is the course of justice perverted when people are influenced to plea otherwise than by free choice, or is the course of justice perverted when evidence is tampered with? If the answer is yes, you ask whether the accused’s behaviour tending towards that end.

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<sup>284</sup> Meissner, at para. 29.

- 7.40 The High Court of Australia recently had the opportunity, in *R v Beckett*,<sup>285</sup> to resolve the tensions in these various authorities on the meaning of tendency. In *Meissner*, the accused had been charged with a common law attempt to pervert the course of justice, the relevant conduct having taken place before the commencement of section 319 (creating the statutory felony of perverting the course of justice) and section 341 (abolishing the common law offence of attempting to pervert the course of justice) of the Crimes Act 1900.<sup>286</sup> In *Beckett*, the accused was a solicitor alleged to have produced false photocopies of bank cheques during an interview with officials in a tax investigation. It was accepted that proof of tendency was an element of the crime, despite the phrase not appearing in section 319. But the accused argued that the proof of tendency required was of the *Murphy* kind, that is tendency not as “an objective quality of the act” but “tendency to fulfil the proscribed intention”.<sup>287</sup> The four-judge majority accepted this and said that the effect of *Murphy* was that the offence had only two elements: the accused doing the act charged, and doing that act with the intention to pervert the course of justice.<sup>288</sup> Any act is sufficient, and tendency is an aspect of the accused’s intention, not a limit on the conduct that can constitute the offence.
- 7.41 Nettle J dissented. He considered that there was a third element to the offence: “that the act or omission had a tendency to pervert the course of justice”.<sup>289</sup> He accepted that on a bare reading of the words of the Crimes Act 1900, either interpretation could be correct.<sup>290</sup> He identified a number of cases, including *R v Charles*,<sup>291</sup> where the court had clearly operated on the assumption that, in incorporating the offence into the Act as it did, the legislature intended to incorporate all aspects of the common law offence, including the requirement for a factual, rather than purposive, tendency to be demonstrated. Ultimately, his argument was principled: an ambiguous penal statute should be interpreted so as not to restrict liberty as much as possible, and the reading contended for by the majority “would potentially result

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<sup>285</sup> *R v Beckett*, [2015] HCA 38.

<sup>286</sup> The criminal code for New South Wales.

<sup>287</sup> *Beckett*, at para 42.

<sup>288</sup> *Beckett*, at para 46.

<sup>289</sup> *Beckett*, at para 49.

<sup>290</sup> *Beckett*, at para 61.

<sup>291</sup> *R v Charles*, unreported, 23 March 1998, referred to and quoted from in *R v Beckett*, [2015] HCA 38, at para. 53.



in a very wide range of conduct, including conduct that was not previously unlawful, being criminalised as a perversion of the course of justice”.<sup>292</sup>

*Tendency: the level of risk, practical impossibility and legal impossibility*

- 7.42 No matter which version of tendency is preferred a question remains. Is a threshold applied to the tendency and if so, what is it? If tendency is of the Murray kind and an actual possibility or risk requires to be established, is it any possible risk, even a remote one, or should the law require a more substantial risk to be demonstrated? Even if tendency is interpreted in the way suggested in Murphy, and we are seeking to establish that tendency in the purpose of the accused, the question still needs to be asked. Someone can do something with a purpose which poses an insubstantial risk to the course of justice as much as they can with more serious intent. English authorities only talk about “a risk” or “a possibility”, suggesting that any non-zero level of risk is sufficient.
- 7.43 There is at least one Australian case, *Healy v R*, where the court has held that a more than insubstantial risk needs to be present for a tendency to be demonstrated.<sup>293</sup> The Supreme Court of Western Australia cited *Foord v Whiddett* and *Murray* as authority for the proposition that a tendency was present where “there was a risk, without further action from the appellant, that what he had said or done might lead to an injustice in the sense that there was a *real possibility* that we he had said or done might lead to injustice”.<sup>294</sup> This is in any event a difficult proposition to follow and is not supported by the authorities it cites. *Murray* simply talks about “a risk ... that injustice will result”<sup>295</sup> and *Foord v Whiddet* simply talks about “a risk”.<sup>296</sup>
- 7.44 In *R v Foord* in the Supreme Court of New South Wales,<sup>297</sup> the judge was invited to direct the jury that they could only find an action to have a tendency when it produced “a *substantial* tendency as distinct from a mere theoretical possibility or remote possibility”. The Supreme Court rejected this submission without needing to “further dilate” on the subject, saying that there was no “warrant or justification” for it.

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<sup>292</sup> Beckett, at para 62.

<sup>293</sup> *Healy v R*, [1995] 15 WAR 104.

<sup>294</sup> *Healy*, at p 107B. My emphasis.

<sup>295</sup> *R v Murray*, [1972] 1 W.L.R. 475 at 479.

<sup>296</sup> *Foord v Whiddet*, at para. 33.

<sup>297</sup> *R v Foord*, (1985) 20 A Crim R 267. This case arose from the same background facts as *Foord v Whiddet*.

- 7.45 It seems, then, that all that is required in New South Wales and England at least, is for the evidence to demonstrate a non-zero possibility of behaviour leading to a perversion of the course of justice. But what if the evidence is of behaviour of a character or class that ordinarily would pervert the course of justice but which, for some reason inherent to the specific actions alleged, in fact demonstrates no possibility of such a perversion? This is not the sort of question raised by *Foord v Whiddet* where it was the character of the accused's would-be conspirator that it was suggested reduced the risk to nil; the question here is about a situation where the character of the behaviour itself suggests a nil risk, such as the factually impossible attempt: what if I try to pervert the course of justice by magical incantation?<sup>298</sup>
- 7.46 In *R v Scholes*,<sup>299</sup> a suspended driver had killed his brother and another woman after driving dangerously. Immediately following the crash, he dragged the fatally injured woman into the driver's seat and told bystanders that she had been driving. This attempt to evade the consequences of his actions was, however, doomed to fail. Witnesses had seen the entire pitiful charade unfold and the injuries suffered by the woman would always have demonstrated that she had not been in the driver's seat. The court considered, in an appeal by the D.P.P. against sentence, that the respondent's "post-accident conduct would not have warranted a conviction for the offence of attempting to pervert the course of justice". Rather than having the required tendency, the respondent's behaviour "amounted [...] to no more than a vain and pathetic attempt [...] to avoid reality."<sup>300</sup> Whether tendency was extinguished because a vain attempt cannot produce the right sort of tendency or because vain attempts demonstrate insufficient intention is not clear from the judgment.
- 7.47 It seems at first as if the court has held that any "vain" attempts to pervert the course of justice will inevitably fail to demonstrate the requisite tendency, and some commentators have interpreted this in that way, saying that the reasoning suggested that "if it is impossible for the conduct to succeed in perverting the course

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<sup>298</sup> This is another question that only arises in consequence of the non-application of the general law of attempt. If it applied, then no separate analysis of the impossible attempt to pervert the course of justice would be required: whatever a jurisdiction's answer to that point is would simply be applied to the offence of perverting the course of justice.

<sup>299</sup> *R v Scholes*, (1998) 102 A Crim R 510.

<sup>300</sup> *Scholes*, at para. 24.

of justice, the offence is not established".<sup>301</sup> Courts in Australia had, of course, already rejected one strain of impossibility-based argument in *Foord v Whiddett* and similar cases. The Victorian Court of Appeal has perhaps been misunderstood here. Impossibility can attach to an attempt in two ways: because of the context of the attempt, or because of the inherent qualities of the attempt. As the same court said in a different case, *R v Aydin*:

“practical impossibility is irrelevant if [a theoretical] tendency is present. It would not be present if, for example, a person attempted to pervert the course of justice by sticking pins into a wax model of the prosecutor; but it would be present, again by way of example, if the accused wrote an intimidating letter in Portuguese to a judicial officer whom the accused wrongly believed to understand that language.”<sup>302</sup>

7.48 This is an analysis very close to the one I suggest based on the court’s reasoning in *Meissner*.<sup>303</sup> Tendency should require an analysis of the character of the conduct, objectively considered. If we understand the court in *Scholes* to be talking about factual impossibility, then their judgment can be criticised on the basis that it produces the unwelcome result that whether an offence is committed or not could depend on whether witnesses were present.<sup>304</sup> But if one prefers the question asked by the same court in *Aydin* – does the behaviour have an inherent tendency to pervert? – then the result is more understandable. What the respondent was accused of could *never* have resulted in a perversion of the course of justice, the steps taken being simply too pathetic. Crucially, it doesn’t matter whether the witnesses were present or not: we are not required to speculate about any third parties’ possible actions, attitudes, honesty or next steps. All we have to do is assess the character of the behaviour itself, against the background of the world as we reasonably know it to be. There is a difference between something being “doomed to fail for reasons that are unconnected with the accused’s act”<sup>305</sup> and doomed to fail because of the nature of the accused’s act. The Court of Appeal in England has taken the inevitable, pitiful failure of an attempt to be a relevant mitigatory factor and, in *R v Sookoo*,

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<sup>301</sup> Victorian Parliament Law Reform Committee (2004), *Administration of Justice Offences*, Parliament of Victoria paper no. 75 of session 2003-2004, at pp 50 and 51.

<sup>302</sup> *R v Aydin*, [2005] VSCA 85.

<sup>303</sup> Para 7.33, *supra*.

<sup>304</sup> See the comments in Victorian Parliament Law Reform Committee, at p 51, fns 199 and 200.

<sup>305</sup> *Beckett*, at para 44.

suggested that such attempts should not routinely be charged,<sup>306</sup> but that such attempts do amount to the offence.<sup>307</sup>

- 7.49 In the U.S., impossibility is no defence to the corresponding offence, separately from the question whether it is a defence generally in charges of attempt.<sup>308</sup>
- 7.50 In Scotland, the general rule is that impossibility is irrelevant, save where a person was aware of it (and therefore would lack the required mens rea).<sup>309</sup> It must be assumed, following Harris and Hanley, that the same rule applies to perverting the course of justice.

*United States: endeavours*

- 7.51 In the U.S., the actus reus of the offence under section 1503 of Title 18 is anything that constitutes an “endeavour” to obstruct justice.<sup>310</sup> An endeavour is “less than an attempt”,<sup>311</sup> but more than any act at all. The act must be “likely to obstruct justice”<sup>312</sup> or have the “natural and probable effect”<sup>313</sup> of doing so.
- 7.52 Speculation about intervening steps between the defendant’s endeavour and the outcome that would obstruct justice is discouraged. In *United States v Aguilar*, the defendant provided false statements to an FBI agent who was unconnected to the relevant grand jury investigation. The Supreme Court held that the possibility of this act ever obstructing justice was “speculative”, since there was no evidence of what use the statements might have been put to in the circumstances: no offence was committed.<sup>314</sup> This is a meaningful conduct limit on the offence: an actual risk is required, and the offender must have done everything they could to bring about that risk.

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<sup>306</sup> R v Sookoo, [2002] EWCA Crim 800.

<sup>307</sup> See the Criminal Attempts Act 1981, especially s1(2).

<sup>308</sup> *Osborn v United States*, 385 U.S. 323 at 333 (1966): “Whatever continuing validity the doctrine of ‘impossibility’ may continue to have in the law of criminal attempt, that body of law is inapplicable here”.

<sup>309</sup> *Docherty v Brown*, 1996 J.C. 48, in particular the judgment of Lord Justice-Clerk Ross.

<sup>310</sup> See para 6.33, supra.

<sup>311</sup> *United States v Buffalano*, 727 F.2d 50, at 53 (2d Cir. 1984).

<sup>312</sup> *Aguilar*, at 602.

<sup>313</sup> *Aguilar*, at 599. This has become known as the “nexus requirement – that the act must have a relationship in time, causation or logic with the judicial proceedings” (ibid).

<sup>314</sup> *Aguilar*, at 601.

7.53 Justice Scalia dissented.<sup>315</sup> It was established law that the required intention had to be the specific intent to obstruct justice, rather than (as the government had sought to argue in *Pettibone v United States*) the intent to do a thing which would obstruct justice.<sup>316</sup> Scalia thought that the majority had over-interpreted one line of the decision in *Pettibone*:

“*Pettibone* did acknowledge, however – and here is the point that is distorted to produce today's opinion – that the specific intent to obstruct justice could be found where the defendant intentionally committed a wrongful act that had obstruction of justice as its "natural and probable consequence.”

Today's "nexus" requirement sounds like this, but is in reality quite different. Instead of reaffirming that "natural and probable consequence" is one way of establishing intent, it *substitutes* “natural and probable effect" for intent, requiring that factor even when intent to obstruct justice is otherwise clear.”<sup>317</sup>

7.54 Scalia argues that an endeavour is characterised only by its purpose, not by its potential:

“But while it is quite proper to derive an intent requirement from [...] the word "endeavor," it is quite impossible to derive a "natural and probable consequence" requirement. One would be "endeavoring" to obstruct justice if he intentionally set out to do it by means that would only unnaturally and improbably be successful.”<sup>318</sup>

7.55 It is worth noting that even when a jurisdiction deliberately elides the difficulties presented by the law of attempt in this context,<sup>319</sup> it ends up presented with the same question and the same difficulties: whether there are practical limits on the qualities of the action that can form the offence.

*Conclusions about the conduct elements of the offence*

7.56 We create preventive offences for a number of reasons: because attempts can themselves be distressing;<sup>320</sup> because there is a level of risk of harm that we are not

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<sup>315</sup> Justices Kennedy and Thomas joined his dissent.

<sup>316</sup> *Pettibone v United States*, 148 U.S. 197 (1983).

<sup>317</sup> *Aguilar*, at 611.

<sup>318</sup> *Aguilar*, at 612.

<sup>319</sup> See fn 247, *supra*.

<sup>320</sup> Christie, S., *Inchoate Crimes: Incitement, Conspiracy and Attempts in Scottish Criminal Law*, (Edin: W. Green, 2001), chapter 8.

prepared to tolerate, in the interests of bringing about an overall reduction in harm;<sup>321</sup> and because the culpability of the attempted offender is hard to distinguish from the successful.<sup>322</sup> All of these justifications are relevant to perverting the course of justice. People ought to feel able to participate in a course of justice protected from attempts to dissuade or coerce them into doing anything other than their normal duties. We cannot tolerate a risk of harm to the course of justice, given the stakes involved and the centrality of our system of justice to the fulfilment of other, important societal goals. And the sort of person who would attempt to pervert justice – who would want to see the law not follow the path it was meant to – has clearly demonstrated behaviour worthy of society’s condemnation.

7.57 There is, however, particular potential for over-reach in preventive criminalisation.<sup>323</sup> The law imposes special limits on the principal preventive offences, reflecting the need for balance between intervention in potentially harmful acts, and a preference for not punishing harmless activity:

“Clearly it is better for harm to be prevented but there must nevertheless be a critical point before which official intervention is discounted to reflect the law’s overriding commitment to freedom and autonomy”<sup>324</sup>

So, in the law of conspiracy we do not criminalise the simple intention to combine with another to commit an offence.<sup>325</sup> We require there to be an agreement of some sort,<sup>326</sup> though there may be no further action taken beyond that plain agreement. More is needed to constitute an attempt. We require a person to have moved from an act of mere preparation to an act of perpetration before the *actus reus* of attempt is established.<sup>327</sup>

7.58 Perverting the course of justice would, if any act at all were sufficient, be an outlier in the family of inchoate and preventive offences. It would not be a substantive possession offence to have a carrot, believing it to be a knife, and no further offence

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<sup>321</sup> Feinberg, J., *The Moral Limits of the Criminal Law: Harm to Others*, (Oxford: OUP, 1984), at p 11.

<sup>322</sup> “A law that ... was utterly silent on attempts to cause such harms would speak with a strange moral voice”: Duff, at p 134.

<sup>323</sup> For an overview, see *Scots Criminal Law: A Critical Analysis*, at paras 8.4, 8.7, 8.10 and 8.13.

<sup>324</sup> Wilson, W., *Central Issues in Criminal Theory*, (Oxford: Hart, 2002) at p 231.

<sup>325</sup> Though we do criminalise attempted conspiracies, as incitements: Gordon (3<sup>rd</sup> ed), at para 6.71.

<sup>326</sup> *Maxwell v H.M. Advocate*, 1980 J.C. 40 at 43.

<sup>327</sup> *H.M. Advocate v Cameron*, 1911 S.C. (J) 110.

would be committed if you were sufficiently deluded to believe your carrot could be used to effect a fraud. I have established no reason of principle why, for example, acts preparatory to murder should not be criminalised while acts preparatory to a perversion of the course of justice are. As well as addressing the (vertical) question of how far down a path a would-be perverter of the course of justice has to go, there is the (horizontal) question of what quality of action the offence requires. It is less clear that it is inappropriate for the actus reus of perverting the course of justice to be limited to actions with an intrinsic tendency to pervert the course of justice. This would be an exception to the general rule regarding the law of attempt in Scotland,<sup>328</sup> where impossibility is generally irrelevant. It is not required to reflect the moral culpability of the person who makes an impossible attempt or who, through their futile actions, distresses someone by trying to pervert the course of justice.

7.59 All American jurisdictions contain offences of obstructing justice. In a survey of these, Decker identified twenty-four states (and the District of Columbia) as having a general offence of obstructing justice that was described in very broad terms.<sup>329</sup> Of these, seventeen explicitly restrict the means, or actus reus, by which the offence may be committed: for example, in Oregon one can only obstruct justice by “means of intimidation, force, physical or economic interference or obstacle”.<sup>330</sup> In six states, and at the federal level, the requirement is for an “endeavour” or for something less.<sup>331</sup> In three states the general offence of obstruction of justice requires an “attempt”.<sup>332</sup>

7.60 There is something valuable and meaningful added to the law of perverting the course of justice by a requirement that the offender’s actions exhibit a tendency (to some standard) to pervert the course of justice. I have argued that perverting the course of justice is best understood as an offence of endangerment; limiting its conduct element to actions which pose a risk of endangering the course of justice is consistent with this. The distinction identified by the Court of Appeal of Victoria in *Aydin* is a useful way of limiting the ambit of the offence to actions which *could*

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<sup>328</sup> *Docherty v Brown*, 1996 J.C. 48.

<sup>329</sup> Decker, J., ‘The Varying Parameters of Obstruction of Justice in American Criminal Law’, 65 La. L. Rev. 49 (2004) at pp 77 to 78. See fn 243 of this article for full citations of these.

<sup>330</sup> Oregon Revised Statutes, § 162.235 (1999) (obstructing governmental or judicial administration).

<sup>331</sup> Decker, at p 79. See fn 247 of this article for full citations of these.

<sup>332</sup> Decker, at p 81. See fn 264 of this article for full citations of these.

pervert the course of justice, but without requiring the courts to become engaged in abstract philosophising. If we did not include a requirement for actions to have moved from preparation to perpetration – and Hanley specifically disclaimed that Scots law required this – then the inclusion of a ‘tendency’ requirement might also address a number of the other concerns I have expressed about the potential breadth of the offence. An entirely private act, such as sketching some plans for a possible perversion of the course of justice, would not engage the requirement for tendency. The inclusion of an objective standard for the actus reus would also open up the possibility of the offence being committed recklessly: the person who deliberately does something which has a tendency to pervert the course of justice (such as destroying a piece of evidence), without any particular intention to pervert but reckless as to the possibility of a perversion occurring, has culpably endangered the course of justice in far more significant a manner than someone who does an action with a nugatory chance of creating a perversion, but with specific intent. If Scots law continues its over-focus on intention, then its criminal law risks arbitrarily not catching people who wrongfully cause risks to the course of justice.

- 7.61 The inclusion of a requirement for tendency would also make the offence sit more neatly alongside the other offences against the course of justice, creating a more coherent scheme for protecting the course of justice from harm, and risk of harm. For example, there is no need to intend to pervert the course of justice in order to commit an offence of perjury or wasting police time. Instead, both of the wrongs involved – lying in court, and lying to the police – have been identified and categorised by the law as the sort of actions which, of themselves and without having to look at the specifics of any individual case, have a tendency to pervert the course of justice.<sup>333</sup> This is the approach I propose for the general requirement of tendency, and can be seen in the Australian law. If the rest of the family of administration of justice offences is concerned with the identification of descriptions of actions which themselves have the tendency to pervert the course of justice, it would be consistent for the residual offence of perverting the course of justice to be similarly so concerned. Hanley, after all, invites us to look to the other administration of justice offences to better understand perverting the course of justice, not to the law of attempt.

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<sup>333</sup> See paras 6.8 and 6.9 for my consideration of whether perjury does require an intent to pervert the course of justice; and para 7.48 for my argument that this is how tendency should be understood, if it is a required element of the offence.



7.62 The Stair Memorial Encyclopaedia claims that the actus reus of the offence is “any conduct that tends to obstruct or hinder the course of justice”, though there is no authority cited.<sup>334</sup> The inclusion of a requirement of ‘tendency’ would however cohere the administration of justice offences in Scotland. I have asked why, if competence and relevance are essential to the analysis of whether perjury has occurred, there is no similar analysis of the evidence at stake in a charge of perverting the course of justice.<sup>335</sup> One way of expressing the justification for not criminalising the telling of mistruths in relation to matters not competently before the court is that such mistruths could not (or, perhaps, *should* not) affect the outcome of a trial: they have no tendency to pervert the course of justice. The law of perjury is already concerned with demonstrating a tendency to pervert the course of justice. If we limited the behaviour capable of amounting to perverting the course of justice to that which had such a tendency, then we would resolve this difficulty. The destruction of ‘incompetent’ evidence would be outwith the ambit of the offence, as incapable of demonstrating the required tendency.

7.63 It might even then be more defensible (though not necessary) to speak of the nominate administration of justice offences as being modes of committing perverting the course of justice, or of perverting the course of justice as the proto-offence, sitting behind each of the others.<sup>336</sup>

7.64 There is, however, little utility in proposing a requirement that an intention to pervert the course of justice should be accompanied by a requirement for actions with a tendency to pervert the course of justice unless we can account for precisely what it means to pervert it.

## 8. What does it mean to ‘pervert’?

*Perverting, obstructing, impeding, preventing, influencing, defeating ...*

8.1 The subject of someone’s actions is either a course of justice or it is not; and the actions they take are either sufficient to amount to an attempt, or they are not. But what do they have to intend to achieve in order for it to amount to an attempt to *pervert* the course of justice? The word ‘perversion’ in this context has no obvious meaning of its own and the courts have never been attracted to attempting any

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<sup>334</sup> Criminal Law (Reissue), para 470.

<sup>335</sup> See para 6.9, supra.

<sup>336</sup> See paras 6.1 to 6.4, supra.

further or more specific definition of what it means.<sup>337</sup> There must, however, be a distinction that can be made between things done with the course of justice as their subject which are perversions of it, and things which are not.

- 8.2 When corresponding offences in other jurisdictions appear in statute, more specific words are often used.<sup>338</sup> The U.S. federal offence of obstruction of justice requires someone to “influence, obstruct or impede ... the due administration of justice”.<sup>339</sup> The Australian commonwealth offences requires a person to attempt to “obstruct, to prevent, to pervert or to defeat the course of justice”.<sup>340</sup> Two things are notable: that in both cases the language suggests that the offence is committed both when the offender’s behaviour risks the course of justice producing an unjust outcome (‘influence’ or ‘defeat’) and where the offender’s behaviour in some lesser way disrupts the manner in which the course of justice is proceeding, though without necessarily risking the ultimate outcome (‘impede’ or ‘obstruct’).
- 8.3 Imagine that three men sought to interfere with a trial. The first wants to go to a family gathering instead of giving evidence, so calls in a false bomb threat, delaying a day of the trial until later but fully intending to give his evidence truthfully on that day. The second, for personal reasons, threatens a witness that they should not reveal certain details; details which are relevant but not necessary to establish the guilt, or otherwise, of the defendant. The third concocts a crucial piece of evidence, without which there would be insufficient evidence to convict the accused. The three men have disrupted the trial in qualitatively very different ways. The first has affected the efficiency and management of the trial<sup>341</sup> but has presented no threat or risk to its outcome: all of the same evidence will be heard and the outcome will be the same. The second has affected the substance of the trial itself – different evidence will be heard than should be – and the fact-finder may arrive at the ‘right’ outcome, but will do so on the basis of (some) incorrect facts. Again, however, there

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<sup>337</sup> The Draft Criminal Code for Scotland used ‘pervert’ in its definition of the offence without further explanation: para 5.5, *supra*.

<sup>338</sup> Even in Scotland, there is the occasional need to create a statutory offence covering at least some of the same conduct as that which is caught by the offence. Again, verbs more specific than ‘to pervert’ are used. The Tribunals (Scotland) Act 2014, section 67, for example allows the creation, by regulations, of the offence of “alteration, concealment or destruction by a person of, or failure by a person to produce, something that is required to be produced in such proceedings in accordance with Tribunal Rules”.

<sup>339</sup> 18 U.S.C. § 1503.

<sup>340</sup> Crimes Act 1914 (Australian Commonwealth), section 43(1).

<sup>341</sup> And has no doubt committed specific and serious offences, including communicating false information alleging the presence of bombs under section 51(2) of the Criminal Law Act 1977.

is no substantial risk to the trial's outcome. The third man, in contrast, has caused a miscarriage of justice. A person has been convicted when they ought to have been acquitted. If all three facts came to light, only the third would, in Scotland, be a sound basis for an appeal.<sup>342</sup> Did all three men have the intention to pervert the course of justice?

- 8.4 Consider the two justifications identified as lying behind the criminalisation in Scotland of wasting police time:<sup>343</sup> that it disrupts the work of the police, and that it can lead to criminal suspicion falling on innocent people. One is about protecting the integrity and efficiency of justice institutions, and the other is concerned with protecting the citizen who is the subject of a course of justice from the harm of an incorrect justice outcome.<sup>344</sup> In the examples above, the first man has only caused a transient interference with the course of justice; the substance of the trial will remain identical and its outcome the same. The third man has, equally clearly, tried to cause someone harm by interfering with a course of justice; he has sought to create a justice outcome (a conviction) which is not justified by law. The harm caused by the second man is harder to categorise. His behaviour is not directed simply towards the outcome of the trial. But what he has done does affect the integrity and honesty of the course of justice. The right outcome might be reached, but in a tainted way. This was the court's concern in *Meissner*, where improper pressure was put on a defendant to plead guilty, in a situation where her guilt was clear.<sup>345</sup> No justice outcome was at stake in the sense that it was at risk of being *different* as a result, but the court was clear that nevertheless the outcome would have been perverted by this conduct: "the entry of a plea of guilty otherwise than by exercise of a free choice in the interests of the person entering the plea" was a perversion of the course of justice.<sup>346</sup> The harm committed by the second man is like this. He has harmed the reliability of the justice outcome by harming the process that led up to it. This can

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<sup>342</sup> See the Criminal Procedure (Scotland) Act 1995, ss 106 and 175.

<sup>343</sup> In paras 3.68 to 3.70, *supra*.

<sup>344</sup> The easiest example would be a person who was convicted when they ought to have been acquitted, but the concept is broad enough to include those who are acquitted on manufactured grounds, and to include (in civil cases) both people who get something they're not entitled to from an action, and vice versa.

<sup>345</sup> See para 7.38, *supra*.

<sup>346</sup> *Meissner*, at para 29. But see the affirmative defence under 18 U.S.C. § 1512 under which a defendant may show that her conduct "consisted solely of lawful conduct" and that her "sole intention was to encourage, induce, or cause the other person to testify truthfully". This may not extend to pleading, of course, and it is difficult to see why this defence was considered necessary, since that conduct could presumably never meet the requirement for 'corrupt intent' and therefore never be the offence in the first place.

have more and less serious forms: it would be trifling and bizarre to try to substitute a red jumper for an identical blue one in evidence (but it *would* introduce falsehood into a trial); it would be much more serious to manipulate evidence in a way that didn't affect a justice outcome, but could alter the terms of a plea in mitigation and therefore a sentence.

- 8.5 Perverting the course of justice has two different, but over-lapping concerns: these might be characterised as contempts of court, and miscarriages of justice. It is much more serious to try to create a miscarriage of justice than it is to disrupt the police, judges or courts staff. But both are criminal and both caught, in Scotland, by the same offence. There therefore may be a fair-labelling problem with perverting the course of justice.<sup>347</sup> Part of the concern of fair labelling is directed at the structure of the criminal law: that the distinctions between offences, and their relations with each other, should accurately reflect the interests protected, the harms done and the relative seriousness of the offences. An over-broad offence could be considered unfairly labelled on the grounds that it failed to distinguish between wrongs of entirely different character, or that it encompassed similar wrongs but did not make the appropriate distinction between their seriousness. The distinctions between the different ways of perverting the course of justice are at least as broad as the distinctions between some of the other offences against the administration of justice; in both character and seriousness.<sup>348</sup> Such a distinction may sometimes be hinted at by charging 'attempt to defeat the ends of justice' in cases where a justice outcome is at stake.
- 8.6 This breadth is common in common law offences, where distinctions in seriousness tend to be expressed at sentence. But the lack of a focus on what it means to pervert a course of justice is, I have concluded, both a function of and a cause of the sheer breadth of the offence. The reasoning of the major cases in Scotland discussed so far can be boiled down to this: the person did something that is self-evidently to be disapproved of, and it was concerned with the course of justice.

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<sup>347</sup> See Chalmers, J. and Leverick, F., *Fair Labelling in Criminal Law*, 71 Mod. L. Rev. 217 (2008) for an overview and analysis of the concept of fair labelling.

<sup>348</sup> It seems instinctively odd that the offenders in both *McFarlane v Jessop* (para 3.53, supra: police officers confecting evidence to secure a false conviction) and *Johnstone v Lees* (para 3.54, supra: denying knowledge of an offence in a reply) were convicted of the same offence.

8.7 Does an intent to pervert the course of justice necessarily demonstrate wickedness? In Scotland, “evil intent” used to be regarded as required.<sup>349</sup> This has largely been replaced, in the modern case law, with the more descriptive intent to pervert the course of justice. In the U.S., in addition to the intention to obstruct justice there is a further requirement in the statute that such intention should be “corrupt”.<sup>350</sup> Working out in which way a corrupt intent to obstruct justice goes further than a specific one been a source of confusion for the U.S. judiciary.<sup>351</sup> It would be preferable to develop an understand of the meaning to pervert that incorporated or demonstrated requirements of ‘evil’ or ‘corruption’, rather than seeking to separate these out.

*How specific can the meaning of ‘to pervert’ be?*

8.8 The question what it means to pervert is relevant both in working out what the required intention is, but also (where necessary) to establish what the conduct elements of the offence might be. If the offence is limited to actions which have a tendency to pervert the course of justice, then we need to be able to characterise what that an action is tending towards: disrupting a trial, influencing its content, or altering its outcome? These are three connected types of harm. Which are caught by perverting the course of justice will depend on the interests being protected by the offence: why should we criminalise the obstruction of justice? Is it because we want to ensure *that* justice is done in a substantive sense, that the right outcomes are the result of each course of justice; or is it that we want to protect the *way* in which justice is done, that it can be administered truthfully and efficiently in each case; or is it because we want to protect the efficiency and effectiveness of the *institutions* charged with administering justice?

8.9 The answer is ‘all of the above’. All are legitimate subjects of the criminal law, and there may be instances where it would not be easy to categorise behaviour into only one of the three cases. We should remember where I have located the development

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<sup>349</sup> “Evil intention, of course, is of the essence of the matter”: Mannion, at 80.

<sup>350</sup> This is said by some commentators to be the reason why some of President Trump’s more notorious actions, even if otherwise caught by U.S.C. § 1503, would not amount to obstruction of justice. The President, when acting within his executive authority (the argument goes) cannot manifest corrupt intent: see Blackman, J. ‘Obstruction of Justice and the Presidency: Part I’, Lawfare Blog (5 December 2017), accessible at <https://www.lawfareblog.com/obstruction-justice-and-presidency-part-i> (accessed 11 September 2018) and Hemel, D. J. and Posner, E. A., ‘Presidential obstruction of justice’, California Law Review 106(4), 1277-1334.

<sup>351</sup> See DeMarco, J., ‘Note: A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute’, 67 N.Y.U.L. Rev 570 at 576 (1992).

of the offence in Scotland: both in the gaps in-between and at the edges of the existing offences against the course of justice,<sup>352</sup> and also in the centre of the Scottish tradition of pragmatic, descriptive development of common law offences.<sup>353</sup> When trying to provide a residual offence which will catch everything not otherwise addressed by a set of crimes, the resulting offence will necessarily be at least equally as broad as those crimes. The offences against the administration of justice contain crimes which explicitly protect the outcome of a justice process (such as deforcement or prison-breaking) as well as offences directed at the integrity of a trial (such as perjury, or the judge's summary jurisdiction in matters of contempt). It was inevitable that the residual offence which grew around them would as well.

- 8.10 Even the term administration of justice is hard to account for fully. The Victorian Parliament Law Reform Committee concluded that it was "often used but seldom defined, even in published reports."<sup>354</sup> It would probably not be possible to narrow down the breadth of the offence by using more specific, or more descriptive, verbs to replace 'to pervert' (though it may be possible to tease out and categorise the different ways in which the offence can be committed). Where jurisdictions have reduced their offences to statute, the drafters have either relied on the breadth and ambiguity of 'to pervert',<sup>355</sup> or they have resorted to a string of overlapping and expansive verbs to provide the required breadth.<sup>356</sup> The Scots offence is not out of step in the breadth of the protection afforded to the course of justice, though it may compare poorly with other jurisdictions in the extent to which the meaning of that breadth has been analysed.

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<sup>352</sup> Paras 6.1 to 6.16, *supra*.

<sup>353</sup> Paras 4.25 to 4.29, *supra*.

<sup>354</sup> Victorian Parliament Law Reform Committee, at p 14.

<sup>355</sup> e.g. Crimes Act 1914 (Australian Commonwealth), section 43(1).

<sup>356</sup> e.g. 18 U.S.C. § 1503: "influence, impede or obstruct".

## WHAT SHOULD BE THE LAW OF PERVERTING THE COURSE OF JUSTICE?

### 9. Conclusions

#### *The state of the offence in Scots law*

- 9.1 Though other jurisdictions have thought it “unwise to attempt to define [perverting the course of justice] exhaustively, as it is impossible to do so”,<sup>357</sup> none has failed to provide a definition of some sort of the conduct that is caught by the offence and the conduct that is not; nor failed to state clearly the mental elements of the offence, whatever they may be. The Scots decisions have either never been confronted with the sort of facts that might have required them to address such questions, or they have preferred broader, more practical answers to them.
- 9.2 Nevertheless, the Scots offence is not such an outlier: in all jurisdictions I have covered the offence is defined broadly and purposively. Most recognise a near-unlimited range of ways in which the offence can be committed, though most seek to place some limits on the character of the conduct required. Only in a few U.S. states are there effective conduct limits on the way in which the offence can be committed.<sup>358</sup> The corresponding U.S. offence has been challenged unsuccessfully on the grounds of vagueness<sup>359</sup> and over-breadth,<sup>360</sup> the court holding in all cases that the requirement for specific and corrupt intent cured the unusual and vague breadth of conduct caught. This should not be surprising: the only practical limitations on the ways in which a person can pervert the course of justice are, first, the range of things which can be the subject of a judicial process and, second, the imagination or desperation of those who want to interfere with it. The first is ever-expanding and the second swells with it. It would be an impossible task to define in advance the type of conduct involved.
- 9.3 But there are a family of questions relating to the elements of the offence which other jurisdictions have addressed, and which Scotland has not: is it right that this

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<sup>357</sup> R v Rogerson (1992) 174 CLR 268 per Brennan and Toohey JJ, at para 2. See also R v McGee and McGee [2008] SASC 328 at para 308.

<sup>358</sup> e.g. in Oregon where the offence can only be committed by “means of intimidation, force, physical or economic interference or obstacle”, see fn 330. Even this is a very broad way of describing a kind of behaviour, though it does resolve the question whether purely private action is sufficient: paras 7.21 to 7.24, *supra*.

<sup>359</sup> United States v Cueto, 151 F.3d 620 at 632 (7<sup>th</sup> Cir. 1998); or United States v Tyler, 281 F.3d 84 at 91 to 92 (3d. Cir. 2002), which is concerned with 18 U.S.C. § 1512, the witness tampering offence.

<sup>360</sup> United States v Cintolo, 818 F.2d 980 at 996, (1<sup>st</sup> Cir. 1987).

should be a crime of pure intention; why should the standard of attempt required be different than in the general part of the criminal law (and what should it be); what is the range of intention, and standard of wrongdoing, relevant to the meaning of 'to pervert'?

- 9.4 I would only conclude that there was a problem in Scotland's failure to answer these questions if the effect of any ambiguity was harmful in itself. Justifying a preventive offence requires "a calculation of benefits and burdens":<sup>361</sup> so what are the burdens imposed by having such a broad and ill-defined offence?

*A duty to cooperate with justice institutions*

- 9.5 It does not take too close a reading of some of the Scots cases to wonder about the chilling effect of the offence: does it effectively enforce a duty on citizens to cooperate with the authorities, including the police?<sup>362</sup> Might we have criminalised omission? Omissions offences are unusual, and are said to require the prior identification of a duty, recognised by law.<sup>363</sup> Perverting the course of justice could create a conditional duty-situation, where a person who becomes involved in a course of justice (possibly even without having wanted to) has her lawful options reduced to one. When the police are investigating an offence, and ask questions of someone, are their options not effectively reduced to telling the truth if they want to avoid a charge of perverting the course of justice?<sup>364</sup> How many options did the accused in *Fletcher v Tudhope* have, when his friend sought to avoid the police via his pub? In this situation, it seems, anything short of refusing him passage would have amounted to an offence. The decision in *Mannion* suggests a duty to make yourself available for citation where you are aware of it. Offences normally require an act; but while it would do some damage to the meaning of, for example, assault to contemplate its being done by omission, there is nothing about having an intention to pervert that necessarily ties it to the positive doing of an action. This

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<sup>361</sup> Ashworth, A. and Zedner, L., *Preventive Justice*, (Oxford: OUP, 2014) at p 103 and, generally, the argument in chapter 5.2, 'Justifying preventive offences', pp 103 to 108.

<sup>362</sup> There is a particular chilling effect associated with pre-inchoate offences: Ashworth, A. and Zedner, L., 'Prevention and Criminalization: Justifications and Limits', (2012) 15 *New Criminal Law Review* 542.

<sup>363</sup> For example, see Ashworth, A., *Positive Obligations in Criminal Law*, (Oxford: Hart, 2013) at pp 32 to 37.

<sup>364</sup> If it attempts a perversion of the course of justice to try to convince someone not to identify a person to the police (as in *Dalton*), can we be sure that it would not pervert the course of justice to convince someone to refuse to participate in an identification, or even to refuse to participate in such an identification yourself? Cf. *Rice v Connolly* [1966] 2 Q.B. 414, where it was held that at common law a person is entitled to refuse to answer a question put by a police officer.



may be a function only of language, rather than morality, but deciding not to participate in a police investigation, refusing to give over information that would lead to a conviction, or simply failing to disclose relevant information when you have the opportunity to are all examples of omissions that a person could very deliberately pursue for the specific purpose of perverting the course of justice. Each might even colourably constitute an act: some steps would have to be taken to refuse to answer question put to you as part of a police inquiry, even if it was simply to say that you would not answer.

- 9.6 The state's responsibility to investigate crime and to administer justice would be impossible to discharge without some level of cooperation by the public, but is the criminal law the appropriate tool to regulate that cooperation? Ashworth identifies civic duties as one of the categories of duty-situations recognised by law, and which can be shown to translate into criminal offences, though he regards it as "ill-defined" and "the most contestable" form of duty.<sup>365</sup> The justice system already generates such duties. The duty to participate in a jury, when cited, is enforced by sanction.<sup>366</sup> Some jurisdictions recognise a general duty to assist the police in certain situations, which can even extend to requiring physical assistance of the police in the execution of their duties.<sup>367</sup> The lack of a defence of ignorance of the law implies a duty to make reasonable efforts to ascertain it.<sup>368</sup>
- 9.7 The first requirement Ashworth identifies as necessary in a duty-situation giving rise to criminal liability is that the duty-bearing person must be aware of the circumstances giving rise to the duty.<sup>369</sup> This would necessarily be satisfied if the requirement for an intention to pervert the course of justice was. The second is that all the law can properly require of the duty-bearing person is to do what is reasonable.<sup>370</sup> This condition is compatible, in principle, with the enforcement of a duty to cooperate with justice institutions. A person would not be under a duty to take all positive steps to ensure that justice was done; but when they or information

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<sup>365</sup> Positive Obligations in Criminal Law, p 56.

<sup>366</sup> The Criminal Procedure (Scotland) Act 1995, section 85(6), for example, contains a summary power to fine those who fail to attend; for England and Wales see the Juries Act 1974, section 20.

<sup>367</sup> See *R v Brown*, (1841) Car & M 314 and Nicolson, D., 'The Citizen's Duty to Assist the Police' [1992] Crim LR 611.

<sup>368</sup> Ashworth, A., 'Ignorance of the Criminal Law, and Duties to Avoid It', (2011) 74 MLR 1.

<sup>369</sup> Positive Obligations in Criminal Law, p 75.

<sup>370</sup> Positive Obligations in Criminal Law, p 77.

they have become concerned in a course of justice, the law might require them not to stay silent for the purpose of perverting that course of justice.

- 9.8 Some non-cooperation, or some right to be silent or do nothing, would always have to be protected, and already is. For example, where enforcing such a duty was incompatible with a person's right to silence or non-incrimination, or their right to test the prosecution's case against them.<sup>371</sup> There is some U.S. case law from Ohio that recognises rights that protect even certain positive acts done in order to pervert justice. The courts have held that officials are "expected to tolerate a certain level of uncooperativeness, especially in a free society in which the citizenry is not obliged to be either blindly or silently obedient to law enforcement".<sup>372</sup> This can have surprising results: it does not obstruct justice to flee the scene of a traffic stop, this not being "an affirmative act that directly interfered with the patrolman's duty".<sup>373</sup> Nor is it obstruction to refuse to allow a search warrant to be effected.<sup>374</sup>
- 9.9 While it is disputable whether perverting the course of justice implies some duty to cooperate with the authorities, it is doubtless part of the legal scheme that allows the investigating and judicial authorities to do their work. That offences against the administrations of justice are concerned with the regulation of the citizen's relationship with the authorities and compelling cooperation is most clearly demonstrated by the offence of wasting police time. There is nothing obviously repugnant about this offence. In England and Wales there is a statutory offence of similar character.<sup>375</sup> The police have finite resources, devoted to the benefit of the whole of society, and there is a need to protect them from waste and mis-application. The same could, however, be said of virtually all actors in public service: but there is no offence of wasting a public official's time. What are the special features of police resources that make them worth protecting by using the criminal law?

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<sup>371</sup> See para 3.55, *supra*.

<sup>372</sup> *State v Davis*, 749 N.E.2d 322 at 324 (Ohio Ct. App 2000).

<sup>373</sup> *State v Gillenwater*, 1998 WL 150354 (Ohio Ct. App 1998).

<sup>374</sup> *State v Corrai*, 591 N.E.2d 1325 (Ohio Ct. App 1990). Though, when the police seek to enforce a warrant, it does obstruct justice to be overheard by them shouting to your mother "They're on our property. Can we shoot them?": *State v Mattila*, 712 P.2d 832 (Or. Ct. App. 1986).

<sup>375</sup> s.5(2) of the Criminal Law Act 1967: "Where a person causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry, he shall be liable ...".

9.10 The case for criminalisation would be easier to make were the offence restricted – as it once was – to behaviour which ran the risk of suspicion falling on the innocent. That would restrict the offence (special to law enforcement) to an interest which is itself special to law enforcement. On that model, the interests protected by the offence are very similar to some protected by the offence of perverting the course of justice: the possibility of an incorrect justice outcome, and the moral taint to the public justice system of being used for improper ends. But wasting the police’s efforts in a non-criminal context (for example, falsely reporting an item missing) is also caught by the offence.<sup>376</sup> Is there something about the consequences of wasting the resources of the police that is different from wasting the resources of the health or education systems, also maintained at public expense and performing vital functions for society? To falsely report to a government department that someone is not entitled to a benefit they are claiming might, in modern public administration, run many of the same risks as the false reporting of an offence; to lobby an official using falsified data might cause serious waste to the public purse, and risk unwise policy decisions being taken, to the detriment of society. In some U.S. states, the offence of obstruction of justice extends to a surprising range of government officials.<sup>377</sup>

9.11 As well as the burdens that flow from the breadth of the offence and the possibility that it is compelling cooperation with the authorities, we must consider the benefits.<sup>378</sup> Administering justice is one of the fundamental duties and functions of the state, of benefit both directly to those to whom justice is done, and indirectly to everyone who enjoys the rewards of living in a just society. It may not even go far enough simply to describe the offence as serving the purpose of *preventing injustice*; should we instead locate it as being required positively to promote justice?

*The state’s positive obligations under article 6*

9.12 Given the importance of the interests protected, the state may have a positive obligation to have an offence of perverting the course of justice, or something similar. Article 6 ECHR imposes a suite of positive obligations on the state.<sup>379</sup> The

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<sup>376</sup> *Bowers v Tudhope*, 1987 S.L.T. 748.

<sup>377</sup> For example, in Ohio it is an offence to obstruct “the performance by any public official or any authorized act within the public official’s official capacity”: Ohio Rev. Code Ann. § 2921.31 (obstructing official business).

<sup>378</sup> See fn 361.

<sup>379</sup> For example, Article 6 (1) taken together with (3) has been held to require states to take positive steps to enable the accused to examine or have examined witnesses against him (*Trofimov v. Russia*, (App no

positive obligations on states under the ECHR can extend to requiring the creation of criminal offences, where that is the most efficient and typical way of ensuring that rights are respected. For example, in *X and Y v the Netherlands*, a young woman was prevented by Dutch law from making a formal complaint of a sex crime committed against her.<sup>380</sup> The court recognised that alternative ways of securing the applicant's rights would be insufficient:

“This is a case where fundamental values and essential aspects of private life are at stake. Effect deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed it is by such provisions that the matter is normally regulated.”<sup>381</sup>

- 9.13 That the state might have a duty under Article 6 to criminalise interference with the course of justice can be seen when one considers how compromised these rights would be without the criminal law protecting them. What could be done about someone who tried to induce another to give false evidence? If exposed before the trial, it would need to become a matter of evidence at the trial, and tested according to the appropriate standard; if exposed after trial, we would have to hope that the state's mechanisms for reviewing decisions (appeal, reference to the SCCRC, for example) were sufficient. Beyond risks to the outcome of the judicial process, and questions of efficiency, there are also questions of redress and punishment. This would have to take the form of a private process, for example a claim for damages against the person who interfered with the course of justice, or against the relevant institution for allowing falsehood to taint its decision-making.
- 9.14 In individual instances, some or all of these alternative methods may still be required. But when the state criminalises interference with the course of justice, it supports Article 6 rights in three essential ways: it punishes interference with the course of justice, signalling society's condemnation of it; it ensures that the same protection is afforded to those who are (voluntarily or otherwise) caught up in a course of justice, regardless of their ability to privately defend their rights; and it

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1111/02) ECHR 4 December 2008, at para 33; *Sadak and Others v. Turkey* (no. 1), [2008] ECHR 20, 74318/01 at para 67). Article 6 (1) imposes on states a duty to organise their judicial systems in such a way that their courts can dispose of business within a reasonable time (*Abdoella v. the Netherlands*, (App No 12728/87), 25 November 1992, at para 24; *Dobbartin v. France*, Application No 13089/87, at para 44). Article 6(3)(e) requires states to provide interpreters (*Cuscani v United Kingdom*, Application no. 32771/96, 24 September 2002).

<sup>380</sup> *X and Y v Netherlands*, (1986) 8 E.H.R.R. 235.

<sup>381</sup> *X and Y*, at para 27.

deters interference in advance, rather than requiring that it is resolved either as part of or after the course of justice itself. The court in *X and Y* recognised this: “effect deterrence” was one of the special features of the criminal law that made it particularly appropriate as a means of discharging the state’s positive obligations under Article 6.

9.15 The sheer effectiveness of the criminal law is not an argument for resorting to the creation of offences, even in the pursuit of laudable aims. Indeed, it might be a good reason to be cautious about it.<sup>382</sup> In *X and Y*, it was noted that the interests involved were normally regulated by the criminal law, not simply in the Netherlands but across Europe. For the criminal law to be required to be invoked by a state, it not only has to be effective in securing the exercise of a right, but the offence concerned has to also meet whatever standards are typically concerned with distinguishing between the criminal and the non-criminal.<sup>383</sup>

9.16 The offence of perverting the course of justice clearly meets that standard. The protection of the administration of justice is a typical subject of the criminal law, both historically in Scotland and the UK, and internationally.<sup>384</sup> The seriousness of the offence may be as broad as any, or at least as broad as the rest of the criminal law. Perverting the course of justice may involve minimally-harmful steps taken to interfere with a minor charge of breach of the peace; or it may involve highly destructive steps taken to defeat the ends of justice in a charge of murder. As Widgery LCJ said:

“[T]here are few more serious offences possible in the present day [...] than those which tend to distort the course of public justice and prevent the courts from producing true and just results in the cases before them.”<sup>385</sup>

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<sup>382</sup> For a sceptical account of the use of the criminal law in the discharge of the state’s duties to its citizens, see Lazarus, L., ‘Positive Obligations and Criminal Justice: Duties to Protect or Coerce?’ in Zedner, L. and Roberts, J. (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, (Oxford: Oxford University Press, 2012), pp 135 to 156.

<sup>383</sup> See Ashworth, A., *Positive Obligations in Criminal Law*, at pp 209 and 210.

<sup>384</sup> The use of offences to deter interference with judicial process can be traced back to Roman law. The *lex Cornelia de falsis* criminalised someone who altered, suppressed or counterfeited with intent to harm another (Digest of Justinian Vol IV, 48.10.1). Many acts which fell under the *lex Cornelia* were concerned with judicial process: conspiring to give false witness (48.10.1); conspiring to ensnare an innocent person (48.10.1.1); accepting money to give evidence (48.10.1.2); or corrupting a judge (48.10.1.2). Fraudulently causing a judge to decide other than as he should, or extorting a judge, was a contravention of the *lex Julia de vi publica* (48.11.3).

<sup>385</sup> *R v Andrews* (1972) 57 Cr App R 254.

9.17 If the creation and maintenance of an appropriate set of offences is *required* to discharge the state's duties under Article 6, then it is as important that those laws should be effective as it is that they should be clearly expressed. The approach of the Scottish courts has been primarily to promote the effectiveness of the law; but has this come at the expense of its clarity?

*What should Scots law do?*

9.18 Farmer has described the equivocal relationship that Scots criminal law has with principle.<sup>386</sup> The irony is that much as Hume tried to derive the principles applying to offences inductively from the decided cases,<sup>387</sup> later authors have had to try to derive the general principles applying to the criminal law inductively from Hume, since he largely failed to spell these out. There is, however, a regularly expressed commitment to the idea of principle in Scots criminal law.<sup>388</sup> If there are principles to be derived from the way that Hume approached the offences against the administration of justice, and from the way the courts have developed the offence of perverting the course of justice in the years since, then they are these:

- first, the criminal law is a proper tool for protecting the efficiency, the integrity and the outcomes of the judicial process;
- second, that protection should be as comprehensive as possible, extending to every aspect of the course of justice; and
- third, that in the interests of maintaining as comprehensive a protection as possible and given the breadth of the subjects covered by the course of justice, over-elaboration or prescriptive definition of the conduct involved in the offence should be avoided.

9.19 This is only unprincipled if you do not consider pragmatism or effectiveness to be principles.

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<sup>386</sup> Farmer, L., 'The idea of principle in Scots criminal law', in Chalmers, J., Leverick, F. and Farmer, L. (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edin: 2010), pp 86 to 102.

<sup>387</sup> In Hume, principles were "inductively drawn from the propositions in different cases [...] frequently from what the court had done rather than what the judge had said": Professor D.M. Walker's introduction to Hume.

<sup>388</sup> "If there is a continuity it is perhaps [...] the commitment to the idea that the criminal law is based on principles – even if those principles are hard to discern to the outside observer – and that it is the role of the courts to interpret and apply those principles in such a way that they are accepted by society in general": *The idea of principle in Scots criminal law*, p 101.

- 9.20 We have seen textbook writers return to the Humean style in trying to explain the offence; demonstrating its qualities by example, rather than definition, and leaving the reader to induce its elements.<sup>389</sup> Perhaps this is simply another feature of the offence that points to it being an exemplar of the Scottish criminal law tradition. Perhaps the offence will always be considered 'still crystallising', because Scottish common law crimes never crystallise.
- 9.21 I do not think that I have made the case that the Scottish offence of perverting the course of justice is so unclear that legislative intervention is required or that its judicial development can be condemned as illegitimate. If there is someone in Scotland presently, with an intention to pervert the course of justice but who is genuinely unsure whether to pursue a particular act because they consider the law on the conduct elements of the offence to be uncertain, that perhaps we should pause before we encourage them to take advantage of that ambiguity. In all of the jurisdictions I have considered, questions which test this aspect of the offence have arisen eventually – and largely the same set of questions, with a very similar set of answers. There is no reason to think that the Scottish courts will not also one day have to grapple with such questions.
- 9.22 And when they do, it would be to the benefit of Scots law if there were room to take account of the relevant law from comparable jurisdictions. For as long as we try to do justice there will be people trying to stop it from being done. That is a human failing, not a Scottish one.

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<sup>389</sup> See paras 5.10 to 5.14.

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