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Diminished Responsibility and the Scottish Criminal Law Tradition

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ABSTRACT

This thesis examines the history and development of diminished responsibility in Scots criminal law and asks what the doctrine's evolution within the practice of the High Court might reveal about the Scottish criminal law tradition more broadly. For important historical and political reasons, the concept of "tradition" has long been central to the way in which Scots law and the Scottish legal system is described. This tradition, however, has habitually been framed in idealised, nationalistic and ultimately misleading terms. The criminal law, commonly regarded as an especially "Scottish" part of the legal system, sits in the foreground of this picture. The present thesis aims to engage with the Scottish criminal law tradition in a more rational, dispassionate and verifiable sense, by focusing more narrowly on the character of the legal rules themselves. To this end, it adopts the doctrine of diminished responsibility – long heralded as a distinctly Scottish creation – as a case study. The thesis begins by locating the position occupied by diminished responsibility within the broader landscape of Scots criminal law, before introducing the concept of "the Scottish legal tradition" and outlining one popular account of its character. Attention then turns to the nature of the criminal law. The foundational Scottish literature is examined, and four key themes extracted: the significance of the High Court's power to declare conduct newly criminal; the emphasis placed on practicality; the purported humanity of the Scottish criminal justice system; and the posited link between criminal law and community values. Each of these themes, it is suggested, provides us with a clue as to the nature of the law itself. Four possible characteristics are deduced: flexibility; pragmatism; leniency; and non-technicality. Finally, the development of diminished responsibility in the Scottish courts is analysed, and the applicability of these four characteristics assessed. It is concluded that the doctrine's development tells us much about the nature of the broader Scottish tradition.

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AUTHOR’S DECLARATION

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

Daniel Buchan

LIST OF ABBREVIATIONS

Alison, *Practice*	A Alison, *Practice of the Criminal Law of Scotland* (Edinburgh, 1833)
Alison, *Principles*	A Alison, *Principles of the Criminal Law of Scotland* (Edinburgh, 1832)
Bell's Notes	B R Bell, *A Supplement to Hume's Commentaries on the Law of Scotland Respecting Crimes* (Edinburgh, 1844)
Chalmers & Leverick, *Criminal Defences*	J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh, 2006)
Gordon, *Criminal Law* i	G H Gordon, *The Criminal Law of Scotland* 3rd edn vol I by M G A Christie (ed) (Edinburgh, 2000)
Gordon, *Criminal Law* ii	G H Gordon, *The Criminal Law of Scotland* 4th edn vol II by J Chalmers and F Leverick (eds) (Edinburgh, 2017)
Hume, *Commentaries* i	D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* 4th edn vol I by B R Bell (ed) (Edinburgh, 1844)
Hume, *Commentaries* ii	D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* 4th edn vol II by B R Bell (ed) (Edinburgh, 1844)
Macdonald, *Criminal Law*	J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* 5th edn by J Walker and D J Stevenson (eds) (Edinburgh, 1948)

Mackenzie, *Matters Criminal*	G Mackenzie, *The Laws and Customs of Scotland in Matters Criminal*, Stair Society vol 59 by O F Robinson (ed) (Edinburgh, 2012)

INTRODUCTION

Over the past two decades, the doctrine of diminished responsibility in Scots criminal law has undergone a striking process of development. In early 2001, as part of a comprehensive review of mental health law in Scotland, the Millan Committee concluded that the defence was unclear in its definition and difficult to apply in practice and recommended its referral to the Scottish Law Commission for consideration.[1] Later that same year, in the case of *Galbraith v HM Advocate (No 2)*,[2] the High Court of Justiciary undertook its own quasi-review of the plea and laid down a substantially reformulated definition. When the SLC did come to consider diminished responsibility shortly thereafter,[3] the result was the doctrine's relocation into the statute book.[4] At the time of writing, the plea is once again under examination, this time as part of the Commission's broader review of the law of homicide.[5]

This flurry of activity, however, should not be regarded as exceptional. Instead, it is best seen as simply an unusually dramatic chapter in a story which has unfolded gradually over the course of at least a century and a half, for the history of diminished responsibility is one of more or less continual change. In this sense, the doctrine is quintessentially a product of the common law, a point which its recent codification has only thrown into sharper relief. It is also, fundamentally, a product of Scots law. For practical purposes, the origins of diminished responsibility can be traced to a series of judicial directions delivered to High Court juries in the mid- to late nineteenth century,[6] before the doctrine crystallised more fully upon the advent of a Scottish criminal appeal court.[7] More than this, its development has remained, for the most part, essentially self-contained, with little evidence of any significant influence being drawn from outside the practice of the High Court.[8] Instead, the doctrine matured largely through a process of citation, interpretation

[1] See Millan Committee, *Report on the Review of the Mental Health (Scotland) Act 1984* (2001) 357-358.
[2] 2002 JC 1.
[3] See Scottish Law Commission, *Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004) pt 3.
[4] Criminal Procedure (Scotland) Act 1995, s 51B (as inserted by s 168 of the Criminal Justice and Licensing (Scotland) Act 2010). The statutory formula, which came into force in 2012, did little more than codify the *Galbraith* definition.
[5] See Scottish Law Commission, *The Mental Element in Homicide* (Scot Law Com DP No 172, 2021) ch 11.
[6] Starting with the case of *Alexander Dingwall* (1867) 5 Irv 466. As we will see in ch 4 below, however, by this stage the doctrine had already spent much of the prior two centuries in gestation.
[7] The High Court of Justiciary's appellate jurisdiction (sitting as the Court of Criminal Appeal) was established under the Criminal Appeal (Scotland) Act 1926.
[8] At least until *Galbraith* itself: see ch 4 below.

and extension of earlier judicial pronouncements. It is unsurprising, then, that diminished responsibility should have come to be regarded as a "distinctly Scottish" [9] creation.

All of this – the doctrine's native origins, its incremental development in the courts, and its popularly perceived "Scottishness" – places diminished responsibility in close relationship to what may be termed "the Scottish criminal law tradition". In its broadest sense, this encapsulates the idea that the Scottish criminal law, beyond simply existing as a discrete body of rules, embraces a particular set of traits and values which allow it to be differentiated from the criminal laws of other comparable jurisdictions. Reflecting a similar discourse around Scots law and the Scottish legal system more broadly, it is commonly imagined that the criminal law might be animated by some distinctly "Scottish" spirit, and moreover that this might in itself be worthy of preservation. Over recent years, this sentiment has visibly permeated many of the most prominent debates in the field. In the criminal justice context, it has been suggested that the difficulties encountered by a number of recent reform efforts – such as the move to abolish the corroboration requirement in criminal cases – might owe something to the fact that these efforts have targeted "distinctive" features of the Scottish system.[10] The corroboration debate has since given way to renewed wrangling over the future of the equally totemic not proven verdict.[11] Within the criminological literature, a lively discourse has emerged around the purported "detartanisation" (and subsequent "retartanisation") of Scottish criminal justice policy in the post-devolution period. Within the first few years of the new Scottish Parliament's existence, an argument had formed that the Scottish welfarist "tradition" was being eroded, perhaps surprisingly, in favour of alignment with the popular punitivism more commonly associated with England and Wales.[12] For the substantive law, the impassioned debate which attended the publication of an unofficial draft Scottish criminal code[13] in the early part of this century brought to the fore "the extent to which codification

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[9] Chalmers & Leverick, *Criminal Defences* para 11.01.

[10] J Chalmers and others, 'The process of criminal evidence law reform in Scotland: what can we learn?' in P Duff and P R Ferguson (eds), *Scottish Criminal Evidence Law: Current Developments and Future Trends* (Edinburgh, 2017) 194 at 212.

[11] See generally J Chalmers and others, 'A modern history of the not proven verdict' (2021) 25 Edin LR 151.

[12] L McAra, 'Crime, criminology and criminal justice in Scotland' (2008) 5 European Journal of Criminology 481; H Croall, 'Criminal justice in post-devolutionary Scotland' (2006) 26 Critical Social Policy 587; cf. G Mooney and others, 'Scottish criminal justice: devolution, divergence and distinctiveness' (2015) 15 Criminology & Criminal Justice 205.

[13] E Clive and others, *A Draft Criminal Code for Scotland with Commentary* (2003). See generally E Clive, 'Codification of the criminal law' in J Chalmers and others (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh, 2010) 54.

has in the past been regarded as distinctly counter to Scottish tradition”.[14] Other noteworthy examples from just the past two decades could doubtless be cited. The key point here is that the notion of “tradition” remains deeply relevant to the way in which Scots criminal law, and the Scottish criminal justice system more broadly, is discussed.

It is unfortunate, however, that much of this discussion has taken place on less-than-helpful terms. Very often, where the Scottish “tradition” is called upon, the image which is invoked is that of a highly idealised, romanticised and, occasionally, outright nationalistic version of the Scottish system. The criminal law is presented as the distillation of some ineffable national spirit, distinguishable by virtue of its connection to Scotland’s history and people and beyond reproach as a developed and enlightened body of rules. Traditionally, this aimed to highlight the Scottish system’s alleged superiority over its English counterpart.

This thesis aims to engage with “the Scottish criminal law tradition” in a slightly different way. The project here is to say something, not about the significance of the criminal law as a Scottish institution, nor about its comparative excellence, but rather about the nature of the rules themselves. Claims about the Scottish “tradition” have tended to be framed in very general terms, being directed towards the system as an apparently coherent whole. This has the effect of rendering these claims essentially unfalsifiable. Here, we will instead focus more narrowly on one particular doctrine – that of diminished responsibility. Given diminished responsibility’s apparent “Scottishness”, it forms an ideal case study for any plausible understanding of the Scottish system. Through an analysis of its development at common law, we will look to identify and describe some of the key characteristics of the criminal law, and thereby some of the values which have informed its development. By anchoring our analysis to a line of case law, the hope is that we will be able to discuss the Scottish tradition in a more rational, dispassionate and verifiable sense, without resort to sentimentality and broad assertions of superiority.

This work proceeds in five chapters. Chapter 1 begins by locating the position occupied by diminished responsibility within the broader landscape of Scots criminal law. The discussion here is structured around the three principal ways in which diminished responsibility might properly be categorised: as an aspect of the law of homicide, as a

[14] T H Jones, ‘Towards a good and complete criminal code for Scotland’ (2005) 68 MLR 448 at 448 (though noting also an “alternative tradition” of disaffection with the judiciary’s augmented role in developing the criminal law).

partial defence, and as a "mental condition" defence. This will direct our attention towards the plea's interaction with the criminal law doctrines to which it is most closely related. There are two main aims here. The first is to introduce diminished responsibility as a concept in Scots law and to outline its operation in practice. The second is to demonstrate that diminished responsibility occupies something of a central position within the criminal law, cutting across several areas which have received considerable judicial and academic attention.

Chapter 2 introduces a second concept, that of "the Scottish legal tradition". The idea of "tradition" has long been central to the way in which Scots law is discussed. We will begin by setting this phenomenon in its historical and political context, before considering the particular position of the criminal law, commonly regarded as an especially "Scottish" part of the legal system. We will look at a prominent understanding of "tradition" in Scots law and consider some of the criticisms which have been levelled at it in the criminal law context. The chapter will close by setting out a slightly different version of this tradition and outlining some of the reasons why the doctrine of diminished responsibility might help us to describe it in the remainder of the work.

Chapter 3 begins this task by examining the accounts offered of Scots criminal law in some of its foundational literature. Focusing especially on the remarks of Hume, and to a lesser extent Alison, the aim of this chapter is to gain a better understanding of the picture which has traditionally been presented of the Scottish system. It will be seen that there are four key themes to be drawn from these accounts which appear relevant to the task of describing the nature of the law itself: the High Court's power to declare conduct newly criminal; the emphasis placed on practicality; the purported humanity of the Scottish criminal justice system; and the posited link between criminal law and community values. Each of these themes, it will be suggested, provides us with a clue as to the nature of the law itself. Four possible characteristics will be deduced: flexibility; pragmatism; leniency; and non-technicality.

In the final two chapters, we will construct a case study around the doctrine of diminished responsibility to test these four characteristics, and to examine the ways in which they might manifest themselves in practice. Chapter 4 sets out the development of diminished responsibility in detail. We will begin by looking at the preliminary stages of its emergence, starting with Mackenzie's contribution in the seventeenth century, before moving to consider the significance of the royal mercy to the plea's history in the days of

Hume and Alison. We will then outline its arrival proper in the eighteenth century and proceed to trace its development in the courts up to its recent codification.

Chapter 5 draws the thesis to a conclusion. It will assess the four characteristics identified in chapter 3 against the line of development set out in chapter 4, and thus come to a judgment about what diminished responsibility might tell us about the broader Scottish tradition. We will find that the notion of flexibility, much vaunted within the literature, finds itself reflected here in at least a couple of different senses. Leniency, on the other hand, appears to have had only a limited role to play in the doctrine's development. It will be argued that the emergence of diminished responsibility, and the manner in which it proceeded, is more obviously an expression of pragmatism within the criminal law. Finally, we will find that the idea of non-technicality has played a major role in how the rules of diminished responsibility have been expressed by the courts.

CHAPTER 1: LOCATING DIMINISHED RESPONSIBILITY WITHIN SCOTS CRIMINAL LAW

The doctrine of diminished responsibility, as it exists in Scots law, might properly be categorised in a number of different ways. It bears close relationship to several other key doctrines, and cuts across numerous important strands of criminal law thinking. This chapter sets out three possible categorisations. The aim here is to identify precisely where the modern plea sits within the broader structure of Scots criminal law. At the same time, this chapter will function as an introduction to the plea's operation in practice, forming the background to an analysis of its development in later chapters.

The modern formulation of the plea is expressed in section 51B(1) of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 168 of the Criminal Justice and Licensing (Scotland) Act 2010):

> A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

Three elements of this definition can be identified which might usefully be set in context. First, it is apparent that diminished responsibility forms part of the law of homicide. As section 51B(1) makes clear, it is a defence which can be pled only in relation to a charge of murder: where the definitional criteria of murder are found to have been made out, the jury is nevertheless permitted to return a verdict of culpable homicide if satisfied that the accused killed under diminished responsibility. Second, and relatedly, a successful plea of diminished responsibility makes for only a partial defence. It operates not to absolve the accused of all criminal liability, but instead to remove their conduct to a lower category of seriousness. Third, diminished responsibility constitutes what might be informally termed a "mental condition" defence. It is concerned with the formal exculpatory value of the accused's impaired state of mind at the time of the offence. These three elements allow for three separate categorisations of the plea, each of which will now be considered in turn.

1.1 Murder reduced: diminished responsibility within the structure of homicide

The history of homicide in Scots criminal law is, as in most jurisdictions, a history of categorisation.[1] Whilst every act of killing is occasioned by the same unfortunate result – the extinguishing of human life – it is broadly agreed that not all such acts are amongst themselves morally equivalent, and that a classificatory framework is therefore required to determine the appropriate legal response in individual cases.[2] To this end, the traditional approach has been to construct a hierarchy of offences with the primary aim of tracking distinctions in culpability. An attempt is made to group together killings to which it is felt a comparable degree of blameworthiness ought to attach, in order that they might be punished with broadly equivalent severity.[3]

In Scots law, the recognised classificatory scheme has remained reasonably stable throughout the modern period. Baron Hume, writing at the end of the eighteenth century, identified four principal species of homicide: homicide "free of all blame", comprising casual ("by pure misadventure") and justifiable ("committed intentionally, but … vindicated on principles of duty") homicide; culpable homicide, attracting a non-capital punishment in accordance with the degree of blame attributable; murder, then a capital crime; and aggravated murder, which was thought to warrant "a more rigorous mode of execution, or some indignity or suffering, beside the loss of life".[4] Absent this final category, Hume's scheme still broadly resembles the law today. The leading modern text divides homicide initially into criminal and non-criminal homicide, with criminal homicide split into just the two major categories of murder and culpable homicide.[5]

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[1] For discussion, see W D H Sellar, 'Forethocht felony, malice aforethought and the classification of homicide' in W M Gordon and T D Fergus (eds), *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (London, 1991) 43. More recently (and partially qualifying Sellar's account), see S A Dropuljic, 'The classification of murder and slaughter in the Justiciary Court from 1625-1650: malice, intent and premeditation – food 'forethought'?' (2017) 7 Aberdeen Student Law Review 121.

[2] As noted at the outset of a collection of comparative essays on homicide law, "[e]ven those jurisdictions with very different philosophies of criminal law commonly have two or more general crimes of homicide, usually with one especially serious one": J Horder and D Hughes, 'Comparative issues in the law of homicide' in J Horder (ed), *Homicide Law in Comparative Perspective* (Oxford, 2007) 1 at 6.

[3] A Cornford, 'The architecture of homicide' (2014) 34 OJLS 819 at 826. By contrast, it has occasionally been suggested that a unified homicide offence, with distinctions in culpability dealt with exclusively at the level of sentencing, would represent a welcome simplification of the law in this area: see discussion in L Wilkinson, 'Murder and manslaughter – a single offence of homicide?' (2000) 5 Cov LJ 39.

[4] Hume, *Commentaries* i at 191.

[5] Gordon, *Criminal Law* ii para 30.09. In addition to these two general offences, a specific offence of "corporate homicide" exists under s 1 of the Corporate Manslaughter and Corporate Homicide Act 2007, whilst several standalone road traffic homicide offences are to be found in the Road Traffic Act 1988. For completeness, concealment of pregnancy remains an offence under the Concealment of Birth (Scotland) Act 1809, as does abortion at common law (though subject to the provisions of the Abortion Act 1967, which contains under s 1 several important medical exceptions).

The distinction between these two categories is the central concern of the law of homicide in Scotland. It holds enormous practical significance, for two primary reasons. The first is that a murder conviction attracts a mandatory penalty of life imprisonment,[6] whereas the sentencing regime for culpable homicide is entirely discretionary.[7] The second is the principle of fair labelling. The label affixed to a criminal offence performs a vital communicative function, both within the criminal justice system and within public life more generally, and so it is important that offences are structured and labelled in a manner which accurately describes and differentiates between distinct kinds and degrees of wrongdoing.[8] The law of homicide presents an especially potent illustration of this principle at work. Being that murder is widely regarded as a uniquely serious crime,[9] to be designated a "murderer" is to be clothed in stigma to an unusual degree. The term ought therefore to be reserved for only the most egregious killings, and in turn the offence itself must be defined in appropriate terms to capture these killings and no more.[10]

The critical project for lawmakers then is that of drawing an appropriate "liability line"[11] between murder and culpable homicide. To this end, the practice of the Scottish criminal justice system, which relies extensively upon the scrupulous exercise of prosecutorial discretion, does not lend itself to conceptual precision. As Farmer has pointed out, "the distinction between murder and culpable homicide … is blurred and remains so because it is something that tends to be determined by the decision of the prosecutor to charge for one crime or another, rather than by any of the theoretical distinctions that are of such importance to academic lawyers".[12] In many cases, the Crown Office will elect as a matter of discretion to charge culpable homicide where murder might otherwise have been established. Gordon's *Criminal Law* lists several "unofficial factors" which it appears may

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[6] Criminal Procedure (Scotland) Act 1995 (CP(S)A 1995), s 205(1). Murder remained a capital offence until the enactment of the Murder (Abolition of Death Penalty) Act 1965.

[7] A culpable homicide conviction might therefore lead to anything from life imprisonment (e.g. *Kirkwood v HM Advocate* 1939 JC 36) to admonition (e.g. *Gordon v HM Advocate* 2018 SLT 278).

[8] See J Chalmers and F Leverick, 'Fair labelling in criminal law' (2008) 71 MLR 217.

[9] It is "the most heinous of all crimes": Gordon, *Criminal Law* ii para 30.19.

[10] Fair labelling was indeed one of the guiding principles behind the Law Commission's proposed restructuring of the law of homicide in England and Wales: Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 2.36-2.44. One commentator has though objected that, in the absence of further empirical research than has been undertaken to date, it is not in fact entirely clear just how the terms "murder" and "manslaughter" (for Scotland, substitute "culpable homicide") are understood within the public discourse: Cornford (n 3) at 834-838.

[11] A C Michaels, 'Acceptance: the missing mental state' (1998) 71 Southern California Law Review 953 at 955. By this is meant "a line between committing a criminal offence and not committing a criminal offence, [or] a line between different levels of a criminal offence – for example, between murder and manslaughter": ibid at 955n2. The Law Commission proposed that an additional line be drawn between first- and second-degree murder: Law Commission (n 10) pt 2.

[12] L Farmer, 'Debatable land: an essay on the relationship between English and Scottish criminal law' (1999) 3 Edin LR 32 at 43.

be expected to precipitate such a decision, namely: infanticide; euthanasia; suicide pacts; necessity; excess of duty; omissions; and, potentially, the killing of a violent partner in circumstances which do not give rise to a recognised defence.[13] Whilst at one level this has diminished the practical significance of the distinction between murder and culpable homicide in the substantive law, the question of exactly where the dividing line ought to lie, as Maher observes, has nevertheless traditionally proven controversial.[14]

According to Gordon,[15] Macdonald's classic statement still forms the basis for the accepted definition of murder:

> Murder is constituted by any wilful act causing the destruction of life, whether [wickedly] intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences.[16]

The position with respect to culpable homicide is rather more difficult to neatly capture, for culpable homicide is an extremely broad offence which "tends to be described rather than defined".[17] As it has been put by the High Court:

> …the crime of culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills.[18]

Culpable homicide thus "occupies potentially more difficult, and certainly rather broader, terrain than murder, extending from killing which is so serious as to sit on the borderline with it to that which, for any of a wide variety of reasons, renders the agent of the death so unblameworthy that the question may be whether to prosecute for a homicide offence at

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[13] Gordon, *Criminal Law* ii para 31.01. See further J Chalmers, 'Partial defences to murder in Scotland: an unlikely tranquillity' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Surrey, 2011) 167 at 169-172.
[14] G Maher, '"The most heinous of all crimes": reflections on the structure of homicide in Scots law' in J Chalmers and others (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh, 2010) 218 at 221.
[15] Gordon, *Criminal Law* ii para 30.19.
[16] Macdonald, *Criminal Law* at 89. The bracketed term is derived from *Drury v HM Advocate* 2001 SLT 1013: see n 24 below.
[17] C McDiarmid, 'Killings short of murder: examining culpable homicide in Scots law' in A Reed and others (eds), *Homicide in Criminal Law: A Research Companion* (Abingdon, 2019) 21 at 22.
[18] *Drury* (n 16) at para 13 (Lord Justice-General (Rodger)). On Macdonald's own definition, culpable homicide is simply "the name applied to cases where death is caused by improper conduct, and where the guilt is less than murder": Macdonald, *Criminal Law* at 96.

all".[19] In essence, culpable homicide can be identified, within criminal homicide, as "not murder".[20] Being that the conduct element in each offence is simply "the destruction of life", the distinction between murder and culpable homicide is commonly expressed as turning on the basis of *mens rea*, though this does not quite paint the full picture.

The *mens rea* distinction is useful only in separating murder from culpable homicide in its *involuntary* form. Involuntary culpable homicide encompasses those killings which, whilst still culpable to some extent, fall short of murder in the absence of the necessary [wicked] intention or wicked recklessness.[21] The concept of *mens rea* "has to do a lot more work" here than it does elsewhere in the criminal law: not only must it perform the traditional function of attaching blameworthiness to the wrongdoer, but it must also determine whether "the individual's conduct is *so blameworthy* that a conviction of culpable homicide would not reflect its gravity".[22]

Voluntary culpable homicide, on the other hand, encompasses those killings which would be murder but for a partial defence of provocation or diminished responsibility being successfully pled.[23] In these cases, the definitional elements of the offence have been made out, but there is felt to be good reason not to convict the accused of murder. In this sense, voluntary culpable homicide can best be conceptualised as something like "murder reduced".[24] On one account, it is unclear whether murder and culpable homicide ought to be seen as two definitively separate crimes at all, or whether they are in fact simply two points along a continuum of seriousness.[25] Whilst the latter reasoning does not necessarily exclude the former, it applies most readily to culpable homicide in its voluntary form.

[19] McDiarmid (n 17) at 22.
[20] ibid at 23.
[21] Gordon, *Criminal Law* ii para 30.09. Involuntary culpable homicide can itself be subdivided into lawful and unlawful act culpable homicide: ibid para 31.03. Each of these divisions however is purely academic. In all cases, the offence charged is simply "culpable homicide".
[22] P R Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* 2nd edn (Edinburgh, 2014) para 9.10.2 (emphasis added).
[23] Gordon, *Criminal Law* ii para 31.01.
[24] At least, this is the traditional understanding. Following *Drury* (n 16), voluntary culpable homicide might instead be described as encompassing intentional killings which lack the wickedness required for murder. On the *Drury* analysis, the operation of a partial defence negates *mens rea*, and thus the definitional elements of murder are not in fact made out. For discussion and criticism, see J Chalmers, 'Collapsing the structure of criminal law' (2001) SLT (News) 241. At least in the context of diminished responsibility, however, the *Drury* analysis does not appear to have prevailed, with the defence continuing to operate on the more straightforward basis of "reducing" murder to culpable homicide: see *Galbraith v HM Advocate (No 2)* 2001 SLT 953 at para 41 (Lord Justice-General (Rodger)), and Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004) para 3.48.
[25] Ferguson and McDiarmid (n 22) para 9.10.3.

The role played by diminished responsibility within the structure of homicide then seems clear enough. Separately to *mens rea*, it exists as a tool by which the liability line between murder and culpable homicide is identified, operating to "reduce" the former to the latter (in its voluntary form) and thereby sidestepping both the mandatory life sentence and the special stigma of the more serious conviction.

1.2 Double effect: diminished responsibility as a partial defence

Much of the above discussion has implications for where the diminished responsibility plea sits within the landscape of criminal defences. There are several different ways in which defences can usefully be categorised.[26] Some are based in statute, whilst others remain governed by the common law. Whereas most defences in Scots law are common law defences,[27] diminished responsibility now stands on a legislative footing.[28] Some defences are general, in that they can be pled regardless of the crime charged, whilst others can be pled only in relation to specific offences. Most defences being of general application, diminished responsibility is again somewhat exceptional in that its operation is now expressly limited to cases of murder.[29] Provocation, the other major specific defence, is similarly restricted.[30]

Of greatest interest in the present context, however, is the distinction between complete defences and partial defences. A successfully pled complete defence results in an outright acquittal,[31] whereas a partial defence results only in conviction of a less serious offence. Diminished responsibility is one of only two partial defences recognised in Scots law, again alongside provocation, which similarly operates to enable the returning of a culpable homicide conviction on a murder charge.[32] More specifically, diminished responsibility

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[26] The classificatory scheme used here is drawn from Chalmers & Leverick, *Criminal Defences* paras 1.01-1.17.

[27] Including self-defence, necessity, coercion, provocation and automatism.

[28] CP(S)A 1995, s 51B(1) (as inserted by the Criminal Justice and Licensing (Scotland) Act 2010 (CJL(S)A 2010), s 168). The other principal exception is the "mental disorder" defence, discussed at 1.3 below.

[29] This was substantially the position at common law: *HM Advocate v Cunningham* 1963 JC 80 at 83 (Lord Justice-General (Clyde)); *Brennan v HM Advocate* 1977 JC 38 at 47 (Lord-Justice General (Emslie)). Exceptionally, it had been held that a successful plea of diminished responsibility could operate to reduce *attempted* murder to assault: *Blake v HM Advocate* 1986 SLT 661; *Kerr v HM Advocate* 2011 SLT 430 (decided before the current legislation came into force). Being that the plea now applies only to those "who would otherwise be convicted of murder", the inchoate offence is no longer covered.

[30] Though the point has been subject to contention: see discussion in Chalmers & Leverick, *Criminal Defences* paras 10.25-10.26. Other specific defences of a lesser profile obtain at common law, including most notably the defence of reasonable chastisement to a charge of assault.

[31] Though the mental disorder defence is unusual in this respect: see below.

[32] Other potential partial defences, which are not recognised as such in Scots law, include infanticide, mercy killing, survival of a suicide pact, and the use of excessive force in self-defence: Chalmers & Leverick, *Criminal Defences* para 1.02. One commentator has suggested that a plea of excessive self-defence, as well as a bespoke partial defence for battered accused, might usefully be established to complement Scots law's

can be classed as a partial *excuse*. Excuses can be distinguished from justifications. Whereas a justification denies the wrongfulness of the act, an excuse denies the blameworthiness of the agent for an act which is concededly wrongful.[33] A partial excuse thus "reduces the blame of the agent who performs the act – but not to a degree sufficient to preclude liability altogether".[34] In the case of diminished responsibility, the claim is that the killer is less blameworthy on account of their impaired ability to determine or control their conduct at the time of the offence.[35]

As Wasik notes, partial excuses must also be differentiated from (or, perhaps more accurately, identified within) the more general category of "mitigating excuses", taken into account by way of sentencing discretion.[36] Partial excuses, like other mitigating excuses, "affect sentence, sometimes drastically".[37] But, unlike other mitigating excuses, partial excuses are taken into account by the jury in determining its verdict and "have the important characteristic effect of changing the category of offence with which the defendant is ultimately convicted".[38] Husak differentiates "formal" from "informal" mitigation on a similar basis.[39]

This distinction is useful in bringing out a key point about the internal mechanics of the diminished responsibility plea. The doctrine has a kind of "double effect", operating both at the level of conviction *and* at the level of sentence. It is important to recall that, whilst the plea of diminished responsibility is itself applicable only to cases of murder, this is not to say that evidence of "abnormality of mind" is irrelevant where any other offence is charged. It simply functions as a mitigating excuse, for the consideration of the sentencing

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narrow conception of provocation: C McDiarmid, 'Don't look back in anger: the partial defence of provocation in Scots criminal law' in Chalmers and others (n 14) 195 at 213-215. The Law Commission in England and Wales considered a partial defence of duress, though ultimately recommended that duress ought to constitute a complete defence: Law Commission (n 10) para 6.3. Victor Tadros has suggested the further possible partial defences of necessity, extreme emotional disturbance, and involuntary intoxication: V Tadros, 'The homicide ladder' (2006) 69 MLR 601 at 616-617. That Scots law subscribes to only two partial defences, despite the evidently extensive range of options available, can largely be attributed to its reliance upon broad prosecutorial discretion.

[33] G P Fletcher, *Rethinking Criminal Law* (Boston, 1978) at §10.1. Whilst the academic commentary on the rationales for admitting different kinds of defences has focused almost exclusively on the distinction between excuses and justifications, this does not tell the full story. A defence might otherwise be categorised as a failure of proof defence, a lack of capacity defence, or a non-exculpatory defence: Chalmers & Leverick, *Criminal Defences* para 1.05.

[34] D Husak, 'Partial defenses' (1998) 11 Canadian Journal of Law and Jurisprudence 167 at 170.

[35] They are both less blameworthy than they would have been in the absence of the mitigating circumstance, and less blameworthy than the "paradigmatic" or "standard" killer: see ibid at 170-171.

[36] M Wasik, 'Partial excuses in the criminal law' (1982) 45 MLR 516 at 516. Wasik gives the examples of mistake of law which does not negate *mens rea*, most cases involving the defendant's good motive for breaking the criminal law, and provocation in crimes other than murder.

[37] ibid.

[38] ibid.

[39] Husak (n 34) at 176.

judge alone.[40] Yet where the conviction is one of murder, to which a life sentence invariably attaches, this kind of excuse can have only limited effect.[41] The formal partial defence of diminished responsibility is thus required as "a special device for, as it were, untying the hands of the judge in murder cases".[42] Where the plea has been successfully made out, permitting the return of a culpable homicide conviction and evasion of the mandatory penalty, the accused's abnormality can then be taken into account separately by the sentencing judge in determining sentence. At this stage, diminished responsibility effectively functions as a mitigating excuse.[43] In the case of *Lindsay v HM Advocate*, the High Court opined that "diminished responsibility is not a defence as such", it being "more accurate to regard [it] as a mitigating factor".[44] In truth, on account of its "double effect", the plea can properly be regarded as both a defence *and* a plea in mitigation. A partial excuse is best seen as simply an unusual species of mitigating excuse.[45]

1.3 "Short of insanity": diminished responsibility as a mental condition defence

It is useful finally to consider the position of the diminished responsibility plea in relation to what might be termed its desert-basis. It is clear that the plea falls within the informal category of "mental condition" defences, which broadly takes in "those defences where the accused relies on some form of abnormal mental condition as a source of exculpation".[46] Mental condition defences are designed to meet the variety of circumstances in which an

[40] See e.g. *Andrews v HM Advocate* 1994 SCCR 1990 (indecent assault); *Arthur v HM Advocate* 1994 SCCR 612 (assault). Of course, where mental abnormality is invoked as a mitigating excuse, it need not meet the statutory "substantial impairment" standard.

[41] It is not the case that mitigation is *entirely* excluded, though discussion of the mandatory penalty occasionally overlooks the realities of Scottish sentencing practice. As Gerald Gordon has pointed out, evidence of "diminished responsibility" may still be considered in setting the punishment part of a life sentence: G H Gordon, 'James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial*' (2007) 11 Edin LR 284 at 285.

[42] Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (Cmnd 6244, 1975) para 19.8.

[43] That conviction and sentence are really two separate questions here is demonstrated most clearly by the course taken in *Kirkwood* (n 7). Whilst diminished responsibility was successfully pled to the effect of evading the death penalty, the Lord Justice-General (Normand) proceeded to affirm a sentence of penal servitude for life on account of the danger Kirkwood posed to the community. Lord Normand opined (at 40) that "[w]hen the jury has, under the presiding judge's direction, given effect to this extenuating circumstance by reducing the crime from murder to culpable homicide, the judge has still to consider whether it should have further weight when he is imposing sentence". With life imprisonment now the maximum penalty for both murder and culpable homicide, it is conceivable that a killer might successfully plead diminished responsibility only for their punishment to remain unaltered. A victory in labelling terms alone is doubtless a rather hollow one.

[44] 1997 JC 19 at 21 (Lord Justice-General (Hope)).

[45] Gordon describes diminished responsibility as simply "a special case of the rule that personal factors mitigate sentence": Gordon, *Criminal Law* i para 11.02. Husak neatly summaries the broader position in terms that "[a]lthough all partial justifications and excuses are mitigating circumstances, not all mitigating circumstances are partial justifications or excuses": Husak (n 34) at 168.

[46] Preface to R D Mackay, *Mental Condition Defences in the Criminal Law* (Oxford, 1995). Three substantive mental condition defences are recognised in Scots law: diminished responsibility, mental disorder, and automatism.

individual is not fully capable of acting rationally in the world, and ought therefore to be attributed something less than full moral responsibility and to have their punishment reduced accordingly.[47] In seeking to understand how the partial defence of diminished responsibility operates, it is worth considering its relationship to what might be considered its "analogous" complete defence. On Husak's "unifying hypothesis", "a circumstance qualifies as a partial defense because it has an *analogue* in a complete justification or excuse".[48] In order that a set of conditions should be formally recognised as partially exculpatory, there ought to be some corresponding set of conditions with an equivalent desert-based rationale which would operate to exculpate entirely. Husak's theory maps broadly onto the notion of "liability lines" within the structure of homicide: we might imagine one line separating complete exculpation from partial exculpation, and another separating partial exculpation from complete responsibility. The plea of diminished responsibility has an obvious analogue in the defence of "mental disorder", the paradigmatic mental condition defence.[49]

The mental disorder defence, a modernised and rebranded replacement for the old common law defence of insanity, is defined in section 51A(1) of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 168 of the Criminal Justice and Licensing (Scotland) Act 2010):

> A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

Mental disorder differs from diminished responsibility both in the degree and in the kind of abnormality entailed. Whereas diminished responsibility is concerned with "substantial" volitional impairment (a reduced ability to "determine or control" one's conduct), mental disorder targets unqualified cognitive impairment (an inability to "appreciate the nature or wrongfulness" of one's conduct). Nevertheless, there is some significant overlap, and

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[47] See discussion in R A A McCall Smith and D Sheldon, *Scots Criminal Law* 2nd edn (Edinburgh, 1997) at 130-131.
[48] Husak (n 34) at 168 (emphasis in original).
[49] Alternatively, one might think of mental disorder and diminished responsibility (and mental abnormality as a mitigating excuse) as points along a "scale of excuse": Wasik (n 36) at 524-525. The mental disorder defence is taken here to operate in Scots law as an excuse defence, as opposed to a lack of capacity defence, because it is concerned with the ability of the accused to appreciate the nature or wrongfulness of the particular conduct in question – not their conduct more generally. For an argument that mental disorder (and, as a corollary, diminished responsibility) would be better constructed around the accused's lack of capacity, see V Tadros, 'Insanity and the capacity for criminal responsibility' (2001) 5 Edin LR 325.

indeed it is now provided that, even where the accused's condition at the time of the offence would have satisfied the definition of mental disorder, they are not precluded from pleading diminished responsibility.[50] And indeed they may have good reason for electing to do so, for although mental disorder constitutes a complete defence in the sense that a successful plea absolves the accused of all criminal liability, a release is by no means guaranteed. As set out in section 57 of the 1995 Act, the court has the power to make a variety of disposals, including indefinite detention in a psychiatric hospital.[51] This is "a poor sort of acquittal",[52] to which a culpable homicide conviction and a determinate prison sentence may appear preferable.

The court's powers of disposal might also at least partly explain why insanity, despite being available as a general defence, appears historically to have been disproportionately pled in relation to murder. For many years, murder was in practice the only offence which remained subject to capital punishment, and today it is the only offence carrying a mandatory life term. Only in these circumstances is indeterminate hospital confinement likely to be reliably deemed an attractive alternative.[53] In any case, it might reasonably be suspected that, quite simply, "murder is very seriously associated with mental abnormality".[54]

At an earlier stage in the development of diminished responsibility, the plea was not only linked conceptually to the insanity defence but was in fact definitionally dependent upon it. As the point was put by the High Court in *Brennan v HM Advocate*, "our law of diminished responsibility rests essentially upon the test which governs the defence of insanity. The only distinction between insanity and the state of diminished responsibility recognised by our law is that for the latter state to be established something less than total alienation of reason will suffice…".[55] From the very beginnings of the plea, and throughout the twentieth century, juries were variously directed to look for such things as "a weak or diseased state of mind, not amounting to insanity",[56] "a degree of insanity, not sufficient to destroy criminal responsibility, and yet sufficient to modify the quality of the

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[50] CP(S)A 1995, s 51B(2) (as inserted by CJL(S)A 2010, s 168).

[51] Until 2003, hospital detention was the only disposal available: Criminal Justice (Scotland) Act 2003, s 2(b).

[52] N Walker, *Crime and Insanity in England, Vol. 1: The Historical Perspective* (Edinburgh, 1968) at 192.

[53] Chalmers & Leverick, *Criminal Defences* para 7.02.

[54] Royal Commission on Capital Punishment (1949-1953), *Minutes of Evidence Taken Before the Royal Commission on Capital Punishment* (London, 1949-1953): Eighteenth Day (Tuesday, 4th April, 1950), Q5525 (evidence of Lord Cooper).

[55] *Brennan* (n 29) at 45 (Lord Justice-General (Emslie)).

[56] *Andrew Granger* (1878) 4 Coup 86 at 103 (Lord Deas).

crime”,[57] “a state of mind which is bordering on, though not amounting to, insanity”,[58] and “something amounting to or approaching to partial insanity”.[59] In essence, diminished responsibility was framed in terms of mental abnormality falling “short of insanity”.[60] Indeed, in most of the early cases the plea was tendered only in the event that an alternative plea of insanity was not sustained, taking the form of a “consolation prize” for the impaired killer.[61]

The present position is different. In *Galbraith v HM Advocate (No 2)*, Lord Rodger was at pains to divorce the definition of diminished responsibility from the concept of insanity, noting the unfortunate quirk in *Lindsay* that the trial judge had felt it necessary to include a direction on insanity in his directions on diminished responsibility, despite there being no suggestion of actual insanity in the case itself.[62] Reformulating the plea, the *Galbraith* court was clear that it was “neither necessary nor appropriate to stipulate that the accused’s mental state should have bordered on insanity”, and that evidence of substantial impairment would suffice.[63] This position is reflected in the current statutory definition. At any rate, as Lord Rodger notes, it is nowadays comparatively rare for a special defence of insanity (mental disorder) at the time of the killing to be put before a jury.[64] In most cases, mental disorder is likely to operate rather as a plea in bar of trial.[65]

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This chapter has introduced the concept of diminished responsibility in Scots law, understood in terms of its twenty-first century statutory definition. Having examined three separate categorisations of the plea, it can be seen to occupy something of a central position within the criminal law, with close ties to several other key doctrines. These ties though are not newly formed. In fact, the present codified plea represents the culmination of around a century and a half of incremental development, its roots lying deep within the very tradition of Scots criminal law. It is this tradition, and diminished responsibility’s

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[57] *HM Advocate v Aitken* (1902) 4 Adam 88 at 94 (Lord Stormonth-Darling).
[58] *HM Advocate v Savage* 1923 JC 49 at 51 (Lord-Justice Clerk (Alness)).
[59] *HM Advocate v Braithwaite* 1945 JC 55 at 58 (Lord Justice-General (Cooper)).
[60] *Blake* (n 29) at 662 (Lord Brand); *Savage* (n 58) at 50 (Lord Justice-Clerk (Alness)).
[61] As Husak notes, some have put forward a more general “consolation theory” of partial defences, wherein “[a]n argument that comes close but fails to win a complete acquittal establishes a claim in mitigation as a kind of a consolation prize”: Husak (n 34) at 180n64.
[62] *Galbraith* (n 24) at para 47, referring to *Lindsay* (n 44) at 69B-D.
[63] *Galbraith* (n 24) at para 46. Of course, where the condition of the accused matches this description, a finding of diminished responsibility remains likely: ibid at para 47.
[64] ibid at para 47.
[65] CP(S)A 1995, s 53F (as inserted by CJL(S)A 2010, s 170).

place within it, which will be in focus for the remainder of this work. The following two chapters will examine this tradition in more detail, before we later return to consider the broader significance of diminished responsibility.

CHAPTER 2: TRADITION AND SCOTS LAW

A "tradition", on one popular sociological account, is "anything which is transmitted or handed down from the past to the present".[1] More precisely, it is anything which "having been created through human actions, through thought and imagination … is handed down from one generation to the next".[2] This might be a material object – a sculpture, a painting, or a book – or equally it might be a belief, an image, a practice or an institution.[3] To qualify as a tradition, the "thing" need not remain wholly identical at all stages of transmission (and indeed it is unlikely that it will do so), but crucially its "essential elements" must remain "recognizable by an external observer as being approximately identical at successive steps or acts of transmission and possession".[4]

The temporal dimension here seems clear enough: a tradition is constituted in part by the continuity of its existence over time. Not to be overlooked, however, is the spatial dimension of tradition. To say that a thing is handed down to a subsequent generation is to say that it is handed down to a subsequent generation of those sharing membership of some identifiable group, be it a family, a neighbourhood, a city, a religious denomination, a political party, or any other. Many traditions are doubtless common to much of humanity itself. The point here is that a tradition is defined not only by the extent of its continuity, but also by the identity of the community or society throughout which it is observed.[5]

One obvious contender here is the nation. Typically occupying a defined territory and united by a common ancestry, language, history and culture, nations offer fertile ground in which tradition may take root. The Scottish example provides an interesting case in point. Owing much to its unusual constitutional position, the idea of tradition, and its continued existence within a range of fields – religion, education, industry, language, the arts, and politics, among others – is thought to have assumed a peculiar role in shaping Scotland's

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[1] E A Shils, *Tradition* (London, 1981) at 12.
[2] ibid.
[3] ibid.
[4] ibid at 14.
[5] As Shils notes elsewhere, traditions are constituted "over several generations or over a long time *within single societies* (with a more or less delimited territory and a genetically continuous population) and *within corporate bodies* as well as *over regions which extend across several bounded territorial discrete societies* which are unified to the extent of sharing in some measure a common culture – which means common traditions": E A Shils, 'Tradition' (1971) 13 Comparative Studies in Society and History 122 at 123.

national identity.[6] The purpose of this chapter is to consider the role of tradition in relation to another of these fields, namely Scots law and the Scottish legal system.

The notion of tradition has long played a major role in the discourse around Scots law. Indeed, one eminent commentator went so far as to claim that "[o]f all the items which make up Scotland's heritage none is more distinctive than Scotland's contribution to law".[7] Whilst this sort of assertion is difficult to substantiate, it is certainly the case that the idea of tradition is central to an understanding of the Scottish legal system. Here, we will begin by setting out some of the historical and political reasons for this, before considering a familiar account of the Scottish "tradition". We will then direct our attention towards the question of what tradition might mean with particular regard to the Scottish criminal law.

2.1 The Scottish legal tradition

Within the contemporary Scottish legal literature, many pages have been devoted to what is often labelled "the Scottish legal tradition". The term itself is perhaps most recognisable as the title of a short volume penned by Lord Cooper, first published in 1949 whilst Cooper was in post as Lord President of the Court of Session.[8] Cooper does not himself expressly define his "tradition", but it would later be described as loosely encapsulating the idea that there exists "a distinctive body of legal principles and institutions linked to the history of the Scottish nation".[9] Indeed, "tradition" for Cooper meant something more than simply the Scottish origins of a set of rules. Scots law, he suggested, "is in a special sense the mirror of Scotland's history and traditions and a typical product of the national character".[10]

One element of this thesis, at least, appears to hold true. It is right to position Scots law as having developed in parallel with the history of the Scottish nation itself, for – especially throughout the modern period – the story of the Scottish legal system broadly tracks Scotland's major political and constitutional developments. It is a familiar story, its central

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[6] For reasons discussed at 2.1 below, religion and education (along with law) enjoy an elevated status in this regard.
[7] Lord Cooper, 'The Scottish legal tradition' in M C Meston and others, *The Scottish Legal Tradition* (Edinburgh, 1991) 65 at 65.
[8] Now available as Cooper (n 7). Cooper was Lord President and Lord Justice-General between 1947 and 1954, having previously served as Solicitor General, Lord Advocate and Lord Justice-Clerk successively. On Cooper's life and career generally, see Lord Keith of Avonholm, 'Cooper, Thomas Mackay, Baron Cooper of Culross (1892-1955)' in *Oxford Dictionary of National Biography* (online edn) (2004), available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-32554?rskey=guscZG&result=11 <accessed 04/04/2021>.
[9] L Farmer, '"The genius of our law…": criminal law and the Scottish legal tradition' (1992) 55 MLR 25 at 29.
[10] Cooper (n 7) at 65.

figures playing out a narrative of independence and identity from opposing sides of the River Tweed, and one which may be recounted here in short order. Two "obvious milestones"[11] can be identified, nearly three centuries apart.

The first, commonly termed the "Union of the Parliaments", concluded on 1 May 1707. On that date, the Acts of Union came into force,[12] bringing into effect the terms of the Treaty of Union and thus decreeing that the Kingdoms of Scotland and England would be merged to form a new unitary state, the Kingdom of Great Britain.[13] The old Parliaments of Scotland and England were likewise to unite, forming a single Parliament of Great Britain.[14] Whilst the two nations had shared a monarch for more than a century,[15] to this point each had continued to produce its own laws. Now, they shared a queen, a government and a legislature. It was, however, provided in the Treaty that Scotland's separate legal system would be preserved. Its existing laws would remain in force, its public law being subject to alteration at the behest of Parliament so as to achieve consistency throughout the kingdom but its private law immutable "except for evident Utility of the Subjects within Scotland".[16] Likewise, its highest courts of civil and criminal jurisdiction were to continue "in all time coming" and retain their pre-Union "Authority and Privileges", though "subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great Britain".[17]

Nonetheless, from this point onwards Scotland found itself home to a legal system without a (dedicated) legislature. On paper, of course, the same was true of England, whose own parliament had ceased to exist at the same moment as its Scottish counterpart. Any legislation with effect over either jurisdiction, or both, would emanate directly and exclusively from the newly inaugurated British parliament. In practice, however, it was no secret that this "new" parliament bore far closer relation to one of its forerunners than the other. In effect, the Treaty had provided for a small number of Scottish members to be inserted into each of the old English assemblies: 45 Scottish representatives were to sit and vote in the House of Commons, while the House of Lords would be supplemented by the

[11] S Cowan and others, 'Devolving dictum? Legal tradition, national identity and feminist activism' in S Cowan and others (eds), *Scottish Feminist Judgments: (Re)creating Law from the Outside In* (Oxford, 2019) 19 at 20.
[12] Union with Scotland Act 1706; Union with England Act 1707.
[13] Treaty of Union, Article I.
[14] ibid, Article III.
[15] On 24 March 1603, a prior union – the "Union of the Crowns" – had taken effect, as James VI of Scotland acceded to the thrones of both England and Ireland as James I.
[16] Treaty of Union, Article XVIII.
[17] ibid, Article XIX.

addition of 16 Scottish peers.[18] Both Houses would continue to meet at the Palace of Westminster in London. Moreover, although the Treaty said nothing of the right to bring Scottish appeals before the Lords – which, in addition to its legislative role, had historically served as a court of last resort in English cases – that body quickly asserted its own final jurisdiction over Scottish civil matters.[19] Thus, as the position has been aptly summarised:

> For England the Union meant, in large part, continuity in constitutional arrangements. For Scotland it meant quite radical change. This reflected the contemporary political reality. Despite the formalities this was not a partnership of equals. By any reckoning, the balance of power was decidedly in England's favour.[20]

That two legal systems should share, in a lopsided marriage, a single legislature and partially a supreme court was almost certainly a unique position, and one always likely to be attended by some measure of disharmony.[21] Nonetheless, the position remained broadly unchanged until the second "milestone" in our story, nearly 300 years on.

For Scotland, the latter half of the twentieth century meant a period of growing nationalist sentiment, bringing with it a rise in demand for constitutional change. Calls for home rule, which to that point had failed to gather significant momentum, began to intensify as the pro-independence Scottish National Party enjoyed its first real taste of electoral success, initially in the 1960s and then especially in the 1970s with its hugely effective "It's Scotland's Oil" campaign. The resulting electoral pressure on the successive Labour governments of Harold Wilson and James Callaghan precipitated a 1979 referendum on the question of a devolved Scottish assembly, which narrowly resulted in retention of the status quo. The outcome of the ballot would play a significant role in the downfall of the Callaghan ministry later that year, and nearly two decades of anti-devolution Conservative

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[18] ibid, Article XXII. In itself, a bifurcated parliamentary structure was alien to the hitherto unicameral Scots.
[19] See generally A J MacLean, 'The 1707 Union: Scots law and the House of Lords' (1983) 4 JLH 50, where it is noted (at 51) that the House of Lords began hearing appeals from the Court of Session within the first year of the Union's existence. Previously, Scottish civil appeals had been competent to the old Parliament of Scotland. In 2009, the House of Lords' judicial functions were assumed by a new Supreme Court of the United Kingdom (Constitutional Reform Act 2005, s 23(1)). On the position regarding criminal appeals, see below.
[20] P H Brodie, 'From Scotland and Ireland: (a) Scotland after 1707' in L Blom-Cooper and others (eds), *The Judicial House of Lords 1876-2009* (Oxford, 2009) 279 at 279.
[21] Indeed, Walker characterises the early years of the eighteenth century as a period marked by dissatisfaction with the Union: see D M Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* 8th edn (Edinburgh, 2001) at 155-157.

government followed. Nevertheless, the issue remained high on the Labour agenda, and in 1997, shortly after the party's return to power, a second referendum saw the Scottish electorate vote decisively in favour of change.[22] On 12 May 1999, a new Scottish Parliament came into existence,[23] and with it came a new era for Scots law and for Scotland itself. Under the terms of the Scotland Act 1998, extensive legislative powers were devolved from Westminster to Holyrood, and after a centuries-long hiatus Scotland's laws would once again be formally produced in Scotland.[24] For the first time, Scotland's separate legal identity within the Union was to be fully recognised at an institutional level.

2.1.1 The "Cooper-Smith ideology" and Scottish legal nationalism

As Hector MacQueen has argued, the existence of a distinctive law and legal system has played a central role in Scotland's national identity from as early as the Middle Ages.[25] It is clear though why this may have been especially true of the centuries following the 1707 Union. Upon the formation of a unitary state, Scots law – its continued existence having been guaranteed within the Union's foundational agreement – came to symbolise in the present something of Scotland's independent past. Along with the Church of Scotland and the Scottish education system, each of which was similarly preserved by the Treaty, it assumed special status as "one of the pillars of the survival of Scottish identity in the modern world".[26] Any perceived threat to its independent character could therefore be expected to meet with emphatic resistance.

Perhaps the most caustic appraisal of the Scottish position in the post-Union years, and certainly the most notable, began to achieve prominence within the legal literature as the twentieth century reached its midpoint. The "Cooper-Smith ideology",[27] so christened owing to the central influence of the aforementioned Lord Cooper and his self-described "junior disciple",[28] Professor T B Smith,[29] has been broadly summarised in the following terms:

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[22] The history outlined here is detailed in I McLean, 'Challenging the Union' in T M Devine and J Wormald (eds), *The Oxford Handbook of Modern Scottish History* (Oxford, 2013) 635.

[23] Established under the Scotland Act 1998 (SA 1998), s 1(1).

[24] Though not all of its laws: several matters, set out in Schedule 5 to the SA 1998, remain "reserved" to the exclusive legislative remit of the UK Parliament.

[25] H L MacQueen, '*Regiam Majestatem*, Scots law, and national identity' (1995) 74 Scottish Historical Review 1 at 25.

[26] ibid at 1.

[27] A term first coined by a critical Ian Willock: I D Willock, 'The Scottish legal heritage revisited' in J P Grant (ed) *Independence and Devolution: The Legal Implications for Scotland* (Edinburgh, 1976) 1 at 8.

[28] T B Smith, 'The contribution of Lord Cooper of Culross to Scottish law' in T B Smith, *Studies Critical and Comparative* (Edinburgh, 1962) 137 at 137.

[29] Smith was Professor of Scots Law at the University of Aberdeen between 1949 and 1958, before transferring to the University of Edinburgh where he became Professor of Civil Law (until 1968) and then

> Modern Scots law was a "mixed" legal system, in which a basically Roman law or Civilian structure of private law had been overlaid since the 1707 Union by influence from the English Common Law. The principal agents of that influence had been the common legislature in Westminster, UK government departments in Whitehall, and the common appeal court in the House of Lords. The influence from England had rarely if ever been for the good. The salvation of Scots law lay in drawing upon its own historical roots and the experience of other "mixed" systems, such as those of South Africa and Louisiana, where too a basically Roman Civilian system was threatened by infiltration from other legal traditions.[30]

The Westminster Parliament, it was thought, being predominantly composed of English members with limited knowledge of or interest in the law of Scotland, tended to legislate for Scotland on English terms. Whilst increasing levels of commercial activity meant that uniformity would undoubtedly be expedient in certain areas, in many others the solutions devised did not happily cohere with the idiosyncrasies of the Scottish system.[31] Much a similar criticism could be levelled at the House of Lords, who – especially in the absence of Scottish input into its judicial activities until the appointment of Lords of Appeal in Ordinary in 1876[32] – continued the supposed trend of haphazardly imposing English principles north of the border.[33] This process of uninvited cross-pollination was only compounded by the "indiscriminate"[34] citation of English authorities and English legal

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Professor of Scots Law (until 1972). See D M Walker, 'Smith, Sir Thomas Broun (1915–1988)' in *Oxford Dictionary of National Biography* (online edn) (2004), available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-40100?rskey=SrzARx&result=1 <accessed 21/05/2021>.

[30] H L MacQueen, 'Two Toms and an ideology for Scots law: T B Smith and Lord Cooper of Culross' in E Reid and D L Carey Miller, *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005) 44 at 46. For arguments in this vein, see e.g. Cooper's 'The Scottish legal tradition' (n 7) and Smith's 'English influences on the law of Scotland' in Smith (n 28) 116.

[31] An often-cited example here is the Sale of Goods Act 1893, which substantially codified (for the whole of the United Kingdom) the (English) common law. In doing so, it upturned (with respect to corporeal moveables) longstanding Scottish principles of transfer: see T B Smith, 'Error and transfer of title' (1967) 12 JLSS 206. On the legislative tendencies of Westminster more generally, note for example Walker's disdain for the "application to Scotland" clause: D M Walker, 'Some characteristics of Scots law' (1955) 18 MLR 321 at 324.

[32] Appellate Jurisdiction Act 1876, s 6.

[33] An especially scathing appraisal of the House of Lords' work in Scottish appeals is to be found in A Dewar Gibb, *Law from Over the Border: A Short Account of a Strange Jurisdiction* (Edinburgh, 1950). It is nowadays generally accepted that the standard criticisms levelled at the Lords by aggrieved Scottish commentators were probably somewhat overstated: see Brodie (n 20) for a more moderate assessment. Certainly, in the modern era, the approach of English judges towards Scottish cases "has swung away from dismissal in favour of deference" to their Scottish counterparts: J Chalmers, 'Scottish appeals and the proposed Supreme Court' (2004) 8 Edin LR 4 at 10; see also Lord Hope of Craighead, 'Scots law seen from south of the border' (2012) 16 Edin LR 58.

[34] Smith (n 28) at 126.

literature in Scottish courts.[35] All of this was to be unfavourably contrasted with earlier stages in the development of Scots law. Whilst little of the law's content had ever been "indigenous",[36] a broad range of influences had been drawn upon, and those influences felt through a process of "carefully selective" appropriation.[37]

This story of "anglicisation" was to prove highly influential in helping to reignite interest in the native legal tradition. The Cooper-Smith line of thinking can be identified as part of a broader tendency towards Scottish "legal nationalism", embraced by many of the twentieth century's leading scholars:[38] "the belief – nay, the conviction – that Scots law has inherent strengths and benefits, that it is an exceptional system which meets the needs and aspirations of the Scottish people and that its integrity must be safeguarded against harmful external influences".[39] At least on Cooper's account, this safeguarding mission had the very future of the Scottish nation at stake. "Scots law", he wrote, "is in a special sense the mirror of Scotland's history and traditions and a typical product of the national character".[40] As one of the few Scottish institutions to have survived the Union, its assimilation with Anglo-American law would engender "the swift annihilation of what is left of Scotland's independent life and culture".[41]

<u>2.1.2 Common law and criminal law</u>

Considering together the two "milestones" outlined above, as well as some of the criticisms levelled at the Scottish position in the intervening years, a key theme which emerges is the centrality of the common law to any plausible account of Scotland's legal "tradition". Whilst the legal system as a whole would come to represent continuity with Scotland's past, in the absence of a dedicated legislature the task of preserving whatever might be peculiarly "Scottish" in its nature necessarily fell upon the courts by way of the common law's development, and perhaps no less significantly upon the institutional writers by way of its ordering and explication.[42] Infringement from Westminster,

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[35] See also on this point D M Walker, 'A note on precedent' 1949 JR 283, and more recently C McDiarmid, 'Scots law: the turning of the tide' 1999 JR 156 at 161-163.
[36] Cooper (n 7) at 70.
[37] ibid at 68.
[38] Alongside Cooper and Smith are usually included the figures of Andrew Dewar Gibb and David M Walker, occupants successively of the Regius Chair in Law at the University of Glasgow (1934-1958 and 1958-1990 respectively). See generally L Farmer, 'Under the shadow over Parliament House: the strange case of legal nationalism' in Grant (n 27) 151.
[39] As defined in the editor's introduction to Grant (n 27) at x, where Grant is keen to point out that legal nationalism does not necessarily correlate with political nationalism.
[40] Cooper (n 7) at 65.
[41] ibid at 88.
[42] Cowan and others (n 11) at 20-21.

legislative or judicial, has tended to attract particular scorn where it has been directed towards core principles developed over centuries in the Scottish courts.

At this stage, it is appropriate to consider the position of the criminal law. Scots criminal law can be distinguished from the remainder of Scots law in at least two important senses. The first is that the criminal law can broadly be treated as an exception to the claim, noted above, that little of Scots law can properly be called "indigenous".[43] The starting point for the modern law is generally taken to be Baron Hume's treatise, *Commentaries on the Law of Scotland, Respecting Crimes*,[44] published in two volumes and running to four editions between 1797 and 1844. Hume's was not the first text to offer a considered treatment of Scots criminal law, but it was clearly distinguishable from those which had gone before in both the comprehensiveness of its coverage and in its very conscious eschewal of foreign and other sources in favour of reliance upon decisions of the Scottish courts. Hume was keen to point out that he had drawn primarily upon a thorough search of the Books of Adjournal (the records of the High Court of Justiciary),[45] "which are the only key to the peculiar practice of Scotland respecting Crimes".[46] By contrast, Hume's most notable predecessor – Sir George Mackenzie, whose more sweeping *Matters Criminal* had led the field from its release in 1678 – had pieced together his work using an assortment of Scots, civil, and natural law sources.[47] Hume's work thus rendered for the first time a definitely Scottish body of rules, which would form the basis for all that was to follow.[48]

The second point of distinction is that the criminal law has been largely exempt from claims of Westminster infringement. Such claims, however valid, have tended to be made primarily with Scots private law in mind, whilst the criminal law is typically thought to have encountered only very limited external pressure. On Stoddart's account, for example, the criminal law is imagined as having "survived and developed for centuries relatively untrammelled by the English influences which have ravaged and eroded many of the basic principles on which other aspects of Scots law are founded".[49] The language of "ravaged and eroded" perhaps somewhat embellishes the point here, but less so that of "untrammelled". Whilst the influence of English law over the development of Scots

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[43] Cooper (n 7) at 84; cf. n 36 above and accompanying text.
[44] Hume, *Commentaries* i and ii.
[45] Hume, *Commentaries* i at 3, 18.
[46] ibid at 2.
[47] See Mackenzie, *Matters Criminal* at 6-11.
[48] See further discussion of Hume's influence in ch 3 below.
[49] C N Stoddart, 'Scottish criminal law' in Grant (n 27) 175 at 175. See also Walker (n 31) at 336: "…the High Court of Justiciary has built up a very satisfactory body of criminal law without the assistance of the House of Lords and with scant regard to English practice".

criminal law, in the centuries both before and after the Union, has been amply demonstrated elsewhere,[50] it seems right to suggest that this influence has more been the result of conscious borrowing – the kind of influence which Lord Cooper and others viewed as central to Scotland's legal past – than forced assimilation.[51] Certainly, the Westminster parliament has enacted a great deal of so-called "regulatory" legislation to contend with newly emergent forms of wrongdoing, but the major offences and defences have largely been left to develop in the Scottish courts. Indeed, that Scots criminal law remains a common law system has been called its "most remarkable feature".[52] Moreover, Scottish criminal decisions have not, for the most part, been subject to the appellate jurisdiction of the House of Lords.[53]

The criminal law, then, is thought to be – and to have remained – an especially "Scottish" part of the legal system. Only in the fullness of time will we discover the extent to which this state of affairs will be shaken up by the influence of the Scottish Parliament. At least in theory, the existence of a dedicated legislature ends the need for widespread judicial innovation, though we have not to date seen the kind of systematic reform of the substantive law which might have initially seemed possible.[54] At any rate, it is clear that the criminal law can be marked out as home territory for Lord Cooper's notion of the Scottish "tradition". Indeed, in surveying some of the most distinctive areas of Scottish practice, the criminal law and its administration are singled out by Cooper as "a branch of

[50] See C Gane, 'Civilian and English influences on Scots criminal law' in Reid and Carey Miller (n 30) 218 at 228-237.

[51] Though express indication is not always given that any borrowing is taking place. The modern definition of diminished responsibility is instructive here. The plea, having originated in the Scottish courts, was imported into English law under s 2 of the Homicide Act 1957. Then, when the High Court came to reformulate the Scottish plea in *Galbraith v HM Advocate (No 2)* 2002 JC 1, it adopted (without acknowledgement) the terminology of s 2 "in a remarkable process of circularity": J Chalmers, 'Abnormality and anglicisation: first thoughts on *Galbraith v HM Advocate (No 2)*' (2002) 6 Edin LR 108 at 114. See further A Braun, 'The value of communication practices for comparative law: exploring the relationship between Scotland and England' (2019) 72 CLP 315 at 337-343 (on unacknowledged borrowing) and 331-332 (on the "circular" communication of legal ideas).

[52] G H Gordon, 'Judicial creativity in a common law system' (1993) 27 Israel Law Review 118 at 118.

[53] It is often taken for granted that this was always the settled position, but in fact the competency of appeals from the High Court of Justiciary remained unclear for some years after the Union: see A J MacLean, 'The House of Lords and appeals from the High Court of Justiciary, 1707-1887' 1985 JR 192.

[54] Some had hoped that devolution would facilitate codification of the criminal law, and indeed an unofficial draft code was published just a few years later: see E Clive and others, *A Draft Criminal Code for Scotland with Commentary* (2003). As the authors of the draft code, whose work had begun in 1995, noted of the new assembly, "[s]uddenly it seemed as if what we were doing might have a real chance of enactment": ibid at 5. Implementation though did not follow, the Parliament instead taking something of a scattergun approach to much of its early crime and justice work: see P R Ferguson, 'Criminal law and criminal justice: an exercise in ad hocery' in E E Sutherland and others (eds), *Law Making and the Scottish Parliament: The Early Years* (Edinburgh, 2011) 208. Major reform of the substantive law, at least initially, was left largely in the hands of the courts, with the Parliament taking some time to "[find] its voice in criminal law": J Chalmers, 'Developing Scots criminal law: a shift in responsibility?' 2017 JR 33 at 34. Its most significant criminal law work to date has been a comprehensive recasting of the law of sexual offences: Sexual Offences (Scotland) Act 2009.

our legal system in which Scotland may justly take pride".[55] What is perhaps less clear from Cooper's account is just what "tradition" looks like in the context of the criminal law. Returning to our introductory discussion, what precisely is the "thing" being transmitted from one generation to the next? Clearly, it is a distinctively "Scottish" body of criminal law, but what might that mean in practice? Cooper himself goes little further in his discussion than to suggest the merits of various evidential and procedural rules.[56]

Lindsay Farmer, writing some years later,[57] identifies four "central and interlocking themes"[58] which have come to underpin modern thinking on Scots criminal law, and which together describe an imagined "tradition" in Cooper's sense of the term. Broadly, these are: (i) a feeling that the system has attained a kind of maturity or modernity as a rational, sophisticated body of rules; (ii) a deliberate sense of separatism from England, with law relied on as a means of asserting national identity; (iii) a shared belief in the centrality and collective wisdom of the common law; and (iv) a conception of "wrong" as being shaped by the shared attitudes of the community.[59]

Farmer has criticised this account of the Scottish tradition as amounting to a backwards-looking, conservative form of nationalism.[60] He argues that it presents rather a fictitious, mythologised version of events, relying heavily on the notion of an essential, unquestioned "genius". The Scottish criminal law, says Farmer, is engaged in a continuous process of "reconstructing an 'invented tradition' which is its own imaginary past".[61]

This thesis is also substantially concerned with the Scottish criminal law tradition. It is concerned, however, with a slightly different picture of tradition to that which Farmer has rightly condemned. The picture of tradition with which we are concerned here is not bound up in comparisons with English law, nor in nationalistic assertions of the superiority of the Scottish system. It does not make any claims about the relationship between law and national identity: as T B Smith has pointed out – marking a point of departure between his

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[55] Cooper (n 7) at 84.
[56] ibid at 84-86.
[57] Farmer (n 9); L Farmer, *Criminal Law, Tradition, and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge, 1997) ch 2.
[58] Farmer (n 9) at 29.
[59] ibid at 29-40.
[60] ibid at 42-43.
[61] ibid at 42. See also L Farmer, 'Debatable land: an essay on the relationship between English and Scottish criminal law' (1999) 3 Edin LR 32 at 54: "…this tradition is deeply unworldly, creating certain myths about a simple world that it saw was passing and of the "destiny" of Scots law. It is also highly conservative, since a closer analysis reveals a fear of the development of the modern state and a nostalgic longing for the past. The Scottish legal tradition, then, has not in fact been about the simple preservation of Scottish identity, but its invention and the consequent rejection of the possibility of certain types of reform."

and Lord Cooper's thinking - "[t]here is something unconvincing about certain theories of 'legal nationalism' which treat a nation's laws as a mystical by-product of a national ethos".[62] This kind of romanticising serves only to distract us from more useful observations. Instead, "tradition" here is taken to refer in a narrower, more dispassionate, and ultimately more verifiable sense to a claim about the *character* of the substantive criminal law itself. In what follows, the aim is to identify some of the typical qualities associated with the law as it has been produced and developed in the Scottish criminal courts. This ought to reveal some of the underlying values which have informed the processes of judicial law-making, bringing into sharper focus something of the nature of Scots criminal law. The project here, ultimately, is to better describe the Scottish criminal law "tradition" – that is, to better describe the "thing" which marks out the domestic criminal law as being distinctively "Scottish" in character.

2.2 Diminished responsibility: a peculiarly Scottish doctrine

In order to accomplish this task, we will largely eschew discussion of Scots criminal law in the abstract. Instead, we will anchor our discussion to the development of a single Scottish doctrine, allowing us to narrow in on the character of a particular set of rules.

The doctrine we will be examining here is, of course, that of diminished responsibility. Before we begin to assess the plea's development, it is necessary to answer a preliminary question: why might the doctrine of diminished responsibility represent an appropriate lens through which to focus an inquiry into the Scottish tradition more broadly? At least three principal reasons suggest themselves.

The first is drawn from diminished responsibility's position as part of the law of homicide. On various accounts, the law of homicide has come to be seen as the nucleus around which much of the modern criminal law has developed. In the Scottish context, Farmer has argued that much of what we have come to regard as central to the "general part" of the criminal law – "the definitions of responsibility, causation, excuse, justification and so on" – has to a large extent been abstracted from the development of the law of homicide.[63] Indeed, our very understanding of responsibility as predicated upon the mental states of

[62] T B Smith, 'Scottish nationalism, law and self-government' in N MacCormick (ed), *The Scottish Debate* (London, 1970) 34 at 35. Smith was keen here to point out this divergence between Cooper and himself, noting his scepticism of what he called "genetic jurisprudence". As George Gretton has highlighted, "legal nationalism" is a broad umbrella. Not all legal nationalists necessarily take up all of the same positions, and some are more nationalistic in their beliefs than others: see G L Gretton, 'The rational and the national: Thomas Broun Smith' in Reid and Carey Miller (n 30) 30.

[63] Farmer, *Criminal Law, Tradition, and Legal Order* (n 57) at 143.

intention and recklessness has been derived from the emergence of culpable homicide as the principal category of unlawful killing.[64] On Binder's account, the law of homicide is central to social order and government authority.[65] Indeed, the protection of human life from arbitrary termination is fundamental to the stability of organised society, and it is perhaps unsurprising that homicide should "cast a long shadow over criminal law".[66] Binder goes as far as to claim that homicide is "the paradigmatic criminal offence and tends to influence the way all other offences are defined".[67] A decidedly pragmatic explanation might of course be offered for all of this: homicide cases, given the consequences at stake for those accused, are likely to be especially worthy of contest and appeal, and thus conducive to detailed and creative legal arguments in relation to other areas of the law.[68] In any case, that the law of homicide, of which diminished responsibility is an important component, is seen as central to the development of the criminal law more broadly makes it an obvious candidate for examination in the context of the wider Scottish "tradition".

The second indication that this area might hold promise is derived from diminished responsibility's recent codification. As will be set out in greater detail in chapter 4 below, a nascent form of the plea first emerged in the Scottish courts in the mid-nineteenth century, before maturing into a more fully formed doctrine throughout the course of the twentieth. When the plea was finally enshrined in statute in 2010, nearly a century and a half of incremental judicial development was brought to its conclusion. Given the suggestion above that the common law is likely to be central to any account of the Scottish tradition, codification might initially seem unhelpful for present purposes. In fact, by closing the common law chapter in the story of diminished responsibility, codification usefully leaves us with a complete line of judicial development to examine.

The final, and perhaps crucial, point to note here is that the doctrine of diminished responsibility is generally regarded as a "distinctly Scottish" creation.[69] More than this, it

[64] ibid. See generally 143-145.
[65] G Binder, 'Homicide' in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford, 2014) 702 at 703.
[66] ibid.
[67] ibid.
[68] Not unrelatedly, Farmer himself has argued elsewhere that the heightened prominence of murder trials historically has meant that our understanding of trial procedure – "the theory of the trial" – has equally been shaped to an unusual degree by murder cases: see L Farmer, 'The criminous and the incriminating: narratives of guilt and innocence in Scottish criminal trials' 2000 JR 285 at 298.
[69] Chalmers & Leverick, *Criminal Defences* para 11.01.

is one which "is apt to fill Scots lawyers with a faint sense of nationalistic pride".[70] Again, we will return to consider the reasons for this below, but for now we can close with the remarks of Lord Cooper himself before the Royal Commission on Capital Punishment in 1950:

> No better proof of the flexibility of the Scottish law can be afforded than the introduction, in obedience to enlightened conceptions of essential justice, of the doctrine of diminished responsibility to mitigate the rigour of the so-called M'Naghten Rules.[71]

There is a discernible feeling in these remarks that not only did the Scottish system first conceive of diminished responsibility, but perhaps more significantly, owing to the nature of the law itself, it was in fact uniquely placed to do so.

* * *

This chapter has introduced the concept of "tradition" as it relates to Scots law and the Scottish legal system. We have described a popular account of its content, before moving to consider the particular position of the criminal law and note some of the criticisms of the way in which "tradition" has been commonly understood in this context. A means of eschewing some of these criticisms has been proposed, taking diminished responsibility as a case study to form a more realistic picture of the criminal law. Before we embark upon this case study, however, it is instructive to take an excursion back to the origins of the modern Scottish criminal law, for here we find a rich source of clues as to the elements of our "tradition" we ought to be looking out for. In the next chapter, we will discuss some of the early literature, and look to extract some of its key themes.

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[70] J Chalmers, 'Partial defences to murder in Scotland: an unlikely tranquillity' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Surrey, 2011) 167 at 172.

[71] Royal Commission on Capital Punishment (1949-1953), *Minutes of Evidence Taken Before the Royal Commission on Capital Punishment* (London, 1949-1953): Eighteenth Day (Tuesday, 4th April, 1950), Supplementary Memorandum Submitted by the Lord Justice General at para 3.

CHAPTER 3: THE SCOTTISH CRIMINAL LAW TRADITION

It was noted in chapter 2 that Baron Hume's *Commentaries on the Law of Scotland, Respecting Crimes*,[1] first published at the end of the eighteenth century, is generally regarded as the foundational text of the modern criminal law in Scotland. It has been said that Hume's efforts "brought order out of chaos"[2] with respect to the law's intelligibility, resulting from the first sustained attempt to "arrange in rational order and systematise the propositions which could be derived from [the records of the High Court], and particularly to abstract from them the principles which could be drawn from the propositions in different cases".[3] Hume's work thus made for the first comprehensive depiction of a truly "Scottish" body of criminal law.[4] The second would not be long in following: after Hume's *Commentaries* came Sir Archibald Alison's *Principles* and *Practice*,[5] published in 1832 and 1833 respectively. Alison's work, which in large measure simply repeated and updated the earlier editions of Hume, is perhaps primarily significant in having solidified Hume's influence at an early stage. Nevertheless, it remains a valuable complementary resource in its own right.[6]

Hume's account commences with a set of remarks, unassumingly headed "Introduction", which read as something of a disquisition on the state of Scots criminal law at the time of publication. Setting out in clear terms both the scholarly deficiency which his work sought to remedy and a defence of the Scottish system as a self-sufficient body of rules, Hume's opening observations offer an ideal starting point in beginning to piece together a picture of the Scottish tradition. It is notable that within these remarks can be found traces of the attitude which would become pervasive in the twentieth century, discussed in chapter 2. As Walker notes, Hume was "an upholder of the distinctiveness, and the merits, of native Scots law".[7] His broadly stated ambition was that of "rescuing the law of my native country from that state of declension in the esteem of some part of the public, into which, of late years, it seems to have been falling",[8] an attitude particularly evident "in those multiplied references to the Criminal Law of England, and those frequent and extravagant

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[1] Hume, *Commentaries* i and ii.
[2] S A Gillon, 'Criminal law' in Various authors, *An Introductory Survey of the Sources and Literature of Scots Law*, Stair Society vol 1 (Edinburgh, 1936) 370 at 371.
[3] D M Walker, introduction to Hume, *Commentaries* i (unpaginated).
[4] On Hume generally, see D M Walker, *The Scottish Jurists* (Edinburgh, 1985) ch 19.
[5] Alison, *Principles* and Alison, *Practice*.
[6] On Alison generally, see Walker, *The Scottish Jurists* (n 4) ch 21.
[7] Walker, introduction to Hume (n 3). See also Gillon (n 2) at 371, referring to Hume's "sturdy nationalism … roused by the insinuating influence of English legal notions alien to those on which Scottish life had been built up".
[8] Hume, *Commentaries* i at 3.

encomiums on the English practice, in preference to our own".[9] Though Hume was prepared to concede that English criminal law presented "a liberal and enlightened system", by comparison with which "in many things our practice has not yet attained to the same maturity and consistency", this was attributable only to "the much greater number of dissolute and profligate people" amongst the English population.[10] And whilst English law might usefully be cited where gaps became evident in his own, Hume was willing to do so only where mandated by "common feelings of equity and reason".[11] The implication, of course, was that there were aspects of English practice which fell below the required standard. Thus, whilst Hume denounced "superstitious admiration" of English law, "which would set up that system as a standard of perfection",[12] it is unsurprising that his work should have played a leading role in generating similar attitudes north of the border.[13] Nevertheless, if one avoids placing too much emphasis on Hume's overtly nationalistic leanings, it is possible to distil a number of useful suggestions with respect to the traditional character of the criminal law. It is made clear at certain points that Hume himself is interested in this question, referring variously to "the general temper of our law",[14] "the general spirit of our jurisprudence",[15] and "the frame and character of [the criminal law]".[16]

3.1 The declaratory power

The clearest indication of what this "general spirit" might entail emerges from Hume's discussion of the High Court's historic law-making capacity:

> …our Supreme Court have an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution.[17]

The "declaratory power", as it is commonly referred to, "has consistently been regarded as the fundamentally controversial aspect" of Scots criminal law, with Hume's statement seen

[9] ibid at 4.
[10] ibid.
[11] ibid at 13. Alison takes up a similar position, putting forward English decisions "not as authorities to be obeyed, but as rules to be considered, and adopted or not according as they seem consonant to the dictates of justice, and in unison with the principles of jurisdiction": Alison, *Practice* at vii.
[12] Hume, *Commentaries* i at 13.
[13] See L Farmer, '"The genius of our law…": criminal law and the Scottish legal tradition' (1992) 55 MLR 25.
[14] Hume, *Commentaries* i at 10.
[15] ibid at 13.
[16] ibid at 16. See similarly Alison, *Practice* at xxvi, referring to "the spirit of our criminal law".
[17] Hume, *Commentaries* i at 12.

as foundational.[18] To the extent that the power remains a relevant concern, the merits of its continued existence have been debated at length elsewhere.[19] For present purposes, it is sufficient to comment on what the power's traditional use suggests about the nature of the Scottish system. As set out in Gordon's *Criminal Law*, there are broadly three ways in which the declaratory power might operate in practice.[20] The first two of these, amounting to an outright pronunciation that otherwise lawful conduct constitutes an entirely new kind of criminal offence – on account of its being contrary to morality or social order,[21] or of its being dishonest or frustrating the course of justice – have long been of limited relevance in practice. Today, this kind of judicial activity would be in clear breach of the prohibition on retroactive criminalisation contained in Article 7(1) of the European Convention on Human Rights,[22] though similar arguments had prevailed with recourse to the principle of *nullum crimen sine lege* long before the Convention became directly applicable in the United Kingdom.[23] Explicit law-making of this description, it is thought, is a task for Parliament, not the courts.

This leaves the third possible form of the declaratory power's use, namely the incremental broadening or development of existing crimes. The proclivity towards judicial creativity over legislative intervention has long been "undoubtedly one of the hallmarks of Scottish criminal law".[24] As noted in the previous section, this tendency can be attributed in large part to constitutional pressures which ought to have been substantially alleviated following the establishment of a new Scottish legislature in 1999. Nonetheless, judicial enterprise of this third kind has more or less defined modern Scottish criminal practice, at least since

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[18] Farmer (n 13) at 26.

[19] Debate around the declaratory power experienced something of a revival towards the end of the twentieth century, with a notable exchange between Ian Willock and Scott Styles centring around the question of its continued fitness within a mature system of criminal law: see I D Willock, 'The declaratory power: an untenable position' 1989 SCOLAG Bulletin 152; S C Styles, 'Something to declare: a defence of the declaratory power of the High Court of Justiciary' in R F Hunter (ed), *Justice and Crime: Essays in Honour of The Right Honourable The Lord Emslie* (Edinburgh, 1993) 211; and I D Willock, 'The declaratory power: still indefensible' 1996 JR 97. T H Jones, 'Common law and criminal law: the Scottish example' [1990] Crim LR 292 argues that some limited ability on the part of the courts to address previously unforeseen forms of wrongdoing is a necessary feature of a system which continues to rely heavily on the common law, though this ability ought to be constrained in line with the modern values of prospectivity and certainty. See also Farmer (n 13), arguing that much of the contemporary debate around the power has been based on false premises.

[20] Gordon, *Criminal Law* i para 1.44. For a complete account of the power's use, see paras 1.20-1.42.

[21] The declaratory power last found expression in this mode in *Bernard Greenhuff* (1838) 2 Swin 236, the classic case of the power's use, in which a majority of the High Court declared the keeping of a public gaming house to be a criminal offence on the basis that it had "a tendency to corrupt public morals, and injure the interests of society" (Lord Justice-Clerk (Boyle) at 261) and as being an act "by the law of God, and the laws of morality *mala in se*" (Lord Meadowbank at 262).

[22] Gordon, *Criminal Law* i para 1.44.

[23] See e.g. W A Elliot, '*Nulla poena sine lege*' 1956 JR 22; G H Gordon, 'Crimes without laws?' 1967 SLT (News) 21. Rights protected under the ECHR became directly enforceable in the United Kingdom with the passing of the Human Rights Act 1998.

[24] C Gane, 'Criminal law reform in Scotland' (1998) 3 SLPQ 101 at 106.

Hume's treatment of the subject. Little of this work has explicitly been carried out under the aegis of the declaratory power.[25] Instead, the law has typically been extended "covertly",[26] the power's continued existence sanctioning judges to "take a much more relaxed approach to expanding the boundaries of criminal liability".[27]

To have relied so extensively upon the courts to develop the criminal law into the modern period is in itself something of a unique feature of the Scottish system, most jurisdictions having long since determined this task to be beyond the purview of the judiciary.[28] From this, it is not difficult to arrive at nationalistic sentiment, Scots lawyers in days gone by having protested – not entirely without justification – apparent Westminster ambivalence, elevating the centrality of the common law to an expression of separate identity. More interesting from a doctrinal perspective, however, is the *flexibility* which the historic use of the declaratory power suggests as being characteristic of the Scottish criminal law.[29] It is this formal feature of the law – that it can be moulded with minimal trouble to meet the exigencies of the times, suppressing novel forms of wrongdoing without the need for legislation – which is typically pointed to as the fundamentally distinctive element of the Scottish system.[30] Often, however, analyses of the law's character develop little beyond merely highlighting this truism and pointing to a few well-known examples. Our survey of Hume suggests that several other features are worthy of consideration.

3.2 A practical treatise

As noted above, Hume's primary focus in the *Commentaries* was upon the records and decisions of the High Court. At one level, this was a functional necessity. Hume's explanation for the "state of declension" into which Scots criminal law had fallen in the esteem of the public at the time of his writings was the simple fact that "they are ignorant of what it really is",[31] and to some extent this almost certainly included members of the legal profession. Mackenzie's *Matters Criminal*, then the most recent, and indeed the only,

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[25] The power was last called upon expressly in *Greenhuff* (n 21).

[26] Gordon (n 23) at 218. Farmer notes that this may manifest either in implicit criminalisation coupled with an explicit denial that the power is being used (e.g. *HM Advocate v Martin* 1956 JC 1), or more commonly in the actions of the court strongly implying that the power is being used but with no attempt at explaining the underlying logic (e.g. *Strathern v Seaforth* 1926 JC 100): Farmer (n 13) at 26-27.

[27] Jones (n 19) at 293. The power's continued existence has been reaffirmed in e.g. *Grant v Allen* 1987 SCCR 402.

[28] Jones (n 19) at 298.

[29] Farmer argues that the standard portrayal of the declaratory power as an aberration is mistaken, and that it is in fact entirely consistent within a system which "is dominated by a belief in the value of flexibility": Farmer (n 13) at 28.

[30] See e.g. Jones (n 19) at 292; Gordon (n 23) at 120; Lord Cooper, 'The Scottish legal tradition' in M C Meston and others, *The Scottish Legal Tradition* (Edinburgh, 1991) 65 at 84.

[31] Hume, *Commentaries* i at 4.

extended treatment of the criminal law, had been published more than a century earlier, and so the *Commentaries* were produced to fill a clear gap in the literature for the practicing lawyer.[32]

Not only did Hume seek to update the work of Mackenzie, however, but the approach taken stood in very deliberate contrast. Whilst Mackenzie drew freely on an array of non-domestic sources, and was content to reach conclusions by analogy in the absence of authority,[33] Hume expressly disavowed recourse to that which could not be abstracted from the practice of the courts:

> I mean to initiate the young lawyer in the Elements of our Criminal Practice …[34] This, undoubtedly, and nothing higher, is the main bent and scope of my undertaking. I have no intention of bringing forward a Philosophical Treatise of Criminal Jurisprudence, in which the history of the human species, with respect to this branch of the science of law, is to be traced; and an attempt made to ascertain, on abstract and universal principles, the nature of the several offences, and the application and proportion of punishments. Certainly these are amusing and interesting disquisitions, and fit to employ an ingenious mind; but they do not lie within his province, whose attention has chiefly been turned to the attention of one peculiar system.[35]

Indeed, Hume is sceptical of the notion that the criminal law, like the civil law, can be understood as an interdependent body of rules, capable of arrangement in any sophisticated analytical ordering, opting to treat "the several crimes in the order rather of their frequency and practical importance, than of their rank in other respects".[36] As Farmer has noted, a distinctly practical approach was thematic of much of the criminal law scholarship which would follow in Hume's wake, composed in the main by experienced practitioners as opposed to academic lawyers.[37] Yet there is some evidence that this feature is of more than mere stylistic significance. It is suggested that Hume's outwardly practical approach found

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[32] ibid at 2.
[33] A point which is made abundantly clear by contrasting Mackenzie and Hume's respective contributions to the development of diminished responsibility, discussed in ch 4 below.
[34] The *Commentaries* were the product of Hume's criminal law lectures whilst Professor of Scots Law at the University of Edinburgh: Hume, *Commentaries* i at 1.
[35] ibid at 14.
[36] ibid at 18-19.
[37] The works of Alison and Macdonald both fall into this category. See L Farmer, 'The idea of principle in Scots criminal law' in J Chalmers and others (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh, 2010) 86 at 92-97; L Farmer, 'Of treatises and textbooks: the literature of the criminal law in nineteenth-century Britain' in A Fernandez and M D Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford, 2012) 145 at 157-159.

itself reflected in his promotion of a *pragmatic* mode of reasoning. Most tellingly, Hume suggests that the administration of criminal justice ought to be assessed “on the testimony of experience, and not according to the fallacious conjectures of human wisdom before the event”.[38] Emphasis is placed less on conceptual elegance, and more on law which works effectively on a case-by-case basis. Discussing, for example, the highly discretionary nature of Scottish sentencing practice, Hume celebrates the fact that “strict regard is … paid (which, wherever it is practicable, is surely desirable,) to the peculiar and equitable circumstances of each case, as it occurs”.[39]

3.3 The humanity of Scottish criminal justice

Each of the features mentioned thus far is framed by Hume in terms which bring out another imagined virtue of the Scottish system: its inherent humanity in dealing with criminal wrongdoing. In discussing the power of the High Court to declare conduct newly criminal, Hume makes the case that this not only allows for the quelling of wrongdoing at its inception, without the risk of conduct falling through the inevitable gaps left by statutory provision, but that paradoxically “it is also a merciful course to the offender: Because the crime being censured on its first appearance, and before it has become flagrant or alarming to the community, is restrained at that season by far milder correctives, than are afterwards necessary to be applied to it, when the growing evil has come to require the passing of an express law in that behalf”.[40] And, on the subject of discretionary sentencing, it is proclaimed that “our custom of punishment is eminently gentle, and would be ill exchanged, for the offenders at least, and indeed I think for the country at large, with a numerous list of special and statutory rules”.[41] This is acknowledged to be a similarly paradoxical state of affairs,[42] but in case these arguments fail to convince Hume recounts in detail several other features of the Scottish system which amount to an altogether fair and compassionate mode of administering justice.[43] In the opportunity to object pre-trial to the indictment, witnesses, or jurors; the permissibility of legal counsel to conduct the accused’s defence in all cases; the barring of conviction on the basis of a single uncorroborated testimony; the separate examination of witnesses to forestall the risk of

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[38] Hume, *Commentaries* i at 13. Seen this way, “the inhabitants of Scotland have no reason to envy the condition … of any other part of Europe”: ibid.
[39] ibid at 11.
[40] ibid at 12.
[41] ibid at 11.
[42] ibid.
[43] see ibid at 5-9.

collusion; and the rule that no one can be twice tried on the same facts, the accused has "every humane attention shown to him, and all due provision made for his just defence".[44]

Alison, in his own "Introduction" at the outset of his *Practice*, echoes and expands upon Hume's panegyric on the benevolence of the Scottish criminal process, which affords "the greatest possible security to the liberty of the subject".[45] Reference is made, for example, to the traditional power of the prosecutor to "restrict the libel" before moving for sentence, to the effect that the availability of the death penalty would be excluded. Whilst a number of offences, like robbery and housebreaking, continued to attract a capital sentence where committed in an aggravated form, it was nevertheless recognised that "the numerous lighter degrees of the same offence may suitably be visited by slighter punishment".[46] The law itself could not account for the full range of distinctions, and so it was necessary that there should be "some dispensing power, at the moment of trial, to mitigate the severity of the strict letter of the law".[47] Such a power was capable of being overextended only "on the side of mercy"; it could not become "the instrument of oppression".[48] In cases where the prosecutor felt the exercise of this discretion to lie outwith their proper remit, the royal mercy remained available to the doomed prisoner. On Alison's account, the presiding judge would invariably secure for a panel a transportation pardon.[49]

The clear suggestion made in these two leading accounts is of an inherent *leniency* in Scottish criminal practice, manifesting in a tendency to tilt proceedings in the accused's favour as far as possible and a distaste for punishment at the more severe end of the scale. Hume and Alison, in putting forward this case, each focus primarily upon procedural aspects of the system. Each could also be found making this claim in order to denigrate the comparatively less lenient English system.[50] Below, we will consider this same element of leniency with respect to the substantive law, through the prism of our case study of diminished responsibility.

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[44] ibid at 9.
[45] Alison, *Practice* at xxx.
[46] ibid at xxv.
[47] ibid.
[48] ibid at xxvi.
[49] ibid.
[50] Hume notes that "in the important matter of the form of trial; and so far as concerns the security of innocence, I see no reason to think, that there is any disadvantage on our side": Hume, *Commentaries* i at 9. Alison straightforwardly proclaims that "the law of Scotland is greatly more lenient than that of England": Alison, *Practice* at xxiv.

3.4 Crime and community values

One final theme underlying Hume's remarks merits consideration in thinking about the traditional character of the Scottish criminal law. At this stage, it is useful to return briefly to our first theme, the declaratory power of the High Court. The power, as indicated above, has tended to be regarded as controversial, and as difficult to justify within a modern system. More recently, however, Kennedy has argued that much of the contemporary criticism of the power is misguided, for it relies upon an understanding of legitimacy – one which appeals only to other legal authorities as a source of justification – which does not accord with the Scottish legal tradition. The declaratory power can be better rationalised, Kennedy suggests, if it is viewed in relationship to a concept of legitimacy which appeals to extra-legal sources for justification, and in particular to the prevailing norms of the community.[51] Set against a demand that legal rules accord with the changing needs of society, the power attains greater logical coherence, and indeed Hume himself exhibits a marked concern with the interplay between criminal law and community values.

Outlining the need for a contemporary account of the law to replace Mackenzie's outdated treatise, Hume relates that the intervening years had seen a considerable recasting "in the manners, and temper, and way of thinking of the nation; by which the state of its Criminal Law, and its application to real business, must always, in a great measure, be affected".[52] Far more so than in relation to the civil law, where for the most part "our moral feelings are altogether indifferent", "[a]nd thus the practice of old times extends to the present, without giving us any shock or uneasiness",[53] the "general spirit" of the criminal law "will always, in some measure, be bent and accommodated to the temper and exigencies of the times; directing its severity against those crimes which the manners of the age breed a direct abhorrence of, or which the present condition of the people renders peculiarly hurtful, in their consequences to private or to public peace".[54] Indeed, it is this more intimate connection between the temperament of the people and the tenor of the law which for Hume ought to caution against any thoughts of substituting one nation's approach to the criminal law for that of another.[55] Whilst the granular accretion of penal statutes south of the border was doubtless "necessary, in their state of wealth, society and manners", this could not be taken to suggest that it might properly be approved of in place of the Scottish

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[51] C Kennedy, 'Declaring crimes' (2017) 37 OJLS 741.
[52] Hume, *Commentaries* i at 2.
[53] ibid at 3.
[54] ibid at 2. Hume offers as an illustration the prosecution of witchcraft, a "strange and miserable delusion" from which Scots criminal law had "recovered": ibid. Witchcraft is given a full treatment in Mackenzie's work; it has no place in Hume's.
[55] Hume, *Commentaries* i at 16.

preference for the law's gradual development in the courts.[56] Alison, in like manner, calls for moderation in "that passion for transplanting into Scotland the institutions of a neighbouring kingdom, which, however well adapted to their character and habits, are certainly not fitted to our customs, or calculated to effect any practical improvements in the Criminal Jurisprudence of this country".[57]

The effect of these observations, at a general level, is simply to draw the necessary link between criminal law and community values which has become fundamental to much modern theorising on the subject. It is a popularly held view that the function of the criminal law is to respond to wrongdoing on behalf of society at large, and that its content ought therefore to reflect society's shared understandings of right and wrong.[58] Yet the prevailing account offered in the early Scottish literature extends beyond merely a description of legal moralism. This becomes clearer when we consider that Hume and Alison were far from the first Scots expounders to identify this connection. Hugo Arnot, writing in 1785, commented that "[t]he Criminal Records of a Country are *an historical monument of the ideas of a People, of their manners* and jurisprudence".[59] Earlier still, William Forbes, prefacing his 1730 treatment of the subject, remarked of "criminal Laws, which are different in different Countries, *suited to the Genius of the People*, the publick Exigencies, and the Situation of Affairs".[60] More than simply reflecting the ethics of the Scottish people, the criminal law is presented as the distillation of some ineffable national spirit, existing at once as both the product of a distinctive national identity and as a necessary element in its preservation. The laws of other nations might be intelligible on their own terms; they might even arrive at broadly the right set of end results; but it is that they lack, by definition, a certain "Scottishness" which renders them wholly unsuitable for transplantation.

It is perhaps here that we can see most clearly the parallels between the thinking of the early Scots writers and that of the more strident legal nationalists of the twentieth century, in whose accounts the notion of a fundamentally shared spirit between Scots law and the

[56] ibid at 13.
[57] Alison, *Practice* at vii. And again, at xxxi: "The principle, that each nation is the best judge of the legal establishments which are adapted to its own circumstances, is too obvious to permit any such attempt."
[58] On the view that the criminal law functions as an "instrument of the community", see R A Duff, 'Theories of criminal law' *Stanford Encyclopedia of Philosophy* (2018), available at https://plato.stanford.edu/entries/criminal-law/ <accessed 19/11/2021>.
[59] H Arnot, *A Collection and Abridgement of Celebrated Criminal Trials in Scotland, from A.D. 1536 to 1784: With Historical and Critical Remarks* (Edinburgh, 1785) at xv (emphasis added).
[60] W Forbes, *The Institutes of the Law of Scotland, Vol. II: Comprehending the Criminal Law* (Edinburgh, 1730) at v (emphasis added).

Scottish people would occupy a central position. It may equally be where the criticisms of those accounts as presenting an overly romanticised, dogmatic picture of the Scottish "tradition" are felt most keenly. Nationalistic assertions of "genius", mediated through the infallible intuitions of the common law, are essentially unfalsifiable, and ultimately tell us little directly about the character of the law.

Nevertheless, the broader claim about the centrality of the Scottish community does offer at least one significant clue. The criminal process, in seeking to dispense punishment in line with the collective judgement of the wider populace, does so most directly through the institution of the jury. Where the role of community sentiments, and thus that of the jury as a conduit, is afforded primacy, it becomes ever more necessary that legal rules should be formulated for ready comprehension amongst those outside of the professional elite. As we will see below, the rules of diminished responsibility have traditionally been laid down with this purpose in mind, reflecting *non-technical*, common-sense ideals.

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This chapter has drawn out four key themes from the early Scottish criminal law literature: the declaratory power of the High Court of Justiciary; the decidedly practical approach taken by the writers of the major Scottish texts; the purported humanity of the Scottish criminal justice system; and the link regularly posited between crime and community values. In themselves, these four themes do not get us very far towards our aim of describing the character of the substantive criminal law. In fact, we have seen that they may occasionally beckon us towards those same traps of nationalism and sentimentality which we are attempting to sidestep. Nevertheless, if we are careful to avoid these hazards, each theme offers us an important clue as to the characteristics we ought to be looking out for. We have thus deduced four possible features which would appear to follow logically from the views expressed in the early Scottish texts, namely: flexibility; pragmatism; leniency; and non-technicality. At this stage, we must now return to consider our case study of diminished responsibility. In what follows, we will assess the plausibility of the four characteristics identified against the development of this overtly "Scottish" doctrine. In chapter 4, we will begin by setting out the history of the plea in detail.

CHAPTER 4: THE HISTORY AND DEVELOPMENT OF DIMINISHED RESPONSIBILITY IN SCOTS LAW

In 1959, Lord Keith of Avonholm described diminished responsibility as "an interesting example of the creation of common law".[1] He could perhaps have gone slightly further, and labelled it, at least for Scots criminal law, the paradigmatic such example, for already by that point the doctrine had undergone nearly a century of piecemeal development in the Scottish courts. Even this, however, does not quite tell the whole story. Whilst diminished responsibility's emergence proper can be rightly identified in the mid- to late nineteenth century, a full account of its development necessarily sets off around 200 years earlier. In what follows, we will trace the doctrine's evolution from its seventeenth-century origins up to its present-day statutory form.

4.1 "By the rule of proportion": madness and Sir George Mackenzie

As one commentator has noted, it might strike one as odd to learn that the origins of the diminished responsibility plea can be traced to the minds of two men bearing "an especial repute as hard and even harsh administrators of the criminal law".[2] The first of these, Sir George Mackenzie, was a prominent figure in seventeenth-century Scotland, perhaps best known for his days as Lord Advocate under Charles II. It was here that he earned his reputation as "Bluidy Mackenzie", owing especially to his proclivity for stretching the law in his fervent pursuit of the Presbyterian Covenanters. It is nowadays generally accepted though that Mackenzie's character was likely rather more complex than his grim sobriquet would suggest. He is thought to have otherwise detested arbitrary punishment, to have helped shape the criminal trial in favour of the accused, and to have been generally a learned and enlightened legal thinker for his time.[3] Thus, that Mackenzie should have taken something of a liberal position on the subject of madness and crime may not be quite as surprising as has been suggested.[4]

In his *Matters Criminal*, originally published in 1678 and considered the first extended treatment of Scots criminal law,[5] Mackenzie outlined a remarkably nuanced approach to

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[1] Lord Keith of Avonholm, 'Some observations on diminished responsibility' (1959) 27 Medico-Legal Journal 4 at 4.
[2] Lord Walker, 'The growth of the criminal law' 1958 JR 230 at 235; see also T B Smith, *British Justice: The Scottish Contribution* (London, 1961) at 107.
[3] On Mackenzie generally, see D M Walker, *The Scottish Jurists* (Edinburgh, 1985) ch 9.
[4] See e.g. N Walker, *Crime and Insanity in England, Vol. 1: The Historical Perspective* (Edinburgh, 1968) at 139.
[5] Walker, *The Scottish Jurists* (n 3) at 162.

mental abnormality. His account proceeded from the basic proposition that, in the eyes of the law, those "absolutely furious" were incapable of criminal conduct, of no greater guilt "than a stone from a house, or a beast".[6] This exemption was born not so much out of science as out of sympathy: the law "commiserates" with the insane; "they are excused by their own misfortune and abundantly punished by their own fury".[7] Whilst the "absolute furiosity" standard is high, its effect is softened in the remainder of Mackenzie's discussion. Where an individual could be shown to fluctuate in and out of sanity, a rebuttable presumption operated that any criminal conduct had been carried out during a spell of madness, "for the committing of a crime looks more like the madness than the lucid intervals".[8] And even where this presumption could be rebutted, it may yet have been right that the punishment was lessened, "for where madness has once disordered the judgment, and much more when it recurs often, it cannot but leave some weakness and make a man an unfit judge of what he ought to do".[9] Evidently, the terms in which the question of insanity was viewed were far from absolute.

In the crucial passage for present purposes, this point is made even more starkly:

> [I]t may be argued that since the law grants a total impunity to such as are absolutely furious, that therefore it should, by the rule of proportion, lessen and moderate the punishments of such as, though they are not absolutely mad, yet are hypochondriac and melancholy to such a degree that it clouds their reason, *qui sensum aliquem habent sed diminutum* [who have some judgment, but diminished], which lawyers call *insania*…[10]

This statement is generally taken to represent the first acknowledgement of any power on the part of the Scottish courts to take account of mental abnormality falling short of insanity in handing down punishment.[11] No authority is cited for the point. Gordon notes simply that the idea "occurred" to Mackenzie,[12] and indeed Walker suggests it to have been an original inference drawn logically from the basis upon which Mackenzie's understanding of insanity lay: "if the 'unhappy fate' of the 'absolutely mad' is a sufficient substitute for punishment, partial insanity should be regarded as a partial substitute".[13]

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[6] Mackenzie, *Matters Criminal* at 16.
[7] ibid.
[8] ibid at 17.
[9] ibid.
[10] ibid.
[11] Chalmers & Leverick, *Criminal Defences* para 11.03; Gordon, *Criminal Law* i para 11.10.
[12] Gordon, *Criminal Law* i para 11.10.
[13] Walker, *Crime and Insanity* (n 4) at 140.

Mackenzie himself, who did not share the aversion to philosophising of his spiritual successor, Baron Hume,[14] claims only that moderation of punishment "may be argued … by the rule of proportion".[15] Mackenzie appears to be describing what in modern parlance would amount to a general plea in mitigation on the basis of abnormality, the necessary precursor to the partial defence of diminished responsibility. There is little evidence however that by 1678 this rule had yet translated from principle into practice.

4.2 The King's mercy: Hume and Alison

It has been observed that neither Hume nor Alison recognised a concept of diminished responsibility.[16] Certainly, this is an area of the contemporary law over which the work of Baron Hume has exerted an unusually limited influence. It is rare that any modern analysis of Scots criminal law, judicial or academic, should proceed from anything other than a statement of Hume's views, closely followed by those of Alison.[17] There remains, however, rather more to be said about the matter.

Hume, though in agreement with Mackenzie's grounding of the insanity defence in compassion,[18] offers that the law does not and cannot excuse the offender where their disorder amounts to less than an absolute alienation of reason. Such constitutions as a "weakness of intellect, or a strange and moody humour, or a crazy and capricious or irritable temper … are not exclusive of a competent understanding of the true state of the circumstances in which the deed is done, nor of the subsistence of some steady and evil passion, grounded in those circumstances, and directed to a certain object".[19] Hume cites, for example, the case of *Thomas Gray*, in which the accused was found guilty of murder. Though Gray was "of a very weak intellect, subject to sudden gusts of passion, addicted to the excessive drinking of strong liquors, and, on the whole … rather a sort of fool or crazy person", this was in Hume's words "plainly short of madness in the sense of the law".[20] Hume's stance might appear significantly less tolerant than that of Mackenzie more than a century earlier, and perhaps surprisingly so given his vigorous belief in the humanity of the

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[14] "Undoubtedly, *Matters Criminal* is in part a reflection of Mackenzie's personal beliefs about the law": C Kennedy, 'Criminal law and religion in post-reformation Scotland' (2012) 16 Edin LR 178 at 182.
[15] Mackenzie, *Matters Criminal* at 17.
[16] T B Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962) at 154; *Kirkwood v HM Advocate* 1939 JC 36 at 39 (Lord Justice-General (Normand)).
[17] See e.g. *Brennan v HM Advocate* 1977 JC 38 at 43 (Lord Justice-General (Emslie)): "In discovering what is insanity within the meaning of our criminal law we cannot do better than begin by noticing that Hume treated the nature of the plea, in Vol. 1 of the third edition of his work on Crimes, thus…". Lord Emslie then goes on (at 44) to cite the corresponding views of Alison.
[18] Hume refers to "…those unfortunate persons, who have to plead the miserable defence of idiocy or insanity": Hume, *Commentaries* i at 37.
[19] Hume, *Commentaries* i at 37.
[20] *Thomas Gray* (1773) Hume, i, 38.

Scottish criminal justice system.[21] Yet it must be remembered that, unlike Mackenzie, Hume explicitly undertook only to expound the existing practice of the criminal courts.[22]

Hume continues, however, that:

> As to the inferior degrees of derangement, or natural weakness of intellect, not amounting to madness, the law can have no rules for them, nor make any account of them; and the culprit has to seek his relief, in the course of application for mercy to the King.[23]

The sentiment is echoed by Alison:

> If it appear from the evidence that the pannel, though partially deranged, was not so much as to relieve him entirely from punishment, the proper course is to find him guilty; but on account of the period of infirmity of mind, which he could not control, recommend him to the royal mercy.[24]

The earliest case referred to by Hume of a jury taking it upon themselves to qualify a guilty verdict with a recommendation to mercy is that of *Robert Bonthorn*[25] in 1763. Earlier cases still indicate a practice of the courts exercising leniency even where the jury themselves had offered no such disclaimer.[26] Hume asks further whether in a number of cases in which the accused was fully acquitted on grounds of insanity, a conviction with a recommendation to mercy might not have been "a more correct and salutary judgment".[27]

Thus, whilst neither Hume nor Alison recognised any power on the part of the courts directly to mitigate punishment in accordance with any weakness of intellect short of absolute derangement, such cases could nonetheless be dealt with extrajudicially by way of a recommendation to mercy. Almost invariably, such a recommendation would be

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[21] See discussion at 3.3 above.
[22] See discussion at 3.2 above.
[23] Hume, *Commentaries* i at 44.
[24] Alison, *Principles* at 652.
[25] (1763) Hume, i, 38.
[26] *Robert Thomson* (1739) Hume, i, 40; *Agnes Crockat* (1756) Hume, i, 42. See also the later cases of *Alexander Campbell* (1809) Hume, i, 38 and *Susan Tilly* (1816) Hume, i, 41. That the case of *Thomas Gray* came even ten years after juries apparently began making use of this disposal might suggest however that the practice took some time to fully establish itself.
[27] Hume, *Commentaries* i at 41, citing *James Cummings* (1810) Hume, i, 40; *William Gates* (1811) Hume, i, 41; and *Pierce Hoskins* (1812) Hume, i, 41. Walker suggests that such acquittals may be attributable to juries either misunderstanding judicial advice or simply interpreting the law in their own way: Walker, *Crime and Insanity* (n 4) at 142.

accepted, and typically a lesser penalty of transportation or confinement substituted for that of execution.[28]

Bell's supplementary notes to the fourth edition of Hume indicate that by 1844 the position had crystallised further. A distinction was drawn between capital cases, in which weakness of intellect would be relevant only in respect of a recommendation to mercy, and non-capital cases, in which it could be relevant to a general mitigatory plea considered by the courts themselves.[29]

One far earlier case does however merit brief comment. In *John Sommerville*,[30] the accused, a town-officer of Edinburgh, had shot a soldier of the town-guard sent as one of a party to seize him upon his becoming "outrageous".[31] Hume records the case as "a successful plea of furiosity", yet notes that execution was substituted rather for assythment and a fine than for a full acquittal.[32] For him this was "a special and awkward verdict"[33] – a "middle course".[34] It is described by Walker as an instance of the court itself recognising partial insanity as a legal ground for mitigating punishment (and indeed a decision of which Mackenzie would likely have approved).[35] Given its inconsistency with the line of development sketched above, Hume may well have been correct to dismiss the decision as a judicial error, "hardly to be approved of as a precedent",[36] but it has nevertheless been suggested that, in 1704, *Sommerville* may in fact have been the first Scottish case to recognise a partial defence of "diminished responsibility".[37]

4.3 "Murder with extenuating circumstances": *Dingwall* and Lord Deas

The case upon which that distinction is generally bestowed, however, would not occur until close to two centuries later. In the interim, the position gradually inched forward. In two capital cases in the mid-nineteenth century, the jury was effectively directed by the trial judge to find the accused guilty, but to recommend him to mercy on account of his

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[28] Walker, *Crime and Insanity* (n 4) at 201. On the King's mercy generally, see ch 12.
[29] Bell's Notes at 5, referred to in Gordon, *Criminal Law* i at 458n57, and citing the cases of *William Braid* (1835), *Thomas Henderson* (1835) (both Bell's Notes, 5) and *James Ainslie* (1842) 1 Broun 25 as instances of more general mitigation. In reviewing the development of diminished responsibility, Lord Justice-General Normand referred to this as "the beginning of a less rigid view": *Kirkwood* (n 16) at 39. See also on this distinction Lord Keith of Avonholm (n 1) at 4-5.
[30] (1704) Hume, i, 42.
[31] Hume, *Commentaries* i at 42.
[32] ibid at 44.
[33] ibid at 43.
[34] ibid.
[35] Walker, *Crime and Insanity* (n 4) at 141. Oddly, Alison notes nothing unusual about the case at all, including it simply as an instance of a successful insanity plea: Alison, *Principles* at 649.
[36] Hume, *Commentaries* i at 44.
[37] Chalmers & Leverick, *Criminal Defences* para 11.04.

weak intellect.[38] And, continuing the earlier trend, three further non-capital cases arose in which the court felt it appropriate to account for abnormality short of insanity directly in mitigating sentence.[39]

Then, on 19 September 1967, came the trial of Alexander Dingwall at the High Court in Aberdeen.[40] If the analysis thus far has served to underline any single point, it is that the shift performed in Lord Deas's charge to the jury was of a far more subtle nature than the case's perennial citation might tend to suggest.

The story is a familiar one within the annals of Scots criminal law. Dingwall, an eccentric laird and notorious alcoholic, returned to his home late on Hogmanay following several glasses of whisky and with another bottle in hand. His wife, towards whom he was known to act aggressively under the influence of drink, took the precaution of concealing the bottle along with Dingwall's money. A dispute resulted, after which the pair turned in for the night. A short while later, Dingwall got out of bed and stabbed his sleeping wife with a carving knife. It was around a fortnight before she died from the wound in her chest.

At trial, a special defence of insanity was lodged, but as Lord Deas directed the jury there was no suggestion in the evidence of a total deprivation of reason.[41] Dingwall's guilt was in little doubt, yet the question remained as to whether his crime was murder or something less. It was very difficult for the law to recognise it as anything else, said Lord Deas, "but he could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence".[42] A number of factors might have merited such a finding: the attack had been sudden and unpremeditated; Dingwall was habitually kind to his wife when drink did not interfere; and the attack had consisted in only a single stab or blow.[43] More than this though, and subject to anxious consideration as to its admissibility, Dingwall "appeared not only to have been peculiar in his mental constitution, but to have had his mind weakened by successive attacks of disease".[44] Namely, he had very likely suffered from sunstroke during his days in the Indian Army, with subsequent epileptic fits, and certainly suffered from repeated attacks of *delirium*

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[38] *James Denny Scott* (1853) 1 Irv 132 and *John McFadyen* (1860) 3 Irv 650.
[39] *Alexander Carr* (1854) 3 Irv 650, *Thomas Wild and Others* (1854) 1 Irv 552 and *Dorothea Perkins or Rodgers* (1858) 3 Irv 105.
[40] *Alexander Dingwall* (1867) 5 Irv 466.
[41] Nor did the accused suffer from idiocy or insane delusions: ibid at 475.
[42] ibid at 479.
[43] ibid.
[44] ibid.

tremens. If ever there was a case in which weakness of mind might be at least partly determinative in distinguishing murder from culpable homicide, this was it:

> Culpable homicide in our law and practice, included what, in some countries, was called murder with extenuating circumstances. Sometimes the crime of culpable homicide approached the very verge of murder; sometimes it was a very minor offence. The state of mind of a prisoner might, his Lordship thought, be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity; and he could not therefore exclude it from the consideration of the jury here, along with the whole other circumstances, in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or of culpable homicide.[45]

Contained within a single short passage at the very conclusion of Lord Deas's directions, if this was legal history in the making one would hardly know it from a perusal of the case report. Indeed, in practical terms, the evolution is slight. As Loughnan has highlighted, the conditions for the move made by Lord Deas were well-established. The Scots law of insanity already encompassed a concept of partial insanity, whilst the malleable category of culpable homicide afforded a ready-made home for the impaired offender. Perhaps most significantly, and as we have outlined above, mental weakness had, from the early nineteenth century, been regarded as a factor which might properly mitigate sentence or justify a recommendation to mercy.[46] Insofar as Lord Deas's charge was innovative, it was to the extent only of realising by way of the jury's verdict what had previously been reserved to the royal prerogative,[47] "but a short step" from those cases of a few years earlier in which the jury had been more or less instructed to recommend leniency.[48] As a matter of life and death, the upshot remained the same. Nonetheless, the doctrine of diminished responsibility had, in a primitive form, made its arrival proper, though it is far from obvious that Lord Deas understood himself to be creating a new "defence" as such. Rather, the state of mind of the accused was seen as simply one factor amongst many which might be considered by the jury in arriving at a verdict of culpable homicide, in the form of "murder with extenuating circumstances".[49] That it was grouped together with what in modern parlance would be termed general mitigating factors, such as the accused's

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[45] ibid.
[46] A Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford, 2012) at 227-228.
[47] Walker, *Crime and Insanity* (n 4) at 144.
[48] Gordon, *Criminal Law* i para 11.13.
[49] ibid para 11.16, discussing Lord Deas's similar charge in *Thomas Ferguson* (1881) 4 Coup 552 at 558.

good character, reflected the still permeable divide between factors relating to conviction and those relating to sentence.[50]

It was noted at the outset of this section that each of the two men commonly cited as the authors of diminished responsibility was said to have been preceded by his reputation as an unforgiving administrator of justice. Like Mackenzie before him, Lord Deas's role in developing what is ostensibly a more compassionate approach to the mentally abnormal offender is thought to have been somewhat out of character.[51] Yet, it has been shown that, far from setting in motion a more enlightened view of the relationship between criminal responsibility and medical science, Lord Deas's role was simply to round off a process that had begun long before his time on the bench.

His innovation though may not have caught on immediately. In the 1875 case of *John Tierney*,[52] the issue was left by Lord Ardmillan to the jury, who nonetheless opted to convict Tierney of murder with a recommendation to mercy.[53]

It was in fact through a later series of judgments handed down by Lord Deas himself that the doctrine would lodge itself firmly within the practice of the courts. In *John McLean*,[54] the accused had been convicted of theft by housebreaking with a recommendation to mercy on account of his "weak intellect".[55] The case was referred to the High Court for sentencing, and though no question of diminished responsibility was directly at hand,[56] Lord Deas took the chance to consolidate his earlier position regarding "an important question, upon which … Judges have not always been agreed":[57]

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[50] Loughnan (n 46) at 229.
[51] See Lord Keith of Avonholm (n 1) at 6. He was said, however, to have "earned a reputation for leniency with those who, because of a sudden temptation or violent emotion, made a single lapse into crime": G F Millar, 'Deas, Sir George (1804-1887)' in *Oxford Dictionary of National Biography* (online edn) (2004), available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-7397 <accessed 30/09/2020>.
[52] (1875) 3 Coup 152.
[53] In this case, the issue of impairment was raised by the Crown. Tierney was later reprieved.
[54] (1876) 3 Coup 334.
[55] ibid at 334.
[56] Lord Deas does refer directly to *Dingwall*, and suggests that "the same principle may, I think, fairly be held applicable in measuring out the punishment": ibid at 337. This can only be correct however in the very general sense of mental weakness being relevant at all. The innovation of diminished responsibility was that it allowed the accused's mental weakness to be accounted for directly at the stage of the verdict; *McLean* was the more straightforward case of mental weakness being considered in mitigation of sentence where the offence inferred arbitrary pains (theft had long ceased to be treated as a capital offence in practice: Gordon, *Criminal Law* i para 11.15), to which end the doctrine itself has no relevance. The latter part of Lord Deas's remarks can therefore be regarded as *obiter*, and as an opportunity seized to secure the advance made in *Dingwall*.
[57] *McLean* (n 54) at 337.

> I am of the opinion that, without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account, not only in awarding the punishment, but in some cases, even in considering within what category of offences the crime shall be held to fall.[58]

Similarly, in *Andrew Granger*:[59]

> But although the jury might not consider the panel in the present case to have been insane, it did not follow that they must convict him of the capital offence. [Lord Deas] would say to them, as he had said to the jury in Dingwall's case at Aberdeen, that a weak or diseased state of mind, not amounting to insanity, might competently form an element to be considered in the question between murder and culpable homicide.[60]

And again, in *Thomas Ferguson*,[61] the jury were directed with reference to the accused's "feeble intellect"[62] that:

> [H]e would be liable to the law, and to punishment, in a greater or lesser degree, according to the circumstances, whatever legal category his crime might fall under … the effect of weakness of mind might be to reduce a charge of murder to culpable homicide.[63]

Gordon notes that the two later cases of *Helen Thomson or Brown*[64] and *Francis Gove*[65] are significant only in that the accused's mental infirmity appeared in each to be the only mitigating factor.[66] This may though be read as part of a subtle shift away from the position of "diminished responsibility" as simply one of the many issues which might weigh upon a more general culpability calculation, towards its modern understanding as a doctrine in its own right.

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[58] ibid.
[59] (1878) 4 Coup 86.
[60] ibid at 103. The jury, specifically finding that the panel's crime did not amount to murder on the basis that it had been "committed when he was labouring under *delirium tremens*", delivered a verdict of culpable homicide: ibid at 104.
[61] (1881) 4 Coup 552.
[62] ibid at 557.
[63] ibid at 558. The jury found "the panel guilty of murder as libelled, with a recommendation to mercy on account of being a man of weak mind": ibid at 559. Ferguson was subsequently reprieved.
[64] (1882) 4 Coup 596.
[65] (1882) 4 Coup 598.
[66] Gordon, *Criminal Law* i para 11.16.

4.4 Towards definition: the twentieth century

The last significant nineteenth-century case, *HM Advocate v Robert Smith*,[67] served to demonstrate just how broad was the potential application of diminished responsibility. In that case, the accused, a farmworker, had been the target of a sustained campaign of harassment at the hands of his colleagues, before finally snapping and fatally shooting one co-worker who "booed" at him. A conviction of culpable homicide was returned on the basis that Smith's "mental equipoise" had been unsettled,[68] leaving him "physiologically unable to resist" the agitation to which he had been subjected.[69] This looks to have been a significant extension of the doctrine as it had previously been applied, appearing to suggest that a prolonged course of (relatively mild) provocation might be sufficient to sustain a plea of diminished responsibility. This appears somewhat inconsistent with Lord McLaren's own emphasis upon "physiological" instability in directing the jury.[70]

If *Smith* appeared though to have extended the doctrine, the prevailing trend throughout the twentieth century was quite to the contrary. Gordon describes an "increasing distrust" of diminished responsibility, manifested in an altogether more circumspect judicial approach.[71] In the case of *HM Advocate v Aitken*,[72] similar on its facts to *Smith* (except that here the persistent agitation from which the accused was argued to have suffered was the doing of his wife, whose throat he would ultimately cut), Lord Stormonth Darling was at pains to emphasise the need for "something amounting to brain disease".[73] Smith's condition would surely have failed to satisfy such a test, and so too, concluded the jury, did Aitken's.[74] *Aitken* marked the beginning of a more restrictive approach, which Gordon attributes to growing fears that an overly broad diminished responsibility plea might serve as an escape route for depraved and dangerous killers whose crimes warranted the ultimate penalty.[75] Those fears could be explained in part, at least as the twentieth century progressed, by the increasingly suspicious view taken of the various esoteric conditions recognised by modern psychiatry.[76] An alternative strand of thinking attacked diminished

[67] (1893) 1 Adam 34.
[68] ibid at 50 (Lord McLaren).
[69] ibid at 52 (Lord McLaren).
[70] Gordon, *Criminal Law* i para 11.17; Chalmers & Leverick, *Criminal Defences* para 11.07.
[71] Gordon, *Criminal Law* i para 11.18.
[72] (1902) 4 Adam 88.
[73] ibid at 94-95.
[74] Aitken was found guilty of murder, though with a strong recommendation to mercy.
[75] Gordon, *Criminal Law* i para 11.18.
[76] ibid. See Gordon's discussion of *Carraher v HM Advocate* 1946 JC 108 and "psychopathic personality" at para 11.21.

responsibility as "illogical and anomalous",[77] presenting it as an intrusion into an otherwise bright line between responsibility and non-responsibility.[78]

The most significant twentieth-century case was that of *HM Advocate v Savage*.[79] The directions given to the jury by the Lord Justice-Clerk (Alness) soon came to be regarded as the definitive statement of the law on diminished responsibility:

> It is very difficult to put in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied … that there must be some form of mental disease.[80]

This represented perhaps the first attempt to set out in any detail exactly what an accused had to demonstrate in order that a plea of diminished responsibility might succeed. It seems clear, however, that Lord Alness was attempting only to describe in general terms the basis of the plea, as opposed to offering any precise set of criteria: this was, he said, "the kind of thing that is necessary".[81] As Lord Rodger would later note in *Galbraith v HM Advocate (No 2)*,[82] the passage quoted amounts in essence to a coalescence of earlier judicial dicta (though only that from *Aitken* is cited).[83] Indeed, it does not appear to have been presented as anything more than this by Lord Alness.

Nevertheless, this point was to become obscured in the latter half of the twentieth century, as the passage quoted came to be treated as something akin to "the M'Naghten Rules of diminished responsibility".[84] In perhaps an indication of a shift in legal reasoning more generally, the courts began to seek out a more systematic understanding of the plea and turned to the *Savage* "formula". Description became definition, as in a series of cases Lord

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[77] ibid.
[78] See the views of Lord Johnstone in *HM Advocate v Higgins* (1913) 7 Adam 229 and the Lord Justice-General (Normand) in *Kirkwood* (n 16).
[79] 1923 JC 49.
[80] ibid at 51.
[81] ibid.
[82] 2002 JC 1 at para 29.
[83] The source cases were *McLean* (n 54) and *Granger* (n 59); *HM Advocate v McClinton* 1902 4 Adam 1; *McLean* (n 54) again; and *HM Advocate v Edmonstone* 1909 2 SLT 223. *Aitken* (n 72) is cited by Lord Alness for the proposition that there is required "some form of mental disease".
[84] Gordon, *Criminal Law* i para 11.19.

Alness's words came to be interpreted as a stage-by-stage "test", or a set of cumulative "criteria".[85] In practice, the most significant consequence of this was to solidify "mental disease" as a prerequisite in every case. As Gordon suggests, this kind of restrictive approach may have been foreshadowed even in *Smith*, through Lord McLaren's focus upon "physiological disturbance".[86]

As a set of criteria, Lord Alness's directions were clearly unsatisfactory.[87] This is hardly surprising, given that they were never intended to be treated as such. Especially problematic was the requirement for "mental disease", which significantly limited the utility of the plea in cases where the condition of the accused could not be readily pathologised. One such case arose in *Galbraith v HM Advocate (No 2)*.[88] The accused was charged with the murder of her husband, who she claimed had subjected her to sustained violent sexual abuse and threatened to kill her. Fearing for her life, she had resolved to kill him "because she could not think of any other way in which to bring her tribulations to an end".[89] A plea of diminished responsibility was tendered. One defence psychologist testified that the accused was experiencing "a form of post-traumatic stress disorder", whilst a second considered that her prolonged abuse had placed her in "a state of learned helplessness".[90] Both agreed that the trauma Galbraith had suffered would likely have severely undermined her powers of rationality during the relevant period, whilst a third expert witness told the court that, shortly before the killing, Galbraith "had been suffering from a clinical depression".[91] Notably, neither of the psychologists was medically qualified, whilst the third – a psychiatrist – was. The Crown's position was that Galbraith's account was untrue. The trial judge, directing the jury in terms of *Savage*, emphasised the need for some form of mental disease, and was clear that this could only be founded upon the evidence of the third witness. The jury convicted Galbraith of murder.

On appeal, the High Court concluded that later cases had wrongly interpreted Lord Alness as having set out a series of cumulative criteria. Rightly, it was determined that the *Savage* direction had been intended as a description of diminished responsibility, as opposed to a definition. "Mental disease", in the sense the trial judge had set out, was not a requirement

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[85] See *Connelly v HM Advocate* 1990 JC 349; *Williamson v HM Advocate* 1994 JC 149; and *Martindale v HM Advocate* 1994 SLT 1093.
[86] Gordon, *Criminal Law* i para 11.17.
[87] For criticism, see J Chalmers, 'Abnormality and anglicisation: first thoughts on *Galbraith v HM Advocate (No 2)*' (2002) 6 Edin LR 108 at 113.
[88] *Galbraith* (n 82).
[89] ibid at para 4.
[90] ibid at para 7.
[91] ibid at para 8.

in every case, and nor was it necessary that the condition of the accused should "border on insanity". Galbraith's conviction was quashed, and authority for a fresh prosecution granted.

This did of course mean that an actual definition of the plea was lacking, which the High Court obliged in providing. Diminished responsibility, it was decided, would apply if "at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts".[92] It has been pointed out that the High Court's work here amounts to something of an "anglicisation", the terminology of "abnormality of mind" and "substantial impairment" appearing to have been borrowed (without acknowledgement) from section 2 of the (English) Homicide Act 1957.[93]

Shortly before the *Galbraith* decision, the Millan Committee had reported to the Scottish Parliament (as part of a broader review of mental health law in Scotland) that diminished responsibility was unclear in its definition and difficult to apply in practice, recommending that it be referred to the Scottish Law Commission for review.[94] When the Commission did come to look at the doctrine, it considered that the Hight Court's work in *Galbraith* had largely resolved any pre-existing issues.[95] The statutory formula which resulted from the Commission's report therefore did little more than codify the *Galbraith* definition.[96]

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This chapter has outlined in detail the development of diminished responsibility in Scots law, beginning with its place in the key early criminal law texts and moving through its emergence and crystallisation in the practice of the High Court. It has been demonstrated that the doctrine did not emerge suddenly in its final form, but rather was the product of several stages of preliminary evolution before progressing in a similarly incremental fashion up to the present day. This gradual, protracted line of development offers us a rich resource from which to infer something of the nature of the criminal law as it has been shaped over centuries in the Scottish courts. Indeed, several markers can be identified of

[92] ibid at para 54, point 2.
[93] See Chalmers (n 87).
[94] See Millan Committee, *Report on the Review of the Mental Health (Scotland) Act 1984* (2001) 357-358.
[95] Scottish Law Commission, *Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004) para 3.15.
[96] Criminal Procedure (Scotland) Act 1995, s 51B (as inserted by s 168 of the Criminal Justice and Licensing (Scotland) Act 2010).

the kind of criminal law the High Court has tended to produce, and in chapter 5 we will conclude by considering some of these markers against the set of possible characteristics inferred in chapter 3.

CHAPTER 5: DIMINISHED RESPONSIBILITY AND THE SCOTTISH CRIMINAL LAW TRADITION

It was noted at the close of chapter 2 that diminished responsibility is seen as a distinctly "Scottish" doctrine, which has tended to be looked upon by Scots lawyers with an especially fond reverence. A number of reasons can be suggested for this. Most obvious amongst these is the doctrine's "homegrown" status. Not only are the doctrine's origins Scottish, but its development has remained essentially self-contained, with little evidence of any significant influence being drawn from outside the practice of the Scottish courts.[1] As we saw in chapter 4, the doctrine matured largely through a process of citation, interpretation and extension of earlier judicial pronouncements. It is, in the truest sense, an artefact of Scottish judge-made law.

The continued allure of diminished responsibility surely also owes something to its widespread emulation.[2] Especially salient here is the doctrine's introduction into English law in 1957.[3] At a time when fears over the anglicisation of Scots law were beginning to be expressed in some quarters with increasing fervour, the sight of a distinctly Scottish creation making its way south of the border (significantly, in the form of statutory intervention) doubtless vindicated belief in the native genius at a crucial moment.

There is, though, a further question to be asked here. Might it be the case that diminished responsibility is held in such high esteem by Scots lawyers, at least in part, because it embodies a number of the characteristics which are regarded as being distinctly "Scottish" more generally? In this chapter, we will consider our four previously suggested features – flexibility, pragmatism, leniency and non-technicality – against the line of development set out in chapter 4.

5.1 Flexibility

Ask a Scots lawyer to describe, in a word, their native criminal law, and more often than not one is likely to be informed of an inherent and distinctive "flexibility". Indeed, it is this

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[1] At least until *Galbraith v HM Advocate (No 2)* 2002 JC 1.

[2] Various iterations of diminished responsibility (or something akin to it) can now be found operating throughout the legal world, a selection of which are discussed in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Surrey, 2011).

[3] Homicide Act 1957, s 2.

purported characteristic which is reliably cast as the system's unique selling point.[4] Claims to flexibility are, of course, bound up in the nature of a judicially developed body of rules. The conventional wisdom is summarised by Jones in terms that "the common law allows the courts a desirable flexibility in dealing with the cases that come before them",[5] citing the words of Lord Avonside in *Khaliq v HM Advocate*: "The great strength of our common law in criminal matters is that it can be invoked to fill a need. It is not static."[6]

But what, precisely, might we mean by "flexibility" in this context? Most straightforwardly, flexibility can be positioned, as it is by Gerald Gordon, in opposition to "rigidity". In adhering to the former, says Gordon, the Scottish system has had the advantage of being able to consider individual cases on their own merits.[7] Comparing this to the evidence given by Lord Cooper before the Royal Commission on Capital Punishment, we find that flexibility is understood in similar terms. Referring in particular to the Scottish law of homicide, Lord Cooper's views are worth quoting at length:

> No two cases are exactly alike, and *very slight distinctions in the circumstances* may tilt the balance as between murder and culpable homicide, and even as between innocence and guilt. By the application of our native methods to our native principles, it has proved possible (within the limits of human fallibility) 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. No better proof of the flexibility of the Scottish law can be afforded than the introduction, in obedience to enlightened conceptions of natural justice, of the doctrine of diminished responsibility to *mitigate the rigour* of the so-called M'Naghten Rules.[8]

Flexibility, the great virtue of the Scottish system, is presented primarily in favourable contrast to an imagined *in*sufficiently flexible alternative. Even its key drawback – identified by Gordon in the danger of "ad-hoccery", with judges retreating behind the

[4] Though for a more critical discussion of "good flexibility" and "bad flexibility", see E Clive, 'Codification of the criminal law' in J Chalmers and others (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh, 2010) 54 at 57-63.
[5] T H Jones, 'Common law and criminal law: the Scottish example' [1990] Crim LR 292 at 292.
[6] 1983 SCCR 483 at 486.
[7] G H Gordon, 'Judicial creativity in a common law system' (1993) 27 Israel Law Review 118 at 120.
[8] Royal Commission on Capital Punishment (1949-1953), *Minutes of Evidence Taken Before the Royal Commission on Capital Punishment* (London, 1949-1953): Eighteenth Day, Supplementary Memorandum Submitted by the Lord Justice General at para 3 (emphasis added).

principle that "every case depends on its own circumstances"[9] – on Cooper's account simply dissolves into the justification for eschewing fixed rules to begin with. The imagined alternative, as acknowledged in Cooper's reference to the English M'Naghten Rules, is of course exemplified by the preference south of the border for statutory delineation.[10] In this sense, "flexibility" has tended to be framed predominantly within a more general debate around the respective merits of judge-made law and legislation – and thus, rather more invidiously, as being central to Anglo-Scottish comparisons. Here, we will instead draw upon the development of diminished responsibility to consider some of the ways in which flexibility might manifest in (Scottish) practice. At least on Cooper's account, as set out above, no clearer example can be imagined.

The first, and clearest, sense in which one might appropriately describe a set of rules as "flexible" is that in which those rules are capable of being altered or adapted in order to address cases which were not previously accounted for. We might refer to this as the *variability* of those rules. The greater the ease with which adjustments can be made, the greater the variability.

We can clearly identify a high degree of variability within the development of the rules of diminished responsibility, evident both at the stage of the plea's inception and in its later progression. To illustrate the point, we will consider both the first and the last major cases in the timeline of the plea at common law.

As we alluded to in chapter 4, perhaps the most remarkable aspect of the *Dingwall* case report is just how un-remarkable its substance appears to be. The process by which the modern doctrine of diminished responsibility is arrived at, for all that would go on to be written and said about it, was startlingly straightforward. Lord Deas, in leaving it open to the jury to consider Dingwall's impaired faculties towards arriving at a verdict of culpable homicide, executed what would come to be seen as a crucial manoeuvre in criminal legal history in just a single short paragraph at the conclusion of his directions. At first glance, one could almost be forgiven for overlooking the case's significance; the only real indication that anything novel might be happening comes in Lord Deas's "anxious consideration"[11] over the question of admissibility.

[9] Gordon (n 7) at 120.
[10] Whilst the Rules themselves were not a statutory creation, the implication is clear enough.
[11] *Alexander Dingwall* (1867) 5 Irv 466 at 479.

By contrast, the significance of the *Galbraith* judgment was plainly advertised. The import of the question before the High Court having been initially recognised in the very fact of its being referred to a Full Bench, the report of the judgment delivered by the Lord Justice-General (Rodger) is a suitably extensive document. Lord Rodger covers in some considerable detail the history and theoretical basis of the plea, before coming to lay out a modern formulation and addressing some of the attendant questions of public policy. Crucially, it was decided that proof of "mental illness" was not a prerequisite for the defence to operate. The case can be summarised in terms that the High Court, in undertaking a full-scale review of diminished responsibility, "swept aside much of the existing authority relating to the plea".[12]

In both of these developments, we can observe a substantial degree of variability in the law, and in each case from a slightly different angle. On one hand, we have a significant substantive legal development taking place with little discernible fuss. On the other, we have a court, though framing its task in terms of ascertaining the true position of the law, implicitly taking it upon itself to conduct something like a scaled-down law reform project.

The second, and perhaps less immediately obvious, sense in which flexibility might be relevantly identified amongst the formal features of a set of rules is that in which those rules can properly be applied across a wide variety of cases. This second kind of flexibility can be distinguished from the first in that it does not entail any alteration to the content of the rules in question, being concerned rather with the rules in their existing shape. We might refer to this as the *coverage* of those rules.

Again, there is much that can be said for the coverage of the rules of diminished responsibility. Looking again initially to the doctrine's origins, it is apparent that the plea was always likely to cover a lot of ground in evidential terms. In *Dingwall*, the jury was told by Lord Deas that, in considering the question of the prisoner's weak constitution, they might properly take account of such factors as Dingwall's likely sunstroke in India, his subsequent epileptic fits, and his repeated attacks of *delirium tremens*. In *Francis Gove*, it was considered relevant that the prisoner was "morose, and very suspicious, fancying that everyone about him was an enemy".[13] In *Robert Smith*, the accused's mind was said to have been unsettled by a repeated course of provocation, his disproportionately violent

[12] J Chalmers, 'Reforming the pleas of insanity and diminished responsibility: some aspects of the Scottish Law Commission's Discussion Paper' (2003) 8 Scottish Law and Practice Quarterly 79 at 86.
[13] *Francis Gove* (1882) 4 Coup 598 at 599.

response taken as an indication of imbalance. It is clear that, at least initially, an extremely broad range of cases had the potential to fall within the ambit of the plea.

5.2 Leniency and pragmatism

In contemporary accounts of the development of diminished responsibility, a curious detail has repeatedly been observed with respect to the prime movers in its creation. As we observed in chapter 4, both Sir George Mackenzie and later Lord Deas are considered to have been unlikely exponents of a liberal approach towards the disordered offender, each being preceded by a somewhat barbarous reputation.

Implied within the sense of puzzlement at the identity of these early campaigners is an understanding of the plea as being largely reflective of considerations of leniency. Indeed, there is some evidence in the early case law that a finding of diminished responsibility was viewed as an expression of compassion. In *Dingwall*, for instance, Lord Deas is said in one report of the trial to have spoken of the "humane and merciful view taken of the case by the jury".[14] In *Granger*, he spoke similarly of the jury having delivered "not only a just but a humane verdict".[15] It is suggested, however, that to better explain the identity of the plea's authors we must consider its inherently pragmatic spirit. "Pragmatism" is here taken to indicate a concern with the law's "workability": it denotes an emphasis placed upon practical expediency – at the cost, if necessary, of theoretical sophistication.

In the sense that it implicates the law's capacity to supply problems with solutions, pragmatism necessarily derives in part from flexibility, in each of the senses described above. Yet, in the case at hand, it is also true that it was a rare example of *in*flexibility in the criminal law which called for pragmatic thinking. As diminished responsibility crystallised in the first half of the twentieth century, it began to attract the objection that it represented a seemingly anomalous intrusion into the otherwise clearly demarcated boundary between responsibility and non-responsibility.[16] The point has been well made by T B Smith, however, that the relevant anomaly was quite the opposite in character, and one to which the doctrine of diminished responsibility is better viewed as a corrective. Scottish sentencing practice has traditionally operated on the basis of almost entirely unfettered judicial discretion, with few restrictions placed upon either the severity of the penalty to be dispensed or the factors which might legitimately be considered. Murder,

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[14] 'Aberdeen Circuit Court of Justiciary' *The Scotsman* (Edinburgh, 20 September 1867) 4.
[15] *Andrew Granger* (1878) 4 Coup 86 at 111.
[16] See the dicta of the Lord Justice-General (Normand) in both *Kirkwood v HM Advocate* 1939 JC 36 at 40, and *Carraher v HM Advocate* 1946 JC 108 at 118.

which continues to attract a mandatory penalty, has long remained a conspicuous anomaly. Today, at least, some room for manoeuvre is afforded in determining the punishment part of a life sentence; prior to the abolition of capital murder, even this luxury was out of the question. Consequently, the sentencing judge was uniquely prohibited from having any regard to evidence that the prisoner had committed their crime in a state of mental impairment.[17] Of course, this did not necessarily mean certain death for the abnormal-but-not-insane convicted murderer. As indicated above, by the time Hume's *Commentaries* came to be published the practice of recommending such an offender to the mercy of the Crown was well-established.

Yet it is not difficult to imagine why this might have made for a less than optimal solution in practice. There was, of course, no guarantee that such a recommendation would ultimately result in a reprieve. Whilst commentators have generally treated the question as having been little more than a formality,[18] and indeed it appears that the vast preponderance of cases remitted for royal review resulted in a commuted sentence, it is by no means impossible to identify instances of abnormal offenders being denied a pardon endorsed by the court.[19] Moreover, the court could not be assured that juries would in fact affix a recommendation to mercy to their guilty verdict in deserving cases, as they were more or less directed on occasion to do. To the contrary, at least one contemporary commentator warned of "the risk that justice may be defeated by the jury returning a verdict of not guilty in the face of the Judge's charge, in case a person with a defective mind should actually be executed in consequence of their verdict".[20] Quite apart from the uncertainty inherent in the process of obtaining a pardon is the unhappy reality of pronouncing death upon an individual agreed to be undeserving, who is then left to ponder their fate for a second time.[21]

With all of this in mind, it can be deduced with little hesitation that the plea's innovation might have owed something – perhaps even its primary impetus – to considerations of

[17] T B Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962) at 160-161.
[18] Alison reports that "the presiding Judge never fails to transmit such an account of the trial as ensures a transportation pardon to the pannel": Alison, *Practice* at xxvi. See also N Walker, *Crime and Insanity in England, Vol. 1: The Historical Perspective* (Edinburgh, 1968) at 201.
[19] See e.g. *Samuel Rogers* (1831) Alison, *Principles*, 653; *George Bryce* (1864) 4 Irv 506; *Andrew Brown* (1866) 5 Irv 215. It may be significant that there is illustrated an ongoing practice of occasionally refusing pardons at least until Dingwall's case in 1867. *Bryce* and *Brown* would have been particularly fresh in the memory of Lord Neaves, who sat at all three cases.
[20] W C S, 'The plea of insanity in trials for murder' (1875) 19 Journal of Jurisprudence 561 at 564-566.
[21] Of course, it is equally true that the modern court cannot be assured in any given case that the jury will sustain a plea of diminished responsibility, even where strongly recommended to do so. The modern jury though has no reason to instead acquit entirely on the suspicion that its verdict might not be adhered to.

expediency. Certainly, this would seem to reconcile far more readily with the character of Lord Deas than would an understanding of the plea rooted primarily in terms of leniency.[22] In placing the fortunes of the abnormal offender directly within the hands of the jury, and in turn removing an obstacle to judicial influence over sentencing in appropriate cases, Lord Deas effectively streamlined the process of circumventing the death penalty, whilst at the same time facilitating the possibility of a more particularised disposal of otherwise capital cases. The “cleaner” solution – perhaps the more holistic means of achieving the desired outcome – would almost certainly have involved the elimination of the anomalous mandatory penalty. Such a solution was though, of course, outside the reach of the courts.[23] Nevertheless, the problem was not to prove intractable, for in a demonstration of the criminal law’s capacity for pragmatism, a workable alternative response was produced. As far as leniency is concerned, its relevance here obtains largely at an institutional level, as opposed to within the substantive law. In eschewing the need for a recommendation to mercy, Lord Deas effectively prised the concept of leniency in murder cases away from the executive and into the hands of the judiciary.

5.3 Non-technical expression

By dint of section 51B(1) of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 168 of the Criminal Justice and Licensing (Scotland) Act 2009), it is possible to offer a “definition” of diminished responsibility. Certainly, we can identify a fixed set of necessary and sufficient conditions in order that the defence might successfully be made out in a given case. It is useful at this stage to consider the wording of the general statutory rule:

> A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person’s ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

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[22] Lord Deas is reputed to have “avoided an abstract, philosophical approach to the law and approached questions from the practical side”: G F Millar, ‘Deas, Sir George (1804-1887)’ in *Oxford Dictionary of National Biography* (online edn) (2004), available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-7397 <accessed 30/09/2020>.

[23] In this connection, it is interesting to note that the “rare example of inflexibility” identified is not part of the substantive criminal law itself: the mandatory penalty operates as something of an external constraint, the removal of which would require legislative intervention.

Breaking this down, we can see that the jury must be satisfied that:

(1) A's conduct was of a kind which, in the absence of a successful plea, would result in a conviction of murder;
(2) A's ability to determine or control that conduct was substantially impaired (at the time of the conduct); and
(3) that impairment prevailed by reason of abnormality of mind.

Where the jury is so satisfied, it ought to convict the accused of culpable homicide only. What this exercise is intended to demonstrate is that the content of section 51B(1) amounts to what is a characteristically "legal" formula. Without being expressed as such, its language is capable of being broken into its constituent parts and analysed as a set of criteria; it sets out to demarcate, completely and systematically, a general basis upon which juries ought to be directed where the issue of diminished responsibility is deemed relevant to their task. The name of the plea is itself enshrined as a term of art, the meaning of which is to be glossed from the surrounding text.

It ought to be stressed that the present shape of the plea is not merely the product of modern legislative drafting technique, for the statutory wording (by design) largely mirrors that laid down in *Galbraith*.[24] That decision, however, marked something of a break with tradition. Prior to that decision, the concept of diminished responsibility had been couched in avowedly non-technical – even non-legal – language. T B Smith, writing in 1961, could confidently state that diminished responsibility had been "described but never defined",[25] and his point remained a valid one throughout the remainder of the twentieth century.

We will consider below the manner in which that description took effect, but a few remarks are first in order on the subject of language. Lord Rodger, in commencing his review of the plea's development in *Galbraith*, undertook to lay out the origins of the "diminished responsibility" label itself.[26] It is suggested that he was wise to do so, for in this case the evolution of the doctrine's attendant terminology is indicative of a deeper trend in the nature of its formation.

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[24] See *Galbraith* (n 1) at para 54 (Lord Justice-General (Rodger)).
[25] Smith (n 17) at 159.
[26] *Galbraith* (n 1) at paras 22-28.

Lord Rodger reports the first recorded use of the term "diminished responsibility" by a Scottish judge as having come in 1939, in the remarks of the Lord Justice-General (Normand) in *Kirkwood v HM Advocate*.[27] In fact, as has been pointed out elsewhere,[28] its adoption dates at least six years prior, the Lord Justice-General (Clyde) having made reference in the 1933 case of *Muir v HM Advocate* to "the defence of diminished responsibility".[29] The likely source of the language is the Lord-Justice Clerk (Alness)'s charge to the jury in *HM Advocate v Savage* in 1923, which contained for many years the leading judicial pronouncement on the nature of the plea. Lord Alness, attempting to characterise the impairment which had to be looked for, referred (amongst other things) to "a mind so affected that responsibility is diminished from full responsibility to partial responsibility".[30] Though not cited as such, the wording here appears in turn to derive from the 1909 case of *HM Advocate v Edmonstone*, in which part of Lord Guthrie's charge is framed in almost identical terms alongside a number of other references to the notion of "responsibility" being "diminished".[31]

There was no clear fixed point at which "diminished responsibility" became firmly lodged within the lexicon of the Scottish courts.[32] A survey of the case law through at least the mid-twentieth century finds a miscellany of labels affixed in its place, with references variously to, amongst other things, "partial responsibility",[33] "partial insanity",[34] and "reduced responsibility".[35] Terms of this sort were treated as essentially interchangeable, even as the modern terminology began to gain currency. In *Muir* and *Kirkwood*, where "diminished responsibility" seemed first to have found favour, Lords Clyde and Normand settled elsewhere in their remarks upon "lessened responsibility"[36] and "impaired

[27] *Kirkwood* (n 16) at 40.
[28] J Chalmers, 'Abnormality and anglicisation: first thoughts on *Galbraith v HM Advocate (No 2)*' (2002) 6 Edin LR 108 at 109.
[29] 1933 JC 46 at 48.
[30] 1923 JC 49 at 51. *Savage* was cited to the court in *Muir* at first instance.
[31] 1909 2 SLT 223 at 225. As Lord Rodger points out (at para 25) in *Galbraith*, the term "diminished responsibility" does itself appear in the SLT report of the case, though it is to be found only in the reporter's headnote. Nevertheless, this seemingly stands as its first appearance in a Scottish case report.
[32] In *Galbraith*, Lord Rodger identifies (at para 25) the mid-1940s as the stage after which the term "seems to have taken root", citing its apparent acceptance in *Carraher* (n 16) and *Caldwell v HM Advocate* 1946 SLT (Notes) 9.
[33] See *Edmonstone* (n 31) 1909 2 SLT 223 at 225 and *Savage* (n 30) at 51.
[34] See *HM Advocate v Abercrombie* (1896) 2 Adam 163 at 165 (Lord McLaren, who refers also here to "partial mental derangement").
[35] See *Russell v HM Advocate* 1946 JC 37 at 48.
[36] *Muir* (n 29) at 47. The trial judge is reported by Lord Sands (at 49) as having referred in his charge to "partial insanity", whilst counsel on both sides appear throughout to have led submissions with respect to "the defence of mental unsoundness falling short of insanity" (reported at 46-47).

responsibility"[37] respectively. Later still, in *HM Advocate v Braithwaite*, the Lord Justice-Clerk (Cooper) adopted a similarly liberal approach, citing "this defence of diminished responsibility"[38] before subsequently mentioning "[the accused]'s defence of partial irresponsibility".[39]

Moreover, in some instances, it is not even entirely clear that what is being referred to is the particular doctrine itself. At one stage, the language used to that end appeared to overlap significantly with that used to comment in a more general sense upon either the accused's state of mind or their level of blameworthiness. Again, to cite *Kirkwood*, Lord Normand is reported as having uttered the phrase "diminished responsibility" on two occasions, referring first to "a plea of guilty of culpable homicide on the ground of [the appellant's] diminished responsibility"[40] before going on to talk of there being present "some degree of diminished responsibility, although it cannot be assessed".[41] At least the latter instance appears to make little sense as an allusion to the plea itself. By contrast, the term had already been used by Lord Clyde in *Muir* in connection with a particular "defence".[42] That a clear distinction between (a) the doctrine itself and (b) the medical and philosophical concepts underlying it would take some time to emerge is hardly surprising. As our earlier account of diminished responsibility's initial development sought to emphasise, the modern plea is derived from the practice of directing juries that they might properly consider evidence of mental abnormality as a factor separating murder from culpable homicide. Being conceived of to this end as simply one element amongst many – as a possible "extenuating circumstance"[43] – its crystallisation as a fully-formed "doctrine" was to follow gradually.

What we can take from all of this is that, even as the twentieth century progressed and that crystallisation took its course, the doctrine which took shape remained somewhat rudimentary in the manner in which it was discussed, lacking any strong sense of uniformity or specificity. Crucially, however, the significance of this point extends beyond the realm of linguistics. As Lord Rodger noted in *Galbraith*, "[i]f the terminology used by the judges was unsettled, this was because they had not really settled the precise nature of

[37] *Kirkwood* (n 16) at 38. Lord Normand also refers (at 40), in discussing the particular relevance of mental abnormality to sentencing, to "the factor of reduced responsibility".
[38] 1945 JC 55 at 57.
[39] ibid at 58.
[40] *Kirkwood* (n 16) at 37.
[41] ibid at 40.
[42] See n 29 above and accompanying text.
[43] *Dingwall* (n 11).

the plea which they were describing".[44] And indeed, to "describe" the plea was as far as most judges were tempted to go, even if this point was to be lost on later courts at arguable cost to the doctrine's utility.[45]

As pointed out above, in the years following *Dingwall* there was little in the way of a "doctrine" for judges to delineate. Generally, juries were directed on the straightforward basis that there might exist some degree of abnormality, short of insanity (the plea in fact tendered by the accused in the majority of early cases), apt to reduce the quality of an otherwise murderous act to culpable homicide. Certainly, as the twentieth century dawned, there was some evidence of judges attempting to set out a more detailed framework for the purposes of approaching the question, though such attempts remained relatively crude. In *HM Advocate v Graham*, for example, the Lord Justice-Clerk (Macdonald) intimated that he would relay the "principles" laid down in *Dingwall* by Lord Deas, upon which juries ought to be directed.[46] Reading on, however, one find that these "principles" amount to no more than a listing of the evidential matters Lord Deas had considered relevant to a possible culpable homicide conviction on the facts of that case, which bore close proximity to facts in *Graham*.[47]

The absence of clear, prescriptive criteria naturally left juries with considerable discretion to determine cases of alleged mental abnormality in line with their own sense of justice. Indeed, judges could be found explicitly directing juries to rely, "as men of the world",[48] on their own "common sense",[49] with "not much direction needed in point of law".[50] As Kennedy has argued, the degree to which the judiciary were prepared to defer to lay knowledge is a remarkable feature of Scottish practice in the nineteenth century. Commenting on the early development of mental condition defences generally, Kennedy suggests that the faith placed in everyday knowledge may have been reflective of the "Common Sense" outlook which had come to prominence amongst contemporary Scottish

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[44] *Galbraith* (n 1) at para 27. See further A Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford, 2012) at 230.
[45] See discussion below.
[46] (1906) 5 Adam 212 at 218-219.
[47] See also the commentary on *Dingwall* in H H Brown, 'Insanity in its relation to crime' 1916 JR 119 at 142, where it appears to have been understood that Lord Deas – in noting the sudden and unpremeditated nature of the attack in question; the normally amicable relationship between the parties; the lack of ferocity in the attack; and the peculiar mental condition of the accused, impaired by bouts of disease – had laid down a general set of conditions of which juries ought to be satisfied.
[48] *Edmonstone* (n 31) at 225.
[49] Dingwall (n 11) at 479.
[50] *Helen Thomson or Brown* (1882) 4 Coup 596 at 597.

philosophers.[51] Certainly, this account would tend to support any claim of distinctiveness in the "non-technical" development of diminished responsibility.

It was not perhaps until *Savage* that an attempt was made to sum up what exactly might be required to demonstrate the presence of a qualifying abnormality. As we noted in chapter 4, however, Lord Alness's dicta here would come to be fundamentally misunderstood by later courts. His attempt at describing "the kind of thing that is necessary"[52] would be erroneously interpreted by later courts as an effort to lay out a stage-by-stage "test", much to the detriment of the plea's utility. Later, in *Galbraith*, the task of the court largely centred around undoing this damage. The point underlined here is that, for more than a century, the plea of diminished responsibility had operated on a basis which appears substantially antithetical to a systematic, characteristically "legal" mode of reasoning.

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This chapter has analysed the development of diminished responsibility in Scots law against some of the common characteristics suggested in the traditional criminal law literature. We have seen that the notion of flexibility finds itself reflected in at least two senses, in terms of both the law's coverage and its variability. The idea of leniency, however, operates here more at an institutional level, featuring as a secondary concern to considerations of pragmatism. Our final characteristic, that of non-technicality, has played a major role in the manner of the law's expression. Our study of diminished responsibility has thus allowed us to draw out in clear terms some of the key characteristics of Scots criminal law, and to demonstrate how these characteristics manifest themselves in practice.

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[51] C Kennedy, '"Ungovernable feelings and passions": common sense philosophy and mental state defences in nineteenth century Scotland' (2016) Edin LR 285. On the significance of lay knowledge in this context more generally, see A Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford, 2012) ch 9.
[52] *Savage* (n 30) at 51.

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