

Capital Punishment and the Criminal Corpse
in Scotland 1740 to 1834

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Abstract

Capital punishment occupies a central area of investigation within the annals of Western European penal history in the eighteenth and nineteenth centuries. However studies of Scotland have thus far garnered limited academic attention, especially when compared to practices in England. Based upon the extensive quantitative and qualitative analysis of previously untapped primary sources, this thesis provides the most in-depth investigation into the use of capital punishment in Scotland between 1740 and 1834 to date. It examines some of the key themes permeating the wider historiography such as the theatre of the gallows and the changing nature of the public execution from a Scottish perspective in order to both enhance the current field whilst also providing a rethinking of some of the broader assumptions. Through an analysis of the fluctuations in Scotland's use of the death sentence and the changing public discourse towards capital punishment throughout this period, the thesis will demonstrate the unique Scottish experience. Furthermore, it will highlight notable areas of comparison with practices in England, an area of research thus far largely neglected by Scottish and English crime historians alike. While previous studies of capital punishment have ended with the public execution, a central area of investigation in this thesis will be the enacting of post-mortem punishments upon the Scottish criminal corpse in the wake of the 1752 Murder Act. An analysis of the punishments of dissection and hanging in chains, and their place within the criminal justice system's response to the crime of murder, presents a caveat in the long term narrative of the changing nature of capital punishment between the mid-eighteenth and early nineteenth centuries.

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List of Abbreviations

BL British Library

ED CRC Edinburgh University Centre for Research Collections

GUA Glasgow University Archives

HO Home Office

JC Justiciary Court

KB Court of King's Bench

NAS National Archives Scotland

NLS National Library Scotland

SP State Papers

TNA National Archives Kew

TS Treasury Solicitor's Papers

Chapter One:

Introduction

The history of capital punishment has been the focus of extensive and sustained investigation, with the eighteenth and nineteenth centuries in particular holding a pervasive attraction for crime historians of Western Europe. However studies of the Scottish experience have thus far remained relatively limited. Therefore this thesis will provide the first extensive investigation into the use of capital punishment in Scotland. It will conduct an in-depth quantitative analysis of the criminals sentenced to death as well as a qualitative exploration of Scottish execution practices between 1740 and 1834. This period of Scottish crime history offers the potential for a rich analysis as, following the 1707 Act of Union (6 Ann c. 11), Scotland and England were governed by the same parliament at Westminster. Despite this Scotland maintained its own legal system and, as this thesis will demonstrate, was distinct in its application of the criminal law. However this study will use the unique Scottish experience to explore potential areas for comparison with practices in England and to rethink some of the broader assumptions within the historiography of capital punishment in the eighteenth and nineteenth centuries.

A central area of investigation in this thesis will be the punishment of the criminal body during and after the public execution. The enacting of additional punishments upon the body had been a penal option prior to the mid-eighteenth century. However the 1752 Murder Act (25 Geo II c.37) placed it more squarely within the criminal justice system. It stipulated that the bodies of those executed for murder were to be either publically dissected or hung in chains in order to “add some further terror and peculiar mark of infamy to the punishment of death”. However the use of post-mortem punishment has been largely neglected within histories of capital punishment.¹ Therefore, through an in-depth investigation into the implementation of the punishments of dissection and hanging in chains, this thesis will question their potential effects upon both the condemned criminal and the spectator. In addition, it

¹ This PhD thesis has been completed as part of the generously funded Wellcome Trust project, Harnessing the Power of the Criminal Corpse. This multi-disciplinary project has produced pioneering research into the uses and treatment of criminal bodies.

will place the use of these punishments within its study of the wider history of Scottish execution practices. In turn it will question their place in the gradual changing nature of capital punishment across this period in order to present a further layer to the historical field.

Exploring the Historiography

This introductory chapter will highlight the key themes and central research questions to be addressed and act as the platform upon which subsequent chapters will build. It will take a dual approach to tackling the vast body of secondary literature consulted in the development of the thesis and split it into two broad categories. The first will address Scotland's unique position after the signing of the 1707 Union with England. Although they were to be governed by the same parliament, each country retained their own separate legal systems. The works consulted in this chapter have acknowledged Scotland's continued distinction and highlighted notable areas of the legal system that differed from the English. They have also argued that the government in Westminster rarely legislated specifically for Scotland and that high ranking members of the legal system were allowed a large degree of autonomy to deal with criminal matters north of the border. However there is a very limited number of works that have progressed on to investigate the application of the criminal law in Scotland, an area of research that will be furthered with the completion of this thesis. The second body of historiography consulted in this chapter will be works focused upon capital punishment in the eighteenth and nineteenth centuries. Although the Scottish experience has been largely ignored, the chapter will thematically explore the literature focused upon England and Continental Europe in order to identify key areas of investigation to be addressed in this thesis. These include the disappearance of older execution practices by the mid-eighteenth century as well as the gradual changes that occurred to the public execution spectacle as this period progressed. A reading of these works will allow for subsequent chapters to use the Scottish experience to build upon, and even challenge, the broader historiography focused upon capital punishment in the eighteenth and nineteenth centuries.

Historians have stressed the importance of economic considerations on the part of Scotland for entering into a union with England. For Queen Anne and the English parliament the major issues were the securing of the succession and the desire to quell the potential threat of Scotland being used as a stronghold for a rebellion in favour of the deposed male Stuart line.² Therefore two of the most prominent institutions in Scotland, the church and the legal system, were largely protected and afforded a degree of continued autonomy by the Articles of the Union in what S.J. Connolly termed as an important “reassurance offered to Scottish sensibilities”.³ In addition, in the new British parliament there were to be 45 Scottish Members of Parliament in the House of Commons and 16 elected peers in the House of Lords. This brought the total number in the Commons to 558 as representation of England and Wales remained unchanged. When investigating representation in parliament per head of population, Julian Hoppit demonstrated that the Union diminished Scottish representation.⁴ Furthermore, when investigating how Westminster legislated for the three kingdoms of England, Scotland and Ireland between 1707 and 1830, Joanna Innes has shown that following their respective unions, Scotland with England in 1707 and Ireland with Britain in 1800, legislation relating to the latter two countries declined. For Scotland the main criminal legislation passed in the eighteenth century dealt with unrest and peaked following the 1745 Jacobite Rebellion and again with a few further acts passed following unrest towards the end of the eighteenth century.⁵

² This chapter does not have the scope to delve deeply into the motivations for the passing of the Union. For more thorough analyses see William Ferguson, *Scotland's Relations with England: A Survey to 1707* (Edinburgh: John Donald Publishers, 1977); Colin Kidd, *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-British Identity 1689-c.1830* (Cambridge: Cambridge University Press, 1993); John Robertson (ed), *A Union for Empire: Political Thought and the Union of 1707* (Cambridge: Cambridge University Press, 1995); T.M Devine, *The Scottish Nation 1700-2000* (London: Penguin Press, 1999); T.M Devine and J.R Young (eds.), *Eighteenth-Century Scotland: New Perspectives* (East Lothian: Tuckwell Press, 1999); David Allan, *Scotland in the Eighteenth Century: Union and Enlightenment* (London: Pearson Education, 2002); Christopher A. Whatley, *The Scots and the Union* (Edinburgh: Edinburgh University Press, 2006).

³ S.J Connolly, 'Albion's Fatal Twigs: Justice and Law in the Eighteenth Century', in Rosalind Mitchison and Peter Roebuck (eds.), *Economy and Society in Scotland and Ireland 1500-1939* (Edinburgh: John Donald Publishers, 1988), pp. 117-125, p. 121.

⁴ Julian Hoppit (ed), *Parliaments, Nations and Identities in Britain and Ireland 1660-1850* (Manchester: Manchester University Press, 2003), p. 3.

⁵ Joanna Innes, 'Legislating for Three kingdoms: How the Westminster Parliament Legislated for England, Scotland and Ireland 1707-1830', in Hoppit, *Parliaments, Nations and Identities*, pp. 15-47, p. 25.

When investigating the ways in which Scotland maintained a degree of autonomy following 1707 Lindsay Paterson characterized the system of the governing of the country as “political management by the social elite whose values were moderation and rationalism”.⁶ Similarly, Michael Fry described the British influence in Scotland as being managed by “native Scottish surrogates”.⁷ These elite men included the Lord Advocate, as the most senior member of the legal system, the Solicitor General and, on occasion, the Lord Justice Clerk and Justiciary court judges, although they were answerable to a minister in London, from 1782 this was the Home Secretary. In 1725 various areas of Scotland, including Stirling, Dundee, Ayr, Elgin and most notably Glasgow witnessed serious unrest following the introduction of the Malt Tax, from which Scotland had been exempted by Article XIII of the Union. General Wade and 400 dragoons were required to quell the riots. The Lord Advocate, Robert Dundas, was a key opponent of the tax and was dismissed from office over his handling of the situation. In London the events were believed to have demonstrated Scotland’s inability, or unwillingness, to implement law and order on such a contentious issue and thus Robert Walpole appointed Islay Campbell, who would later inherit the Dukedom of Argyll, to manage Scottish affairs between the 1720s and 1761. He exercised great influence, ensuring political stability in Scotland and sway over Scottish MPs, but in return he had great patronage and authority to govern the country.⁸ The political management of Scotland in the second half of the eighteenth century was vested in Henry Dundas, whose influence and powers of patronage saw him referred to as the “uncrowned King of Scotland”.⁹ In cases where a criminal had been capitally convicted and were sending petitions to London for a remission of the sentence, the opinion of the Lord Advocate was often solicited by both the petitioners and the authorities in London. As subsequent chapters will show, the opinion of the Lord Advocate could be pivotal in the decision making process.

⁶ Lindsay Paterson, *The Autonomy of Modern Scotland* (Edinburgh: Edinburgh University Press, 1994), p. 31. For a further discussion of internal political management in Scotland see John Stuart Shaw, *The Management of Scottish Society 1707-1764; Power, Nobles, Lawyers, Edinburgh Agents and English Influences* (Edinburgh: John Donald Publishers, 1983).

⁷ Michael Fry, *Patronage and Principle: A Political History of Modern Scotland* (Aberdeen: Aberdeen University Press, 1987), p. 79.

⁸ Devine, *Scottish Nation*, pp. 21-22.

⁹ Allan, *Scotland in the Eighteenth Century*, p. 23.

During the period under investigation here Scotland was producing a growing amount of legal literature expounding the distinction of Scots law.¹⁰ Of particular relevance here are the arguments that not only served to highlight the differences between Scots law and that of its southern counterpart, but also go some way to explaining Scotland's lesser use of the death sentence. In 1681 Viscount Stair stated that "we are happy in so few and clear statutes".¹¹ Sir Archibald Alison argued that in England the powers of the common law did not generally extend beyond a misdemeanour and that all serious offences were subject to legislative statutes. In consequence, he argued, the capital statutes were characterized by severity and the judges had limited power to modify the penalties. Comparatively, in Scotland the powers of the common law were more extensive and thus they were less affected with legislation. Evidence of this lay in the fact that capital crimes in England numbered over 200 when Alison was writing in the early nineteenth century but not quite 50 in Scotland and more than half of these had originated with the British parliament.¹²

Scotland's lesser use of capital punishment was also attributed to the nature of the building up of evidence in potentially capital cases. Since the sixteenth century in Scotland the responsibility for prosecuting offenders was vested in the legal profession, from the Lord Advocate in Edinburgh to the procurator fiscals who would gather evidence or precognitions in their local areas and build up the case. In more serious cases the fiscals would send the precognitions to the Crown Office where the Lord Advocate, or in most cases one of his deputies, would decide whether to prosecute in the High Court or its circuit courts.¹³ This system of public prosecution was more comparable to other Continental European practices than elements of the English system with its heavy reliance upon private prosecution. David Hume argued

¹⁰ See in particular John Louthian, *The Form of Process before the Court of Justiciary in Scotland* (Edinburgh: 1732); Henry Home, Lord Kames, *Statute Law of Scotland Abridged with Historical Notes* (Edinburgh: 1757); David Hume, *Commentaries on the Law of Scotland Respecting Crimes Volumes 1 and 2* (Edinburgh: Bell and Bradfute, 1819); Sir Archibald Alison, *Principles of the Criminal Law of Scotland* (Edinburgh: William Blackwood, 1832).

¹¹ James Dalrymple, Viscount of Stair, *Institutions of the Law of Scotland* (Edinburgh: first published 1681, this edition 1832), p. vi.

¹² Alison, *Principles of the Criminal Law of Scotland*, p. 625.

¹³ For a more detailed account of the role of the procurator fiscal in building up evidence see M. Anne Crowther, 'Crime, Prosecution and Mercy: English Influence and Scottish Practice in the Early Nineteenth Century', in S.J. Connolly (ed), *Kingdom's United? Great Britain and Ireland since 1500* (Dublin: Four Courts Press, 1999), pp. 225-238.

that Scottish practice was better suited for “repressing the growth of crime” than the English practice where, he stated, the burden of prosecution and conviction lay with the offended party.¹⁴ Due to the nature of the building up of evidence Anne-Marie Kilday argued that Scottish criminal trials were only permitted to proceed when the authorities were confident that the case against the accused was “effectively incontrovertible”.¹⁵ The process of indicting an accused person also garnered favourable comment in the courts. An Advocate Depute stated to the High Court in 1817 that a Scottish indictment “requires more precision, more accuracy and more minuteness than ever was required in any English indictment”.¹⁶ In addition, Hume stated that in England no prisoner, except in more modern treason trials, saw their indictment until they stood arraigned on it. They also remained ignorant of the witnesses to be called against them. However in Scotland the accused would be given this information at least 15 days before their trial commenced and even the poorest would be afforded defence counsel.¹⁷ This was a key factor that allowed for defence counsels to argue successfully for a restriction of the charge prior to the commencing of potentially capital trials and offer any mitigation for the crime.

Stephen Davies argued that if someone was charged with a serious offence before the Court of Justiciary “their chances of survival were slim”.¹⁸ However it is the argument here that, due to the nature of the building up of evidence discussed above, a relatively high proportion of people brought before the courts did receive some form of punishment but this was not necessarily death, even for crimes that were punishable capitally. This can, in part, be attributed to the power of the court to restrict the level of punishment to be meted out immediately prior to the commencing of the trial. This process requires some brief explanation here. The accused person, who was referred to as the panel in the Scottish courts, would be brought into the court to hear the charges against them. At this point the Advocate Depute, who would

¹⁴ Hume, *Commentaries*, Vol. 1, p. 9.

¹⁵ Anne-Marie Kilday, ‘Contemplating the Evil Within: Examining Attitudes to Criminality in Scotland 1700-1840’, in David Lemmings (ed), *Crime, Courtrooms and the Public Sphere in Britain 1700-1850* (Surrey: Ashgate Publishing, 2012), pp. 147-166, p. 154.

¹⁶ National Archives Scotland [hereafter NAS] JC8/12/129.

¹⁷ Hume, *Commentaries*, Vol. 1, p. 5.

¹⁸ Stephen J. Davies, ‘The Courts and the Scottish Legal System 1600-1747: The Case of Stirlingshire’, in V.A.C Gatrell, Bruce Lenman and Geoffrey Parker (eds.), *Crime and the Law; the Social History of Crime in Western Europe since 1500* (London: Europa Publications, 1980), pp. 120-154, p. 149.

be acting as the Crown prosecution, and the defence counsel would have the opportunity to debate these charges, in the Scottish court records this would be referred to as their debating the relevancy of the libel. In cases that potentially carried a capital punishment the judges could decide to restrict the charges, or the libel, to what was termed an “arbitrary punishment”. In effect this meant that if the person was found guilty after their trial they could be punished with anything short of the death sentence from a fine, a corporal punishment, imprisonment, banishment or transportation. If the libel was not restricted to an arbitrary punishment it would be found relevant to “infer the pains of law”, which could be any punishment including the death sentence. The jury would then be sworn in and the trial would begin.¹⁹ Although the key differences in the Scottish system, especially in comparison to the English, have been noted in the above historiography, there have been limited studies showing how these distinctions affected the application of the criminal law. This thesis will demonstrate that it was predominantly for certain property offences, such as theft and housebreaking, where the libel would be restricted and thus it is important to understand this process when discussing the fluctuations in Scotland’s use of capital punishment.

Within the annals of penal history the eighteenth and nineteenth centuries have been the focus of extensive investigation. The capital statutes that made up the period’s infamous Bloody Code have been an area of debate for English crime historians. Leon Radzinowicz provided a pioneering and extensive study of the English criminal law in this period, including the legislation passed. However subsequent historians have progressed from his argument that the capital offences that made up the Bloody Code were created by a disinterested parliament.²⁰ The authors of *Albion’s Fatal Tree*, in particular Douglas Hay, focused upon the statutes relating to property offences in order to argue that the authorities used the increased capital statutes as a means of controlling the population. Hay argued that the “decisions that moved the levers of fear and mercy were decisions of propertied men” from the initial

¹⁹ For a more detailed guide of the Justiciary Court trial process see Louthian, *Form of Process before the Court of Justiciary*.

²⁰ Leon Radzinowicz, *A History of English Criminal Law Volume 1. The Movement for Reform* (London: Stevens and Sons, 1948), p. 35.

prosecution stage to the decision on who to pardon and who to execute.²¹ In his critique of Hay, John Langbein instead inferred that the Bloody Code had been passed almost by accident as the statutes lacked proper definition and thus the parliament added “particularity in order to compensate for generality”.²² More recently Peter King has argued that “the whole criminal justice system was shot through with discretion” and has demonstrated how the discretionary powers of the legal system were used by a much wider range of people than was argued by Hay, particularly the middle classes.²³ The journey of an offender from the commission of their crimes to their suffering for them upon the scaffold was subject to a discretionary and multi-staged decision making-process. Although this thesis is focused upon those who were brought before the central criminal courts and capitally convicted, it acknowledges the importance of pre-trial processes such as the building up of evidence and the decision of the courts to pursue capital charges or not in order to address the theme of judicial discretion in Scotland and to question how these factors potentially affected the number of people who were tried on a capital charge.

In addition to investigations of the legislation passed and its administration in the courts, there has also been substantial attention given to the carrying out of the death sentence in this period. Key themes include the theatre of the gallows, the behaviour of the condemned and the importance of the spectators to the spectacle.²⁴ V.A.C Gatrell’s *The Hanging Tree* remains the leading monograph cited by historians. He detailed various aspects of the public execution in England and provided a qualitative analysis of the practicalities and potential effects of the scaffold from 1770 until executions were moved behind the prison walls in 1868. Gatrell called for historians to further engage with what happened upon the scaffold, to get closer to the “choking, pissing and screaming than taboo, custom or comfort usually allow”, in

²¹ Douglas Hay, ‘Property, Authority and the Criminal Law’, in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thomson and Cal Winslow, *Albion’s Fatal Tree; Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975), pp. 17-63, p. 51. Peter Linebaugh similarly stressed the importance of Tyburn hangings in protecting property in *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London: Allen Lane, 1991).

²² John H. Langbein, ‘Albion’s Fatal Flaws’, *Past and Present*, Vol. 98, (1983), pp. 96-120, p. 118.

²³ Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford: Oxford University Press, 2000), p. 1.

²⁴ The Tyburn ritual has received particular attention. For a recent monograph see Andrea McKenzie, *Tyburn’s Martyrs; Execution in England 1675-1775* (London: Hambledon Continuum, 2007).

order to gain an understanding of its importance and how contemporaries felt about it.²⁵ A central element of the public execution in this period was the crowd in attendance. Sharpe argued that there was little evidence of any great ceremony attending executed criminals in the Late Middle Ages but cited an elaboration of the scaffold ritual in the seventeenth century.²⁶ Similarly, in his study of capital punishment in Germany, Richard Evans argued that executions were not ceremonial affairs until the late seventeenth century.²⁷ In France, although there was a great deal of interest in Early Modern executions, Paul Friedland cited the seventeenth and eighteenth centuries as marking the high point of a “public fascination with watching executions”.²⁸ Stuart Banner has also highlighted similarities between practices in Europe and the American colonies. He stated that executions in the eighteenth century were conducted in large, open spaces in order to accommodate large crowds and included processions and last dying speeches as was custom in Britain.²⁹

Prior to the eighteenth century the importance attached to the death sentence has been linked to the long term process of state formation across the period c.1400 to c.1700 in Western Europe. Due to a quest for stabilization emerging states sought a means by which to maintain control and thus used the death penalty. David Garland distinguished between three eras of capital punishment in the west: the Early Modern, the Modern and the Late Modern. Within this he characterized the Early Modern period as the “heyday of capital punishment” in terms of both the level of executions

²⁵ V.A.C Gatrell, *The Hanging Tree; Execution and the English People 1770-1868* (Oxford: Oxford University Press, 1994), p. 30.

²⁶ J.A. Sharpe, *Judicial Punishment in England* (London: Faber and Faber, 1990), pp. 31-32. See also J.A. Sharpe, ‘Civility, Civilising Processes and the End of Public Punishment in England’, in Peter Burke, Brian Harrison and Paul Slack (eds.), *Civil Histories; Essays Presented to Sir Keith Thomas* (Oxford: Oxford University Press, 2000), pp. 215-230, p. 228.

²⁷ Richard J. Evans, *Rituals of Retribution; Capital Punishment in Germany 1600-1987* (Oxford: Oxford University Press, 1996), p. 50.

²⁸ Paul Friedland, *Seeing Justice Done: The Age of Spectacular Capital Punishment in France* (Oxford: Oxford University Press, 2014), p. 119.

²⁹ Stuart Banner, *The Death Penalty; An American History* (Massachusetts: Harvard University Press, 2002), p. 10.

but also the manner in which they were carried out.³⁰ In France, Friedland cited the development of punishments increasingly spectacular and violent in nature such as drawing and quartering, boiling alive, live burial and breaking on/with the wheel which formed the basis of Early Modern execution ritual.³¹ The punishment of breaking on/with the wheel was used in the Netherlands, Germany, France and Scotland and involved tying the condemned down before the executioner proceeded to break their bones and limbs. The punishment could be conducted 'from below' where the executioner would begin at the legs and work their way to the head, a prolonged and agonising death, or the perceived more merciful breaking 'from above' where a blow to the head was intended to kill the person first. The punishment remained the standard form of prolonged execution in Amsterdam in the seventeenth and eighteenth centuries.³² Despite the lack of any extensive analysis of execution practices in Scotland in this period, there are a few examples of the punishment being given to murderers in the late sixteenth and early seventeenth centuries. It is apparent that the condemned suffered the more prolonged execution and their point of death was unclear as the bodies were left on the wheel for a whole day.³³ However, between the Early Modern period and the mid-nineteenth century, which marked the beginning of what Garland termed his Modern period, he argued that the primary purpose of capital punishment altered from being an instrument of rule, which was essential to state security, to becoming an instrument of penal policy with a narrower focus of "doing justice and controlling crime".³⁴ Within this transition, despite the continuing importance and ceremony attached to the public execution, more overt displays of prolonged physical suffering declined.

³⁰ David Garland, 'Modes of Capital Punishment: The Death Penalty in Historical Perspective', in David Garland, Randall McGowen and Michael Meranze (eds.), *America's Death Penalty: Between Past and Present* (London: New York University Press, 2011), pp. 30-71, p. 48. For more in-depth discussions of the toughening of the criminal law in Tudor England see Sharpe, *Judicial Punishment*; Philip Jenkins, 'From Gallows to Prison? The Execution Rate in Early Modern England', *Criminal Justice History*, Vol. 7, (1986), pp. 51-71.

³¹ Friedland, *Seeing Justice Done*, p. 46.

³² Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984), p. 71.

³³ Lord John MacLaurin, *Arguments and Decisions in Remarkable Cases Before the High Court of Justiciary and Other Supreme Courts in Scotland* (Edinburgh: 1774), p. xxxviii; Hugo Arnot, *A Collection and Abridgement of Celebrated Criminal Trials in Scotland from 1536 to 1784* (Edinburgh: 1785), p. 129.

³⁴ Garland, 'Modes of Capital Punishment', pp. 31-35.

Michel Foucault's *Discipline and Punish* remains one of the pioneering works within the historiography of crime and punishment. His opening chapter detailed the prolonged execution, through quartering, of the would-be regicide Robert Damiens in 1757. He contrasted this with the more regimented running of a house for young prisoners in Paris in the mid-nineteenth century in order to form the basis to his discussion of the shift from the public punishment of the body to the more private attempts at the reformation of the mind.³⁵ However subsequent historians have demonstrated that the journey from the scaffold to the prison did not follow such a linear trajectory.³⁶ Within this, the manner in which certain forms of executions were carried out was adapted over time. In some countries, burial alive and the drowning of women rapidly diminished in frequency and decapitation, which had once been reserved only for the nobility, came to be used for a wider group of offenders.³⁷ Burning as a result of witch trials ceased between the late seventeenth and early eighteenth centuries. Similarly, the burning of women for treason and petty treason in England was increasingly mitigated by the executioner strangling them first.³⁸ In Prussia in 1749 Friedrich II issued a decree stating that the objective of the punishment of breaking on the wheel was "not to torment the criminal but rather to make a frightful example of him in order to arouse repugnance in others". Therefore, unless the case was utterly abhorrent, the criminal would be strangled by the executioner prior to their bodies being broken on the wheel. However this was to be done in secret, without attracting the attention of the crowd, again demonstrating that the ceremony of the punishment remained an important element of the execution ritual, although increasingly this did not include prolonged pre-mortem suffering.³⁹

³⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Allen Lane, 1977).

³⁶ Pieter Spierenburg has recently criticised the pace attached to the change by Foucault, namely it's taking place between 1760 and 1840, and has instead pointed to a longer term process. See Pieter Spierenburg, *Violence and Punishment; Civilising the Body Through Time* (Cambridge: Polity Press, 2013), p. 82.

³⁷ Evans, *Rituals of Retribution*, p. 48.

³⁸ For a more thorough discussion of the eventual abolition of this form of execution in England see Simon Devereaux, 'The Abolition of the Burning of Women in England Reconsidered', *Crime, History and Societies*, Vol. 9, (2005), pp. 73-98.

³⁹ Evans, *Rituals of Retribution*, p. 122.

When questioning the gradual changes that were occurring to execution practices in the eighteenth and nineteenth centuries we need to place the topic into the historiography focused upon the changing sensibilities of the execution crowd. German sociologist Norbert Elias argued that a long term civilising process had occurred in Western Europe between the medieval period and the twentieth century. Through a detailed analysis of the changes to everyday manners and behaviours he provided an explanatory framework for changes in social organisation.⁴⁰ Although he did not place capital punishment into his model, subsequent historians have acknowledged his study when attempting to understand the changing crowd reactions to the public execution.⁴¹ However they have also shown that these changes cannot be solely attributed to the idea that as people became more civilised they began to view capital punishment with disdain. In his investigation of the criticism levelled at the public execution in the mid-eighteenth century, McGowen stressed the changes in the way respectable society viewed the spectacle. He argued that they had begun to lose faith in the deterrent value of the scaffold and that this was due to a “class dimension that was not reducible to psychological states”.⁴² Gatrell argued instead that by the mid-eighteenth century curiosity became a “valued element in the sympathetic sensibility” and was retained as an alibi for attendance at the public execution into the 1830s.⁴³ Throughout the eighteenth and early nineteenth centuries public executions continued to attract large crowds in Scotland. Whilst there is some evidence to suggest that these crowds sometimes sympathised with the condemned, this sympathy rarely led to large scale opposition to the execution. However this thesis will present a further dynamic to the history of the crowd and the public execution by questioning their reactions to the post-mortem punishment of the body. It will

⁴⁰ His work was first published in two volumes in 1939. For an English translation including both volumes see Norbert Elias, *The Civilising Process; The History of Manners and State Formation and Civilisation* (Oxford: Blackwell Publishers, 1994).

⁴¹ For an analysis of Elias’ model in relation to punishment see David Garland, *Punishment and Modern Society; A Study in Social Theory* (Oxford: Clarendon Press, 1990), pp. 213-248. In addition, Spierenburg used Elias’ argument that the changing sensibilities of the elites later permeated broader society in order to offer a potential explanation for the gradual retreat from public physical punishments. See *Spectacle of Suffering*, pp. 183-199.

⁴² Randall McGowen, ‘Making Examples and the Crisis of Punishment in Mid-Eighteenth-Century England’, in David Lemmings (ed), *The British and their Laws in the Eighteenth Century* (Woodbridge: Boydell Press, 2005), pp. 182-205, p. 202.

⁴³ Gatrell, *Hanging Tree*, p. 250.

demonstrate that there were examples of adverse attitudes towards the punishments of dissection and hanging in chains which led to open attempts to prevent them, despite the fact that the execution of the criminal had occurred with no reported unrest.

Key Aims and Methodology

The central focus of this thesis is the history of capital punishment and the criminal corpse in Scotland between 1740 and 1834. These time parameters have been chosen for investigation as the mid-eighteenth century marked a peak time of executions in Scotland and had notable links to the aftermath of the 1745 Jacobite Rebellion. In addition, the Murder Act had been passed in 1752 thus placing the post-mortem punishment of the murderer's corpse at the centre of the criminal justice system. The study ends in 1834 as this year saw an act (4 & 5 Will. IV c.26) passed to formally abolish the penal option to hang an offender's body in chains. As the option to sentence criminals to dissection had been abolished by the 1832 Anatomy Act (2 & 3 Will. IV c.75), the year 1834 marked the final repeal of the clauses set out in the Murder Act. In order to investigate the subject this study will address the following key aims. It will begin by providing the first quantitative analysis of everyone capitally convicted in Scotland in this period. Through an in-depth exploration of the fluctuations in the use of the death sentence it will question the types of crimes sending offenders to the gallows as well as highlighting factors that affected this such as the geographical context, rapid industrialisation and population growth. In doing so it will argue that there were intra-Scottish patterns in the use of capital punishment at different intervals across this period but it will also demonstrate that notable comparisons can be drawn with England.

The second key aim of this thesis is to explore the theatre of the gallows and to demonstrate the changing nature of capital punishment between the mid-eighteenth and early nineteenth centuries. This will include an exploration of the changes made to the logistics of the public execution such as its location and those that gradually occurred to the death sentence itself, notably the decline in aggravated forms of execution for a range of crimes including treason. An analysis of the Scottish

experience provides a reinforcement of some of the broader themes in the consulted historiography whilst challenging others. The third key aim of this study is to investigate the use of post-mortem punishments across this period, from their implementation to their potential effects upon both the condemned and the spectator. From an analysis of dissection and hanging in chains respectively we can again demonstrate the unique use of the punishments in Scotland whilst also drawing comparisons with practices in England. Furthermore, the inclusion of post-mortem punishment within this study provides a rethinking of some of the broader assumptions about the changing nature of capital punishment in this period. In particular the assumption that, as aggravated forms of execution gradually disappeared, the body ceased to be a central part of the punishment spectacle. In order to address these key aims the thesis will employ the following methodology.

Although Article XX of the 1707 Union stipulated that all Heritable Jurisdictions enjoyed by the law of Scotland would continue, the 1747 Act for the Abolition of the Heritable Jurisdictions (20 Geo II c.43) abolished heritable sheriffs, Lords and Baillies of Regalities as well as limiting the powers of the Baron courts. In the wake of the 1745 Jacobite Rebellion, and the fears over the power of key figures holding heritable powers particularly in northern Scotland, the act aimed to end a complex system in favour of a more central and government controlled one. Davies argued that the act was the conclusion to a long process of a slow decline of the old Scottish legal system.⁴⁴ At one time the Barons had the power of life and death over those within their jurisdiction. However, by the seventeenth century, Colin Kidd argued that these powers were increasingly vested in the central criminal courts.⁴⁵ From a reading of legal commentaries published in the eighteenth century, as well as works discussing Scots law in this period, it is apparent that jurisdiction over capital cases was almost exclusively vested in the High Court and its circuit courts. Following the 1672 Courts Act they had exclusive rights to hear cases of treason and the four pleas of the crown;

⁴⁴ Davies, 'The Courts and the Scottish Legal System', p. 153.

⁴⁵ Kidd, *Subverting Scotland's Past*, p. 151.

murder, robbery, fire raising and rape.⁴⁶ John Erskine stated that the jurisdiction of the sheriff had once extended to both civil and criminal cases but it became increasingly limited from the early sixteenth century onwards.⁴⁷ There were a handful of executions for theft as a result of trials before the sheriff of a particular area in the mid-eighteenth century. However they appeared to cease by the second half of the eighteenth century.⁴⁸

Following the 1672 act, the High Court was to sit in Edinburgh and twice a year two of the five Lords of Justiciary would travel to hear cases at each of the three circuits. Although the court sat at three particular places at each circuit, the sheriff depute of the surrounding areas would attend with the criminals to be tried from their area. For example, the Northern Circuit sat at Aberdeen, Inverness and Perth but covered a vast geographical area including Caithness, Sutherland, Nairn, Elgin, Ross and Cromarty as well as Shetland and Orkney.⁴⁹ Of the remaining two circuits; the Southern Circuit sat at Ayr, Dumfries and Jedburgh and covered the border areas. The Western Circuit sat at Inveraray, Stirling and Glasgow, with the predominant amount of cases tried at the latter, especially by the turn of the nineteenth century. This study is the first to undertake a systematic searching of these records and, using them as the backbone of a database of everyone executed, provides the most accurate and detailed analysis of capital punishment in Scotland between the mid-eighteenth and early nineteenth centuries to date.

In order to investigate the fluctuations in the use of capital punishment this thesis analyses the information available regarding those executed as well as those who were capitally convicted but subsequently received a pardon. One of the

⁴⁶ See Louthian, *Form of Process before the Court of Justiciary*; MacLaurin, *Arguments and Decisions*; Hume, *Commentaries*, Vol. 2. For a more recent study see Lindsay Farmer, *Criminal Law, Tradition and Legal Order; Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge: Cambridge University Press, 1997), see in particular pp. 65-69.

⁴⁷ John Erskine, *Principles of the Law of Scotland* (Edinburgh: William Green and Sons, 1911), p. 33.

⁴⁸ As it is beyond the scope of this thesis to analyse the extensive sheriff court records the details of these crimes and executions were gathered from contemporary newspapers and brief references to them in the state papers. Therefore the figures presented in chapter two have included these executions in order to provide the most accurate figures possible.

⁴⁹ However a reading of the court records demonstrated that the sheriff depute of Shetland and Orkney rarely attended and while this was reported to the High Court on several occasions the situation remained the same. Consequently there were no executions in Shetland or Orkney as a result of trials before the High Court or its circuits.

stipulations of the 1725 Disarming Act (11 Geo I c.26) was that executions in Scotland could not be carried out within less than 30 days if the sentence was pronounced south of the River Forth or within less than 40 days if it was pronounced north of the Forth. While the Murder Act ordered that executions should be carried out on the day after sentencing, unless this happened to fall on a Sunday in which case the execution would happen the following Monday, it did not repeal the clause in the 1725 act. Therefore all capitally convicted Scottish criminals had time to send petitions to London asking for the Royal mercy. Following the passing of the death sentence the criminal themselves, their relatives or people from their local area, such as magistrates and local clergy, could send letters of petition to London. There is also evidence of correspondence being sent via the Lord Advocate's office in Edinburgh asking for an endorsement of these petitions. Furthermore, in some cases the judges were asked to send their trial reports and give their opinion on whether the condemned deserved to be extended the Royal mercy. If a pardon was to be granted it would be sent to Scotland stipulating any conditions such as transportation or imprisonment.⁵⁰ The records highlight the complex interplay between punishment and discretion or, to quote Hay, the pulling of the "levers of fear and mercy" in Scotland's use of capital punishment in this period.⁵¹ Furthermore, we can gain some insight into what King termed "a set of broadly held social ideals about how justice should work", namely the use of discretion based upon factors such as age, gender, character and nature of crime as well as geographical and chronological context.⁵² The records can be found among the Home Office papers from the 1760s onwards but appear to have remained an untapped resource by historians of Scottish crime in this period. Therefore a systematic reading of them offers a valuable and fresh insight into the pardoning process, especially during times of higher numbers of capital convictions.

⁵⁰ The National Archives [hereafter TNA] HO102 series, particularly folios 50 to 58, contains the various petitions and judges' trial reports as well as their opinions on whether the condemned deserved a pardon. The HO104 series, folios 1 to 8, contains the pardons, or copies of them, that were sent to Scotland. For the earlier part of the period, prior to 1762, details of pardons were gathered from the state papers relative to Scotland as well as an index of remissions that has been printed and is available at the National Archives of Scotland. Although this is incomplete and does not provide details of the conditions stipulated within the pardons.

⁵¹ Hay, 'Property, Authority and the Criminal Law', p. 51.

⁵² King, *Crime, Justice and Discretion*, p. 332.

This thesis has also utilized a range of sources rich with the potential for qualitative exploration. Scotland had no regular tradition of printing criminal trials in the early part of the period under investigation here. However there is some printed material available for the most sensational cases in the eighteenth century and the National Library of Scotland holds a collection of broadsides related to crime and punishment in the early nineteenth century. In addition, this thesis has made extensive use of the contemporary newspapers made available by the British Library, particularly the *Caledonian Mercury* and the *Scots Magazine*, but also other titles as they came into print in the late eighteenth century. However the Scottish newspapers are not without some limitations as historical sources. When investigating crime, the courts and the press in the early eighteenth century David Lemmings demonstrated that the *Caledonian Mercury's* reporting upon crime and the administration of justice was minimal.⁵³ In conducting a sampling of the *Caledonian Mercury* and the *Glasgow Journal* at five yearly intervals between 1720 and 1790, Kilday similarly argued that crime did not warrant any substantial attention until the late eighteenth century.⁵⁴ Although this research concurs with their findings in relation to the minimal reports of trials and executions prior to the more detailed reports offering more journalistic opinion from the late eighteenth century onwards, it has still been possible to use the newspapers as a valuable historical source. Furthermore, as King has argued, they offer an insight into how contemporaries were informed about the believed prevalence of certain crimes which was important, especially at times of increased use of capital punishment.⁵⁵

A key aim of this thesis is to highlight the uses and treatment of the executed body within the criminal justice system and to question the capacity of post-mortem punishment to affect both the condemned and the spectator. Whilst an analysis of the court records provides information on who was sentenced to be dissected or hung in chains and where this was to take place, this thesis has also made use of a range of

⁵³ David Lemmings, 'Negotiating Justice in the New Public Sphere: Crime, the Courts and the Press in Early Eighteenth-Century Britain', in David Lemmings (ed), *Crime, Courtrooms and the Public Sphere in Britain 1700-1850* (Surrey: Ashgate, 2012), pp. 119-145, p. 128.

⁵⁴ Kilday, 'Contemplating the Evil Within', p. 156.

⁵⁵ Peter King, 'Newspaper Reporting and Attitudes to Crime and Justice in Late-Eighteenth- and Early-Nineteenth-Century London', *Continuity and Change*, Vol. 22, (2007), pp. 73-112, p. 76.

qualitative sources. From a reading of contemporary newspapers it is possible to gauge crowd reactions to post-mortem punishments in a few cases. This includes their reporting upon instances where bodies had been stolen from their gibbet cages or where there was crowd unrest when the body was cut down to be taken to the surgeons. As criminal dissections in Scotland were predominantly conducted in the main universities the thesis also uses archival material from the universities of Edinburgh and Glasgow. It has uncovered lecture notes of the university professors who carried out criminal dissections as part of their courses on anatomy as well as their correspondence with others in the medical field regarding the use of criminal bodies to carry out original research. In addition, the diary of Sylls Neville, a medical student in Edinburgh in the 1770s, helps to shed light upon how the bodies were used during lectures.⁵⁶ Therefore these sources allow this study to explore dissection as a punitive measure whilst also questioning how the bodies yielded by the Murder Act, albeit relatively small in number, were used in the advancement of anatomical knowledge in Scotland.

Breakdown of Chapters

In his study of capital punishment in England, Gatrell commented that he excluded Scotland and Ireland as “much basic research remains to be done on those countries’ legal and criminal histories; luckily, Scotland had few hangings anyway”.⁵⁷ M.A. Crowther attributed the lack of research into Scotland’s criminal history to “nervousness” among some historians of the differences in Scots law, whereby certain elements of the legal system such as the manner of building up evidence and the system of public prosecution were not readily comparable to the English system.⁵⁸ While there have been works dedicated to the Scottish legal system and its continued distinction after 1707, thus far there has been very limited investigation of the use of capital punishment. Kilday’s *Women and Violent Crime* offers a detailed analysis of

⁵⁶ Basil Cozens-Hardy (ed), *The Diary of Sylls Neville 1767-1788* (Oxford: Oxford University Press, 1950). See also S.S. Kennedy, K.J. McLeod and S.W. McDonald, ‘And Afterwards Your Body to be given for Public Dissection: A History of the Murderers Dissected in Glasgow and the West of Scotland’, *Scottish Medical Journal*, Vol. 46, (2001), pp. 20-24. They briefly recount some of the details of the murder cases that sent offenders to the dissection table.

⁵⁷ Gatrell, *Hanging Tree*, p. ix.

⁵⁸ M. Anne Crowther, ‘Scotland; A Country with No Criminal Record’, *Scottish Economic and Social History*, Vol. 12, (1992), pp. 82-85, p. 82.

female offenders in Lowland Scotland between 1750 and 1815.⁵⁹ Quantitative surveys of Scottish crime in the first half of the nineteenth century using the parliamentary returns, which were available more regularly after 1836, include those of Ian Donnachie and Peter King's work on homicide rates.⁶⁰ In addition, while Alex Young's *Encyclopaedia of Scottish Executions* provides details of some of the criminals executed in this period, it is not based upon any systematic analysis of the court records and is thus incomplete.⁶¹ Peter King and Richard Ward's more recent study of the geography of capital punishment in the third quarter of the eighteenth century highlighted major regional variations in the use of hanging in Britain for property offences at the centre, namely in London and the Home Counties, and on the peripheries which included large parts of northern and western England as well as Wales and Scotland.⁶² Therefore, utilising the vast amount of data gathered, chapter two will provide the first extensive analysis of capital punishment in Scotland between 1740 and 1834, investigating its fluctuations across the period and the effects of location, population growth and public discourse upon the use of the death sentence.

In contrast to England and some other European countries such as France, Germany and the Netherlands there are no monographs dedicated to the history of the public execution in Scotland in this period. Chapter three seeks to redress this scholarly gap through an investigation of the spectacle of the gallows and the changing nature of capital punishment as the period progressed. It will start by exploring the scene of the public execution and the theatre of the gallows including the multitude of behaviours and responses it could provoke from the condemned criminals themselves

⁵⁹ Anne-Marie Kilday, *Women and Violent Crime in Enlightenment Scotland* (Suffolk: The Boydell Press, 2007).

⁶⁰ Ian Donnachie, 'The Darker Side: A Speculative Survey of Scottish Crime during the First Half of the Nineteenth Century', *Journal of the Economic and Social History of Scotland*, Vol. 15, (1995), pp. 5-24; Peter King, 'Urbanization, Rising Homicide Rates and the Geography of Lethal Violence in Scotland 1800-1860', *History*, Vol. 96, (2011), pp. 231-259. In the second half of the nineteenth century the more thorough organisation of the police and the availability of summary modes of prosecution has allowed for more quantitative statistical analysis. See in particular W.W.J. Knox and A. McKinlay, 'Crime, Protest and Policing in Nineteenth-Century Scotland', in Trevor Griffiths and Graeme Morton (eds.), *A History of Everyday Life in Scotland 1800 to 1900* (Edinburgh: Edinburgh University Press, 2010), pp. 196-224.

⁶¹ Alex F. Young, *The Encyclopaedia of Scottish Executions 1750-1963* (Kent: Eric Dobby Publishing, 1998). See also *Scots Black Kalendar – 100 Years of Murder and Execution: Scottish Crime and Punishment* (Midlothian: Lang Syne Publishers, 1985). This source details executions in the nineteenth century but again is incomplete and misses out whole years of executions.

⁶² Peter King and Richard Ward, 'Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery', *Past and Present*, Vol. 228, (2015), pp. 159-205.

and the crowds who gathered to witness the spectacle. It will then chart the changes that gradually occurred to the logistics of the public execution such as the move of executions from urban peripheries to more central locations closer to the places of confinement. Within this there was a decline in the need for historically important elements of the scaffold ritual, notably the procession, yet executions continued to attract large crowds throughout the period. In addition, the chapter will demonstrate that, by the mid-eighteenth century, although most capitally convicted criminals were to be hanged by the neck until dead, some with the additional stipulation of a post-mortem punishment, there were a handful of cases where further severity was sought due to the heinousness of the offence. This severity came in the form of one man sentenced to be burnt and another four sentenced to have their hands severed from their bodies immediately prior to execution. In identifying the final instances of these punishments, which were more characteristic of Early Modern execution practices, the chapter will present potential explanations for their disappearance in the mid-eighteenth century. Finally it will place the post-mortem punishment of the body within the discussion in order to provide an introduction to the following chapters.

Randall McGowen argued that the post-mortem punishments of dissection and hanging in chains as practices pulled in opposite directions. The body in chains acted as a reminder of the mortal body. During dissection it was opened up by professionals and justified in the name of science and was supposed to be “divorced from passion, opposed to delight and justified as useful to humanity”.⁶³ However, in reality, there was less difference than McGowen implied as both hanging in chains and dissection placed the criminal corpse on show and involved its public dismemberment, whether this was under the surgeon’s lancet or rotting in the gibbet cage. In addition, as chapters four and five will demonstrate, they each touched upon contemporary fears and beliefs about the dead body and its disposal. There are examples where criminals and the watching crowd appeared to fear the post-mortem element of the punishment more than the death sentence itself. An exploration of the potential reasons for these fears will be used in the chapters in order to shed further light upon

⁶³ McGowen, ‘Making Examples and the Crisis of Punishment’, p. 204.

the capacity of the punishments to fulfil the desire of the Murder Act, namely to add a further degree of severity to the punishment of death.

The final chapter of this thesis will focus upon the punishment for the crime of treason between the 1715 Jacobite Rebellion and the 1820 treason trials conducted in Scotland. Within penal history the distinction attached to the crime of treason by legal statute has been matched by the nature of the punishment enacted for it upon the scaffold. The death sentence pronounced against the traitor was intended to answer the heinousness of the offence with the most severe and exemplary punishment available; namely to be hung, drawn and quartered. However studies of the punishment for treason in the eighteenth and early nineteenth centuries are limited and even within the historiography of the Jacobite rebellions the punishment of the rebels has remained peripheral. Chapter six will demonstrate that, although the death sentence passed against the convicted traitor remained unchanged for most of the period, it was increasingly subject to discretionary implementation and thus the fine line between an aggravated execution and subsequent post-mortem punishment was indeterminate. Finally the chapter will address some of the wider themes filtering through the thesis regarding the public punishment of the body in order to add a further dimension to its study of the gradual changing nature of capital punishment across this period.

Conclusion

This chapter has highlighted the originality of the study as it will be the first extensive investigation into the use of capital punishment in Scotland between 1740 and 1834. However it has also demonstrated its relevance to the historical field. After 1707 Scotland was in the unique position of being in a union with England and Wales, yet it maintained its own distinct legal system, a fact that has been acknowledged within the historiography consulted above but not yet expanded upon in relation to the administration of the criminal law. Furthermore, although the history of the public execution in the eighteenth and nineteenth centuries has provided a pervasive attraction for crime historians of Western Europe, the Scottish experience has remained largely ignored. Therefore, in providing the first extensive investigation into

the use of the death sentence and the changing nature of capital punishment across this period, the thesis will utilise the unique Scottish experience to explore, and even challenge, the broader assumptions in the historiography of the eighteenth and nineteenth centuries.

Chapter Two:

Fluctuations in the Use of Capital Punishment in Scotland 1740-1834.

Legal writers of the late eighteenth and early nineteenth centuries recognised not only the differences between the legal systems north and south of the border, but also the differences in their use of capital punishment. An awareness of Scotland's lesser recourse to the death sentence was exalted in the legal commentaries cited in chapter one and Scots law was held up as a bastion of Scottish identity that had been maintained after the Union.⁶⁴ However, in conducting the first extensive investigation of the court records, as well as sources rich with qualitative material such as newspapers, state papers and Home Office records, this study demonstrates that Scotland did witness notable fluctuations in its execution rate and a more frequent recourse to the death sentence for particular crimes at particular times. Despite Scotland's lower execution rate, the Scottish courts, while perhaps more discretionary in their use of the death sentence, were not averse to using the full weight of the law. An analysis of capital punishment in Scotland across this period highlights notable fluctuations in terms of the numbers executed and the types of crimes sending offenders to the scaffold.

In Scotland between 1740 and 1834 there were 797 people sentenced to death. There were 505 offenders executed and 292 subsequently pardoned, usually with the condition of transportation stipulated.⁶⁵ The relatively low number of executions in this period goes some way towards explaining the limited historiography focused upon the use of capital punishment in Scotland, especially when compared to the vast field focused upon England. However the lower numbers of executions, and the contemporary awareness of this, allows this chapter to analyse periods of an increased recourse to capital punishment. In order to provide a quantitative analysis of the figures, with the potential for expansion into more qualitative studies in

⁶⁴ See in particular Louthian, *Form of Process before the Court of Justiciary*; Hume, *Commentaries*, Vols. 1 and 2; Alison, *Principles of the Criminal Law of Scotland*.

⁶⁵ The executions following the Jacobite Rebellions of 1715 and 1745 are not included in these figures as they were tried and executed by commissions of Oyer and Terminer in England. However the convictions following unrest in Scotland in 1794 and 1820 are included in these figures as they were tried before commissions of Oyer and Terminer in Scotland.

subsequent chapters, this chapter will be split into two halves. First, it will provide an extensive investigation of the figures. Within the historiography focused upon England in the eighteenth and early nineteenth centuries the use of capital punishment in London and its surrounding counties has been a focal point of investigation. While the lower rate of capital punishments in other provincial areas has been noted, it has only recently been more expanded upon using quantitative analysis.⁶⁶ In breaking down the use of capital punishment in Scotland by location it is clear that the capital city of Edinburgh consistently accounted for a sizeable proportion of offenders capitally convicted across the period. However it is also evident that during certain intervals other areas of Scotland, notably the Northern Circuit in the mid-eighteenth century and the Western Circuit in the early nineteenth century, were sending almost as many, if not more, offenders to the gallows. Furthermore, an analysis of the types of offences sending offenders to the gallows provides a platform upon which to build a more thorough investigation of the fluctuations in the use of the death sentence.

The second half of this chapter will provide a more focused analysis of the decades that witnessed peak numbers of executions, namely the late 1740s to early 1750s, the 1780s and the early nineteenth century. From an in-depth examination of each of these periods it is evident that the increase in the number of executions in the late 1740s and 1750s, particularly as a result of trials before the Northern Circuit, were linked to the aftermath of the 1745 Jacobite Rebellion. However for the later peak decades of executions, while Scotland did not match the numbers of capital convictions and executions south of the border, the chapter will highlight that some of the difficulties and debates over capital punishment facing the Scottish authorities, and reported upon in the newspapers, were comparable to those evident in England. Despite this, the Scottish experience remained distinct. An example of its continued distinction was the concentration of executions at the scene of the crime in the early nineteenth century as an attempt to add further severity to the punishment of death in the face of rising numbers of capital convictions.

⁶⁶ For a study focused upon the North-East of England see Gwenda Morgan and Peter Rushton, *Rogues, Thieves and the Rule of Law; The Problem of Law Enforcement in North-East England, 1718-1800* (London: UCL Press, 1998). For a more recent analysis of the differences in the use of capital punishment in England's south-eastern metropolis and the peripheries see King and Ward, 'Rethinking the Bloody Code'.

Geography of Capital Punishment:

As this chapter seeks to highlight the fluctuations in the use of the death penalty more thoroughly, an important area of investigation with which to begin is the geography of capital punishment across this period. Figure 1 is a map showing Scotland's circuit court sittings. It highlights the areas covered by each of the three circuits as well as the High Court in Edinburgh.

Fig 1: Map of Scotland's Circuit Courts.

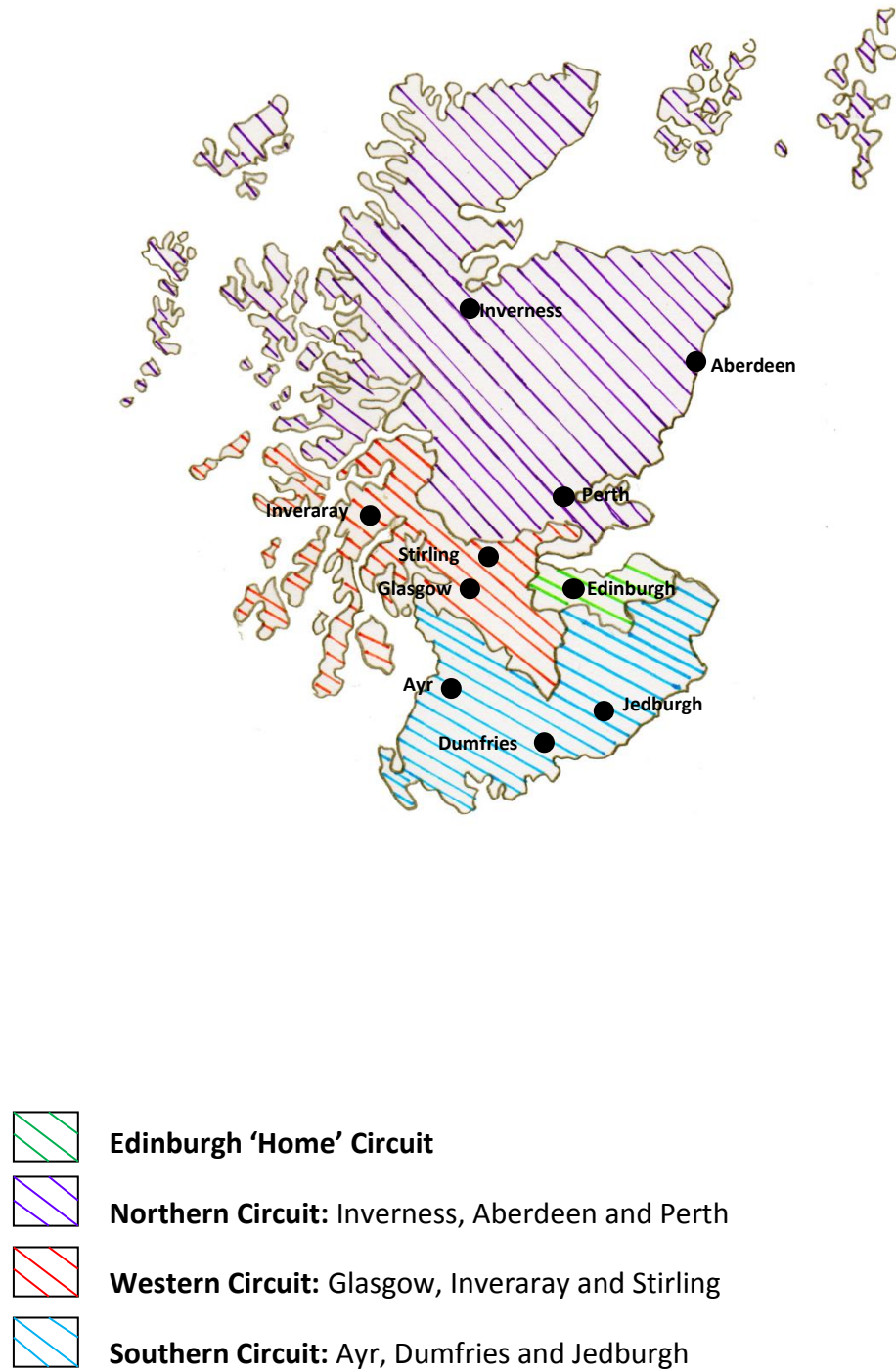


Table 1 provides a breakdown of the total number of executions by decade and by circuit with table 2 highlighting the percentage of executions accounted for by convictions before the High Court in Edinburgh and the three circuit courts. Edinburgh consistently accounted for a notable percentage of the total executions. In contrast the Southern Circuit of Ayr, Dumfries and Jedburgh consistently made up a low percentage of the total number of executions across the period. In Ayr in April 1751, upon being informed that there was no criminal business for the district, His Lordship expressed the pleasure it give him to find so extensive an area in such quiet and peaceful disposition.⁶⁷ This continued to be the case and, while the 1820s saw an increase in court business in line with the wider Scottish context, the number of capital punishments remained relatively low. However there were evident fluctuations in the percentages made up by the Western and Northern Circuits at different intervals in this period that require deeper analysis.

Table 1: Total Executions by Circuit.

	Edinburgh	Northern	Western	Southern	Sheriff	Total
1740-1749	9	19	5	0	5	38
1750-1759	14	38	3	7	4	66
1760-1769	7	14	6	4	0	31
1770-1779	16	11	4	4	0	35
1780-1789	29	14	20	14	2	79
1790-1799	13	8	10	1	0	32
1800-1809	17	6	9	5	0	37
1810-1819	31	9	22	11	0	73
1820-1829	29	10	35	7	0	81
1830-1834	11	5	16	1	0	33
Total	176	134	130	54	11	505

Source: Figures compiled using the Justiciary Court records.

⁶⁷ NAS JC12/7/3.

Table 2: Percentage of Total Executions made up by Each Circuit.

	Edinburgh	Northern	Western	Southern	Sheriff	Total
1740-49	23.7	50	13.2	0	13.1	100
1750-59	21.2	57.6	4.6	10.6	6	100
1760-69	22.6	45.2	19.3	12.9	0	100
1770-79	45.7	31.5	11.4	11.4	0	100
1780-89	36.7	17.7	25.4	17.7	2.5	100
1790-99	40.6	25	31.3	3.1	0	100
1800-09	46	16.2	24.3	13.5	0	100
1810-19	42.5	12.3	30.2	15	0	100
1820-29	35.8	12.4	43.2	8.6	0	100
1830-34	33.3	15.2	48.5	3	0	100

Source: Figures compiled using the Justiciary Court records.

In questioning the geography of capital punishment we must first investigate Scotland's demographic history in this period, namely the increase in population and, more importantly, where this was most concentrated. In order to trace the population figures for as much of this period as possible this chapter will draw upon figures taken from the following sources. For the earlier part of the period Alexander Webster's account of 1755 is used. He was a minister in Edinburgh who based his population figures upon information he collected from 909 parishes. James Kyd has published Webster's account along with the population data that became available following the first census in 1801 and at subsequent ten yearly intervals.⁶⁸ In addition, an enumeration of the census data taken in 1801, 1811 and 1821 was published in 1823 and is also useful.⁶⁹ Prior to Webster's account Scottish population totals are subject to educated guesswork. Houston and Whyte put the late sixteenth-century figure at around 800,000, rising to one million by 1700.⁷⁰ Table 3 demonstrates Scotland's population increase between 1755 and 1831, generally cited as a period of great and sustained growth. The population increased in most areas but the percentage and rate of growth differed markedly. For example, while the population of northern Scotland

⁶⁸ James Gray Kyd (ed), *Scottish Population Statistics Including Webster's Analysis of Population 1755* (Edinburgh: T and A Constable, 1952).

⁶⁹ *Enumeration of the Inhabitants of Scotland, taken from the Government Abstracts of 1801, 1811, 1821* (Glasgow: 1823).

⁷⁰ R.A. Houston and I.D. Whyte, 'Scottish Society in Perspective', in R.A Houston and I.D Whyte (eds.), *Scottish Society 1500-1800* (Cambridge: Cambridge University Press, 1989), pp. 1-36, p. 3.

did increase, it was not at the same intense scale as the country's central belt.⁷¹ For the purposes of this study we need to further analyse the rate of population growth in this area and establish links between population distribution, urbanisation and the geography of capital punishment.

Table 3: Population of Scotland.

	Total Population	Rate of increase %
1755	1,265,380	-
1801	1,608,420	27.1
1811	1,805,864	12.3
1821	2,091,521	15.8
1831	2,364,386	13.0

Source: Figures compiled from those provided in Kyd, *Scottish Population Statistics*, p. xvii.

Investigations of Scotland have often pointed to the principal division, geographically but also culturally and linguistically, as existing between the Highlands and the Lowlands. However this is an oversimplified dichotomy when applied to Scottish population history. Geographically speaking the Lowlands included anything south of the Highland line, dividing the country from the Grampian Mountains to the southeast from the northwest Highlands. However it was the central belt, including Scotland's largest cities of Glasgow to the west and Edinburgh to the east and their growing surrounding towns, rather than the southern border areas, that witnessed the greatest increase and concentration of population. During the eighteenth century Scotland's urban growth was among the fastest in Europe. In 1750 it was ranked seventh in a table of Europe's most urbanised societies. By 1800 it was fourth and by 1850 it was second only to England and Wales.⁷² Edinburgh's population more than doubled from around 57,000 in 1755 to 138,000 in 1821.⁷³ Tables 1 and 2 demonstrate that convictions before the High Court in Edinburgh consistently accounted for a sizeable proportion of executions throughout the period. However Edinburgh did not contain as large a proportion of the urban population of Scotland as London did for

⁷¹ For a more thorough and long term analysis see Michael Flinn et al (eds.), *Scottish Population History from the Seventeenth Century to the 1930s* (Cambridge: Cambridge University Press, 1977).

⁷² Devine, *Scottish Nation*, p. 108.

⁷³ T.M Devine, *The Transformation of Rural Scotland; Social Change and the Agrarian Economy, 1660-1815* (Edinburgh: Edinburgh University Press, 1994), p. 40.

England. By the early nineteenth century the central belt was increasingly densely populated, with a growing proportion concentrated in Glasgow. The rise in prominence of west-central Scotland in terms of trade and population has been termed a “classic story of Scotland’s economic history”.⁷⁴ A focal point of activity was the areas surrounding the Clyde, an extensive maritime inlet that was well connected with the western seaways. In the early decades of the nineteenth century the urban expansion of Glasgow, to a point where it matched and then superseded that of Edinburgh in terms of population, correlated with the growing proportion of the total executions occurring in the area.

There was very little criminal business brought before the Western Circuit in the 1740s and 1750s when whole years passed with no cases at all. Even in 1764 the judge at Glasgow expressed satisfaction that there were no criminal cases for trial and praised “the civilised state of this part of the country”.⁷⁵ However in December 1828 provisions were made for an additional sitting of the court. By the 1820s and 1830s the Western Circuit, predominantly cases from Glasgow, sent more criminals to the scaffold than the High Court in Edinburgh, accounting for 43.2 per cent of the total executions in the 1820s and 48.5 per cent in the early 1830s. In combining Webster’s 1755 account and the enumerated data for the first three census’ with the execution figures gathered for this study it is possible to calculate the number of executions per 100,000 head of Scotland’s population across Edinburgh and the three circuits in 1755 and the early decades of the nineteenth century. The findings are provided in table 4. The figure for Edinburgh consistently remained above 1.0 execution per 100,000 head of population. However the figures for the Western Circuit present a different pattern which is linked to the area’s rapidly increasing population and rising prominence as an urban centre. Glasgow’s population in 1755 was about 32,000 and by 1801 it was 77,385 compared to Edinburgh’s 82,560. By 1821 Glasgow had overtaken with over 147,000 inhabitants compared to Edinburgh’s 138,000.⁷⁶

⁷⁴ David Turnock, *The Historical Geography of Scotland since 1707* (Cambridge: Cambridge University Press, 1982), p. 153.

⁷⁵ NAS JC13/14/93.

⁷⁶ *Enumeration of the Inhabitants of Scotland*, p. 55.

Table 4: Executions per 100,000 Head of Scotland's Population.

	Scotland	Edinburgh	Northern	Western	Southern
1750-59	5.2	1.1	3.0	0.2	0.6
1800-09	2.3	1.1	0.4	0.6	0.3
1810-19	4.0	1.7	0.5	1.2	0.6
1820-29	3.9	1.4	0.5	1.7	0.3

Source: Figures compiled from Justiciary Court records and the population statistics provided in Kyd, *Scottish Population Statistics*, p. xvii and the *Enumeration of the Inhabitants of Scotland* (Glasgow: 1823).

In the first three decades of the period under investigation in this study the Northern Circuit accounted for the highest percentage of executions, with a peak of 57.6 per cent in the 1750s. Table 4 demonstrates that in the 1750s executions as a result of trials before the Northern Circuit were as high as 3.0 per 100,000 of Scotland's population, an area to be further investigated in the second half of this chapter. However, despite covering a large geographical area, as demonstrated in figure 1, capital convictions as a result of trials before the Northern Circuit had fallen by the 1770s. By the early nineteenth century the percentage they made up of the total executions in Scotland was markedly lower. In 1818 it was commented, to the credit of the city of Aberdeen and its surrounding counties, that there had been only three executions conducted there in the last 27 years. Although two people had forfeited their lives in 1818 alone, it was further remarked that the area was certainly not "the forerunner of that increase in crime, by which many parts of the United Kingdom are, at this period, lamentably disgusted".⁷⁷ One potential explanation for this may be that, despite experiencing an increase, the population in northern Scotland was not growing at anywhere near the rate experienced in the central belt. In addition, the increased numbers of executions in the late 1740s and 1750s can be placed within the wider context of the aftermath of the 1745 Jacobite Rebellion and the attempts made to establish long term stability. By the late eighteenth century the area ceased to be a government concern for any potential uprising.

⁷⁷ *Scots Magazine*, Tuesday 1 December 1818, p. 86.

The quantitative analysis provided in this chapter includes all offenders who were capitally convicted and subsequently either executed or pardoned. However we must note here that not all offenders who committed a potentially capital crime ended up facing the death sentence. Instead the implementation of criminal justice in this period was a multi-staged decision-making process that was subject to discretion. Therefore we must acknowledge that the low numbers of executions in Scotland may not solely be due to low crime rates and that the figures could also have been affected by more deliberate customary, and largely unrecorded, practices of crime control. In the late eighteenth century MacLaurin recalled former times when the government and the Monarch were too weak to impose central powers in areas of northern Scotland.⁷⁸ The abolition of Heritable Jurisdictions in 1747 was intended to combat this and to act as the conclusion to an already declining complex system in favour of vesting judicial power in the hands of the central criminal courts. However, the very low numbers of offenders brought before the circuit courts, particularly from certain areas in northern Scotland, suggest that extra-judicial practices persisted in this period to some extent. For example, the Northern Circuit court sitting at Inverness was attended by the sheriff deputies of Inverness, Ross, Elgin, Nairn, Cromarty, Sutherland, Caithness, Shetland and Orkney. However there were very few offenders stated to be from the latter four areas among the list of those capitally convicted. In addition, the sheriff depute from Shetland and Orkney rarely attended and, while the court instructed the clerk to write to them insisting that they attend and reported their continued absence to the High Court in Edinburgh, the situation was not rectified.⁷⁹ Therefore, while this thesis has based its arguments upon a systematic gathering and analysis of the available records, it acknowledges that the true extent of the commission of potentially capital crimes that never made it before the courts cannot be accurately quantified here.

⁷⁸ MacLaurin, *Arguments and Decisions*, p. 705.

⁷⁹ The attendance of the sheriff deputies from each area is recorded in the circuit court minute books. A reading of the Northern Circuit records highlights the sheriff-depute of Shetland and Orkney's very infrequent attendance. For examples of where the court made particular note of this and instructed the clerk to write to him and to the High Court to report his non-attendance see JC11/13/11; JC11/23/73; JC11/49/44.

Breakdown by Crime

Murder

There were 160 people executed for the crime of murder between 1740 and 1834, 124 men and 36 women. Of the total 505 executions, murders accounted for 31.7 per cent. Table 5 demonstrates that the number of executions for murder did not fluctuate to the extent of that for property offences. Throughout most of this period murder accounted for around one third of the total executions until the 1830s, when there was a lesser recourse to the death sentence for some property offences and murder convictions accounted for over two thirds of the total executions. Table 6 shows the proportion of offenders capitally condemned who were executed between 1740 and 1834. Apart from the figures for the 1820s, which were affected by the remissions following the 1820 treason trials, the percentage throughout the period remained between 60-80 per cent. However when we tabulate the proportion of offenders capitally convicted of murder subsequently executed in table 7, the figures are almost consistently higher in comparison to overall capital convictions. This demonstrates that a capital conviction for murder was most likely to result in the execution of the criminal. This chapter will now turn to investigate the men and women condemned for murder across this period in order to highlight the various contexts in which the murders occurred and the relationship between the perpetrator and the victim.

Table 5: Executions Broken Down by Category of Offence.

	Murder		Property		Other		Total	
	No. of Ex	% of Ex	No. of Ex	% of Ex	No. of Ex	% of Ex	No. of Ex	% of Ex
1740-49	20	52.6	16	42.1	2	5.3	38	100
1750-59	22	33.4	43	65.1	1	1.5	66	100
1760-69	17	54.9	13	41.9	1	3.2	31	100
1770-79	11	31.4	24	68.6	0	0	35	100
1780-89	6	7.6	73	92.4	0	0	79	100
1790-99	10	31.3	21	65.6	1	3.1	32	100
1800-09	14	37.8	22	59.5	1	2.7	37	100
1810-19	13	17.8	59	80.8	1	1.4	73	100
1820-29	25	30.9	52	64.2	4	4.9	81	100
1830-34	22	66.7	9	27.3	2	6	33	100
Total	160		332		13		505	

Source: Figures compiled using Justiciary Court records.

Table 6: Proportion of Offenders Capitally Convicted Executed.

	Executions		Remissions		Total Capital Convictions	
	No.	%	No.	%	No.	%
1740-49	38	79.2	10	20.8	48	100
1750-59	66	81.5	15	18.5	81	100
1760-69	31	70.5	13	29.5	44	100
1770-79	35	64.8	19	35.2	54	100
1780-89	79	65.8	41	34.2	120	100
1790-99	32	60.4	21	39.6	53	100
1800-09	37	62.7	22	37.3	59	100
1810-19	73	62.4	44	37.6	117	100
1820-29	81	46.6	93	53.4	174	100
1830-34	33	70.2	14	29.8	47	100
Total	505		292		797	

Source: Figures compiled using Justiciary Court records and Home Office papers, series HO104, folios 1 to 8.

Table 7: Proportion of Offenders Capitally Convicted for Murder Executed.

	Executions		Remissions		Total
	No.	%	No.	%	
1740-49	20	87	3	13	23
1750-59	22	81.5	5	18.5	27
1760-69	17	74	6	26	23
1770-79	11	61	7	39	18
1780-89	6	85.7	1	14.3	7
1790-99	10	77	3	23	13
1800-09	14	93	1	7	15
1810-19	13	81.3	3	18.7	16
1820-29	25	83.3	5	16.7	30
1830-34	22	78.6	6	21.4	28
Total	160		40		200

Source: Figures compiled using Justiciary Court records and Home Office papers, series HO104, folios 1 to 8.

Men

In terms of male murderers, the victim was either a family member or a lover in 40 per cent of the total 124 cases. In 31 of the cases the victim was their wife and most had occurred within the confines of the home. In some of these cases premeditation and malice were proven when neighbours attested to hearing the men threaten to kill their wives. There were seven men executed for the murder of a lover, in most instances the woman had either recently bore them an illegitimate child, in one case the child was also murdered, or had revealed a pregnancy to them. John MacMillan

was convicted of the murder of Barbara McKinnel in 1810. She was six months pregnant with his child when he gave her muriate of mercury with the intention of aborting the child. Although his defence claimed he had only tried to conceal her shame in procuring the poison for her he was capitally convicted.⁸⁰ Despite the apparent lack of desire to kill Barbara, the intent to kill the child was proof enough of premeditation to send him to the gallows. Similar motivations can be found in the cases of five men who were executed for the murder of their own child, all of whom appeared to have been illegitimate. Unlike in cases where young, single women had killed their illegitimate child, there was no apparent sympathy for these men and their desire to conceal an affair or avoid taking financial responsibility for an illegitimate child served to further aggravate their guilt.

Of the remaining male murder cases, over half were linked to an act of theft or robbery which aggravated their case. In some, premeditation was evident due to the location of the crimes, being on roads or less frequented areas. William Doig had acquainted himself with fellow travelling chapmen, 14 year old Peter Maxton, in Perth in order to murder him and steal £9 worth of goods. The body was left in a mass of woodland and was not discovered for seven weeks due to the seclusion of the location.⁸¹ The fear of murders that occurred during robberies became a potent theme in the courts and the press coverage of crime in the early nineteenth century and will be expanded upon in the second half of this chapter. Financial motive was also apparent in some cases when men murdered family members. George Thom had attempted to kill his whole family by putting arsenic in the salt. Despite various family members falling ill, only his brother-in-law died as a result.⁸² The remaining cases of male murderers were predominantly made up of drunken disputes or as a result of a fight between the victim and the murderer who were, in some of the cases, work colleagues and friends.

In cases of murder intent, often referred to as malice in the court records, had to be proven to be considered murder rather than the lesser and non-capital crime of

⁸⁰ NAS JC12/26/103.

⁸¹ NAS JC11/20/92.

⁸² NAS JC11/64/18.

culpable homicide. In terms of murders committed by men where the victims were also men, especially those that occurred during fights, there were often debates surrounding the issue of provocation and the proving of premeditation. If it was proven that the accused had started the fight, the charge would be murder rather than culpable homicide. In 1802 George Lindsay was executed after he and John Allan had publically argued and when Lindsay returned to the place they both lived he picked up a knife and waited for Allan to return before stabbing him.⁸³ A similar case occurred in 1814 when John McManus had previously fought with Allan Hutton before returning to his lodgings to procure his gun and shoot Hutton dead.⁸⁴ These cases, and numerous others like them, resulted in murder charges, rather than the lesser charge of culpable homicide, as the accused had been the principal actor in the altercations and, in the cases of Lindsay and McManus, had not acted in the heat of the moment. Instead their crime could be classed as premeditated as they left the initial fight to procure a lethal weapon.

Women

Of the total number of 505 executions in Scotland between 1740 and 1834, 47 of the condemned were women. As women made up only 9.3 per cent of the total number of executions it is not surprising that years could pass without any females being executed in Scotland, for example there was a gap of 15 years where there were no women executed between 1793 and 1808.⁸⁵ In some circuit cities this gap could be even longer and was noted by contemporary newspapers. Catherine Davidson was executed in Aberdeen in 1830 for the murder of her husband through the use of poison. When reporting upon her execution the *Caledonian Mercury* commented upon the vast concourse of spectators gathered to witness the event due to that fact that the last execution of a woman in Aberdeen had been Jean Craig in 1794. Due to the rarity of the event the article appeared to buy into the superstition that Catherine's execution had, in some way, been fated as she mentioned, more than once since her

⁸³ NAS JC8/2/109.

⁸⁴ NAS JC12/28/73.

⁸⁵ The low percentage of the total executions made up by women was comparable to England. See J.M. Beattie, *Crime and the Courts in England 1660-1800* (Oxford: Oxford University Press, 1986), p. 514; King, *Crime, Justice and Discretion*, p. 280.

condemnation, that she had been present at Jean Craig's execution. When Jean's body was cut down and the rope thrown among the crowd the knot had struck Catherine on the breast. She described having recoiled in horror at the time but stated she had not thought of it again until her sentencing.⁸⁶

Of the total 47 women executed across this period, 36 had been convicted of murder. In 30 of the cases (83 per cent) their victims were family members. In 23 of these cases the victim was their own child and, in the majority of instances, the child was under the age of one year. The crime of child murder, sometimes referred to as infanticide, whilst a form of homicide punishable by death, was treated with some distinction in the courts. In Scotland the 1690 'Act Anent Murthering of Children' directed juries to capitally convict women who had concealed their pregnancy and the birth of an infant that had subsequently died, with or without direct evidence of murder. Its provisions mirrored those of the 1624 statute in England, namely that the onus was upon the mother to prove her innocence of the crime and that the child had been born dead. The theme of illegitimacy is pervasive within studies of infanticide as the predominant number of offenders brought before the courts were unmarried young women who often worked in some form of domestic service.⁸⁷ However, as this period progressed, convictions based upon the provisions of the 1690 statute alone were more difficult to secure.

By the mid-eighteenth century, while the statute was still charged, it required more justification and there were cases where there was an evident ambivalence on the part of the jury to capitally convict. In 1754 Isobel Kilgown was found guilty only of exposure after the body of her dead infant was discovered, despite the fact that she had concealed her pregnancy and the birth. She was sentenced to be whipped and banished from Scotland.⁸⁸ Murdo Downie was also found guilty of exposure as opposed to murder and received a prison sentence of nine months in 1800.⁸⁹ Similarly,

⁸⁶ *Caledonian Mercury*, Monday 11 October 1830, p. 3.

⁸⁷ See R.W. Malcolmson, 'Infanticide in the Eighteenth Century', in J.S. Cockburn (ed), *Crime in England 1550-1800* (London: Methven, 1977), pp. 187-209. See also the collection of essays in Mark Jackson (ed), *Infanticide; Historical Perspectives on Child Murder and Concealment 1550-2000* (Aldershot: Ashgate, 2002). For a Scottish example see Kilday, *Women and Violent Crime*, pp. 59-79.

⁸⁸ NAS JC7/30/23.

⁸⁹ NAS JC11/44/76.

in 1777 it was commented that the severe law in England regarding child murder was becoming more mildly interpreted and that some form of presumptive evidence was required to prove the child was born alive.⁹⁰ In addition, in the Scottish court records it was increasingly apparent that witnesses who had examined the body were questioned as to whether the child had come full term and whether it appeared healthy. When charting the indictment and conviction rates for infanticide between 1700 and 1799 Kilday demonstrated that there was an increase in indictments beginning in the mid-eighteenth century and peaking in the late 1760s before declining. However she also showed that petitions for banishment followed a similar trend whereas convictions for infanticide steadily declined as the period progressed.⁹¹ This study has found that there were in excess of 200 women brought before the courts for child murder who were allowed to petition the courts for banishment or transportation across this period. This reinforces the argument that the proportion of women brought before the courts for child murder subsequently tried and capitally convicted fell as the courts instead allowed women to petition for a lesser punishment short of the death sentence.

In terms of the chronology of the 23 executions for child murder, 19 occurred between the 1740s and 1760s, with the remaining four occurring sporadically, averaging about one per decade, until the final execution in 1808. The final execution for child murder in Scotland in this period was that of Barbara Malcolm. She had murdered her illegitimate daughter, aged 18 months, by forcing oil of vitriol down her throat.⁹² Of the 292 people pardoned across this period, table 8 shows that only 40 were convicted murderers, 13.7 per cent of the total. In terms of a breakdown by gender, the pardons for murder accounted for only 10 per cent of all men pardoned but 44 per cent of all women. In most of these cases their victim had been their infant child. Therefore Kilday's argument that Scottish women in the eighteenth century were given "escalated and aggravated punishments for their crimes in comparison to their male criminal counterparts and were unlikely to be pardoned" is not

⁹⁰ *The Laws Respecting Women, as they Regard their Natural Rights, or their Connections and Conduct* (London: 1777), p. 307.

⁹¹ Anne-Marie Kilday, *A History of Infanticide in Britain c. 1600 to the Present* (Basingstoke: Palgrave, 2013), p. 30.

⁹² NAS JC8/5/181.

substantiated in this research.⁹³ Instead, as the period progressed, women convicted of child murder were more likely to receive a remission of the death sentence than men or women convicted of other forms of homicide. In 1809 an act for repealing the 1690 statute, also known as the Concealment of Birth (Scotland) Act (49 Geo III c.14), stipulated that concealment of birth was an alternative charge to child murder which carried a sentence of up to two years imprisonment. It carried similar provisions to an act passed in 1803 in England, often referred to as Lord Ellenborough's act (43 Geo III c. 58). Following Malcolm's case in 1808 there were no further executions for child murder in Scotland in the period under investigation here. Instead of a murder charge the alternative charge of concealment, provided by the stipulations of the act, was used by the courts.

Table 8: Pardons Broken Down by Category of Offence.

	Murder		Property		Other		Total	
	No.	%	No.	%	No.	%	No.	%
1740-49	3	30	6	60	1	10	10	100
1750-59	5	33.3	9	60	1	6.7	15	100
1760-69	6	46.2	6	46.2	1	7.6	13	100
1770-79	7	36.8	11	57.9	1	5.3	19	100
1780-89	1	2.4	39	95.2	1	2.4	41	100
1790-99	3	14.3	13	61.9	5	23.8	21	100
1800-09	1	4.5	19	86.4	2	9.1	22	100
1810-19	3	6.9	39	88.6	2	4.5	44	100
1820-29	5	5.4	65	69.9	23	24.7	93	100
1830-34	6	42.9	5	35.7	3	21.4	14	100
Total	40		212		40		292	

Source: Figures compiled using Home Office papers, series HO104, folios 1 to 8.

Of the remaining 13 women executed for murder between 1740 and 1834, four had murdered their husbands. Margaret Cunningham was executed in 1807 for poisoning her husband. She had initially been indicted at Perth but as she was pregnant her sentence had been delayed and her case was sent to Edinburgh for consideration. In the space of only one month following the birth she appeared at the bar with the child in her arms to hear her death sentence. The Lord Justice Clerk stated that for such an atrocious offence she had no hope of a reprieve.⁹⁴ In September 1754

⁹³ Kilday, 'Contemplating the Evil Within', p. 150.

⁹⁴ NAS JC8/5/90; *Lancaster Gazette*, Saturday 6 December 1806, p. 4.

Nicholas Cockburn was executed in Edinburgh for the murder of her husband and her step-mother by poisoning them with arsenic.⁹⁵ In England women accused of petty treason, which included the murder of a husband by his wife, were to be burnt at the stake. While often mitigated by strangulation prior to burning, the punishment was not formally abolished until 1790. Despite the extension of the English laws regarding full treason to Scotland in 1708 (7 Ann C.21), the crime of petty treason was not. Therefore, when addressing Nicholas to deliver the verdict, the Lord Justice Clerk highlighted the different punishments inflicted in foreign countries for the crime and stated that the sentence she received, to be executed and sent for dissection, was a mild one in comparison.⁹⁶

There were only six cases of female murder where their victims were strangers to them, unlike in the case of male murderers. Two of these women had been convicted along with their husbands for murdering their victims whilst also robbing them. In 1752 Helen Torrance and Jean Waldie were executed in Edinburgh after being found guilty of stealing John Dallas, a boy of eight, and subsequently selling his dead body to some medical students. It appeared that they had arranged to procure the body of a child who had died in their neighbourhood and had received payment for it from some medical students. When they could not obtain this body they had resorted to abducting and murdering John.⁹⁷ Women who acted for financial gain or who had committed more violent murders did not receive the sympathy sometimes evident in cases of child murder. Indeed, due to the rarity of these cases, their crimes were believed to be beyond comprehension. When Christian McKenzie was accused of the murder of her husband's mother and 13 year old brother her defence argued that the crime was so shocking in nature, as she had brutally stabbed them, that it would be impossible for Christian, who was a 19 year old woman, to commit this barbarity.⁹⁸ Similarly Margaret Adams, aged 22, had broken into the shop of Janet McIntyre in Glasgow and violently strangled her and plundered the shop. Her defence labelled the

⁹⁵ NAS JC7/30/30-67.

⁹⁶ *Caledonian Mercury*, Thursday 15 August 1754, p. 3.

⁹⁷ NAS JC7/28/413.

⁹⁸ NAS JC11/24/328.

story as being too horrid in nature to be true.⁹⁹ Despite this both women were executed.

Property Crime

As this chapter progresses, it becomes apparent that the fluctuations in Scotland's use of capital punishment across this period were largely as a result of executions for property offences. During the period 1740 to 1834 property offences accounted for 332 of the total 505 executions (65.7 per cent). There were fluctuations, not only in the number of property offenders executed, but also in the proportion of those capitally convicted who were subsequently executed as highlighted in table 9. Although this thesis is focused upon cases that made it before the central criminal courts and resulted in capital convictions, it also explores the role of discretion in deciding who faced a capital charge for property offences, particularly on the part of the judges and the prosecution. For example, offenders could petition the court prior to the commencing of capital trials and this could be consented to by the Advocate Depute, acting as the prosecution, which resulted in the accused facing a secondary punishment that fell short of the death sentence. In addition, before the jury was sworn in, the judges could decide to restrict the libel, a process detailed in chapter one, meaning that offenders would not face a capital punishment even if the jury returned a guilty verdict. The role of discretion in the decision-making process was more marked in cases of property offences than murder and could go some way to determining the level of capital punishment for certain property offences depending upon factors such as geographical context, the age and gender of offenders and the public discourse surrounding crime.

⁹⁹ NAS JC7/38/219.

Table 9: Proportion of Offenders Capitally Convicted for Property Offences Executed.

	Executions		Remissions		Total
	No.	%	No.	%	
1740-49	16	72.7	6	27.3	22
1750-59	43	82.7	9	17.3	52
1760-69	13	68.4	6	31.6	19
1770-79	24	68.6	11	31.4	35
1780-89	73	65.2	39	34.8	112
1790-99	21	61.8	13	38.2	34
1800-09	22	53.7	19	46.3	41
1810-19	59	60.2	39	39.8	98
1820-29	52	44.4	65	55.6	117
1830-34	9	64.3	5	35.7	14
Total	332		212		544

Source: Figures compiled using Justiciary Court records and Home Office papers, series HO104, folios 1 to 8.

Scotland did not have the number of capital statutes that existed in England at this time and the list of thefts punishable by death in virtue of special statutes was very short in comparison. Thefts related to the mail were crimes at common law but were also covered by a Scottish act passed in 1690 ‘Anent stealing of the packet’. The legislation passed in Westminster in 1767 (7 Geo III c.50) also included Scotland. Despite this, executions for the crime were still relatively low, only 12 in this period. However, in the case of Kenneth Leal in 1773, exemplary punishment was used as he was executed and hung in chains at the spot where he robbed the post boy. Along with theft relating to the mail, Hume only cited one further specific category of theft covered by special statute passed in 1744 (18 Geo II c.27), namely theft of linen, cotton and calico to the value of 10 shillings from a bleaching field.¹⁰⁰ There was another particular form of theft that was capital in Scotland, plagium, which involved the theft of a child. There were only three capital convictions of women for the crime but they were all subsequently conditionally pardoned. Throughout this period housebreaking was the most frequent aggravation of theft and was capital regardless of the value of the items stolen. The crime of housebreaking and theft, as charged in the courts, made up about one fifth of the total executions in this period and almost one third of the total executions for property offences. However, due to the potential for a restriction of the charge prior to the commencing of the trial by the judges, an

¹⁰⁰ Hume, *Commentaries*, Vol. 1, p. 103.

offender could face a punishment short of the death sentence. Thus, in exercising this discretion, the courts ensured that hundreds of offenders avoided facing a capital punishment for the crime. At times of increased executions, notably the 1780s and the second and third decades of the nineteenth century, capital convictions for the crime of housebreaking and theft increased. The outbreak of the American War of Independence ended the penal option of transporting offenders to America and the British government did not immediately decide upon Australia as an alternative destination.¹⁰¹ Therefore, this chapter will argue that in the 1780s there were more capital convictions and thus more executions for the crime due to the lack of a sufficiently severe secondary penal option.

After housebreaking and theft, robbery made up the second largest proportion of executions for property offences, making up 17 per cent of the total. In England robbery had been held up as an indicator of the prevalence of crime more generally in the eighteenth century. In 1751 Henry Fielding warned of the frequency of the crime in London and stated that, if unchecked, the already flagrant increase in robberies would be capable of reaching even greater heights.¹⁰² However in Scotland more pressing concerns over the prevalence of the crime of robbery were not as evident in the mid-eighteenth century. In February 1747 three men were indicted before the High Court in Edinburgh for violently invading His Majesty's subjects with lethal weapons and robbing them of money upon the public highways. Their defence had argued that the crime of highway robbery should be punished with less severity in Scotland than in England "where the punishment was always capital". He went on to argue that the crime rarely happened in Scotland and it was a just principle that laws should always be made more or less severe according to how often the crime was committed. The men petitioned the court, which was consented to by the Advocate Depute, and they were banished to America for life instead of standing trial and facing

¹⁰¹ For a recent discussion of the end of transportation to America see Barry Godfrey and Paul Lawrence, *Crime and Justice since 1750*, Second Edition (Oxon: Routledge, 2015), p. 75.

¹⁰² Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers, with Some Proposals for Remedying this Growing Evil* (London: 1751), p. 1. See also *Hanging Not Punishment Enough for Murtherers, Highway Men and House-breakers, Offered to the Consideration of the Two Houses of Parliament* (London: 1701); John Fielding, *A Plan for Preventing Robberies within Twenty Miles of London* (London: 1755).

a capital punishment.¹⁰³ This case not only demonstrates the discretionary powers of the courts, it also reveals how attitudes towards the believed prevalence of the crime could affect legal responses to it in the decision-making process. The reluctance to pursue a capital charge for some offenders in Scotland is comparable to practices in Wales where both petty and grand juries made marked efforts to prevent offenders being found guilty of robbery indictments. Therefore, in this sense, the Scottish experience, in terms of responses to robbery in the mid-eighteenth century, reinforces the centre-periphery dichotomy established by King and Ward in their study of the capital punishment of property offences in the third quarter of the eighteenth century.¹⁰⁴

Executions for robbery had been relatively low until the 1780s, especially when compared to England, and there was at least a degree of awareness of this, as evidenced in the above case. However, by the second decade of the nineteenth century, robbery had become a greater concern in the Scottish courts and the newspapers, a topic that will be further discussed in the second half of this chapter. In terms of the geography of the crime, the predominant number of capital convictions occurred in Scotland's central belt, a fact that was evident in the returns presented to parliament for the years 1811-14.¹⁰⁵ During the trial of two men for three acts of highway robbery in 1814 the Lord Justice Clerk stated that the High Court was determined, by the most prompt and vigorous administration of justice, to punish offences of that kind in order to correct the loose manners of the time.¹⁰⁶ The *Caledonian Mercury* added that it was due to the frequency of this offence "formerly little known in Scotland" that the court was induced to execute the men at the scene of the last robbery.¹⁰⁷ In gathering and analysing the data presented in the 1819 *Report from the Select Committee on Criminal Laws*, Emsley demonstrated that for London and Middlesex, between 1775 and 1784, the percentage of people executed following a capital conviction for highway robbery was 38.9 per cent. By the early

¹⁰³ NAS JC7/25/425.

¹⁰⁴ King and Ward, 'Rethinking the Bloody Code', p. 181.

¹⁰⁵ *Parliamentary Papers*, Vol. XI (163) 1814-1815. A Return of Persons, Male and Female, Committed in the Years 1811, 1812, 1813 and 1814 to the Several Goals in Scotland.

¹⁰⁶ *Scots Magazine*, Sunday 1 January 1815, p. 31.

¹⁰⁷ *Caledonian Mercury*, Thursday 26 January 1815, p. 3; NAS JC8/11/10.

nineteenth century this had fallen to 8.6 per cent.¹⁰⁸ Comparatively, in Scotland in the 1780s, during a peak decade in the overall numbers sent to the scaffold, 58.3 per cent of those capitally convicted for robbery were executed. While this subsequently declined slightly, by the second decade of the nineteenth century it had risen again and 79.3 per cent of offenders capitally convicted for robbery or the crime of stouthrief, which was sometimes charged synonymously with robbery in the early nineteenth century and involved the use of violence within a dwelling place, were executed. The second half of this chapter will question this continued high proportion of executions to capital convictions and will present some potential explanations for it.

There were 49 executions for theft of cattle, horses or sheep in this period. 14 of the cases occurred between 1746 and 1755 following trials before the Northern Circuit, this being the highest concentration of executions for the crime in any decade across this period. When breaking down the numbers of executions by decade, those for cattle, horse or sheep theft present almost a reverse pattern to the figures for other property offences, notably robbery, as there were only seven people executed for the crime following the turn of the nineteenth century. Towards the end of the eighteenth century the charges were often restricted to a lesser punishment and thus not punished capitally. For example, in Inverness in May 1774, three men had been indicted for cattle theft but were found guilty only of slaughtering the cows.¹⁰⁹ By the nineteenth century it was only in cases of excessive theft, such as that of James Ritchie who stole 30 sheep from the parks of Gordon Castle, where a capital punishment was passed.¹¹⁰ A return of the number of persons brought to trial for crimes of a potentially capital nature in Scotland between 1827 and 1832 was presented to parliament in 1832. The total number of people charged with various forms of theft,

¹⁰⁸ Clive Emsley, *Crime and Society in England 1750-1900* Fourth Edition (London: Routledge, 2013), p. 270.

¹⁰⁹ NAS JC11/30/70.

¹¹⁰ The removal of many people from traditional land tenancies during the Highland Clearances in order to create space for sheep and cattle farms has received the attention of Scottish historians who have pointed towards not only the physical displacement of these people but also the further dislocation of traditional Highland society. Devine has highlighted at least 20 recorded major incidents of resistance to eviction between 1760 and 1855. See T.M Devine, 'Social Responses to Agrarian Improvement: The Highland and Lowland Clearances in Scotland', in R.A Houston and I.D Whyte (eds.), *Scottish Society 1500-1800* (Cambridge: Cambridge University Press, 1989), pp. 148-168. However it does not appear, from the figures gathered for this research, that the clearances directly impacted the numbers of people capitally convicted for theft of sheep or cattle.

including that of horses and cattle as well as theft aggravated by housebreaking, was 1076. However, in all but 24 of these cases, the charge was restricted so the criminal would not face a capital trial.¹¹¹ This demonstrates that, by the 1830s, property offences were sending fewer criminals to the scaffold despite Alison's observation in 1832 that "probably a greater number of cases have been tried since the peace of 1815 than from the institution of the Court of Justiciary down to that time".¹¹² A reading of the court records themselves also reflects the swell in the sheer volume of cases. An increase in criminality may have occurred, particularly in Scotland's rapidly industrialising central belt, or policing and prosecution methods may have become more efficient thus bringing more offenders to justice. However what is clear is that the figures demonstrate the importance of the discretionary power of the courts, in particular the judges, to limit the level of punishment to be meted out. Of the 24 cases where the charges were not restricted there were 12 capital convictions but only three executions.

In England there were upwards of 60 capital statutes passed in the eighteenth century related to the crime of forgery.¹¹³ Furthermore McGowen stated that, along with murder, a capital conviction for the crime of forgery in the eighteenth century was the most likely to see an offender subsequently executed in England.¹¹⁴ However, many of the capital statutes that made up the Bloody Code were not extended to Scotland. In turn, there were only 26 men executed for the crime of forgery in Scotland in this period and a further 18 men and two women who had been capitally convicted for the crime but subsequently pardoned. Comparatively, in England between 1775 and 1815, Emsley has gathered the figures for London and Middlesex as well as the Home, Western and Norfolk circuits and found that there were 366 people capitally convicted for forgery and, of these, 204 were executed.¹¹⁵ During the trial of George McKerracher in 1788, despite the fact that he had forged and uttered

¹¹¹ *Parliamentary Papers*, Vol. XXXV (499) 1831-1832. Return of Number of Persons Brought for Trial for Capital Crimes before Justiciary Courts in Scotland, 1827-31, pp. 193-196.

¹¹² Alison, *Principles of the Criminal Law of Scotland*, p. v.

¹¹³ Randall McGowen, 'From Pillory to Gallows: The Punishment of Forgery in the Age of the Financial Revolution', *Past and Present*, Vol. 165, (1999), pp. 107-140, p. 107.

¹¹⁴ Randall McGowen, 'Managing the Gallows: The Bank of England and the Death Penalty, 1797-1821', *Law and History Review*, Vol. 25, (2007), pp. 241-282, p. 243.

¹¹⁵ Emsley, *Crime and Society*, p. 271.

(distributed) £48 and £49 bills of exchange, his defence argued that no damage had been sustained by any individual and thus asked for a restriction of the charge. However this was refused and he was found guilty and sentenced to be executed in Stirling in March 1788.¹¹⁶ When sending his report of the trial proceedings to the Home Office the Lord Advocate Ilay Campbell stated that there were no favourable circumstances in McKerracher's favour. He further asserted that forgery was as much a capital crime in Scotland as in England and called for an example to be made with his execution.¹¹⁷ The belief that the crime would not be punished with death in Scotland was also apparent among others capitally convicted, even as they mounted the scaffold. At his execution in 1785 Neil Mclean was described as having "laboured under a misconception of the nature of his crime" and the severity of the punishment attached to it.¹¹⁸ This again demonstrates the discretion that was exercised in the Scottish courts, perhaps due to their greater use of the common law as opposed to the statutes that made up the Bloody Code, in their response to the crime of forgery.

There were two main aggravations evident in the cases where offenders were capitally punished for the crime of forgery. The first was the magnitude of the crime. David Reid had forged Bank of Scotland notes and uttered them in various areas including Edinburgh, Dumfries, Kirkcudbright and Wigtown in 1780.¹¹⁹ Similarly, William Mackay had committed the crime in Ayr, Lanark and Renfrew. Although the jury only found him guilty of one of the charges, when passing the death sentence Lord Gillies stated that even if the prisoner issued only one forged note it was the same as if he had issued 50.¹²⁰ The second aggravation in some of the cases was the status of the condemned. In cases of forgery, unlike in most other crimes, if a person was educated, a man of property or held a position of trust this aggravated their crime. William Evans had been an overseer on the estate of the Duke of Portland before his execution in 1816 for forging bills of exchange.¹²¹ Malcolm Gillespie was an excise officer in Aberdeen when he was convicted of forging in excess of £200 in bills

¹¹⁶ NAS JC7/45/15.

¹¹⁷ TNA HO102/51/234.

¹¹⁸ *Caledonian Mercury*, Saturday 4 June 1785, p. 3.

¹¹⁹ NAS JC7/40/357.

¹²⁰ NAS JC13/43/41; *Caledonian Mercury*, Monday 28 April 1817, p. 3.

¹²¹ NAS JC12/29/98.

of exchange.¹²² At his execution in 1800 for forging and uttering notes of Carrick, Brown and Company, bankers in Glasgow, Samuel Bell was described as being an industrious man of property.¹²³ Following his conviction for forgery in 1797 Millesius Roderick Maccullan was reported to have had the manners of a gentleman and as being bred in polite life. Despite petitions from various respectable quarters in Edinburgh he was executed.¹²⁴ An article in the *Chester Courant* cited similarities between his case and the heavily reported upon English case of Dr William Dodd, who had been executed at Tyburn for forgery in 1777, when stating that forgery was a dangerous crime and was not to be forgiven.¹²⁵

By the late 1820s there were calls to abolish the death penalty for the crime of forgery due to the increasing difficulties in securing capital convictions.¹²⁶ In England and Wales between 1820 and 1829 Radzinowicz noted that, of 733 people capitally convicted for forgery, only 64 were executed.¹²⁷ In Scotland in the 1820s there were six executions but nine pardons for the crime. The *Edinburgh Review*, a magazine edited by young Whig lawyers with support from men such as Francis Jeffrey and Henry Cockburn, argued for the promotion of Whig reforms to Scots law in the early nineteenth century. Despite sitting in an English seat in the Commons, Henry Brougham was one of the most prominent contributors to the *Review* and wrote in 1831 on the abolition of the death sentence for the crime of forgery. He argued that the death sentence was harder to secure for the crime and thus it was logical to legislate for a less severe, but more certain, punishment.¹²⁸ In this sense the situation north and south of the border was comparable and thus the death sentence was abolished for the crime of forgery in England and Wales and Scotland by an act passed in 1832 (2 & 3 Will. IV c. 123).

¹²² NAS JC11/73/94.

¹²³ *Aberdeen Journal*, Monday 28 July 1800, p. 3.

¹²⁴ NAS JC7/52/15.

¹²⁵ *Chester Courant*, Tuesday 19 December 1797, p. 2.

¹²⁶ This fact was noted by Paul Riggs in his investigation of the prosecution's decision to restrict the charges in potentially capital cases for property offences, including forgery, by the 1830s. See Paul T. Riggs, 'Prosecutors, Juries, Judges and Punishment in Early Nineteenth-Century Scotland', *Journal of Scottish Historical Studies*, Vol. 32, (2012), pp. 166-189.

¹²⁷ Radzinowicz, *History of English Criminal Law*, p. 594.

¹²⁸ Jim Smyth and Alan McKinlay, 'Whigs, Tories and Scottish Legal Reform c. 1785-1832', *Crime, History and Societies*, Vol. 15, (2011), pp. 111-132, p. 128.

Of the 47 women executed across this period, only 11 had been convicted of property offences. Although the sheer numbers were smaller in Scotland, the proportion of capitally convicted property offenders who were women was similar to the situation in England.¹²⁹ In turn there was evidently discretion used in terms of restrictions of the charges prior to the commencing of the trials and in the punishments meted out following the pronouncement of a guilty verdict that affected the number of women capitally convicted for property offences in this period. In the case of Margaret Crossan, who was executed in Ayr in 1817 for wilful fire-raising, the extent of the damage caused may have been a deciding factor in her punishment. She had deliberately set three separate fires on a farm in Wigtown, which had the desired effect of completely consuming the farm in flames. The motive was apparently an earlier dispute she had with the tenant farmer.¹³⁰ Isabella McMenemy was executed for robbery along with her husband Thomas in 1828 and her case was the only property crime committed by a woman that resulted in a capital conviction involving any real degree of violence. The court heard how she acted as a decoy in order to lure the boatmen on the banks of Paisley canal into a secluded area so Thomas could assault and rob them. When passing the death sentence for both, Lord Meadowbank stated with consternation that the female offender had been the principal actor in devising the robberies.¹³¹ Beattie's figures demonstrated the relative infrequency of women prosecuted for robbery. He argued that when women did engage in robberies it was often with male accomplices, for whom they acted as decoys and for this reason there may have been numerous women never taken or prosecuted for their part in the crime.¹³² In Isabella's case it was in her capacity as the decoy, and apparent deviser of the robberies, that the presiding judge found the deepest concern and arguably sealed her fate.

The remaining nine women executed for property offences had been convicted of theft or theft and housebreaking. As theft alone was not automatically punished capitally in Scotland there were a number of women who were charged with various

¹²⁹ King, *Crime, Justice and Discretion*, p. 280.

¹³⁰ NAS JC12/31/6.

¹³¹ NAS JC13/56/12; *Morning Chronicle*, Monday 22 September 1828, p. 4.

¹³² J.M. Beattie, 'The Criminality of Women in Eighteenth-Century England', *Journal of Social History*, Vol. 8, (1975), pp. 80-116, p. 90.

forms of theft who were not capitally convicted due to the discretionary powers of the courts. In turn, there were often aggravations to the crimes debated in the courts when women did receive the death sentence. In six of the cases the court heard how the women were 'habute' thieves and in four of these cases they had previously been banished from Scotland for the crimes, from which they had illegally returned. The value of the items stolen combined with the charge of being a 'habute' thief led Sarah Graham to the scaffold. She had stolen a bill bag from the pocket of Alexander McLean at a Whitsunday fair in 1753 containing bills and bank notes to the value of £900. He told the court how he had taken extra precautions to securely button the pocket and that her seeming expertise in picking the pocket would suggest previous experience of the crime.¹³³ In two of the cases the women had been repeat offenders who had stolen from a bleaching field, a category of theft covered by a capital statute extended to Scotland in 1744. The victim of the thefts could also have been a deciding factor as in the case of Anne Campbell who had stolen £50 from a chest in her master's house.¹³⁴ What is clear is that, due to the low numbers of women capitally convicted for property offences, the Scottish courts only passed the death sentence if there was some aggravation to the case and in many other instances secondary punishments that fell short of the death sentence such as banishment, transportation or even short-term prison sentences were believed to be sufficient.

Executions Following the 1745 Jacobite Rebellion

The second half of this chapter will turn to examine three particular periods between 1740 and 1834 that witnessed a marked increase in the use of capital punishment and present potential explanations for this pattern. The first of these periods was between 1746 and 1755. There was a total of 75 executions in this ten year period; 26 for murder, 46 for property offences and a further three for crimes categorised in table 5 as other, namely rape and bestiality. Table 6 demonstrates that the 1740s and 1750s saw around 80 per cent of those capitally convicted subsequently executed, a level not reached again even during the increased numbers of executions in the 1780s and early nineteenth century. A large proportion of these executions were as a result of

¹³³ NAS JC13/11/75.

¹³⁴ NAS JC13/11/77.

convictions before the Northern Circuit. Of the total 75 executions, 43 were from the Northern Circuit compared with only 15 from the High Court in Edinburgh and even fewer numbers from the other circuits.

Before examining the potential reasons for the peak in executions in Scotland it is beneficial to highlight that the late 1740s and early 1750s was also a period of concern over crime in England. Two of the key explanations presented for this include the effects of demobilization following major wars and the occurrence of moral panics over crime in the newspapers in this period. Within the crime and punishment historiography focused upon England a reoccurring link has been developed between recorded levels of crime and the impact of times of war and peace. Beattie has demonstrated an evident upturn in prosecutions for property offences in Surrey as major wars ended. Following the end of the War of the Austrian Succession (1740-1748) the period 1749 to 1756 saw 99 people capitally convicted and, of those, 50 (50.5 per cent) were executed. In contrast, in the period 1757 to 1763, during the Seven Years War, of 44 people capitally convicted there were 10 (22.7 per cent) executed.¹³⁵ Similar patterns have been highlighted in works focused upon Staffordshire and Essex respectively in the same period.¹³⁶

In addition to the threats to public order posed by demobilization, the mid-eighteenth century in England also witnessed moral panics over the feared prevalence of certain crimes, notably violent robberies in and around the metropolis of London. In the second half of 1744 the London newspapers showed a growing interest in the crime of street robbery. They reported in great depth about the apprehension of some notorious street robbers linked to known gangs. While this moral panic possibly resulted from growing criminality, it may also be attributed to an editorial need for sensational news due to a dearth in noteworthy foreign war news.¹³⁷ In contrast, there was not the same moral panic over the crime evident in the Scottish newspapers. When reporting upon the conviction and execution of John Irving in Edinburgh after he

¹³⁵ Beattie, *Crime and the Courts*, pp. 532-533.

¹³⁶ For an analysis of the increase in committals for theft in Staffordshire see Douglas Hay, 'War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts', *Past and Present*, Vol. 95, (1982), pp. 117-160. For an analysis of Essex see King, *Crime, Justice and Discretion*, pp. 153-168.

¹³⁷ Richard Ward, 'Print Culture, Moral Panic, and the Administration of the Law: The London Crime Wave of 1744', *Crime, History and Societies*, Vol. 16, (2012), pp. 5-24, p. 10.

had robbed two different people upon the highways in September 1744, the *Caledonian Mercury* provided only the basic details of the case and neglected to include that he had also shot one of his victims.¹³⁸ Further anxieties over robbery in England were heightened in the aftermath of the War of the Austrian Succession and the early 1750s saw commentators proposing a variety of measures to stem the feared crime epidemic.¹³⁹ The House of Commons committee appointed in February 1751 to investigate the existing laws related to offences against the peace included the Prime Minister, Henry Pelham and the Secretary of War, Henry Fox but also the members of parliament for London and the counties of Middlesex and Surrey, perhaps reflecting that the problem was very much believed to be centred upon London.¹⁴⁰ Therefore, while acknowledging that Scotland was not alone in experiencing an increase in capital convictions in this period, this chapter will demonstrate that the reasons for this were different from England and were largely linked to the aftermath of the late 1745 Jacobite Rebellion.

In April 1746 the Jacobite army was decisively defeated at the Battle of Culloden and the circuit courts were able to resume business after some disruptions, particularly in the Northern Circuit. The government army, under the leadership of the Duke of Cumberland, sought to hunt down any remaining rebels and permanently suppress any potential unrest in the future. In addition, the suspicion and disdain that had typified English and Lowland Scottish views of the Highlands during the rebellion continued in its wake. The acknowledgement of the need for a tighter control of the Highlands was not new in the mid-eighteenth century. Disarming acts in 1716 and 1725 had attempted to legislate against the possession of weapons such as broad swords and various guns in northern Scotland. Under the leadership of General Wade there had been 260 miles of roads constructed along the Great Glen linking Inverness to the western seaboard at Fort William and linking the Lowlands to the Great Glen.¹⁴¹

¹³⁸ *Caledonian Mercury*, Thursday 8 November 1744, p. 4; NAS JC7/24/497.

¹³⁹ For a more detailed analysis see Nicholas Rogers, 'Confronting the Crime Wave: The Debate over Social Reform and Regulation, 1749-1753', in Lee Davison, Tim Hitchcock, Tim Keirn and Robert B. Shoemaker (eds.), *Stilling the Grumbling Hive; The Response to Social and Economic Problems in England, 1689-1750* (Stroud: Alan Sutton, 1992), pp. 77-98.

¹⁴⁰ Beattie, *Crime and the Courts*, p. 521.

¹⁴¹ Bruce Lenman, *The Jacobite Risings in Britain 1689-1746* (Aberdeen: Scottish Cultural Press, first published 1980, this edition 1995), p. 222.

Following the defeat of the '45 a further Disarming Act was passed in 1746 as well as legislation banning the wearing of Highland dress such as tartan and kilts (19 Geo II c. 39). In addition, Heritable Jurisdictions were abolished in 1747. Despite historians arguing that these powers had already declined by the mid-eighteenth century, this was accelerated following the passing of the legislation. The focus here is to provide an analysis of capital punishment in the wake of the '45, particularly as a result of trials before the Northern Circuit, and to highlight the evident links to wider attempts to gain tighter control over northern Scotland.

Cattle theft by large groups in the Scottish Highlands had been a problem prior to the mid-eighteenth century and was particularly prominent in the western Highland area of Lochaber. Cattle were the main source of wealth in the area but, following the rebellion, it was confiscated on a large scale. For a time Fort Augustus became the largest cattle market in Scotland, partly due to a steady supply of confiscations.¹⁴² In the period 1746 to 1755 there were 16 executions for cattle or horse theft, only two of which occurred outside of the Northern Circuit. Although the trials were held in Inverness, Perth and Aberdeen the places where the thefts were stated to have taken place show that the crime was not only committed in the immediate vicinity of these larger cities but was apparent across various areas of northern Scotland, both east and west. Among the large body of correspondence between government and army officials in Scotland and authorities in London in the years immediately following the '45, the problem of cattle and horse theft was highlighted. In a letter to the Duke of Argyle, on behalf of several of his tenants in Morvern, John McDougall complained of the thefts. Morvern is a peninsula in south-west Lochaber but he claimed that the people there had no affiliation with Clan Cameron whose relations he accused of being principally concerned in the crime. He informed the Duke that several of the tenants had taken to guarding their livestock continually and needed more government protection.¹⁴³

The aftermath of the '45, and the rigour with which instances of cattle theft were pursued by the authorities, is perhaps reflective of the fact that the crime had

¹⁴² Devine, *Scottish Nation*, p. 46.

¹⁴³ TNA SP54/37/1. Letter dated 3 October 1747.

been a long-standing feature of parts of northern Scotland that the government believed had not been adequately punished. This could, in part, have been due to the lack of sufficient central judicial power in the area. However the continued perpetuation of the offence could also have been facilitated due to wider issues surrounding crime detection, reporting and prosecution, especially in peripheral areas that were separated geographically from the country's centre but also had distinct attitudes and responses to certain crimes. In almost all of the cases brought before the Northern Circuit the panel was not only charged with a particular instance of theft/s. Instead the charge would also state that they were 'habute' thieves as an aggravation to their crime. Kenneth Dow Kennedy was accused of having been a notorious cattle thief for upwards of 20 years during his trial in 1750.¹⁴⁴ The fact that Kennedy and others had been able to carry on their crimes for years seemingly unchecked suggests that customary practices in certain areas of northern Scotland meant that there was either some reluctance or an inability for victims to prosecute the crimes in the central courts. King and Ward have identified a "widespread reluctance of many areas on the periphery" to implement capital punishments for property offences in the eighteenth century.¹⁴⁵ In addition, Sharon Howard has demonstrated that legal officials took only a limited role in the investigation of theft in Wales and that it was often a matter of private initiative wherein some sort of restorative action, such as the returning of property or the paying of compensation, was preferred to the pursuing of punitive justice.¹⁴⁶ In the Scottish court records, a reading of some of the witness statements does highlight that in cases where the accused had been 'habute' thieves the victims had previously taken it upon themselves to pursue the offender and take back their property without going through the courts. Therefore, in parts of northern Scotland it is likely that the reporting and pursuing of cattle thieves was subject to extra-judicial discretion but was also made more difficult as it was such a common feature of certain areas. When John Breck MacMillan mounted the scaffold in Inverlochy in 1755 the recorder of his speech observed that theft of cattle was "not reckoned too

¹⁴⁴ NAS JC11/14/321.

¹⁴⁵ King and Ward, 'Rethinking the Bloody code', p. 160.

¹⁴⁶ Sharon Howard, 'Investigating Responses to Theft in Early Modern Wales: Communities, Thieves and Courts', *Continuity and Change*, Vol. XIX, (2004), pp. 409-430, pp. 411-414.

dishonourable by the commonality in that part of the world as in other places”.¹⁴⁷ However, in the wake of the '45, the authorities sought to curb these practices. The need for some form of additional infamy to be added to the punishment of cattle thieves is demonstrated in the decision to execute offenders at certain locations.

There were 12 people sentenced to be executed either at the scene of their crime or within the town in which it was committed between 1740 and 1755. Ten of the cases were convicted before the Northern Circuit and eight of these were for property offences. This was an evident concentration of the punishment as between 1740 and 1799 there were only 21 people executed at the scene of their crime and it was not until the increasing numbers of executions at the beginning of the nineteenth century that a marked increase in crime scene executions would occur again. In five of the cases the criminals had been condemned at Inverness for cattle theft and sentenced to be taken to Fort William to be confined before their execution in Inverlochy. Fort William is located in Lochaber and in the eighteenth century was one of three Great Glen fortifications along with Fort Augustus and Fort George. During the '45 it was the only one of the three not to fall into the hands of the rebel army and following the rebellion it remained a government army base. Donald McOiloig alias Cameron, also commonly called 'the Officer', was described in court as a most notorious cattle thief who had been so for 20 years. He had been apprehended by a party of General Pultney's regiment and sent to Inverness for trial before the circuit court and was sentenced to be executed in Inverlochy in 1752.¹⁴⁸ He was executed at the Old Castle of Inverlochy, a mile north of Fort William. This location was chosen as it was not only geographically close to the Fort but also because the area was a centre of the Camerons, his relations and kinsmen, and thus had more potential deterrent value than execution at the common place in Inverness. A report of his execution praised the pains taken by the troops in the Highlands to apprehend the "great numbers of these villains" in the area and hoped the success they achieved would finally put an end to the "wicked practice".¹⁴⁹ Crime scene executions for cattle theft were not only reserved for Inverlochy. Donald Bain was condemned at Perth for multiple instances of

¹⁴⁷ *Scots Magazine*, Monday 7 July 1755, p. 39.

¹⁴⁸ NAS JC11/16/247.

¹⁴⁹ *Derby Mercury*, Friday 17 July 1752, p. 1.

cattle and horse theft in the area surrounding Kinloch-Rannoch. Witnesses told the court how he dressed in full Highland plaid when committing the crimes and had attempted to charge them for the return of their property. He was executed in the village of Kinloch-Rannoch on a “conspicuous eminence” in August 1753.¹⁵⁰

Executions in the 1780s

Between 1780 and 1789 there were 79 executions in Scotland, a level not reached in a ten yearly period since the post-1745 increase. Table 1 demonstrates this marked increase, especially when compared to only 35 executions in the preceding decade of the 1770s and 32 in the 1790s, presenting a similar pattern to the earlier peak. Beattie’s figures show that there was also an increase in capital convictions and executions in England after 1782 and that in Surrey there were more offenders executed in the year 1785 than in any other in the second half of the eighteenth century.¹⁵¹ From September 1782 the government was determined that no one convicted at the Old Bailey of robberies or burglaries that included a degree of cruelty would be pardoned. In addition, Devereaux has shown that between 1775 and 1779 there was an average of 34 executions per year in London but the figure rose to 47 between 1780 and 1784 and to nearly 80 by the mid-1780s before dramatically retreating.¹⁵² While the figures were still markedly lower in Scotland, there were examples of the newspapers highlighting the increased numbers sent to the scaffold. For example, in June 1785 the *Caledonian Mercury* lamented that there had been six criminals executed in Glasgow in the previous twelve months.¹⁵³ However, when reporting upon the sentence of death passed against William and John Haugh for shop breaking and theft in February 1786, the newspaper stated that the court might have the satisfaction to reflect that in discharging their duty they were showing mercy to the public at large.¹⁵⁴

¹⁵⁰ NAS JC11/17/239.

¹⁵¹ Beattie, *Crime and the Courts*, p. 584.

¹⁵² Simon Devereaux, ‘Imposing the Royal Pardon: Execution, Transportation and Convict Resistance in London, 1789’, *Law and History Review*, Vol. 25, (2007), pp. 101-138, p. 120.

¹⁵³ *Caledonian Mercury*, Monday 13 June 1785, p. 3.

¹⁵⁴ *Caledonian Mercury*, Wednesday 8 February 1786, p. 3.

The aftermath of the '45 saw executions for particular property offences based upon the context, location and the evident links to the difficulties in permanently stabilising northern Scotland. However, the chapter will argue that the increase in executions in the 1780s can be placed more within the wider British context. Firstly, the demobilization of large numbers of the armed forces following major wars had been cause for concern earlier in the eighteenth century in England but had not been an evident concern in Scotland. However following the American War of Independence (1775-1783) a marked proportion of offenders were stated to have either been late soldiers and sailors or part of army regiments billeted in Edinburgh, Glasgow and Inverness. Furthermore, the outbreak of the American war had brought an end to the penal option of transporting British convicts to the American colonies. This chapter will argue that the removal of this secondary punishment was of crucial importance to the increase in capital convictions for property offences, particularly by the turn of the 1780s as there were large numbers of offenders still awaiting sentences of transportation that had been passed after 1775 in the Scottish places of confinement. Thus the courts could not continue to impose the punishment at the same level. Within this table 6 shows that, although the number of executions rose in the 1780s, when analysed within the total number of capital convictions, 65.8 per cent were executed. Unlike the higher percentage earlier in the century, the level in the 1780s remained similar to that of the preceding decade. This suggests that there was not the desire, more evident in the earlier period, to send large numbers to the scaffold.

In times of war large numbers of young men were sent abroad helping to drain some of the labour surplus in major cities and producing work for those who were left. However at the coming of peace time, and the returning of the armed forces, levels of property crime in particular increased. Hay stated that the greatest pressure on the poor could be expected when dearth in food supply and demobilization coincided. This occurred in England in 1783 as he estimated that 20 per cent of the population were destitute and the second largest army of the eighteenth century was paid off. In turn, this year saw the greatest percentage increase in indictments for theft in Staffordshire

and the Home Circuit counties.¹⁵⁵ Similarly Beattie has shown that, compared to the period 1776 to 1782 when 29 (31.2 per cent) of 93 people sentenced to death were executed in Surrey, the period 1783 to 1787 saw 64 (49.2 per cent) of 130 people capitally convicted executed. This was an average of 12.8 executions per year which fell to 5.3 after 1788 until another increase at the turn of the nineteenth century, associated with recruitment for the French Revolutionary Wars.¹⁵⁶ Unlike the earlier fears of crime and demobilization that had occurred in England in the mid-eighteenth century but were not evident in Scotland, the 1780s increase in capital convictions was more comparable.

After the 1707 Union the Scottish army and navy merged with those of England to form the new British Army. From the mid-eighteenth century the army began to increasingly recruit from Scottish regiments such as the Scots Guards but also a newer regiment of Highlanders. During the major wars of the second half of the eighteenth century the Scots played an influential role in the British army.¹⁵⁷ In the 1780s, following the American War, soldiers made up a notable proportion of the increased numbers of capital convictions, especially those billeted in Edinburgh and Glasgow. Of 120 capital convictions between 1780 and 1789, 19 (15.8 per cent) were stated to have been a part of the army or the navy and 17 of these occurred after the war's end in 1783. All of the convictions were for property offences; 12 robberies, six instances of house or shop breaking and theft and one case of forgery. As a result there were ten executions and nine remissions. Interestingly, in three of the remissions the condition stipulated was their entering into the armed forces and in a further four they were to be set at liberty, presumably under both circumstances the men would have re-joined their regiment. An example of this was the case of James McMoin who had been condemned at Glasgow for robbery. He had committed the crime with three of his fellow soldiers but was believed to be the principal actor. He had already been taken before a court martial and received part of a sentence of 800 lashes. Therefore,

¹⁵⁵ Hay, 'War, Dearth and Theft in the Eighteenth Century', p. 145.

¹⁵⁶ Beattie, *Crime and the Courts*, pp. 532-533.

¹⁵⁷ For a more extensive study of Scottish soldiers in the British army see Steve Murdoch and A. Mackillop (eds.), *Fighting for Identity; Scottish Military Experience c. 1550-1900* (Leiden: Brill, 2002).

following his capital conviction before the circuit court, he had been recommended mercy.¹⁵⁸

The outbreak of the American War meant the end of the penal option of transporting criminals to the American colonies. Convict transportation to Australia did not immediately become an alternative destination as the First Fleet did not embark until 1787-88. Ian Donnachie stated that prior to the 1780s transportation had been used relatively infrequently by the Scots. Even after the establishment of transportation to Australia he estimated that the Scots made up just over 5 per cent of convicts sent from Britain and Ireland.¹⁵⁹ However this seemingly low proportion of offenders is arguably more reflective of the lower numbers tried by the Scottish courts for capital or transportable offences rather than an aversion to the use of the punishment as in Scotland the temporary cessation of the penal option of transportation did have a marked effect on levels of capital punishment. In terms of the Scottish courts sentencing transportation, they continued to sentence the punishment even after the outbreak of the war in 1775, which meant that the places of confinement were filled with offenders waiting to be sent to London. However by the turn of the 1780s there was an evident decrease of the sentence, perhaps due to the realisation that the places of confinement were already under pressure from offenders awaiting transportation. The courts' sentencing of transportation would not increase again until well into the 1790s. Therefore, the need for alternative punishments that fell short of the severity of the death sentence in the 1780s led to an increase in banishment from Scotland as well as a less dramatic increase in prison sentences for some property offences that would have most likely carried a sentence of transportation previously. Similar problems were facing authorities in England and in 1786 the *Gentlemen's Magazine* included a petition sent to the King from the Lord Mayor and Alderman of the city of London. They complained of the interruption to transportation and the fact that more convicts, who were supposed to be sent abroad,

¹⁵⁸ NAS JC13/24/67.

¹⁵⁹ Ian Donnachie, 'Scottish Criminals and Transportation to Australia, 1786-1852', *Scottish Economic and Social History*, Vol. 4, (1984), pp. 21-38, p. 22.

were either at large or confined in the prisons. They blamed this “dreadful accumulation” for the increase in crime “so heavily felt and so justly complained of”.¹⁶⁰

In the 1780s there were 79 offenders executed in Scotland. In 73 (92.4 per cent) of the cases they had been convicted of a property offence. This was the highest percentage of the total executions made up by property offences across the period 1740 to 1834. Housebreaking and theft accounted for 34 of the total 79 executions. In the 1770s the crime made up only 17 per cent of the total executions compared to 43 per cent in this ten year period before falling to 12.5 per cent in the 1790s. A reading of the petitions for mercy sent to London highlighted that there was some debate over the severity of the death sentence for certain property offences. In the case of James Grant he was found guilty of housebreaking and theft but on account of “several alleviating circumstances” was recommended mercy.¹⁶¹ These circumstances were that he had returned the stolen property and had made a full confession to the court. Petitions from the judges Hallies and Erkgrove as well as from the magistrates of Aberdeen and members of Marischal College failed to secure him a pardon.¹⁶² In 1783 Alexander Mowat’s defence claimed that he had committed a single act of housebreaking and theft with no aggravations and called for the charge to be restricted so he would not face the death sentence. However the Advocate Depute answered that a single theft was capital in Scotland as in England.¹⁶³ It can be argued that, had the secondary punishment of transportation been a viable option, the charge would have been restricted prior to the commencing of the trial so he would face a sufficiently severe punishment that fell short of death.

In terms of other property offences, executions for cattle, horse or sheep theft witnessed a slight increase in the 1780s after they had gradually decreased in the 1760s and 1770s. In addition, executions for robbery increased from eight in the 1770s to 14 in the 1780s. However, proportionately the percentage they made up of the total executions fell from 23 per cent in the 1770s to 18 per cent in the 1780s, arguably due to the increased executions for housebreaking and theft. As offenders

¹⁶⁰ *Gentlemen’s Magazine and Historical Chronicle*, Vol. 56 (London: 1786), p. 264.

¹⁶¹ NAS JC11/38/27.

¹⁶² TNA HO102/51/267; HO102/51/365.

¹⁶³ NAS JC7/41/411.

accused of robbery were less likely to be able to petition the court or have their charge and punishment restricted prior to the commencing of their trial, the limited availability of transportation arguably did not have the same effect of increasing the number of executions for the crime as it did for housebreaking and theft. However, in the case of James Andrew, it may have gone some way to preventing him obtaining a conditional pardon. He was condemned in Edinburgh in February 1784 for robbing John Dykes of a silver watch in Hope Park, near Edinburgh. The jury had strongly recommended mercy due to his relatively young age of 21 and possibly as the robbery had not involved any great degree of violence against the person.¹⁶⁴ When reporting upon his execution the *Caledonian Mercury* stated that they could not fail to mention “to the honour of the magistrates, and as an instance of real humanity, that the execution was delayed considerably beyond the usual time in hopes of a reprieve being received”.¹⁶⁵

The desire, at least at a more local level, for mercy to be shown was also evident in various petitions sent to London in this period. William Tough was charged with housebreaking and theft before the circuit court in Aberdeen and despite the removal of part of the charge in the libel, in order to mitigate his case, he was sentenced to death in October 1788.¹⁶⁶ The subscribers of a petition sent from Aberdeen to London offered to pay the expenses of having him sent abroad instead.¹⁶⁷ Although this offer does not appear to have been taken up, his execution was delayed and he was pardoned on condition of transportation in March 1789. Jean Craig was one of seven women capitally punished between 1780 and 1789. She had stolen from a bleaching field in 1784 and was executed in Aberdeen. A petition from John Grieve, an official in Aberdeen, had been sent to the Lord Advocate asking him to support it when it was sent to London. He highlighted that there was already another woman in Aberdeen under the sentence of death, Elspeth Reid for housebreaking and theft, and stated “I would fain hope that the execution of one might somewhat suffice the

¹⁶⁴ NAS JC7/42/67. Note that in Scotland there were 15 jury members and a majority decision was sufficient to return a verdict.

¹⁶⁵ *Caledonian Mercury*, Wednesday 4 February 1784, p. 3.

¹⁶⁶ NAS JC11/38/63.

¹⁶⁷ TNA HO102/51/497.

public”.¹⁶⁸ As previously discussed, women across the entire period 1740 to 1834 were predominantly executed for murder. However in the 1780s there were seven women executed for property offences and, while most of their cases were aggravated by their being found to be ‘habute’ thieves, we can question if at least some of them would have been remitted on condition of transportation had it been a suitable option.

In addition to an analysis of those executed following the passing of the death sentence, it is now beneficial to turn to an investigation of the 41 people who received a pardon in the 1780s. Table 8 demonstrates that 39 (95.2 per cent) of these remissions were for property offences. This figure presented the highest proportion of remissions for property offences across the entire period under investigation in this thesis. 24 of the pardons were on the condition of transportation, two on condition of banishment, seven were to be set at liberty and eight on condition of entering either the army or the sea services, seven of which occurred in 1780-81, during the latter years of the American War. A reoccurring argument for mercy was the youth of the condemned as the predominant age range of those condemned for property offences was between 20 and 24. In his investigation of the age of offenders charged with the crimes of burglary and housebreaking before the English Home Circuit between 1782 and 1800, King has highlighted the similarly large proportion of offenders that were aged between 17 and 26.¹⁶⁹ Robert Ligget (20) and John Carmichael (23) had been condemned in Dumfries for housebreaking and theft in which they stole six gallons of spirits. In a letter to the Home Office one of the judges, Robert Macqueen, stated that the crime was certainly capital yet the jury had recommended them to mercy on account of their age. He added that if His Majesty wanted to extend mercy it should only be to Ligget as the younger of the two.¹⁷⁰ Similarly, following the conviction of Henrietta Faulds in 1784, a petition sent from Glasgow stated that thousands of its inhabitants wished for the extension of mercy. A further petition had begged for the assistance of the Lord Advocate in securing a pardon and having it sent express to

¹⁶⁸ TNA HO102/50/11.

¹⁶⁹ King, *Crime, Justice and Discretion*, p. 291.

¹⁷⁰ TNA HO102/52/15.

Glasgow at the town's expense.¹⁷¹ She was pardoned on condition of banishment on 25th November. Even during times of peak capital convictions there was not a desire, especially within local areas, to send everyone to the scaffold. Furthermore, in at least six cases where the condemned had been remitted on condition of transportation they subsequently received further remissions of this sentence between 1787-89 and instead were banished or set at liberty.

Executions in the Early Nineteenth Century

Table 1 demonstrates that in the second decade of the nineteenth century the number of executions doubled compared to the previous decade. Furthermore, unlike the subsequent reduction in the numbers in the earlier periods, the 1820s saw a continuing increase. The potential explanations for this increase will be analysed through an investigation of the geography of capital punishment in this final period and the predominant offences sending criminals to the scaffold. The increase and density of population growth across Scotland's central belt was a key factor that contributed to the increased proportion of capital convictions and resulting executions in the area. However, the chapter will demonstrate that, while the numbers of people executed increased in Edinburgh, the number per 100,000 head of Scotland's population did not witness the same increase evident in the figure for the Western Circuit which covered an area that had experienced rapid population growth. Within this, table 4 demonstrates that in Edinburgh executions per 100,000 head of Scotland's population remained between 1.1 and 1.7 across the period from the mid-eighteenth century to the late 1820s. It was similarly the case in the Southern and Northern circuits, after the mid-eighteenth century peak, with both having consistently low figures below 1.0. However the figure for the Western Circuit rose from 0.2 in the mid-eighteenth century to 1.7 by the 1820s, with an increase of 0.5 occurring between 1810 and 1829. This chapter will argue that when we break down the figures for the Western Circuit it is clear that property offences accounted for much of this increase.

When demonstrating the pattern of capital convictions and executions in England, Emsley showed that for London and Middlesex capital convictions markedly

¹⁷¹ TNA HO102/50/126; HO102/50/131.

increased following the end of the Napoleonic Wars but the number of executions did not drastically increase. He argued that this widening gap between capital convictions and executions, while coming at a time when the Bloody Code faced increasing criticism by reformers, may also have been recognition, on the part of the authorities, that it would not be acceptable to execute so many individuals.¹⁷² In a similar vein, Gatrell highlighted that in 1785, during the crime wave of the 1780s, of the 153 criminals capitally convicted at the Old Bailey, 85 were executed. He argued that, while it may have been plausible to execute 56 per cent of the total offenders capitally convicted in 1785, by the 1820s this proportion could not be sustained.¹⁷³ Thus he cited the rising death sentences of the early nineteenth century as a primary reason why “the system unravelled itself and became unworkable”.¹⁷⁴ However this chapter provides a reinforcement of the argument briefly made by Crowther, namely that in Scotland, rather than keeping executions to a socially acceptable level in the early nineteenth century, as Gatrell’s argument suggested, the unprecedented number of capital convictions meant that it was believed to be necessary to keep up the level of exemplary punishments.¹⁷⁵ Table 6 shows that in Scotland the proportion of offenders capitally convicted who were subsequently executed was consistently 60 per cent or above by the 1770s and, if we remove the numbers of those executed and remitted for treason, the figure was still 52 per cent in the 1820s.¹⁷⁶ This chapter will now turn to investigate the factors contributing to both the increased levels of capital convictions and the continuity in the proportion executed.

Glasgow’s population had risen from 32,000 in 1755 to 147,000 in 1821 and the accompanying industrial growth and urbanisation has been described as a “cumulative and self-reinforcing growth that produced the greatest of Britain’s provincial cities”.¹⁷⁷ When investigating the industrialisation and demographic change in Glasgow in the first half of the nineteenth century Andrew Gibb has pointed

¹⁷² Emsley, *Crime and Society in England*, pp. 265-267.

¹⁷³ Gatrell, *Hanging Tree*, p. 544.

¹⁷⁴ *Ibid.*, p. 103.

¹⁷⁵ Crowther, ‘Crime, Prosecution and Mercy’, p. 233.

¹⁷⁶ The figures for the 1820s differ as there were three executions for treason and 21 remissions. If we remove these figures from the totals the percentage of executions rises to 52 per cent. In addition, the period 1830-34 saw 70 per cent of those convicted executed. This was arguably due to the fact that by this time more capital convictions were for murder and thus were less likely to be pardoned.

¹⁷⁷ Turnock, *Historical Geography of Scotland*, p. 166.

towards rapid urbanisation due to population growth and migration from other areas of Scotland as well as Ireland. Furthermore, he highlighted that between 1814 and 1830 the living standards of the unskilled workforce fell markedly in the face of overcrowding and inadequate nourishment.¹⁷⁸ In addition, Lenman highlighted that the wartime levels of income for handloom weavers, particularly those working on the plainer fabrics that accounted for the majority of their production, fell sharply after 1815 and did not recover.¹⁷⁹ Within this, the number of people executed for property offences in Glasgow equalled and then surpassed the figure for Edinburgh. In their recent study of the regional variations in the implementation of capital punishment for property offences in the third quarter of the eighteenth century, King and Ward argued that executions for property offences were markedly higher in and around the central urban areas than on the peripheries in Britain.¹⁸⁰ The mid-eighteenth century peak in executions provides a caveat to their findings, as capital punishment was used to further punish the peripheral north. However this chapter's analysis of the early nineteenth century provides a reinforcement of their centre-periphery dichotomy. Despite covering roughly one seventh of the geographical area of Scotland, the central belt contained the highest density of population and industry and the area accounted for the highest proportion of executions for property offences.

Of the total capital convictions at the Western Circuit between 1810 and 1819, 36 (92 per cent) were for property offences and between 1820 and 1829 the figure was 46 (88.5 per cent). Table 9 shows the proportion of those capitally convicted for property offences executed in Scotland as a whole. The 1820s evidently witnessed the lowest percentage of convicted property offenders sent to the gallows despite the decade having the highest number of capital convictions. In Edinburgh, of 36 capital convictions for property offences between 1810 and 1819, 26 (72.2 per cent) were executed. However of 42 capital convictions in the 1820s only 14 (33.3 per cent) were executed. This pattern fits with the arguments of Gatrell and Emsley discussed above,

¹⁷⁸ Andrew Gibb, 'Industrialisation and Demographic Change: A Case Study of Glasgow 1801-1914', in Richard Lawton and Robert Lee (eds.), *Population and Society in Western European Port Cities c. 1650-1939* (Liverpool: Liverpool University Press, 2002), pp. 37-73, p. 46.

¹⁷⁹ Bruce Lenman, *Integration and Enlightenment Scotland 1746-1832* (Edinburgh: Edinburgh University Press, 1981), p. 152.

¹⁸⁰ King and Ward, 'Rethinking the Bloody Code'.

namely that in the face of rising capital convictions, the proportion of offenders who were executed fell, particularly for certain property offences. However the figures for the Western Circuit do not support this argument and provide a notable caveat as they were markedly higher with 55.6 per cent of capital convicted property offenders executed between 1810 and 1819 and 63 per cent in the 1820s. Table 10, showing executions for property offences per 100,000 of Scotland's population by circuit, demonstrates that by the early nineteenth century the figure for the Western Circuit, notably Glasgow, equalled and then surpassed that for Edinburgh. In contrast, the figures presented in table 11 for murder in the Western Circuit remained very low at 0.1, behind that of Edinburgh and the Northern Circuit.

Table 10: Executions for Property Offences per 100,000 Head of Scotland's Population.

	Total		Edinburgh		Northern		Western		Southern	
	Ex.	Per head of pop.	Ex.	Per head of pop.	Ex.	Per head of pop.	Ex.	Per head of pop.	Ex.	Per head of pop.
1750-59	39*	3.1	6	0.5	27	2.1	2	0.2	4	0.3
1800-09	22	1.7	10	0.6	3	0.2	6	0.4	3	0.2
1810-19	59	3.7	26	1.4	5	0.3	20	1.1	8	0.4
1820-29	52	2.5	14	0.7	4	0.2	29	1.4	5	0.2

*Note there were an additional four executions as a result of trials before the sheriffs in the 1750s which makes the total figure 43. However these additional cases are not included here as they were conducted in various areas.

Source: Figures compiled using Justiciary Court records and population statistics provided in Kyd, *Scottish Population Statistics*, p. xvii and the *Enumeration of the Inhabitants of Scotland* (Glasgow: 1823).

Table 11: Executions for Murder per 100,000 Head of Scotland's Population.

	Total		Edinburgh		Northern		Western		Southern	
	Ex.	Per head of pop.	Ex.	Per head of pop.	Ex.	Per head of pop.	Ex.	Per head of pop.	Ex.	Per head of pop.
1750-59	22	1.7	8	0.6	10	0.8	1	0.08	3	0.2
1800-09	14	0.9	7	0.4	3	0.2	3	0.2	1	0.06
1810-19	13	0.7	5	0.3	3	0.2	2	0.1	3	0.2
1820-29	25	1.2	14	0.7	6	0.3	3	0.1	2	0.09

Source: Figures compiled using Justiciary Court records and population statistics provided in Kyd, *Scottish Population Statistics*, p. xvii and the *Enumeration of the Inhabitants of Scotland* (Glasgow: 1823).

A key source utilised to gain a degree of understanding of crime, or more specifically the believed prevalence of crime, in this period is the newspapers. Until the late eighteenth century crime reporting in the Scottish newspapers often only contained the basic facts of the offence with little of the journalistic opinion that can be found in the London newspapers. However, by the early nineteenth century, the newspapers offered a greater volume of opinion regarding the need for exemplary punishment in the face of a believed rise in crime. Kilday argued that, by this period, the newspapers gave an alarming impression regarding the nature and frequency of crime, even though the sheer number of indictments remained lower than in other countries. In turn, she argued that this distortion played a key part in the “burgeoning misconception surrounding Scottish crime.”¹⁸¹ From a reading of the newspapers it is evident that, despite the reporting of increased numbers sent to the scaffold, there was an acknowledgment that Scotland was not the forerunner in this trend. However it is also evident that certain crimes were portrayed as being committed to an unprecedented degree due to the numbers sent to the gallows. In reporting upon the case of two men executed for robbery in 1815 the *Scots Magazine* echoed the sentiment of the Lord Justice Clerk in passing the death sentence, namely that the

¹⁸¹ Kilday, ‘Contemplating the Evil Within’, p. 159.

most vigorous administration of justice was required in order to curb the crime which was “unknown formerly in this part of the United Kingdom.”¹⁸²

A reoccurring theme and contemporary fear expressed in the court records, but even more so in the newspapers, was the youth of many of those receiving capital punishments. In October 1817 the *Scots Magazine* commented that it was a remarkable circumstance and a deep regret that in one month it had been necessary to execute 11 people and most were under the age of 30.¹⁸³ Using the enumeration statistics available for 1821 it is possible to calculate that in most areas, including the main cities of Edinburgh, Inverness and Aberdeen and the industrial areas in and around Lanark, which included Glasgow, as well as large areas of northern Scotland including Caithness, Ross and Cromarty, about a quarter of the male population was aged between 15 and 30 with a further 9-13 per cent aged between 30 and 40.¹⁸⁴ Of the 154 people executed in Scotland between 1810 and 1829 it is possible to calculate, from the ages that were provided, that at least 60 per cent were aged between 15 and 25 and a further 12 per cent were aged between 26 and 30. In March 1812 Hugh MacDonald, Neil Sutherland and Hugh Mackintosh were indicted for several robberies, with Mackintosh additionally charged with murder. The crimes were part of riots that had occurred in Edinburgh in December 1811, in which “idle apprentice boys...knocked down, robbed and wantonly abused almost every person who had the misfortune to fall in their way”. Amidst attempts to quell the unrest Dugald Campbell, a police watchman, was beaten to death. The magistrates of the city offered monetary rewards for the apprehension of the culprits, in particular the murderer. Of the arrests made there were five men brought to trial with others acting as prosecution witnesses.

The youth of the prisoners, especially MacDonald who was 15, created a strong sensation in the court. All three were sentenced to be executed on 22nd April 1812 on the High Street in Edinburgh opposite the stamp office, close to where the murder had occurred, with the body of Mackintosh to be delivered to Alexander Monro for dissection.¹⁸⁵ George Napier and John Grotto were brought before the court a couple

¹⁸² *Scots Magazine*, Sunday 1 January 1815, p. 31.

¹⁸³ *Scots Magazine*, Saturday 1 November 1817, p. 88.

¹⁸⁴ *Enumeration of the Inhabitants of Scotland*, p. 52.

¹⁸⁵ NAS JC8/8/266.

of days after the sentencing of the three men but pleaded guilty to one robbery each. The Advocate Depute restricted the charge so they would face a punishment short of the death sentence and they were to be transported for 14 years. In a report sent to the Secretary of State detailing the case David Boyle, the Lord Justice Clerk, stated that, due to the alarming nature of the crime and the fact that it had occurred on the heavily frequented streets of Edinburgh, he could see no reason for the law not to take its course.¹⁸⁶ Following their execution it was reported that there had been evident sympathy for them but the article added that their execution was intended as a dreadful and lasting example and that this motivation was “the only justification of so strong a measure”.¹⁸⁷ Following this case the category of ‘murder and robbery’ was added to the return of persons committed to trial in Scotland that were to be presented to parliament for the years between 1811-14, again demonstrating the wide spread attention the circumstances of the crime and its aftermath had attracted.¹⁸⁸

In his work on the first half of the nineteenth century Donnachie has demonstrated that crimes were committed overwhelmingly by males, the vast majority of whom were under the age of 30.¹⁸⁹ This chapter supports this argument as it has found that, instead of serving as a dreadful but lasting example, the above case was to become one of a number in the early nineteenth century where not only the fears about the prevalence of crime but also the youth of those involved would be highlighted. When passing the death sentence against John McDonald (20) and James Williamson Black (18) in 1813 for murder and robbery the judges delivered their opinions on the case at length. They expressed astonishment that in a country “so long distinguished for knowledge and virtuous conduct” so many instances of youthful depravity should have lately occurred. Similar to the case discussed above, they lamented that they were obliged to “recur to those more striking and awful punishments which our law enjoins”.¹⁹⁰ As well as an increase in the number of executions, this period also witnessed cases where three or even four criminals were executed for the same property offence. This again further serves to demonstrate the

¹⁸⁶ TNA HO102/55/66.

¹⁸⁷ *Aberdeen Journal*, Wednesday 29 April 1812, p. 3.

¹⁸⁸ *Parliamentary Papers*, Vol. XI (163) 1814-1815.

¹⁸⁹ Donnachie, ‘The Darker Side’, p. 20.

¹⁹⁰ NAS JC8/9/232; *Scots Magazine*, Monday 7 June 1813, p. 36.

determination to make more stark examples in the early nineteenth century as there were no examples of similar occurrences in the eighteenth century.

Richard Smith, aged 16, was found guilty of housebreaking and theft and despite the jury's recommendation to mercy on account of his youth he was executed in May 1820.¹⁹¹ Similarly James Ritchie, aged 17, was condemned in Aberdeen for stealing 30 sheep from the parks of Gordon Castle. Despite a recommendation to mercy and zealous endeavours on the part of the local clergy, university professors and the Duke of Gordon to obtain a remission Lord Sidmouth, the Secretary of State, refused on account of the magnitude of the crime.¹⁹² There are numerous other examples of the jury recommending an offender to mercy where the judges in the cases or the Lord Justice Clerk, in correspondence with the Home Office, would not support the recommendation due to the believed need to make more severe examples. In 1817 John Larg and James Mitchell were charged with having broken into the house of William McRitchie and stolen two papers that they believed to be bank notes, although it was later discovered that they were worthless papers of no value. When their defence attempted to object to the charge the prosecutor answered that in cases such as theirs the value of the thing stolen was irrelevant. Despite finding them guilty of the crime, the jury had recommended mercy as no personal violence had been used against the occupants of the house. However the judges stated to the court that they were at a loss to conceive this recommendation as the threat posed by the offenders, in possession of a pistol, constituted personal violence as it was against a man in his own home. They added that any hopes of a pardon were "precarious indeed".¹⁹³

Table 9 demonstrates that the percentage of property offenders who were executed fell in the 1820s, despite the fact that the decade witnessed the highest proportion of capital convictions for property offences. These figures would therefore reinforce the argument made by Gatrell for England, that the authorities could not execute large proportions of property offenders even in the face of rising convictions

¹⁹¹ NAS JC13/48/33.

¹⁹² *Scots Magazine*, Monday 1 June 1818, p. 85.

¹⁹³ NAS JC8/11/269; *Caledonian Mercury*, Thursday 23 January 1817, p. 4.

and increased press attention on the supposed prevalence of crime. This was shown in the case of Charles McLaren (14), Thomas Grierson (13) and James McEwan (13) who had been sentenced to be executed at the common place in Edinburgh on 12th February 1823 for housebreaking and theft.¹⁹⁴ They had been unanimously recommended to mercy by the jury on account of their youth and a few days before the scheduled date of execution the Lord Justice Clerk reported to the High Court that the full details of the case had been sent directly to Home Secretary, Robert Peel. He added that he had no doubt a remission would arrive for them but, owing to the state of the roads due to the weather, six London mails were running late. Therefore it was indispensable for the court to use its authority to stay their execution until 26th February.¹⁹⁵ A remission finally arrived for them and they were to be transported for life.¹⁹⁶ This confidence that they would be pardoned goes some way to explaining why they were capitally convicted at all, instead of a restriction to the charge earlier in the court proceedings. At a time of the need to make increased use of capital punishment, the sentencing of these three boys to death made a poignant statement, yet the court clearly intended their subsequent remission.

Hanging at the Scene of the Crime

John Watt was convicted for housebreaking and theft by the circuit court in Perth and was sentenced to be executed in Dundee in June 1801. When reporting upon the execution the *Caledonian Mercury* stated that “a scene like this, at all times and all places awful and impressive must be particularly so in Dundee, which has not witnessed anything of a similar nature for perhaps a century”. The article continued “we understand it is the determination of the Lords of Justiciary that in future all criminals who are sentenced to die shall be executed in the places where they committed the crimes for which their life is forfeited. This is certainly a wise and salutary measure and we have no doubt will be followed by the most beneficial consequences”.¹⁹⁷ While this may have been slightly ambitious, the period between 1800 and 1834 saw a notable increase in crime scene executions in Scotland. The

¹⁹⁴ NAS JC8/17/7.

¹⁹⁵ NAS JC8/17/21.

¹⁹⁶ TNA HO104/6/180.

¹⁹⁷ *Caledonian Mercury*, Monday 15 June 1801, p. 3.

argument here is that, as the sheer numbers of executions rose, there was an increased consciousness regarding the dangers of crime and this was evident in the sentences meted out by judges and in the newspapers' reporting of the cases. The portrayal of certain crimes, such as property offences accompanied with violence and particularly heinous murders were continually dwelled upon to justify the need for more severe punishment in the form of crime scene executions.

Chapter three will demonstrate that in the late eighteenth and early nineteenth centuries there were marked changes made to the carrying out of public executions. Of particular relevance here are those relating to their location. The chapter will provide a discussion of the courts predominantly sentencing executions to occur at the common place, either in Edinburgh or the circuit city in which the trial was held. However, between 1740 and 1834, there were 53 criminals who were instead ordered to be executed at the scene of their crime or within the town in which it was committed. Steve Poole has sought to understand the purpose and longevity of crime scene executions in England between 1720 and 1830, which were seemingly at odds with modern concerns for efficiency. His figures show that there were at least 211 people taken in procession to the scene of their crime to be hanged, with more than half having been sentenced by courts in the south east of England.¹⁹⁸ In terms of the chronology of the executions in England, there was a decline after about 1790. However sporadic decisions to execute at the scene of the crime did continue in some regions into the first third of the nineteenth century until the final case in England in 1830.¹⁹⁹ This chapter will demonstrate that Scotland presents a reverse pattern as decisions to execute criminals at the scene of their crime were more concentrated in the first third of the nineteenth century, with 32 of the total 53 cases having occurred between 1801 and 1834. Three occurred between 1800 and 1809, 16 between 1810 and 1819, nine between 1820 and 1829 and four between 1830 and 1834. 16 of the executions were for murder, in one case it was perpetrated with rape and in a further

¹⁹⁸ Steve Poole, 'For the Benefit of Example: Crime Scene Executions in England, 1720-1830', in Richard Ward (ed), *A Global History of Execution and the Criminal Corpse* (Basingstoke: Palgrave Macmillan, 2015), pp. 96-134, p. 104.

¹⁹⁹ Ibid., p. 101. For a more detailed study of England's final crime scene execution see Steve Poole, 'A Lasting and Salutory Warning: Incendiarism, Rural Order and England's Last Scene of Crime Execution', *Rural History*, Vol. 19, (2008), pp. 163-177. Comparatively, the last crime scene execution in Scotland occurred in 1841, although the practice did decline following 1834 and the end of the period under investigation here.

two with robbery. The remaining 16 were for property offences; eight for robbery, three for housebreaking and theft and five for stouthrief. This chapter will now turn to question why crime scene executions increased in the early nineteenth century. It will highlight some contemporary arguments put forward in the courts and the newspapers, namely that these executions needed to be used more frequently in the face of rising numbers of capital convictions due to the need to add some further severity to the punishment of death.

Donnachie demonstrated that, within the overall number of criminal investigations, property offences rose from making up slightly more than half the total number in 1810 to 75 per cent by 1830, with the period between 1810 and 1830 showing the biggest increase from 55 to 75 per cent.²⁰⁰ The parliamentary returns for Scotland available for this period also demonstrated how the overwhelming majority of those committed for trials had committed property offences.²⁰¹ Furthermore, this study has found that property offences made up 60 per cent of the total number of executions between 1800 and 1809, rising to 80 per cent between 1810 and 1819. This ten year period also saw the most crime scene executions for property offences with nine. However the percentage decreased to 63 per cent between 1820 and 1829 and to 28 per cent in the four years between 1830 and 1834, where murder made up 66 per cent of the total. Again, between 1820 and 1834 there were nine crime scene executions for murder as opposed to six in the preceding 20 years. King's work on rising Scottish homicide rates between 1800 and 1860 demonstrated that between 1805 and 1814 there was an average of 1.0 recorded murder per 100,000 of Scotland's population. By the 1830s this had risen to 1.75 and by the 1840s to 2.6.²⁰² Table 11 shows that executions for murder per 100,000 of Scotland's population were 1.2 in the 1820s, the highest figure since the mid-eighteenth century. In the 1820s there were 25 people executed for murder and in the first four years of the 1830s alone there were 22 people executed for murder. This coincided with the highest concentration of crime scene executions for murder which again points towards a determination on the part of the authorities to make more stark examples.

²⁰⁰ Donnachie, 'The Darker Side', pp. 9-10.

²⁰¹ *Parliamentary Papers*, Vol. XI (163) 1814-1815; *Parliamentary Papers*, Vol. XXXV (499) 1831-1832.

²⁰² King, 'Urbanization, Rising Homicide Rates and the Geography of Lethal Violence', p. 237.

One of the prevalent motivations in sentencing criminals to be executed either at the immediate spot of their crime, or within the close vicinity of a small town, was to send out a stark deterrent against crime. In any public execution a key component of the whole spectacle was the crowd. While executions in the larger Scottish cities of Edinburgh or Glasgow may not have been as high in number as their English counterparts there could be up to five or six in a year, making them a semi-regular but not excessive occurrence. However, in many of the cases examined here, the execution was the first to occur in the area in decades or even beyond living memory. John Watt was the first person executed in Dundee in 1801 for perhaps a century. Similarly, when John Gibson was sent to the gallows for the murder of his wife in Hawick in 1814, the *Caledonian Mercury* reported that an immense crowd had gathered as this was the first time an execution had taken place in that town.²⁰³ When John Craig and James Brown were executed in Paisley for stouthrief the *Aberdeen Journal* observed that since the days of witchcraft there had only been three melancholy exhibitions of this nature in Paisley.²⁰⁴ In the case of William Thomson, who was executed in Dalkeith for robbery in 1827, it was reported that while a large assemblage of people had come from outside the town to witness the execution, many of the locals “regarding the exhibition with feelings of horror and detestation, a similar scene not having been witnessed there for centuries, shut their places of business and manifested every indication of regret at their respectable town having been subjected to such degradation.”²⁰⁵ Similarly, the magistrates of Greenock had petitioned against the conducting of the execution of Moses McDonald there in 1812 and stated their firm conviction that “every beneficial consequence to that community which could be contemplated as the result of a public execution...will be equally, nay preferably, prompted by a commutation of his punishment from death to transportation”.²⁰⁶ In these cases the question of whether or not the motivation of making a deep impression upon the town was achieved is more complex. In one sense the inhabitants were so disgusted as to openly protest its being held there. However there were large crowds gathered, although, in the case of Thomson, most seemed to

²⁰³ *Caledonian Mercury*, Saturday 14 May 1814, p. 3.

²⁰⁴ *Aberdeen Journal*, Wednesday 4 November 1829, p. 4.

²⁰⁵ *Caledonian Mercury*, Saturday 3 March 1827, p. 3.

²⁰⁶ TNA HO102/55/232.

come from outside of the immediate area. In addition, the executions clearly impacted negatively upon their daily lives and thus made some impression upon them whether this was deterrence or annoyance. What is also clear is that the crowd in Edinburgh, perhaps more accustomed to public executions, showed a keen interest in the whole spectacle from the procession through to the execution in Thomson's case.

When passing the death sentence the judges would stipulate the time, date and location at which the public execution was to be carried out. It would then be signed, recorded by the court clerk and sent to the magistrates of a given area for them to see it put into execution. When offenders were to be executed at or near the scene of their crime the judges still had the discretion of stipulating the logistics of the events, but in some cases it was local sheriffs and magistrates who shaped the spectacle in practice. In 1828 Francis Cockburn was conveyed from the prison in Stirling, where he had been convicted for the murder of William Burt, to the location of his execution in Falkirk. However the decision was taken to drive the chaise in which he was conveyed through the small village of Camelon where he had relatives in order to heap greater disgrace upon the criminal.²⁰⁷ In addition, although the courts stipulated the execution locations, there were instances where the local authorities chose very specific spots upon which to erect the scaffold. John Gibson was sentenced to be executed in the town of Hawick in 1814 and the magistrates ordered the scaffold to be constructed on a green opposite the house in which he had stabbed his wife to death.²⁰⁸ Similarly, Duncan MacArthur was executed opposite his home upon the banks of Crinan Canal in 1804. As he had been convicted for murder his body was sentenced to be delivered for dissection. However, when local surgeon John Anderson declined to accept it, the sheriff made the decision to hand it over to MacArthur's relatives for burial rather than consulting the court.²⁰⁹ Furthermore, in a number of cases the procession of the criminal to the gallows involved the ceremonious handing over of the criminal from one set of local authorities to another if the places of confinement and execution were in different jurisdictions. For example, John Worthington was tried in Edinburgh in 1815 for three robberies he had committed

²⁰⁷ *Aberdeen Journal*, Wednesday 14 May 1828, p. 4.

²⁰⁸ *Caledonian Mercury*, Saturday 14 May 1814, p. 3.

²⁰⁹ *Caledonian Mercury*, Saturday 10 November 1804, p. 3.

upon a road leading out of Kilmarnock. He was found guilty and sentenced to be transmitted to Glasgow, then to Lanark and finally to Ayr to be detained until 17th February when he was to be taken to a convenient place near Symington Tollbar situated on the highway between Kilmarnock and Monkton and hanged.²¹⁰ On the day of his execution Worthington was handcuffed to a cart and accompanied by the sheriff of Ayr who travelled as part of the procession in a coach drawn by four horses as far as Flockbridge when he handed him over to the sheriff of Renfrew to continue on until he reached the place of execution. The whole proceedings were heavily guarded by a troop of cavalry and proved to be lengthy procedure which was rich in the symbolism of both local and national justice.²¹¹

Conclusion

To conclude, within the wider historiography of crime and punishment in the eighteenth and early nineteenth centuries, even that focused upon Britain rather than England alone, investigations of the Scottish experience have remained peripheral at best. Although Scotland's lower numbers of executions have been briefly acknowledged, this chapter has shown that the fluctuations in the use of capital punishment across this period required deeper analysis. The chapter has demonstrated that the punishment of certain crimes at certain times and in particular locations was rooted in a Scottish context, thus highlighting the unique Scottish experience. This was certainly the case during the peak numbers of executions following the defeat of the '45 where particular property offences, notably cattle theft, were punished with more vigour in northern Scotland. In addition, within the volumes of work focused upon the use of capital punishment in England in this period, times of peak numbers of executions, such as the mid-eighteenth century, the 1780s and the early nineteenth century, have been examined in detail. However this chapter provides the first exploration of the fact that Scotland also witnessed peak numbers of executions at the same time, thus offering the potential for comparison, especially in the 1780s and the early nineteenth century.

²¹⁰ NAS JC8/11/35.

²¹¹ *Caledonian Mercury*, Monday 20 February 1815, p. 3.

The increase in the use of capital punishment in the 1780s in England has been linked to the problems caused by mass demobilization. While this had been an issue in the 1740s in England it was not until the 1780s that Scotland faced a similar increase in the numbers of members of the armed forces littering the court records. In addition, following the removal of the penal option of transporting felons to the American colonies there were concerns north and south of the border regarding the overcrowding of the prisons. This chapter has shown that in Scotland, while the punishments of imprisonment and banishment from Scotland did increase for crimes of a potentially capital nature that would ordinarily have received a sentence of transportation, the lack of the penal option of transportation also contributed to the increase in capital convictions. In particular, capital convictions for property offences in this decade witnessed a marked increase compared to the decades before and after. However, the proportion of those subsequently executed did not witness the same increase. Furthermore, despite peak numbers of executions in the early nineteenth century, the proportion of those capitally convicted did not witness an increase. In this sense we can draw comparison with the difficulties facing the authorities in England pointed out by Gatrell and others.

In terms of attitudes towards crime, there have been studies of moral panics occurring in the English, and particularly the London, newspapers at various intervals in the eighteenth century. However crime reporting in Scotland remained fairly limited with the exception of sensational cases until the early nineteenth century. Despite the early nineteenth century witnessing an increase in the numbers executed, the proportion of offenders capitally convicted who were executed did not increase. Similarly, the figures of executions per 100,000 head of Scotland's population remained comparable to those of the mid-eighteenth century. However, as the newspapers tended to focus upon the sheer numbers sent to the scaffold, there was a reoccurring statement that the number of executions at this time was unprecedented and thus a serious concern that required consideration. Therefore this chapter has demonstrated that, in one sense, these reports did reflect the increased numbers of offenders sent to the gallows. Within this, in reporting extensively upon certain crimes such as robbery, and in discussing the numbers executed for the crime, the

newspapers highlighted the supposed need for more exemplary punishments. One believed means of adding severity to the punishment of death came in the form of crime scene executions. A potential explanation for the concentration of crime scene executions in Scotland in the early nineteenth century, which presented a reverse pattern to the English experience where these executions were waning by this period, was this believed need for more severity in the face of a supposed rise in capital crime. While this was a reoccurring justification for them, the multitude of reactions to them, from excitement to disdain, demonstrates that they did have some effect, whether this was the deterrent sought by the authorities or not remains questionable.

Chapter Three:

The Spectacle of the Gallows and the Changing Nature of Capital Punishment in Scotland.

This thesis is the first extensive investigation into the use of capital punishment in Scotland between 1740 and 1834. While chapter two provided a quantitative analysis of the implementation of the death sentence, the focus of this chapter is to qualitatively explore the carrying out of public executions in Scotland before progressing on to investigate the changing nature of capital punishment across the period. From an extensive gathering and analysing of the available sources offering qualitative details of the scene at the public execution, the opening section of the chapter will provide a discussion of the spectacle of the gallows. It will question the role of the key actors of the event, namely the condemned criminals themselves and the concourse of spectators gathered to witness them suffer the last punishment of the law. In doing so it will highlight the multitude of behaviours and responses the execution spectacle could generate in this period.

Following this exploration of the scene at the gallows, section two of the chapter will examine the changes made to the logistics of the public execution including those related to its location. In Edinburgh executions had been conducted at the Grassmarket following a procession from the tolbooth through the Old Town. However in 1785 they were moved closer to the tolbooth. At around the same time, and continuing into the early nineteenth century, Scotland's circuit cities and towns began to follow suit, relocating their common place of execution from urban peripheries to locations closer to their places of confinement. In addition, other traditional elements of the scaffold ritual were subject to adaptation. Notably there was a decline in the need for a lengthy procession to the place of execution which had historically been a focal part of the proceedings. Despite these changes the public execution continued to hold a pervasive attraction and drew large crowds throughout the period under investigation here.

The third section of this chapter will move on to examine the changes made to execution practices. While there has been little work focused upon Scottish execution

practices the chapter will draw upon the wider historiography discussed in chapter one and combine this with the previously unexplored primary material utilised here. By the mid-eighteenth century it was evident that the courts almost exclusively sentenced offenders to be hanged by the neck until dead and aggravated executions that inflicted prolonged pre-mortem suffering upon the condemned, more characteristic of the Early Modern period, had majorly declined. However this chapter has identified the last examples of older execution practices in Scotland as late as the mid-eighteenth century. It will highlight one case of a man sentenced to be burnt and four cases where offenders were sentenced to have a hand severed from their bodies as a prelude to their execution. It will question the precedent for these punishments to be found in previous centuries but will argue that the sporadic decisions to use them in the mid-eighteenth century require further analysis when they are placed within a discussion of the long term decline of aggravated executions. Within the annals of penal history the crime of treason was distinct due to the believed heinous nature of it and the exemplary punishment meted out to the traitor. While this has been briefly acknowledged by historians, the changes that occurred to executions for treason have been largely ignored within the broader historiography of capital punishment. Section four of this chapter will provide a discussion of the punishment for treason in the late seventeenth century in order to question the changes that occurred to executions in the eighteenth century. In doing so it will lay the foundations upon which chapter six will build.

The post-mortem punishment of the criminal corpse had been a penal option prior to the mid-eighteenth century, but it was subject to discretionary implementation. However the 1752 Murder Act placed it at the centre of the criminal justice system's response to the crime of murder. Despite this, the subject has been largely ignored by crime historians. Therefore the fifth and final section of this chapter will question where the post-mortem punishment of the criminal corpse fits into the broader historiography of capital punishment in this period, particularly the meta-narrative pointing towards the changing nature of execution practices. In addition, it will highlight that there was a concentration of gibbeting in the mid-eighteenth century, on the eve of the Murder Act, demonstrating that, around the same time that

the older execution practices to be discussed in section two were disappearing, the authorities were instead using post-mortem punishment as a means to enact additional infamies to the death sentence.

The Spectacle of the Gallows

In eighteenth and early nineteenth-century Scotland, the theatre of the gallows involved numerous actors from the authorities responsible for carrying out the death sentence including the sheriffs, magistrates and executioners to the condemned criminals themselves and the vast number of people who attended to see the spectacle unfold. As discussed in chapter one, prior to the final quarter of the eighteenth century, reports of crime and punishment were rather limited in the Scottish newspapers. However, from an extensive searching and gathering of the information that is available regarding public executions, it is possible to build up a picture of the scene at the gallows across this period including key elements such as the procession to the scaffold, the deliverance of last dying speeches and the multitude of crowd reactions that executions could provoke.

The procession of the criminal to the scaffold was of great importance to the execution ritual. On the morning of their execution they would be brought out of the prison and placed in a cart, or in some cases would walk, to begin their final journey to the scaffold. Often crowds would gather to see the criminals brought out and to join the procession which consisted of the condemned, local authorities including the sheriffs and the magistrates, the executioner and ministers who would offer religious instruction. When lamenting against the abolition of the procession to Tyburn, Samuel Johnson stated that “the old method was most satisfactory to all parties; the public was gratified by a procession, the criminal supported by it”.²¹² As processions to the gallows as well as the executions themselves attracted large crowds, which often contained relatives of the condemned, they required security. This was organised by local sheriffs and magistrates and drawn from military regiments, local militia and, in the case of the execution of Margaret Minna in Jedburgh in 1753, a guard formed of

²¹² Simon Devereaux, ‘Recasting the Theatre of Execution: The Abolition of the Tyburn Ritual’, *Past and Present*, Vol. 202, (2009), pp. 127-174, p. 140.

the town's principal inhabitants.²¹³ The procession to the scaffold could often begin hours before the execution itself and in many cases the businesses and shops in the area would be closed making the execution spectacle a whole day event. In other cases people would travel for days to attend an execution. For example, friends and relatives of Patrick Wallace had travelled as a large group for two days from Glasgow to Edinburgh in order to witness his execution in 1747.²¹⁴ In addition, in some cases the procession crossed through more than one jurisdiction and thus the sheriffs of each area ceremoniously exchanged responsibility for the condemned. In 1770 Alexander McDonald and Charles Jamieson were taken on a cart by the sheriff of Edinburgh to be received by the sheriff of Linlithgow for execution near the scene of their crime.²¹⁵ Thus the procession was not only a necessary part of the execution, it was often a focal element of the spectacle.

The central actors in the theatre of the gallows were the condemned themselves. A reading of reports detailing the behaviour of malefactors upon the scaffold reveals a multitude of reactions to their fate. Some faced the noose with outward confidence, bolstered by the presence of their friends and relatives. John Breck MacMillan used his execution in Inverlochy in 1755 as an opportunity to toast the health of Charles Stuart, the 'Young Pretender', with the watching crowd. The *Scots Magazine* lamented that it was a "pity the criminal's friends are allowed to carry off his body from the gallows in triumph...burying it at the gallows-foot would be looked upon as more disgraceful than hanging".²¹⁶ For his execution in 1788 William Brodie was elaborately dressed in satin breeches and silk stockings and entered into "easy conversation with his acquaintances in attendance".²¹⁷ There were others, such as Randall Courtney who was executed in Fettercairn in 1743, who had remained seemingly undaunted until they came in sight of the fatal apparatus upon which they would be hanged.²¹⁸

²¹³ *Caledonian Mercury*, Monday 28 May 1753, p. 2.

²¹⁴ *Caledonian Mercury*, Tuesday 21 April 1747, p. 3.

²¹⁵ *Scots Magazine*, Saturday 1 September 1770, p. 57.

²¹⁶ *Scots Magazine*, Monday 7 July 1755, p. 39.

²¹⁷ *Caledonian Mercury*, Thursday 2 October 1788, p. 3.

²¹⁸ *Derby Mercury*, Thursday 13 October 1743, p. 2.

In Scotland, as in England, after they had mounted the scaffold condemned criminals were allowed to deliver their last dying speeches in the presence of the watching crowd. The authorities intended for them to attest to the justice of their sentence and to warn others from the commission of the crimes that had led them to such a lamentable fate. There were some offenders who refused to speak and others who continued to deny their crimes to the last. In 1774 John Reid's last words were "mine is an unjust sentence".²¹⁹ While we must be cautious when taking newspaper reports entirely at face value due to their repeated use of the words penitent and resigned to describe the behaviour of the condemned, it is clear that many Scottish criminals in this period did use their last dying speeches to confess their guilt of the crimes for which they were to suffer, with some recounting the details of them. Others took the opportunity to confess to crimes they had never even been suspected of such as Margaret Douglas in 1764 who confessed to having murdered her previous employer's son whose death was believed to have been accidental.²²⁰ A number of criminals also gave speeches that were replete with warnings against crimes but also against drinking, Sabbath-breaking and the keeping of bad company. They claimed to take comfort in their religious instruction between their sentencing and execution and thanked the minsters in attendance at the scaffold before partaking in a final prayer. In addition, the condemned sometimes even praised the magistrates for the humane treatment they had afforded them and publically forgave the executioner. The behaviour of the condemned is of vital importance to building up a picture of the scene at the gallows in this period. However, by their very nature, executions were public events and thus in order to gain a fuller understanding of them we must also investigate the behaviours and reactions of those who gathered to witness them.

Scottish executions in the eighteenth and early nineteenth centuries attracted large crowds that included people of various age, gender and social rank. Crowther stated that the Scots attended a public hanging as enthusiastically as the English; they just did not get the chance to do so as often due to the lower numbers sent to the gallows.²²¹ Historians of crime and punishment have cited the deterrent value of the

²¹⁹ *Leeds Intelligencer*, Tuesday 4 October 1774, p. 3.

²²⁰ Young, *Encyclopaedia of Scottish Executions*, p. 48.

²²¹ Crowther, 'Crime, Prosecution and Mercy', p. 230.

scaffold as both a motive for, and a justification of, the public execution. However Gatrell claimed that this allows a degree of historical detachment. Instead he advised that we must more closely engage with what happened upon the scaffold in order to gain a degree of understanding of how people felt about it.²²² While it is difficult to know exactly what each individual spectator took away from an execution, there has been attention given to the roles and reactions of the crowd. Early crime historiography argued that attendance at the public execution “could only flourish amidst a callous people”.²²³ However subsequent historians have demonstrated that the subject required deeper analysis. Thomas Laqueur wrote of a “buoyant, holiday crowd wholly unconcerned with serious state theatre and unaffected by its efforts.”²²⁴ In addition, McKenzie investigated the early eighteenth-century “criminal celebrities” such as highwaymen and robbers who gained infamy for “dying game” at the scaffold.²²⁵ An often cited criticism of executions was the concern that they encouraged drunken revelry mixed with immoral behaviour which undermined the solemn carrying out of justice.²²⁶ However the work of Randall McGowen provided a further dynamic to the study of the criticisms of the public execution by the late eighteenth century. Drawing upon the idea that executions were not only susceptible to disorderly behaviour, but that they could also have lasting negative effects on the spectator, he highlighted contemporary fears that attending an execution and witnessing violence could lead to a desire to emulate “the hero of the spectacle”.²²⁷ If, in witnessing state sanctioned violence people were encouraged to commit crimes, this again undermined the deterrent value of the scaffold.

The motivation behind attendance at a public execution and what, if anything, a person took away from the experience, while impossible to ascertain for every individual, is a key part of this investigation into the spectacle of the gallows between

²²² Gatrell, *Hanging Tree*, p. 30.

²²³ J.H. Plumb, *The First Four Georges* (Glasgow: William Collins and Sons, 1956), p. 16.

²²⁴ Thomas W. Laqueur, ‘Crowds, Carnival and the State in English Executions, 1604-1868’, in A.L. Beier, David Cannadine and James M. Rosenheim (eds.), *The First Modern Society; Essays in English History in Honour of Lawrence Stone* (Cambridge: Cambridge University Press, 1989), pp. 305-355, p. 332.

²²⁵ McKenzie, *Tyburn’s Martyrs*.

²²⁶ For a widely cited example of these criticisms see Fielding, *Enquiry into the Causes of the Late Increase of Robbers*, pp. 121-127.

²²⁷ Randall McGowen, ‘Civilizing Punishment: The End of the Public Execution in England’, *Journal of British Studies*, Vol. 33, (1994), pp. 257-282, p. 264.

the mid-eighteenth and early nineteenth centuries. Despite the desire for the scaffold to act as a reminder of the punishment for crime there were those within the crowd who were unconcerned with this piece of state theatre. For example, when William Webster was hanged in Aberdeen in 1787 for theft the *Caledonian Mercury* lamented the numerous cases of pick-pocketing that had occurred and stated that the spectacle had little effect upon the perpetrators of the offence as they were “so hardened as to persist in theft with the gibbet staring them in the face”.²²⁸ Similarly, when a woman was caught stealing a man’s watch at an execution in Glasgow in 1819 it caused a fight to erupt among members of the crowd which again detracted from the solemn scene of punishment the authorities had intended.²²⁹

There were some people who attended public executions in this period due to a morbid curiosity to witness the spectacle. In 1787 the desire to get the best possible view at an execution at the Lawnmarket in Edinburgh meant the large crowd was in danger of being crushed and led to one man walking across the heads of those around him in order to get closer to the scaffold.²³⁰ Prior to the execution of John Worthington at the scene of his crime in 1815 the executioner, Thomas Young, was practicing pulling the “vile trigger” of the scaffold drop mechanism and a cheer went up from the large crowd that had gathered to watch each practice ‘drop’.²³¹ When 16 year old Richard Smith was executed in Glasgow in 1820 Dr Muir, who had attended him in jail, spoke to the gathered crowd and reminded them that their attendance at the spectacle should not be driven by idle curiosity and instead he encouraged them to join in fervent prayer.²³²

Despite the curiosity and even excitement that the prospect of a public execution could generate, it was often the case that the gallows scene could not fail to strike a chord with members of the large crowds gathered around the scaffold. When Margaret Gillespie was hanged in Stirling in 1749 for drowning her illegitimate infant the *Scots Magazine* reported that the story she recounted upon the scaffold, of having

²²⁸ *Caledonian Mercury*, Thursday 7 June 1787, p. 3.

²²⁹ *Caledonian Mercury*, Saturday 20 November 1819, p. 4.

²³⁰ *Derby Mercury*, Thursday 25 January 1787, p. 2.

²³¹ Young, *Encyclopaedia of Scottish Executions*, p. 76.

²³² *Caledonian Mercury*, Saturday 3 June 1820, p. 3.

been ravished against her will by a man who refused to acknowledge the child, could not fail to create an atmosphere of deep sympathy for her plight.²³³ The execution of Andrew Low in Forfar in 1785 was held on a market day and the town was filled almost to capacity. However, when the steeple bell commenced its death knell at midday and the cart pulled up outside the prison to take him to the scaffold, a solemn silence fell over the town.²³⁴ Similarly, the case of three young men in Edinburgh in 1812 had generated massive public interest in the lead up to their execution at the scene of the crime which was replete with a lengthy gallows procession and a large concourse of spectators who had been gathering from very early in the morning. However, the tolling of the great bell at the moment the drop fell struck an “inconceivable awe into the minds of the spectators, many of whom took off their hats and remained uncovered” for the whole hour that the bodies hung for.²³⁵ At the execution of Francis Cain and George Laidlaw for robbery in Glasgow in 1823 the large crowd, which included many women, were described as crying through compassion.²³⁶ Gatrell has argued that, while older curiosities surrounding scaffold horrors were not wholly retracted after the mid-eighteenth century, this curiosity came to be justified as a “valued element in the sympathetic sensibility” that was still evident in the early nineteenth century.²³⁷ Similarly, Friedland traced two largely incompatible trends in France in this period, namely a fascination with the spectacle of the scaffold and a revolution in sensibilities which meant that any pleasure taken from the suffering of others came to be seen as inhuman.²³⁸ Even in cases such as that of brothel-keeper Mary McKinnon, who was hanged for the murder of a patron, the bitter feelings of the 30,000 people gathered were subdued by feelings of sympathy as she mounted the scaffold.²³⁹ The chapter will now progress on to investigate the changes that were gradually made to the carrying out of public executions but will highlight that, regardless of their motivations for attending, the event continued to offer a pervasive attraction throughout the period.

²³³ *Scots Magazine*, Sunday 1 October 1749, p. 45.

²³⁴ Young, *Encyclopaedia of Scottish Executions*, p. 55.

²³⁵ *Aberdeen Journal*, Wednesday 29 April 1812, p. 3.

²³⁶ *Caledonian Mercury*, Saturday 1 November 1823, p. 4.

²³⁷ Gatrell, *Hanging Tree*, p. 250.

²³⁸ Friedland, *Seeing Justice Done*, p. 143.

²³⁹ *Caledonian Mercury*, Thursday 17 April 1823, p. 3.

Changes to the Public Execution

Public executions were planned events that could be, and sometimes were, susceptible to disorderly behaviour during the carrying out of justice. Ideally, however, they served as a staged lesson in morality and legality in which orderliness was a prerequisite. By the eighteenth century public executions were predominantly conducted at an established location, often referred to as the common place. The Grassmarket, a busy area in Edinburgh's Old Town, was used for public executions between 1660 and 1784. Today the site continues to commemorate its historically central importance to crime and punishment through the aptly named 'Last Drop' pub. However in 1785 the Grassmarket ceased to be a desirable location for the public execution. Archibald Stewart was condemned for two instances of housebreaking and theft and was sentenced to be executed there in April 1785. However, between his sentencing and the scheduled date of execution, the location was changed to be conducted at the west end of the Luckenbooths, which was closer to the place of confinement in the tolbooth. The *Caledonian Mercury* remarked that "the disagreeable ceremony of walking from the prison to the former place of execution was avoided". The majority of his prayers were also conducted in the prison, as was to gradually become custom.²⁴⁰ In addition to the change in location there were also amendments made to the scaffold's construction. Following the observation that the previous scaffold was too diminutive in size, for the execution of William Mills in September 1785 the *Caledonian Mercury* reported that "it has very properly been enlarged by which means not only the criminal and executioner, but also the magistrates, clergymen and officers can appear in view of the spectators". It was believed that this gave the scene a solemn atmosphere which had previously been wanting and had a stronger effect upon the spectators as, the article reminded the readers, the intention of the public execution was to deter from crime rather than to solely punish the offender.²⁴¹

Similar alterations to the location of the common place were gradually occurring elsewhere in Scotland as well as in England. Simon Devereaux investigated

²⁴⁰ *Caledonian Mercury*, Wednesday 20 April 1785, p. 3.

²⁴¹ *Caledonian Mercury*, Wednesday 21 September 1785, p. 3.

the abolition of Tyburn in 1783 in favour of staging London's executions outside of Newgate. He highlighted similar moves from urban peripheries to nearer the jail in other English towns including Chelmsford in 1785, Oxford in 1787 and Liverpool in 1788.²⁴² In Scotland's circuit towns and cities executions had often been conducted at locations which were outside of urban centres, but they gradually moved nearer to the places of confinement by the late eighteenth century. In Aberdeen executions were held at Gallows Hill until 1783 when they moved nearer the tolbooth. In Perth the common place of execution was to the west of the town on the Burgh Muir, which is now known as 'Old Gallows Road', until the late 1780s when they moved to the foot of the High Street, again quite a central urban location. Executions in Glasgow moved from the Gallowmuir to the Howgate-head in 1765 which was just north of the infirmary and near to the industry developing around the canal. However the development of the Monkland Canal in 1776 meant that executions could no longer be held in the area. Therefore, by the final quarter of the eighteenth century, the changing location of executions in Glasgow presented a gradual move towards becoming more geographically central as they would be conducted at the Castleyard then at the Cross before moving to outside the jail by the second decade of the nineteenth century. In some circuit cities executions continued in urban peripheries into the early nineteenth century. For example, executions in Ayr were conducted upon a common that was south of the town before moving outside the tolbooth in 1809. Similarly, John Hume's 1774 map of Inverness showed the scaffold as part of the landscape, situated on the town's common near the main road which led towards Edinburgh. Executions persisted there until the early nineteenth century.²⁴³ The situating of the gallows on a main route towards Edinburgh would have served as a lasting and ever present warning against crime to both the inhabitants of Inverness and any potential visitors.

In addition to the changes made to the location of public executions in the late eighteenth century there were also accompanying alterations to other aspects of the execution ritual. The procession of the condemned to the gallows was of great

²⁴² Devereaux, 'Recasting the Theatre', p. 140.

²⁴³ Young, *Encyclopaedia of Scottish Executions*, p. 31.

importance to the whole proceedings but it was this part of the spectacle that had attracted increasing criticism. In 1751 Henry Fielding had proposed conducting executions more privately as he argued that it would remove any semblance of support the condemned could gain from the procession crowd and would thus make the whole experience more shocking.²⁴⁴ With the move of execution locations closer to the places of confinement there was a decline in the need for lengthy processions which was seen to be a good thing, as in the above case of Stewart in 1785. However, the shift of the common place of execution in Scotland's circuit cities from urban peripheries to locations closer to the places of confinement was a gradual one. This coupled with the increased use of crime scene executions in the early nineteenth century meant that the reduced need for the procession to the scaffold in Scotland was not a pattern of uniform and uninterrupted decline. For example, from reports of executions at the Castleyard in Glasgow it appears that it was just under half a mile between the prison and the place of execution so a procession was still required. During the execution of three men in 1787 the procession had taken an hour as they had received wine from the "commiserating multitude of spectators".²⁴⁵ Similarly, Poole demonstrated that the standardisation of execution practices in England after 1783 was by no means driven by one central policy and that the processional culture persisted for some time thereafter, even on the doorstep of the capital.²⁴⁶ Furthermore, from a reading of reports detailing the crime scene executions in Scotland in the early nineteenth century, it is evident that, rather than solely being a necessary part of the execution, the procession was a focal part of the whole spectacle and, within this, the desire for more severity in the face of increased levels of capital punishment outweighed more modern concerns for efficiency. For example, when John Henderson was executed in Cupar in 1830 15,000 people had travelled from all over the county of Fife for the event. The town's shops and businesses were closed for the day and the harvest was at a stand-still for miles around.²⁴⁷

²⁴⁴ Fielding, *Enquiry into the Causes of the Late Increase of Robbers*, p. 124.

²⁴⁵ *Derby Mercury*, Thursday 31 May 1787, p. 2.

²⁴⁶ Poole, 'For the Benefit of Example', p. 121.

²⁴⁷ *Caledonian Mercury*, Saturday 2 October 1830, p. 3.

Due to the staging of executions closer to the places of confinement, and thus the reduced need for processions, the time of executions gradually changed and became earlier in the day. In Scotland the time specified in the court's sentencing was between two and four in the afternoon. However, in Edinburgh in 1819, followed by Glasgow in the 1820s, the time was altered to between eight and ten in the morning. It can be argued that, in conducting the executions earlier, the authorities were attempting to have greater control over the execution crowd as the earlier times limited the opportunity for excessive drinking, which had previously been facilitated by the closure of local businesses and people having the day off for an execution. In addition, in some cases the earlier times reduced the potential size of the crowd whether this was intentional or not. Following the change in time in Edinburgh the crowd witnessing the execution of Brine Judd and Thomas Clapperton in January 1820 was described as not as great in number as on former occasions. A report of the execution of John Dempsey in December 1820 also pointed to the relatively small crowd. An explanation offered in both instances was the cold weather and early mornings.²⁴⁸ However these cases proved to be the exception rather than the rule as the majority of public executions continued to attract very large crowds.

The decline in the time taken to transport the criminal from the place of confinement to the scaffold meant that there were arrangements increasingly made for parts of the traditional execution ritual to be conducted inside the court house. Immediately prior to the execution offenders would be taken into a nearby court house to receive much of their religious instruction and to address the magistrates in order to acknowledge the justice of their sentence. While these proceedings were still open to the public, space inside was limited. To an extent the Scottish experience had some parallels with Continental European practice. In focusing upon a few jurisdictions in the Netherlands, Spierenburg highlighted the practice of the magistrates meeting with the condemned, usually in the town hall, before they proceeded to the scaffold.²⁴⁹ In Paris the condemned were not permitted to address the crowd with the last dying speeches that were central to the execution ritual in Britain. Pascal Bastien

²⁴⁸ *Caledonian Mercury*, Saturday 8 January 1820, p. 4; *Caledonian Mercury*, Thursday 14 December 1820, p. 3.

²⁴⁹ Spierenburg, *Spectacle of Suffering*, p. 50.

has shown that the exchanges between the confessor, the parliament clerk and sometimes the judges with the condemned took place before a more limited audience in the halls of the Palais de Justice before the execution was carried out at the Place de Greve.²⁵⁰ In Scotland, although prayers would still be said and the condemned could still give their last speech to the watching crowd, the time spent on the scaffold was shortened in some cases. During the execution of three men in Glasgow in 1817 they spent 70 minutes in the court hall being received by the magistrates and partaking in the majority of their religious devotion. However the time taken for them to proceed to the scaffold, say a prayer and for the drop to fall was only 20 minutes.²⁵¹ When William Noble was executed in Elgin for murder in 1834 the gallows were erected on the west side of the jail on a level with the court house and a window was taken out so he was able to walk to the scaffold without leaving the building. His body was then buried within the old guard house as was stipulated following the removal of the penal option of dissection for murderers in 1832.²⁵² Therefore the whole proceedings, from the religious devotions to the last speech, the procession to the scaffold and even the post-mortem punishment of the body were conducted with a degree of distance from the crowd below.

The final part of the scaffold ritual to be discussed in this chapter will be the hanging of the condemned. Following the move from Tyburn to Newgate in 1783 the drop system was used in London to hang offenders and was gradually adopted elsewhere in England and Scotland. When three offenders were executed in Glasgow in 1784 it was reported that the scaffold was constructed “on the plan of the London scaffold with springs and it sunk down with ease” which was intended to launch the criminals into eternity more swiftly.²⁵³ Similarly the *Caledonian Mercury* observed in Aberdeen in 1788 that James Grant was executed in the same way, “a scaffold being erected in front of the prison, over which the gibbet projected; the place on which the

²⁵⁰ Pascal Bastien, ‘Never Equal before Death: Three Experiences of Dying as seen through Eighteenth-Century French Executions’, in Richard Ward (ed), *A Global History of Execution and the Criminal Corpse* (Basingstoke: Palgrave Macmillan, 2015), pp. 168-197, pp. 185-186.

²⁵¹ *Caledonian Mercury*, Saturday 1 November 1817, p. 3.

²⁵² *Aberdeen Journal*, Wednesday 11 June 1834, p. 4.

²⁵³ Young, *Encyclopaedia of Scottish Executions*, p. 55.

criminal stood was made to fall down and leave him suspended”.²⁵⁴ Prior to the use of the drop in Scotland, as elsewhere, the condemned were hung from the ‘fatal tree’ as well as from gallows, usually after being pushed from a ladder or having a cart driven out from under them. In 1774 Alexander Monro, the Professor of Anatomy at Edinburgh University, told James Boswell that “the man who is hanged suffers a great deal; that he is not at once stupefied by the shock...for some time after a man is thrown over he is sensible and is conscious that he is hanging”.²⁵⁵ In earlier periods, before executions upon raised scaffolds presented slightly more distance from the crowd, a condemned person’s relatives could pull on their legs in the hope of occasioning a quicker death. Even after the adoption of the drop, Gatrell stated that the condemned continued to suffer slow deaths by suffocation and choking through the ineptitude of the executioner and the relatively insignificant advancements of scaffold construction.²⁵⁶ Subsequently Elizabeth Hurren has provided more thorough details about the experience of the body during execution from a medical perspective, including the sight and smell produced by the body at the end of the hangman’s rope.²⁵⁷

By the early nineteenth century there was a degree of awareness that the length of the rope could be important in quickening death. There were reports of criminals themselves asking that the executioner give them ‘more rope’ and thus a longer drop which, it was believed, would be more likely to break the neck. While successful dislocation of the neck did not necessarily mean a person died instantly, as will be further discussed in chapter four, it could paralyse them and present a quicker, if not easier, death to the watching crowd. However the sight of someone being slowly strangled could potentially trigger unrest among the crowd. At the execution of Alexander Gillan in 1810 he is described as being detained in an “awful suspense” due to the incompetence of the hangman. In this case the executioner, William Taylor, would pay with his own life. He was passing through the town of Elgin when he was identified as the executioner who had bungled Gillan’s execution and a considerable

²⁵⁴ *Caledonian Mercury*, Thursday 3 July 1788, p. 3.

²⁵⁵ Gatrell, *Hanging Tree*, p. 45.

²⁵⁶ *Ibid.*, pp. 45-55.

²⁵⁷ Elizabeth Hurren, *Dissecting the Criminal Corpse: Post-Execution Punishment from the Murder Act (1752) to the Anatomy Act (1832)* (Palgrave: Forthcoming 2016) see in particular pp. 47-83.

mob gathered and beat him to death.²⁵⁸ The execution of Robert Johnston in Edinburgh in December 1818 received mass press attention both in Scotland and in England due to the actions of the crowd. In this case the rope was too long and Johnston was able to rest his toes on the platform but still struggled and slowly began to choke. The scene was met with “a loud shout of horror with cries of murder bursting from the immense multitude assembled” and a shower of stones were thrown at the magistrates and other authority figures who had to retreat into the church. Cries of “cut him down – he is alive” ensued and someone jumped up and obliged and the criminal was taken on a furious ride towards the High Street before being retaken by the police. The scene at the scaffold was described as “a disgraceful scene of outrage and riot” with people tearing his waiting coffin to pieces and trying unsuccessfully to tear the whole scaffold down. However the authorities finally managed to clear the scaffold and he was brought back and hanged.²⁵⁹ The case again demonstrates the knife edge on which the crowd’s reaction to public executions could sit as, had the execution occurred without the prolonging of Johnston’s death, it is most likely that the crowd would have dispersed peacefully.

Scottish Execution Practices

Chapter one demonstrated the varied execution practices, some of which involved prolonged pre-mortem suffering on the part of the condemned, that were characteristic of the Early Modern period. It also highlighted that, by the mid-eighteenth century, capitally convicted criminals were almost exclusively sentenced to be hanged by the neck until dead, with the penal option of enacting some further post-mortem infamies upon the corpse. However, within this broad narrative of the decline in aggravated executions, this chapter will identify the final examples of older execution practices that had not entirely disappeared in Scotland in the mid-eighteenth century. It will question the potential reasons behind the courts’ decisions to sentence one man to be burnt and another four to have their hand severed from their bodies immediately prior to their execution. In addition, it will question where to

²⁵⁸ TNA HO 102/54.

²⁵⁹ *Chester Courant*, Tuesday 12 January 1819, p. 3.

place these punishments within a discussion of the changing nature of capital punishment between the mid-eighteenth and the early nineteenth centuries.

Alexander Geddes was indicted at Aberdeen in 1751 for the crime of bestiality, with witnesses attesting that he had been committing the crime for over a decade. He was sentenced to be taken on 21st June between three and five in the morning to Gallows Hill in Aberdeen and strangled by the neck upon the gibbet but “not until he be dead”, he was then to be cut down and burnt at the gibbet foot until his body was consumed to ashes.²⁶⁰ Bestiality had historically been punished in this manner in Scotland with cases in the late seventeenth century and in 1702 and 1719.²⁶¹ In 1732 John Louthian stated that those condemned for the crime of bestiality “are generally stifled with a rope and then burnt in the morning before sun rise; as are also witches”.²⁶² In 1570 a brother and sister were burnt for incest as was another man for incest with his sister-in-law at the Cross in Edinburgh in 1613.²⁶³ In each of these crimes there was an element of moral revulsion and even superstition that required them to be marked out for exemplary punishment. Therefore Geddes’ case supports the argument that for offences of a particularly aggravating nature, in this instance the unnatural crime of bestiality, the courts would resort to the punishment of burning which was almost obsolete in Scotland by this period. In addition, as his sentence stipulated he was to be strangled, but not until he was dead, the burning part of the sentence was intended as an aggravated execution that would also cross the line into a post-mortem punishment, with his body to be burnt to ashes. However it is unclear, from the brief details provided of his execution, if he was alive during the latter part of the sentence. Reports of his execution provide only the basic details that he confessed to the unnatural crime and died penitently.²⁶⁴

There are a few potential explanations for the disappearance of executions by burning in Scotland after Geddes’ case. First, the persecution of witches in Scotland had been more sanguine than in England, particularly concentrated in the east-central

²⁶⁰ NAS JC11/15/128.

²⁶¹ Joy Cameron, *Prisons and Punishment in Scotland from the Middle Ages to the Present* (Edinburgh: Canongate Publishing, 1983), p. 22.

²⁶² Louthian, *Form of Process before the Court of Justiciary*, p. 54.

²⁶³ Hume, *Commentaries*, Vol. 1, p. 443.

²⁶⁴ *Caledonian Mercury*, Monday 1 July 1751, p. 2.

Lowlands, with approximately ten times the number of executions per head of the population.²⁶⁵ However the last recorded burning of an accused witch in Scotland occurred in Sutherland in 1727.²⁶⁶ Thereafter the Witchcraft Act 1735 (9 Geo II c.5) repealed former statutes relating to the crime. Secondly, in England the punishment of burning at the stake was attached to the crime of a wife murdering her husband as per the existing laws of petty treason until its repeal in 1790. However the 1708 Treason Act, which brought Scotland's treason laws in line with those of England, did not extend the crime of petty treason to Scotland. As demonstrated in the previous chapter, women who murdered their husbands were instead sentenced to be hanged and their bodies dissected as with other murderers. A final explanation for the end of executions by burning can be linked to the disappearance of the crime of bestiality from the court records. After Geddes' case there were only a further few bestiality cases found in the High Court or circuit court minute books and no one else received a capital sentence. In the case of Thomas Kirkland in 1765 the jury found him guilty only of attempting the crime and he was transported for life despite similar details in the witness statements that were found in Geddes' case.²⁶⁷ The *Scots Magazine* believed that "a corporal punishment would probably have been inflicted, but it was thought such an odious crime should not be made a subject of conversation among the populace".²⁶⁸ This demonstrates that it was not only the punishment of burning that was to become extinct in Scotland, the exemplary marking out of bestiality was also to become less desirable as evidenced by the fact that Geddes was the last to suffer a capital punishment for the crime.

Joy Cameron has cited a range of punishments in medieval Scotland that fell short of death but left an offender permanently marked out. These included having their cheek branded, scourging with branding, cutting out tongues and cutting off ears and hands.²⁶⁹ The mutilation or disfiguring of an offender in the Early Modern period was intended to incite shame and to mark out their criminality when they were

²⁶⁵ Houston and Whyte, 'Scottish Society in Perspective', p. 31.

²⁶⁶ For a more thorough analysis of the Scottish witch-hunt from the sixteenth century to the decline and eventual end of Scottish witch-hunting see Julian Goodare (ed), *The Scottish Witch-Hunt in Context* (Manchester: Manchester University Press, 2002).

²⁶⁷ NAS JC11/12/179.

²⁶⁸ *Scots Magazine*, Monday 1 July 1765, p. 54.

²⁶⁹ Cameron, *Prisons and Punishment*, p. 10.

attempting to reintegrate back into society. Edward Johnston had both of his hands cut off and displayed for sedition in 1597, possibly a symbolic punishment targeting the source of his criminality, his hands.²⁷⁰ However mutilation as a punishment in itself fell into disuse by the late seventeenth century and was only considered acceptable if it was inflicted as a prelude to execution.²⁷¹ In Scotland there were examples in the seventeenth century where men who had committed particularly heinous murders were to have their hand struck off prior to execution.²⁷² As offenders were to be executed anyway, this pre-mortem aggravation held a different meaning to mutilation as a punishment in itself. It can be argued that the motivation in sentencing the punishment was not only to add further infamy to the death sentence but also an additional degree of physical pain due to the egregious nature of the cases.²⁷³

There were four examples of male murderers sentenced to suffer the aggravation of having their hand cut off immediately prior to execution in Perth in 1750, in Edinburgh in 1752, in Inverness in 1754 and in Glasgow in 1765. One similarity shared by the three earlier examples was the judges in the cases. There were five Lords of Justiciary who sat in the High Court in Edinburgh and twice a year two of their number would attend each of the circuit courts. In the 1750 case of Alexander McCowan judges Fergusson of Kilkerren and Grant of Elchies had attended and passed judgement at the Northern Circuit. They were also two of the five Lords of Justiciary who sat in the High Court in Edinburgh when Normand Ross received the sentence in 1751. In addition, Fergusson was one of the two judges to attend the Northern Circuit when John Shirvel was sentenced in 1754. While these judges would have presided over numerous other murder cases during these years it can be argued that they

²⁷⁰ MacLaurin, *Arguments and Decisions*, p. xxxviii.

²⁷¹ Pieter Spierenburg, 'The Body and the State: Early Modern Europe', in Norval Morris and David J. Rothman (eds.), *The Oxford History of the Prison; the Practice of Punishment in Western Society* (Oxford: Oxford University Press, 1998), pp. 44-70, p. 53.

²⁷² Arnot, *Collection and Abridgement of Celebrated Criminal Trials in Scotland*, p. 132, p. 152.

²⁷³ Diana Paton has identified that bodily mutilation was still used against slaves in the late eighteenth century in Jamaica and has also highlighted incidences where slaves were hung in chains alive or burnt as an aggravated form of execution intended to demonstrate both power and difference between slaves and the free white population. See Diana Paton, 'Punishment, Crime and the Bodies of Slaves in Eighteenth-Century Jamaica', *Journal of Social History*, Vol. 34, (2001), pp. 923-945. James Campbell has similarly identified that practices such as burning at the stake and branding persisted into the nineteenth century for African American convicts long after they were abolished for white criminals. See James Campbell, *Crime and Punishment in African American History* (Basingstoke: Palgrave, 2013), p. 49.

chose to sentence the additional punishment of having a hand severed prior to execution due to the atrocious nature of the cases. In addition, the first three cases were relatively close together and presented the first examples of the punishment since at least as far back as 1740, when this study commences. Incidentally, Fergusson of Kilkerran had been made a Lord of Justiciary in 1749 and was described as one of the “ablest” lawmen of his time.²⁷⁴

An additional similarity in each of the four cases was that there were particularly aggravating circumstances evident in their committing the murders which could go some way to explaining the additional exemplary punishment. Alexander McCowan murdered Margaret McLean and their three year old child in Perth so that he could “carry on the filthy intrigue more easily with another woman”. The *Scots Magazine* emphasised the image of how “his bloody hand thrust the dirk into her belly” in order to be rid of Margaret.²⁷⁵ He was sentenced to have his hand severed from his body, then hanged and his body hung in chains with the hand fixed to the top of the gibbet.²⁷⁶ John Shirvel received the same punishment in Inverness in 1754, again for the murder of his wife and child through beating them with his bayonet. He was described as a drunk who systematically beat his wife excessively. A witness in the case recalled how John had predicted “some time or other he would be hanged on her account”.²⁷⁷ The manner in which Alexander Provan had committed the crime was especially brutal, even compared to the above cases. The *Scots Magazine* called the crime so atrocious “that the devil could not have exceeded it in wanton cruelty”.²⁷⁸ He had suspected that his wife was with child by another man, the surgeons who examined her body found this not to be the case. From the depositions given by the surgeons to the court it appeared that he had literally attempted to pull the non-existent child from her body and had made several lacerations in order to do so. There

²⁷⁴ William Anderson, *The Scottish Nation and Biological History of the People of Scotland, Vol. II* (Edinburgh: 1867), p. 196.

²⁷⁵ *Scots Magazine*, Friday 1 June 1750, p. 45.

²⁷⁶ NAS JC11/14/224.

²⁷⁷ NAS JC11/19/103.

²⁷⁸ *Scots Magazine*, Monday 7 October 1765, p. 52.

was also evidence of suffocation. The Glasgow circuit court ordered that his right hand was to be struck off prior to his execution near the scene of the murder in Paisley.²⁷⁹

The final case to be discussed is that of Normand Ross who was tried in Edinburgh for the murder of his mistress Margaret Home, Lady Billie. On the night of the murder another servant heard a loud shriek and when she entered Margaret's room she found a man standing, his hand poignantly described as dripping with blood, over the victim before escaping out of the window. He had been attempting to steal a key from under her pillow in order to open the drawers containing money when she awoke and in the ensuing struggle she was stabbed in the throat with a kitchen knife. She survived for a further two days and was able to identify Ross as the perpetrator. He was sentenced to be executed at the Gallowlee between Edinburgh and Leith in January 1752, his hand struck off and his body hung in chains with the hand fixed on top of the gibbet.²⁸⁰ In England a servant murdering their master or mistress was stipulated to be petty treason and thus could be distinctly punished. However, as the crime of petty treason was not extended to Scotland, in this particular case it was the judges who made the conscious decision to add a further degree of punishment to the execution, this was likely due to the relationship of the accused to the victim.

At the place of execution John Shirvel showed a relative degree of calmness as he bade the executioner not to be afraid and not to mangle his arm.²⁸¹ Similarly, Normand Ross was described as suffering the striking off of his hand with great resolution.²⁸² While the newspapers at the time provided only brief details it is possible to learn more from other sources. Thomas Taylor, who was charged with gaining a confession from Alexander Provan during his confinement, published a short account of his case following the execution. From Taylor's account of the execution it appeared that Provan's hand was bound with cords around a block and at the same time a rope was placed around his neck. His hand was stuck off at one stroke and he

²⁷⁹ NAS JC13/15/45-53.

²⁸⁰ NAS JC7/28/319.

²⁸¹ *Leeds Intelligencer*, Tuesday 12 November 1754, p. 2.

²⁸² *Derby Mercury*, Friday 24 January 1752, p. 1.

was immediately drawn up, with the whole being conducted in only three minutes.²⁸³ However Robert Brown, in his 1886 *History of Paisley*, provided further variations of the event. The executioner had apparently struck Provan's palm rather than his wrist causing him to cry out "cut and pull" repeatedly until the rope was brought to hang him immediately. He added that the axe used had since been kept as a relic and was shown to those curious in these matters.²⁸⁴ Despite the vague details regarding the cutting off of the hands it is reasonable to assume that the condemned suffered a great degree of pain, whether that was only momentarily or not as they appear to have been hung within minutes.

As there has been no systematic analysis of Scottish execution practices it is difficult to quantify the use of mutilation as a prelude to execution prior to the commencing of this study. A reading of the available printed sources suggests that, similar to burning, the punishment was used relatively sporadically and had all but disappeared by the mid-eighteenth century. The fact that there are only four cases among the records analysed for this study also supports this assessment. Similar to the cessation of the punishment of burning following Geddes' case, after 1765 there were no more criminals sentenced to this form of pre-mortem aggravation to the death sentence. One potential reason for this could be due to the difficulties faced in cutting off Provan's hand in 1765 and the seeming ambivalence and desire to conduct the execution as quickly as possible on the part of the scaffold authorities. However the disappearance of the punishment can also be linked to the wider context of the time and the long term decline in prolonged execution spectacles discussed in chapter one. In addition, by the mid-eighteenth century the post-mortem punishment of hanging in chains was used as a means of enacting some further infamy to the punishment of death in particularly heinous cases, even before the passing of the Murder Act, and thus replaced aggravated executions.

²⁸³ British Library [hereafter BL] 4136.c.8.(12). Thomas Taylor, *A Short Account of the State of Alexander Provan during his Confinement after his Condemnation* (Glasgow: 1765), p. 9.

²⁸⁴ Robert Brown, *The History of Paisley from the Roman Period down to 1884* (Paisley: J & J Cook, 1886), p. 40.

The Punishment for Treason

Within the annals of penal history the distinction attached to treason by legal statute had been matched by the nature of the punishment for the crime upon the scaffold. The murderers of James I of Scotland in 1437 were subjected to executions lasting for three days during which red hot irons were put through their legs, they were disembowelled alive and their quartered bodies were displayed.²⁸⁵ During the repression and punishment of the Covenanters, who opposed the interference of the Stuarts in the Presbyterian Church of Scotland in the 1680s, a period in Scotland known as the “killing times”, there were numerous examples of the state’s use of execution and post-mortem display of body parts. A notable example was that of David Hackston who was tried before the Scottish Privy Council for rebellion against the King and for being guilty of the murder of Arch-Bishop James Sharp in 1679. He was drawn on a hurdle to the Market Cross in Edinburgh and there had his hands struck off, he was then hanged but cut down alive. His bowels were taken out, followed by his heart which was shown to the people before being burnt. His head was then severed and his body quartered and sent for display around Scotland.²⁸⁶

In England, perhaps the most sanguine and prominent executions for treason in living memory at the time of the 1715 Jacobite Rebellion would have been those conducted following Monmouth’s Rebellion. It had been a failed attempt to overthrow James II in favour of the Protestant Duke of Monmouth, an illegitimate son of the late Charles II in 1685. Following the Western ‘bloody’ Assizes that were presided over by the infamous Lord Jeffries there were 251 executions carried out in various western towns including Lyme, Bridport, Weymouth and Exeter. The full sentence of the law was carried out as the condemned were hanged, but not until they were dead, disembowelled, beheaded, quartered and their remains boiled in brine, covered in black tar and set upon poles and in trees in the surrounding areas. It was reported that it was only when James himself was passing through the west the following year that

²⁸⁵ Cameron, *Prisons and Punishment*, p. 11.

²⁸⁶ T.B. Howell, *Cobbett’s Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours*, Vol. X 1680-1685 (London: T.C Hansard, 1811), p. 843.

the sight and odour prompted him to order that they be taken down and buried.²⁸⁷ Following the Glorious Revolution of 1688, and continuing into the eighteenth century, a prevalent Whig argument was that the ancient contract between the Stuart King and his people had been violated, therefore the regime was illegitimate and resistance to it was lawful. When investigating Whig martyrdom and memory after 1688 Melinda Zook demonstrated how the 'bloody assizes' became a focal point in post-revolution Whig martyrologies aimed at legitimizing their actions.²⁸⁸ Therefore, when deciding on how best to punish the Jacobite rebels of 1715, the government and the King had to balance the need to demonstrate their strength as a deterrent to future rebellion but without the excessive cruelties of the regime they had overthrown.

The Early Modern period has been labelled as the heyday of capital punishment due to the need to maintain control in a time of few practical alternatives with "richly symbolic rituals and representations...silencing all questions about its [the state's] legitimacy".²⁸⁹ Katherine Royer emphasised the historic importance of theatricality as well as brutality in the punishment for treason.²⁹⁰ However the argument to be presented in chapter six is that, while the symbolism of the traitor's death remained important in the eighteenth century, excessive cruelty could have potentially threatened the legitimacy of those inflicting the punishment. In addition, due to the multiple stages of the traitor's death sentence, their legal death extended beyond their physical death and thus the point at which their execution became a post-mortem punishment was indeterminate. Furthermore, while the death sentence remained the same throughout much of the period, its implementation upon the scaffold was discretionary. Following the rebellions of 1715 and 1745 chapter six will demonstrate that the disembowelling, beheading and quartering parts of the executions were carried out in varying orders and in some cases were post-mortem punishments rather than aggravated executions. In addition, by the late eighteenth century all parts of the sentence except the hanging and beheading were removed

²⁸⁷ Melinda Zook, 'The Bloody Assizes: Whig Martyrdom and Memory after the Glorious Revolution', *Albion*, Vol. 27, (1995), pp. 373-396, p. 382.

²⁸⁸ *Ibid.*, pp. 373-396.

²⁸⁹ Garland, 'Modes of Capital Punishment', p. 48.

²⁹⁰ Katherine Royer, 'The Body in Parts: Reading the Execution Ritual in Late Medieval England', *Historical Reflections*, Vol. 29, (2003), pp. 319-339, p. 323.

prior to the scheduled date of execution. These gradual changes to the punishment of treason require further expansion, especially when we place them into a discussion of the changing nature of capital punishment more widely across this period. This is a central theme to be addressed in chapter six.

Post-Mortem Punishment

When investigating the post-mortem infamies that were enacted upon the corpse a key question is why punish the dead? In this period there were various religious, legal and medical discourses as well as popular beliefs about the dead criminal body. These included beliefs about the potency of the recently dead. Sarah Tarlow has highlighted that in Denmark, Germany and Switzerland the blood of decapitated criminals was taken as a form of medicine into the nineteenth century.²⁹¹ Similarly, Owen Davies and Francesca Matteoni have investigated the belief in the healing properties of the hanged man's hand if it was rubbed against bodily swellings that achieved prominence in England in the second half of the eighteenth century.²⁹² In his investigation of the punishing of the suicide body in England and Scotland R.A. Houston distinguished between the forfeiture of goods and the more obvious punitive punishing of the body. He included examples in the sixteenth and early seventeenth centuries where suicide corpses were dragged through the streets before they were buried or where they were hung upon the gallows. While the gibbeting of suicide bodies in Scotland disappeared in the late seventeenth century the bodies were still dragged through the streets in the eighteenth century in what he termed as an "extra-judicial punishment".²⁹³ McGowen stated that the punishment of a criminal's body was as much to do with the "language of community" as with the "mechanics of pain".²⁹⁴ This would certainly fit with the aims outlined in the Murder Act, namely to impress upon

²⁹¹ Sarah Tarlow, *Ritual, Belief and the Dead in Early Modern Britain and Ireland* (Cambridge: Cambridge University Press, 2011), p. 160.

²⁹² Owen Davies and Francesca Matteoni, 'A Virtue beyond All Measure: The Hanged Man's Hand, Gallows Tradition and Healing in Eighteenth- and Nineteenth-Century England', *Social History of Medicine*, Vol. 10, (2015), pp. 1-20.

²⁹³ R.A. Houston, *Punishing the Dead? Suicide, Lordship and Community in Britain, 1500-1830* (Oxford: Oxford University Press, 2010), pp. 238-239.

²⁹⁴ Randall McGowen, 'The Body and Punishment in Eighteenth-Century England', *The Journal of Modern History*, Vol. 59, (1987), pp. 651-679, p. 654.

the minds of both the condemned and the spectator through the use of post-mortem punishment.

The additional punishment of an offender's body following execution had been a penal option before the passing of the Murder Act in 1752. However it had been subject to discretionary implementation, whereas the act made it explicit that all murderers must be sentenced to either public dissection or hanging in chains. Chapters four and five will provide more in-depth analyses of these punishments but the final section of this chapter will attempt to place the use of post-mortem punishment within the changing nature of capital punishment in this period. The first half of the eighteenth century had witnessed the publication of a number of commentaries calling for more severity to be added to the death sentence. A notable example is the 1701 pamphlet *Hanging Not Punishment Enough* which advocated hanging in chains alive and breaking on the wheel for certain crimes.²⁹⁵ From a reading of these commentaries McGowen has highlighted the reoccurring argument that the punishment should be more proportionate to the crime committed. For example, in 1752 Charles Jones lamented that "almost all nations but ours adopt their punishments to the nature of the offence...we make no difference in the sentence of our laws between a poor sheep stealer and the most inhuman and blood mangling highwaymen or murderer".²⁹⁶ McGowen has additionally argued that there were some who advocated more severe death sentences due to a belief that stark examples would lead to a reduction in the sheer numbers capitally punished.²⁹⁷

Nicholas Rogers stated that the Murder Act was one of the measures added to the statute books to counteract the crime wave happening in London between 1749 and 1753.²⁹⁸ At the time of its passing, violent robberies that had the potential to lead to murder had become an established "theme of crime reporting" within the London

²⁹⁵ *Hanging Not Punishment Enough*, p. 9.

²⁹⁶ Randall McGowen, 'The Problem of Punishment in Eighteenth-Century England', in Simon Devereaux and Paul Griffiths (eds.), *Penal Practice and Culture, 1500-1900 Punishing the English* (Basingstoke: Palgrave, 2004), pp. 210-231, p. 218.

²⁹⁷ *Ibid.*, p. 213.

²⁹⁸ Rogers, 'Confronting the Crime Wave', p. 88.

newspapers.²⁹⁹ When questioning what motivations lay behind the passing of the act, Beattie argued that it was not prompted by fears over domestic or neighbourhood quarrels. Instead fears were rooted in the committing of murders and the threat of violence involved during street and highway robberies in and around the capital.³⁰⁰ The preamble to the act stated that “the horrid crime of murder has of late been more frequently perpetrated than formerly, and particularly in and near the metropolis of the kingdom”, again showing the specific concerns over London. Despite this, the act covered all of Britain and thus placed the post-mortem punishment of the criminal corpse squarely within the criminal justice system. While it did not enact any pre-mortem suffering upon the condemned, it sought to add the severity to the death sentence advocated within the public debates at the time.

Chapter five will provide a more in-depth discussion of hanging in chains, including an analysis of the chronology of the punishment. It will demonstrate how the mid-eighteenth century in Scotland, even before the passing of the act, witnessed a concentration of gibbeting at a time of peak numbers of executions and will draw comparisons with the use of the punishment in England around the same time. However it is beneficial here to place the concentration of hanging in chains within this discussion of the changing nature of capital punishment. We have already noted how the penal option of severing a hand from the body immediately prior to execution remained, yet it was used only sporadically by the mid-eighteenth century. Furthermore, the previous chapter demonstrated that, following the defeat of the 1745 Jacobite Rebellion, there was a marked increase in the number of offenders sent to the gallows as a result of trials before the Northern Circuit. Within this, in a number of cases the decision was taken to hang the bodies of some offenders in chains at the scene of their crime in order to add further severity to the punishment of death. Comparatively, the late 1740s and early 1750s in south-east England witnessed a similar increase in gibbeting for the crimes of murder, robbery and smuggling prior to

²⁹⁹ Richard Ward, *Print Culture, Crime and Justice in Eighteenth-Century London* (London: Bloomsbury, 2014), p. 202.

³⁰⁰ Beattie, *Crime and the Courts*, p. 529.

1752.³⁰¹ Therefore, by the mid-eighteenth century, post-mortem punishment was gradually becoming the main aggravation added to the death sentence before being placed more centrally within the criminal justice system in 1752.

In conducting this research it has been difficult to gauge exactly how contemporaries in the eighteenth and early nineteenth centuries viewed post-mortem punishment, from those administering the punishments to those receiving and witnessing them. However, using the available sources, it is possible to place the use of post-mortem punishment within a discussion of the changing nature of capital punishment in this period. Francis Hutcheson read at Glasgow University from 1710 to 1716 and was later appointed the Chair of Philosophy in 1729. He warned, in his posthumously published *System of Moral Philosophy*, that horrid execution spectacles, especially if frequently presented, would harden the hearts of those present and abate their natural sense of compassion by overstraining it. Instead he advised that an “easy death” of the condemned but with subsequent infamy upon the corpse would still affect the spectators and answer its judicial purpose, but without inflicting greater misery upon the criminal and thus hardening the hearts of the spectators.³⁰² In 1832 Sir Archibald Alison remarked that in Scotland in the most atrocious cases the only peculiarities that could be added to the death sentence were executions at the scene of the crime or hanging the body in chains as opposed to the earlier practices of quartering limbs and affixing them to public places.³⁰³ This again demonstrates that by this period the post-mortem punishment of the body had replaced pre-mortem evisceration as the main aggravation added to the death sentence for the crime of murder.

Conclusion

To conclude, the purpose of this chapter was to build up a picture of the scene at the scaffold across this period before exploring the changes that were made to the

³⁰¹ See Nicholas Rogers, *Mayhem: Post-war Crime and Violence in Britain, 1748-53* (London: Yale University Press, 2012); Zoe Dyndor, ‘The Gibbet in the Landscape: Locating the Criminal Corpse in Mid-Eighteenth Century England’, in Richard Ward (ed), *A Global History of Execution and the Criminal Corpse* (Basingstoke: Palgrave Macmillan, 2015), pp. 135-167.

³⁰² Francis Hutcheson, *System of Moral Philosophy, Volume I* (Glasgow: R. and A. Foulis Printers, 1755), p. 337.

³⁰³ Alison, *Principles of the Criminal Law of Scotland*, p. 90.

carrying out of public executions between the mid-eighteenth and early nineteenth centuries. It has demonstrated that the theatre of the gallows was a public spectacle that could generate a diverse range of behaviours and reactions on the part of the central actors, the condemned criminals themselves, and the large concourse of spectators who gathered to witness the event. Whether the scenes were characterised by obstinate or penitent criminals and a raucous or solemn crowd they continued to offer a pervasive attraction despite the fact that the period between the mid-eighteenth and early nineteenth centuries saw gradual but crucial changes made to the public execution spectacle.

From an examination of the different locations and times of executions as well as the adaptations to certain elements of the execution ritual, it is clear that this period did witness changes in the carrying out of capital punishment. However this was a pattern of gradual progression rather than an instant break with older practices. For example, after most of Scotland's circuit cities and towns had moved their common place of execution closer to the place of confinement there was a reduced need for certain parts of the scaffold ritual such as the procession. However the lack of uniformity or central policy dictating these changes throughout the country combined with the increased use of crime scene executions in the early nineteenth century, meant that the procession continued to be of central importance in some cases and could attract a large crowd. Within this, executions could take nearly all day and disrupt local areas that may have not witnessed a similar spectacle in living memory.

In addition to the gradual changes made to the logistics of the execution ritual, this chapter has also investigated the death sentences meted out by the courts. By the mid-eighteenth century capitally convicted offenders were almost exclusively sentenced to be hanged by the neck until dead. However the sentencing of one man to be burnt and another four to have their hands severed from their bodies immediately prior to execution required further analysis. While there has been limited work done on Scottish execution practices it appears that the sentence of burning had been used in the Early Modern period to punish the crime of bestiality and, of course, this punishment was also characteristic of the witch trials. Similarly, the pre-mortem aggravation of having a hand severed prior to execution had been used to add severity

to the death sentence for the commission of particularly heinous murders. However, from a reading of the available details of Scottish execution practices within legal commentaries, it certainly appears that these punishments had declined and that decisions to use them were sporadic. The apparent difficulties in the carrying out of the punishment in Alexander Provan's case in 1765, where his hand was not cleanly severed at the wrist and he was hastily hanged crying out in pain, may have also deterred the authorities from using this punishment again.

Thus far this thesis has provided an extensive quantitative analysis of the administration of the death sentence as well as a qualitative examination of the changing nature of capital punishment across this period. The second half of the thesis will now turn to investigate the use of the post-mortem punishments of dissection and hanging in chains. It will develop the argument presented in the current chapter, namely that the mid-eighteenth century witnessed a concentration in the use of hanging in chains at a time of peak numbers of executions and calls for more exemplary punishment. Furthermore, the Murder Act placed post-mortem punishment at the heart of the criminal justice system. Within this, the post-mortem evisceration of the criminal corpse, whether on the dissection table or in the gibbet cage, acted as a more exemplary form of punishment instead of the pre-mortem aggravations to the public execution found in previous centuries, a fact that has been largely ignored by crime historians.

Chapter Four:

A Fate Worse than Death? Dissection and the Criminal Corpse 1752-1832.

The anatomy of the human body has a long history in the annals of science and medicine. An area that had long been the subject of debate prior to the mid-eighteenth century, and would continue to be, was the dissection of the human body. The practice was defended in terms of the pursuit of knowledge for the long term benefit of the living but faced difficulties in the form of superstition and fear regarding the fate of the dead body. Historians have placed their investigations of dissection within wider beliefs about the body and the disposal of it in death in order to shed light upon fears over its use for anatomical study. Attention has also been given to the difficulties faced by the medical profession in obtaining cadavers and the problem of body-snatching, which reached its pinnacle in the early nineteenth century.³⁰⁴ Ruth Richardson's *Death, Dissection and the Destitute* placed the anatomical corpse and popular beliefs about the dead body within an extensive study of the passing of the 1832 Anatomy Act.³⁰⁵ More recently Elizabeth Hurren has provided a rereading of the act in order to investigate more thoroughly the trade in the dead poor in its wake.³⁰⁶ However the sentencing of a murderer to the post-mortem punishment of dissection between the 1752 Murder Act and the Anatomy Act has received relatively little in-depth investigation until recently.³⁰⁷

Due to the medical demand for the supply of dead bodies, legislation had been passed in 1505 that granted the Incorporation of Surgeons and Barbers in Edinburgh the body of one executed criminal per year. Similar provisions were made in London in 1540 to allow the newly united Companies of Barbers and Surgeons the bodies of four

³⁰⁴ See Martin Fido, *Bodysnatchers; A History of the Resurrectionists 1742-1832* (London: Weidenfeld and Nicolson, 1988); Jonathan Sawday, *The Body Emblazoned: Dissection and the Human Body in Renaissance Culture* (London: Routledge, 1995); Helen MacDonald, *Human Remains; Dissection and its Histories* (London: Yale University Press, 2006).

³⁰⁵ Ruth Richardson, *Death, Dissection and the Destitute* (London: Routledge, 1978).

³⁰⁶ Elizabeth Hurren, *Dying for Victorian Medicine; English Anatomy and its Trade in the Dead Poor, c. 1834-1929* (Basingstoke: Palgrave, 2012).

³⁰⁷ The post-mortem punishment of dissection following the Murder Act is a key strand of the Wellcome Trust funded project Harnessing the Power of the Criminal Corpse. In particular the work of project member Elizabeth Hurren who has kindly allowed me to read her upcoming monograph, *Dissecting the Criminal Corpse: Post-Execution Punishment from the Murder Act (1752) to the Anatomy Act (1832)* (Palgrave: Forthcoming 2016).

executed felons. In 1636 William Gordon of Kings College, Aberdeen successfully petitioned the Privy Council for the bodies of two executed men or those dying in hospitals with “few friends or acquaintances that can take exception”.³⁰⁸ However it was with the passing of the Murder Act that post-mortem dissection took a more central place in the criminal justice system. The act stated that the bodies of criminals executed anywhere in Britain other than London, where they were to be given to Surgeon’s Hall, would be given to a surgeon as directed by the judge and provided a clause to protect against attempts made to reclaim the bodies. Although it provided much needed cadavers at a time of increased demand, the act made no explicit mention that the criminal corpses were to be used for the purpose of medical advancement. Instead the preamble to the act pointed to the necessity for some “further terror and peculiar mark of infamy” to be added to the punishment of death.³⁰⁹ The focus of this chapter is to investigate the use of post-mortem dissection and question its capacity to act as the effective punishment sought by the Murder Act.

The first half of this chapter will investigate beliefs and fears surrounding the dead body in this period, particularly those over its disposal. Furthermore, it will highlight instances where criminals and their relatives were more preoccupied with the fate of their body than with the execution itself. In 1829 Sir Walter Scott commented that dissection as a punishment was certainly not without effect as “criminals have been known to shrink from that part of the sentence which seems to affect them more than the doom of death itself”.³¹⁰ Alongside popular beliefs about the dead body and dissection we must also question those of the men within the medical profession who carried out the dissections. An interior knowledge of the human body, and practical experience in dissecting it, was deemed to be a vital part of medical education for the ultimate benefit of the living. There is evidence to demonstrate that, for the professors of anatomy receiving the criminal corpses and

³⁰⁸ G.A.G. Mitchell, ‘Anatomical and Resurrectionist Activities in Northern Scotland’, *Journal of the History of Medicine and Allied Sciences*, Vol. IV, (1949), pp. 417-430, p. 418.

³⁰⁹ *House of Commons Parliamentary Papers* [accessed 25 April 2015] House of Lords Papers, *A Bill intituled an Act for better preventing the horrid Crime of Murder*, (5 March 1752).

³¹⁰ David Douglas (ed), *The Journal of Sir Walter Scott*, Vol. 2 (Cambridge: Cambridge University Press, 1890), p. 219.

their students, the dissections were a means to an end in the acquisition of knowledge rather than the punitive measure sought by the Murder Act.

The second half of this chapter will highlight the conjunction between medicine and punishment and the preservation of life with the ending of it. A reading of the available university records shows that, often, criminal corpses were used as subjects for investigation and demonstration as part of courses on anatomy. Andrew Cunningham has argued that, by the late eighteenth century, the discipline had undergone a number of changes constituting what he called “the end of old anatomy” and that dissection was increasingly used as means to learn and teach about the interior workings of the body.³¹¹ Therefore, rather than solely serving the retributive justice sought by the Murder Act, some criminal dissections, and the findings taken from them, contributed to medical knowledge more widely and offered the opportunity for original research. The final part of this chapter will provide a more in-depth study of the dissection of the infamous William Burke. His case is a fitting conclusion to the chapter as it embodied popular fears over dissection, especially heightened due to the prevalence of body-snatching at the time. However the excitement generated by the whole case reached fever pitch by the time of Burke’s dissection and the very abhorrence felt for the practice contributed to the creation of a mass public desire to see his corpse laid out in Monro’s anatomy theatre. His dissection, perhaps more than any of the others performed in Scotland, served to add the infamy sought by the Murder Act.

Beliefs about the Body

In order to question the capacity of dissection to act as a post-mortem punishment it is first beneficial to explore contemporary beliefs over the disposal of the dead body. Richardson argued that confusion and ambiguity concerning the definition of death meant an uncertain balance existed in the eighteenth century between solicitude and fear towards the corpse.³¹² In stipulating that the bodies of executed murderers were to be subject to post-mortem punishment the Murder Act prevented the bodies from

³¹¹ Andrew Cunningham, *The Anatomist Anatomiz’d; An Experimental Discipline in Enlightenment Europe* (Surrey: Ashgate, 2010), p. 384.

³¹² Richardson, *Death, Dissection and the Destitute*, p. 7.

receiving a conventional Christian burial. Jonathan Sawday highlighted that in the Early Modern period, in popular belief, the denial of a Christian burial was thought to affect the deceased person's soul despite neither the Protestant nor Catholic religion stating that "intact burial was a prerequisite for posthumous grace".³¹³ A central element of Protestant doctrine was that the soul was beyond earthly control. Similarly, beliefs about the importance of the body for the Resurrection were contradictory but with little documented evidence suggesting that people believed dissection would compromise future Resurrection.³¹⁴ Steven Wilf argued that popular fears of dissection were rooted more in visceral rather than ideological trepidation whereby the conjuring up of images of "sharpened knives and lacerated flesh" served to centre fears upon the body rather than the soul.³¹⁵ As condemned Scottish criminals had up to a month to contemplate their fate, between sentencing and execution, the fate of their body was evidently a cause for concern in some cases.

Following his conviction and sentencing for murder in 1820 David Dobie shouted to the presiding judge, "my Lord it is a grand thing that you cannot dissect the soul".³¹⁶ However this seeming lack of fear on the part of the criminal over the disposal of their body or the sentence of dissection was not always the case. Kenneth Dow Kennedy, executed in Inverness in 1750 for cattle theft, called out from the scaffold for any MacDonalds or Camerons present to take hold of his body and see it buried in the churchyard. Four came forward and he was buried in a remote corner "appointed for such malefactors".³¹⁷ In addition, some criminals and their relatives feared that their executed bodies would end up in the surgeon's dissection room. Peter Linebaugh highlighted the dealings between criminals, scaffold authorities and the surgeons at Tyburn in the first half of the eighteenth century which often resulted in scuffles over the possession of the bodies.³¹⁸ A similar situation existed in Scotland in this period. The body of Alexander Cheyne, executed in Aberdeen in 1748 for robbery, was finally given over to his relatives after an altercation with the surgeons at

³¹³ Sawday, *The Body Emblazoned*, p. 280.

³¹⁴ Tarlow, *Ritual, Belief and the Dead*, p. 36.

³¹⁵ Steven Wilf, 'Anatomy and Punishment in Late Eighteenth-Century New York', *Journal of Social History*, Vol. 22, (1989), pp. 507-530, p. 510.

³¹⁶ NAS JC8/25/59; *Fife Herald*, Thursday 15 July 1820, p. 2.

³¹⁷ *Derby Mercury*, Friday 20 July 1750, p. 1.

³¹⁸ Peter Linebaugh, 'The Tyburn Riot against the Surgeons', in Hay et al, *Albion's Fatal Tree*, pp. 65-117.

the scaffold.³¹⁹ There are other examples of executed criminal bodies being handed over to sailors to be disposed of at sea to prevent their falling into the hands of the surgeons. This was the case with James Millar's body in 1753 despite the Aberdeen authorities ordering it to be buried at the foot of Gallows Hill.³²⁰ Following the execution of John Worthington for robbery in 1815 his body was lowered into a coffin and carried to Kilmarnock for burial. Prior to interment his friends, "anxious to accelerate the consumption of the corpse", had poured a quantity of vitriol on it which had caused "a fume to rise in volumes from the grave".³²¹ The motive behind this action was to make the corpse an unsuitable candidate for resurrection men.

The sentencing of a criminal to post-mortem dissection was not only intended to provide a further mark of infamy to the punishment of death, as made explicit in the wording of the Murder Act, it was also intended to act as a deterrent from crime. However the issue of deterrence needs to be further unpicked. If someone was intent on committing a premeditated murder or had acted out of extreme anger we can question whether the possibility of dissection was a sufficient deterrent if the prospect of the death sentence was not. In the early eighteenth century Bernard de Mandeville defended the dissection of criminals and argued that the strong aversion against the practice was based upon vulgar superstition. He added that dissection "can never be a greater scandal than hanging".³²² However, while it is more difficult to ascertain whether dissection was a deterrent, it is possible to argue that for some condemned murderers the prospect of dissection caused them greater apprehension than the death sentence itself. The Murder Act did not alter an act that had been passed in 1725 (11 Geo I c.26) which stipulated that executions in Scotland could not be carried out within less than 30 days if the sentence was pronounced south of the Forth and within 40 days if north of the Forth. Therefore, the murderers sentenced to dissection would have had plenty of time to contemplate the fate of their body. When Robert McIntosh was convicted of murder in Aberdeen in 1822 his father travelled to London to petition for a remission of the punishment of dissection. However he returned

³¹⁹ *Derby Mercury*, Friday 16 September 1748, p. 4.

³²⁰ *Caledonian Mercury*, Monday 26 November 1753, p. 3.

³²¹ *Caledonian Mercury*, Monday 20 February 1815, p. 3.

³²² Bernard de Mandeville, *An Enquiry into the Causes of the Frequent Executions at Tyburn* (London: 1725), pp. 26-27.

unsuccessful the day before the scheduled execution and took leave of his son in a “truly affecting scene”.³²³ Following her capital conviction for murder in 1823 Mary McKinnon had beseeched the visitors she received in jail to see her body was decently buried. The *Caledonian Mercury* reported that when the part of the sentence ordering her body to be sent for dissection was read out “she was in a state of insensibility”. It added that her attendants had “very humanely kept her ignorant of the circumstance”.³²⁴ This would suggest that a key part of the capacity of dissection to act as an effective punishment was the psychological torment the prospect caused the condemned criminal.

As well as investigating how criminals viewed the punishment, it is also beneficial to question its effects upon the crowd more generally. John McDonald and James Williamson Black were executed on the spot where they had robbed and murdered 73 year old William Muirhead on the highway between Coltbridge and Corstorphine near Edinburgh in 1813. The *Scots Magazine* observed that “with the view of impressing the minds of the spectators with more awe” their bodies remained uncovered in the cart that delivered them to Edinburgh University for dissection.³²⁵ Similarly, the bodies of William Gordon and Robert McIntosh were escorted to Marischal College by the constables following their execution in Aberdeen which created a spectacle that “could not fail to make a deep impression in the hearts of the thousands gathered”.³²⁶ The execution of James Glen in Glasgow in 1827 had seemingly passed without incident, with the crowd described as maintaining the utmost order. However when the body was lowered into a coffin to be immediately conveyed to the Professor of Anatomy at the university the mood shifted. The driver of the cart that had delivered the body was severely beaten by a great crowd who had followed in procession from the place of execution to the university.³²⁷ Again, while the newspapers did not, and could not, accurately report upon whether these scenes were an effective deterrent from crime, the fact that people followed the carts and, in the case of Glen, reacted angrily when faced with the delivery of the body for

³²³ *Aberdeen Journal*, Wednesday 5 June 1822, p. 3.

³²⁴ *Caledonian Mercury*, Thursday 17 April 1823, p. 3.

³²⁵ *Scots Magazine*, Thursday 1 July 1813, p. 44.

³²⁶ *Aberdeen Journal*, Wednesday 5 June 1822, p. 3.

³²⁷ *Caledonian Mercury*, Saturday 15 December 1827, p. 4.

dissection, demonstrates that the punishment did prompt a negative reaction from the crowd in some cases.

The case of Patrick Ogilvie in 1765 raised the question of social class and dissection. He was a Lieutenant in the 89th Regiment of Foot and had recently returned from the East Indies to stay with his elder brother Thomas and his young wife Katherine Nairn, the niece of Lord Dunsinnan. Thomas was poisoned soon after and both Patrick and Katherine were subsequently tried and convicted for incest and murder. The case garnered great attention and debate over their guilt and the trial proceedings were among only a few sensational Scottish cases in the mid-eighteenth century to be printed in Edinburgh, Glasgow and London. Both were found guilty and sentenced to be executed and their bodies delivered to Alexander Monro on 25th September. However Katherine successfully pled pregnancy and Patrick received four respites of his sentence. The *Caledonian Mercury* reported that “crimes of so black a dye, charged on persons who, until that time, had preserved unblemished characters” required the most evident proof and pointed towards the circumstantial nature of much of the evidence.³²⁸ However Patrick was eventually executed on 13th November and his body delivered to Monro at the university.³²⁹ He was dissected over the course of three days as part of Monro’s anatomy lectures. Medical student Syllas Neville noted in his diary that, due to the great attention the case garnered, many believed “the prejudice of the people of this country would have prevented them from dissecting the body of a murderer of superior rank”.³³⁰ Similarities can be drawn with the English case of Laurence Shirley, Earl Ferrers, who was convicted of murdering his steward and following his execution his body was dissected at Surgeon’s Hall in London in 1760. His body was exposed to the public view for three days before being taken for burial. When reporting upon the punishment, the *Manchester Mercury* assured its readers

³²⁸ *Caledonian Mercury*, Wednesday 9 October 1765, p. 1.

³²⁹ The lengthy trial proceedings can be found in NAS JC7/33-34. It was reported to the High Court that Katherine Nairn gave birth to a baby girl. However she failed to appear in court and in March 1766 it was reported that she had escaped and was never apprehended.

³³⁰ Cozens-Hardy, *Diary of Syllas Neville*, p. 147.

that “even a nobleman of the first rank could not be exempted from the fatal consequences” of murder.³³¹

The importance of the punishment of dissection and its potential effects upon the relatives of the condemned, more so than the criminal themselves, was evident in the 1804 case of Duncan MacArthur. He was convicted for the murder of his wife before the circuit court at Inveraray but was sentenced to be executed where the body had been found, on the banks of Crinan Canal in South Knap, Argyle. He was described as having acknowledged the justice of his sentence upon the scaffold and there were no reported incidents involving the crowd. However following the execution his body was, by an order of the sheriff, handed over to his relatives for interment as John Anderson, the surgeon named in the court’s sentencing, declined to accept it.³³² Anderson was seemingly not against dissecting the body of a criminal as he later accepted the body of Peter McDougall in 1807 following his execution at the common place in Inveraray.³³³ Therefore we can question if his refusal to accept the body was due to the fact that MacArthur was executed in the immediate vicinity of where he had lived, among family and friends who might have become less acquiescent should the body have been cut down and handed over to the surgeon as opposed to his family. It can be argued that those within the criminal justice system understood both the symbolic and material value of dissection, and the potential effects upon both the condemned and their relatives, and thus how it could be harnessed in further punishing the criminal corpse.

Medical Beliefs about the Body

An understanding of the human body was a cornerstone of medical education. A crucial element of the process was the study of anatomy through dissection. In the period between 1700 and 1800 historians have cited a progression from “infrequent, ritualised and moralising dissections” to those more scientifically based and morally

³³¹ *Manchester Mercury*, Tuesday 13 May 1760, p. 2.

³³² *Caledonian Mercury*, Saturday 10 November 1804, p. 3.

³³³ NAS JC13/35/46.

neutral, at least on the part of those performing them.³³⁴ The Scottish universities had established the positions of Professor of Anatomy in the early eighteenth century with Alexander Monro *primus* in Edinburgh and John Gordon in Glasgow credited with raising the teaching standards within the medical schools.³³⁵ In this period Edinburgh University was fast becoming a renowned centre of medical instruction with Alexander Monro *primus* and subsequently his son and grandson, both named Alexander Monro, occupying the position of Professor of Anatomy well into the early nineteenth century. As the eighteenth century progressed a student's first-hand experience of dissecting a human body was believed to be crucial to their medical training and by the early nineteenth century it was an indispensable requirement. However Anita Guerrini argued that the additional meanings of dissection for the punishment of criminal bodies "intruded into the anatomy theatre".³³⁶ This chapter will now turn to question how the practice of dissection was viewed by the people performing it. In turn it will demonstrate that Scottish criminal corpses were used in the teaching of anatomy and to conduct original research and thus the dissection of these bodies went beyond the enacting of retributive justice.

In the first lecture of his course on anatomy entitled 'How to open a dead body' Monro *primus* instructed the class that in this "you are to observe to do everything with the greatest decency".³³⁷ His son, Monro *secundus*, echoed this sentiment and added that dissection should always be "conducted in a skilful manner".³³⁸ In 1775 James Johnston, a student of Monro *secundus*, commented with apparent elation that the class were now moving on to a more accurate examination of the interior of the body having already studied the basic structure through text. He particularly commented upon the opportunity to examine the organs in "a more entertaining light...as several parts conspiring to form a machine".³³⁹ To those within

³³⁴ Johanna Geyer-Kordesch and Fiona Macdonald, *Physicians and Surgeons in Glasgow; The History of the Royal College of Physicians and Surgeons of Glasgow 1599-1858* (London: Hambledon Press, 1999), p. 172.

³³⁵ Helen Dingwall, *A History of Scottish Medicine* (Edinburgh: Edinburgh University Press, 2003), p. 117.

³³⁶ Anita Guerrini, 'Alexander Munro *Primus* and the Moral Theatre of Anatomy', *The Eighteenth Century*, Vol. 47, (2006), pp. 1-18, p. 3.

³³⁷ Edinburgh University Centre for Research Collections [hereafter ED CRC] Lectures of Professor Alexander Munro *primus*, DC.5.129, p. 56.

³³⁸ ED CRC Papers of Alexander Munro *secundus*, Gen 579, p. 1.

³³⁹ ED CRC Papers of Alexander Munro *secundus*, Gen 570, p. 1.

the medical profession the dead body was a subject for investigation or indeed a machine, the mechanics of which were to be studied as a means of advancing knowledge. In 1795 William Rowley argued that an in-depth knowledge of anatomy was vital to the successful performance of surgery to all classes of society, including His Majesties army and navy, as well as during childbirth.³⁴⁰ A reoccurring justification of the use of the dead for the benefit of the living was, and continued to be, characteristic of the arguments of those defending dissection.

Andrew Duncan, a Professor of Medicine in Edinburgh, exalted the benefits of morbid anatomy, the opening of the body to investigate the cause of death. He detailed cases where he had opened the bodies of those who died of certain diseases, sometimes in the presence of their relatives who had given their consent.³⁴¹ Similarly, Guenter Risse highlighted that the Royal Edinburgh Infirmary regulations meant that autopsies could be performed upon the bodies of patients with permission from relatives and the consent of hospital managers.³⁴² In terms of the medical profession and its links with the criminal justice system, there are numerous examples throughout this period where surgeons attested to the cause of death in murder cases. In many of these the victims' bodies had been examined internally as well as externally. In suspected poison cases the stomach was subject to more detailed examination and removed from the body. Similarly, in suspected infanticide cases the infant's lungs were removed in order to conduct the test to see if they would float. It was believed that this would indicate whether the child had taken breath. It can be argued that there were some instances where the surgeon's evidence was pivotal. Upon the scaffold Edward Moore claimed the surgeons had "swore his life away" after they confirmed to the court that his wife had died of a severe and deliberate beating

³⁴⁰ William Rowley, *On the Absolute Necessity of Encouraging Instead of Preventing or Embarrassing the Study of Anatomy* (London: 1795), p. 5.

³⁴¹ ED CRC Andrew Duncan, *Contributions to Morbid Anatomy*, P. 46, X:1, p. 11.

³⁴² Guenter B. Risse, *Hospital Life in Enlightenment Scotland; Care and Teaching at the Royal Infirmary of Edinburgh* (Cambridge: Cambridge University Press, 1986), p. 263. In 1993 human bones were discovered as a result of excavations in Edinburgh. They showed signs of post-mortem dissection and were identified as belonging to 'unclaimed' bodies of patients who had died in the Royal Infirmary. See David Henderson, Mark Collard and Daniel Johnston, 'Archaeological Evidence for Eighteenth-Century Medical Practice in the Old Town of Edinburgh: Excavations at 13 Infirmary Street and Surgeon's Square', *Proceedings of the Society of Antiquities of Scotland*, Vol. 126, (1996), pp. 929-941.

rather than by accident as he had claimed.³⁴³ In these cases the inspection of the body was a necessary and useful practice and, perhaps crucially, was viewed primarily as an investigation into the cause of death through autopsy. However dissection was distinct from autopsy and involved the cutting open of the body for examination and was both a research and a pedagogical process.³⁴⁴ Although the line between the two was not always clear, it was the practice of dissection which seemed to cause greater anxieties. Despite this, it is the argument here that it was often the case that the body of the murderer, unless it belonged to someone of great infamy such as William Burke, was treated in a similar manner to many others upon the dissection table. Therefore the punitive aims of the Murder Act were largely met due to the public anxiety regarding dissection rather than any distinction in the manner in which the criminal dissections were conducted.

Throughout this period, particularly in the early nineteenth century during widespread concern over grave-robbing, men of science continually defended and justified the need for dissection. Within this they showed contempt for the ignorance and superstition thought to be characteristic of popular beliefs surrounding the fate of the dead body. Incidentally it was these beliefs that prompted a fear of dissection, thus aiding in its capacity to act as an effective punishment. In defence of dissection in 1819 Dr Barclay addressed the issue of burial. He stated that many thought it unchristian not to decently bury the body. However, in making a comparison with the Egyptian belief that it was profane not to embalm the body, or the necessity of burning in far eastern practice, he argued that in any of these methods of disposal the body was reduced to atoms.³⁴⁵ When reporting upon the prospective legislation as a result of Henry Warburton's Select Committee on the supply of bodies for the anatomy schools in 1829 an article in the *Caledonian Mercury* discussed the opposition to the use of the unclaimed bodies of those dying in hospitals, workhouses and penitentiaries. It described a "great clamour" raised by "foolish and ignorant people" on the issue and defended the proposal by stating that these people had no kindred to care what became of their bodies or to have their "feelings wounded" by the

³⁴³ *Caledonian Mercury*, Saturday 23 May 1829, p. 3.

³⁴⁴ Tarlow, *Ritual, Belief and the Dead*, p. 78.

³⁴⁵ ED CRC Dr Barclay, *The Medical School of Edinburgh* (Edinburgh: 1819), P.46, X:1, p. 11.

dissection.³⁴⁶ It was their disconnection from the living that made them the ideal candidates, again suggesting that the disposal of the corpse was just as much a concern for the living as the dead.

The study of anatomy had long faced popular contempt and, despite receiving a supply of bodies as per the stipulations of the Murder Act, Monro *tertius* summed up the position of the surgeons when he stated “in this country anatomists teach rather by the forbearance than by the countenance of the government”.³⁴⁷ The legal supply of criminal corpses was not sufficient to sustain the growing demand for cadavers and thus the medical schools obtained bodies from other sources. In 1742 the raising of the dead from their graves for profit was formally made a criminal offence in Scotland in order to tackle the problem of grave-robbing.³⁴⁸ In addition, the early nineteenth century has been called the ‘Golden Age of Bodysnatching’ due to the increased use of professional grave-robbes by the medical schools. Monro *tertius* obtained cadavers in this manner and his supply extended beyond Scotland alone. At least one of his shipments of bodies from Dublin had been confiscated and buried by customs officials but the Lord Advocate, Sir William Rae, sent a letter to the head of the Scottish customs hoping to direct against any future “unnecessary impediments being thrown in the way of the conveyance of dead subjects”.³⁴⁹ This suggests that the practice, although unsavoury, was an acknowledged necessity. Dr Robert Knox, infamous for his part in the sensational Burke and Hare case of the late 1820s, received around 15 bodies per year from body-snatchers in Edinburgh and his surviving accounts show that he also had agents in Glasgow, Manchester and Ireland from whom he collectively obtained up to a further 20 bodies annually.³⁵⁰

The problem of bodysnatching and its inexplicable links to the medical schools meant that the main driver behind the eventual passing of the 1832 Anatomy Act (2 & 3 Will. IV c. 75) was a desire to end the practice by providing a more adequate supply

³⁴⁶ *Caledonian Mercury*, Monday 12 January 1829, p. 3.

³⁴⁷ Glasgow University Archives Special Collections [hereafter GUA] MS Murray 663/5.

³⁴⁸ Houston, *Punishing the Dead*, p. 246.

³⁴⁹ Lisa Rosner, *Anatomy Murders: Being the True and Spectacular History of Edinburgh's Notorious Burke and Hare and the Man of Science who Abetted Them in the Commission of Their Most Heinous Crimes* (Philadelphia: University of Pennsylvania, 2010), p. 42.

³⁵⁰ *Ibid.*, p. 37.

of cadavers for dissection. The Lord Advocate, Sir William Rae, gave evidence in support of Henry Warburton's 'Bill for Preventing the Unlawful Disinterment of Human Bodies, and for Regulating Schools of Anatomy' in March 1829.³⁵¹ His involvement in the bill was likely due to the fact that William Burke had been executed in January 1829 and his case was still very much a cause for national public concern. Charles Bell, a future Professor of Surgery at Edinburgh University, was a member of an early nineteenth-century anatomical society formed to call for changes to the law regarding the legal supply of bodies to the medical schools. Granville Sharp Pattison, a Glasgow anatomy lecturer, reported upon the difficulties in obtaining first-hand experience of dissecting a human body to Warburton's Select Committee. He admitted that when he was a student himself groups of around eight would take part in grave-robbing in order to gain the valuable experience of dissection.³⁵² Thus the recommendation of the Select Committee that the bodies of those who died and were unclaimed in public institutions such as hospitals and workhouses should be given over for dissection received the support of the medical profession.

The *Caledonian Mercury* reported upon the findings of the Select Committee in great depth. In April 1828 the newspaper estimated that the number of unclaimed bodies in public institutions in Edinburgh alone numbered around 400 annually.³⁵³ An article in November 1828 focused upon the difficulties faced when attempting to "abate the dislike of the public to dissection". In particular it argued for the removal of the clause within the Murder Act directing bodies to be dissected. The article pointed to the insufficient number of bodies yielded but also stated that the act had failed to adequately prevent the crime of murder. It further claimed that those within the medical field were unanimous in wanting the act repealed as the use of criminal corpses had heaped disdain on the practice of dissection.³⁵⁴ This chapter will now demonstrate that, for those carrying out the criminal dissections, the practice was used as a means to an end in the acquisition of knowledge without reference to its capacity to act as a judicial punishment as per the stipulations of the Murder Act.

³⁵¹ Richardson, *Death, Dissection and the Destitute*, p. 146.

³⁵² Rosner, *Anatomy Murders*, p. 37.

³⁵³ *Caledonian Mercury*, Saturday 26 April 1828, p. 3.

³⁵⁴ *Caledonian Mercury*, Saturday 15 November 1828, p. 3.

Dissection and the Criminal Corpse

The Murder Act stipulated that the bodies of those executed in London or within the county of Middlesex would be conveyed to Surgeon's Hall for the purpose of public dissection. In all other parts of Britain the judge appointed the surgeon who would receive the corpse. Elizabeth Hurren has shown that criminal corpses were sought as they could serve as a lucrative means for medical men to practice dissection before paying audiences made up of those within the medical profession but also the general public.³⁵⁵ However in Scotland the bodies of executed murderers were predominantly sentenced to be dissected within one of the country's biggest universities before a predominantly medical audience. Table 12 demonstrates that, between the passing of the Murder Act in 1752 and the Anatomy Act in 1832, there were 110 murderers sentenced to the post-mortem punishment of dissection in Scotland, 85 men and 25 women.³⁵⁶ It is evident that in any given decade there were no more than 25 cadavers made available to the medical schools, with the number in some decades falling below ten. The eighteenth century witnessed a marked increase in the numbers of medical students and, as discussed above, an increasing demand for bodies for the purpose of dissection as part of the anatomy courses. The numbers provided through the legal channel of convicted murderers were not nearly enough to sustain this demand and corpses were procured, often through illegal or illicit means, elsewhere. However the focus here is upon dissection and the criminal corpse and the first issue to be investigated is where the bodies were sentenced to be dissected.

³⁵⁵ Hurren, *Dissecting the Criminal Corpse*. See also Richard Ward, 'The Criminal Corpse, Anatomists and the Criminal Law: Parliamentary Attempts to Extend the Dissection of Offenders in Late Eighteenth-Century England', *Journal of British Studies*, Vol. 54, (2015), pp. 63-87. Ward discussed an attempt made by William Wilberforce in 1786 to extend the punishment of dissection for a wider range of crimes. The bill, he argued, originated with Wilberforce's close friend William Hey, a senior surgeon at Leeds Infirmary, who made considerable monetary gains from charging the public for tickets to the criminal dissections he carried out.

³⁵⁶ There were five women convicted of the murder of their infants who did not receive any post-mortem punishment within the court's sentencing. The cases occurred in the 1750s and 1760s and it is unclear what happened to their bodies after execution as there were no reports of them being conveyed to the place of dissection as was normally the case.

Table 12: Breakdown by Decade of Murderers Sentenced to Dissection Between 1752 and 1832.

	Men	Women	Total
1752-1759	2	6	8
1760-1769	4	6	10
1770-1779	7	2	9
1780-1789	5	1	6
1790-1799	9	1	10
1800-1809	12	2	14
1810-1819	11	1	12
1820-1829	21	4	25
1830-1832	14	2	16
Total	85	25	110

Source: Figures compiled using Justiciary Court records.

If a murderer had been executed in Edinburgh or Glasgow their bodies were delivered to the Professor of Anatomy at the respective city's university across the period. Similarly, by the late eighteenth century, those executed in Aberdeen were sentenced to be dissected within the Marischal College. Therefore in over 76 per cent of the total cases the criminal corpses were sentenced by the courts to be delivered to the Professor of Anatomy at Edinburgh, Glasgow or Aberdeen universities. In terms of those executed elsewhere in Scotland, in the early part of the period their bodies would be delivered to a local physician or surgeon named in the court's sentencing. However, as the period progressed, the bodies of those executed outside of Scotland's biggest cities were sentenced to be conveyed to either Edinburgh or Glasgow universities for dissection as opposed to being given over to a local medical man. In the 1760s, following executions in Paisley and Lanark respectively, the court ordered the bodies to be delivered to Glasgow University. Similarly, despite being executed in Perth in 1775 Alexander Husband's corpse was to become the first of a few sentenced to be dissected 50 miles away by Monro *secundus* in Edinburgh. There were also examples where bodies were sentenced to be handed over to local surgeons following execution but ended up in Edinburgh or Glasgow instead. For example, Robert Keith was executed in Jedburgh in 1772 and instead of being delivered to Dr Thomas Rutherford as sentenced he became a subject in the anatomy lectures of Monro in

Edinburgh.³⁵⁷ Following her execution in 1784 in Stirling Sarah Cameron's body was cut down from the scaffold, put in a coffin and immediately conveyed to Glasgow University despite having been sentenced to be handed over to Thomas Lucas, a surgeon in Stirling.³⁵⁸

The decision to send bodies executed elsewhere in Scotland to Edinburgh became even more frequent in the early nineteenth century. Following executions in areas of northern Scotland such as Dundee, Montrose, Cupar, Kinghorn, Forfar and Inverness, some of which were closer to Aberdeen, as well as areas in the west of Scotland that were geographically closer to Glasgow such as Stirling and Ayr, the bodies were conveyed to Edinburgh for dissection by *Monro tertius*. This further attested to the monopoly the main universities, particularly Edinburgh, had over the supply of criminal corpses as, often, the bodies had to be conveyed miles from the place of execution and we can question the condition of the bodies upon arrival, particularly in the summer months. Similarly, the Professor of Anatomy at Glasgow University would sometimes receive the bodies of those executed in its surrounding areas. However a case in 1823 caused contention. James Anderson and David Glen were tried in Edinburgh for murder but sentenced to be executed in Ayr before their bodies would then be delivered back to Edinburgh. Duncan MacFarlane, the Principal of Glasgow University, wrote to the Lord Justice Clerk David Boyle to petition against the decision as, despite trial in Edinburgh, the practice had previously been that the bodies of those executed in the west of Scotland were directed to go to Glasgow. He called the decision of the court to send Anderson and Glen to Edinburgh a mistake and asked that Boyle intervene to prevent this becoming a precedent.³⁵⁹ By the early nineteenth century, although the number of students continually increased in Edinburgh, the percentage who attended *Monro tertius'* anatomy class had fallen since the time of his father. Lisa Rosner attributed this, at least in part, to competition from private anatomy lecturers such as John Barclay and John Bell but also to the increasing prominence of anatomy teaching under James Jeffrey at Glasgow

³⁵⁷ Cozens-Hardy, *Diary of Sylls Neville*, p. 191.

³⁵⁸ *Caledonian Mercury*, Saturday 30 October 1784, p. 3.

³⁵⁹ GUA Special Collections MS Gen 1717/3/1/26.

University.³⁶⁰ In turn this would have increased competition for cadavers and possibly explains the above petition.

Following trial, conviction and execution the bodies of condemned murderers would be transmitted to the destination stipulated within the court's sentencing for their post-mortem punishment of dissection. As noted above, criminal corpses had been used for anatomical demonstration prior to the passing of the Murder Act. In 1702, as per the agreement made in the late seventeenth century regarding the procuring of bodies in Edinburgh, the body of David Myles, executed for incest, was publically dissected over the course of a week. Different medical men from the Royal College of Surgeons demonstrated upon it each day. They began with a general discourse of the body before moving on to an inspection of key organs such as the stomach, intestines, liver, kidneys, parts of generation, the brain and finally the muscles of the extremities and the resulting skeleton. A vote was subsequently taken to determine if the assembled College masters were satisfied with the standard of the dissection.³⁶¹ To use a contemporary term, the body had been 'cut to its extremities' yet it was for the purpose of an in-depth demonstration rather than solely to serve the ends of criminal justice.

In consulting the available records of criminal dissections conducted within the universities following 1752 it is evident that the bodies were often used as subjects during anatomy lectures and to educate those witnessing the dissection rather than merely acting as a post-mortem punishment. Following his execution in 1772 Robert Keith became a subject for Monro *secundus*. He was used particularly to conduct demonstrations on parts of the eye.³⁶² Monro had, for a number of years, devoted much attention to the anatomy of the eyeball and published a treatise on the subject. Similarly, when dissenting from the views of others regarding the effects of sudden death upon the stomach, namely that it caused a dissolving of the mucous coat, Monro argued that from his own examinations of executed criminals he had found no

³⁶⁰ Lisa Rosner, *Medical Education in the Age of Improvement: Edinburgh Students and Apprentices 1760-1826* (Edinburgh: Edinburgh University Press, 1991), p. 49.

³⁶¹ Helen Dingwall, *Physicians, Surgeons and Apothecaries: Medical Practice in Seventeenth-Century Edinburgh* (East Lothian: Tuckwell Press, 1995), pp. 75-76.

³⁶² Cozens-Hardy, *Diary of Syllas Neville*, p. 191.

uniformity of appearance of the mucous membrane.³⁶³ When Margaret Shuttleworth was executed in Montrose in 1821 her body was subsequently delivered to *Monro tertius*. Her dissection formed part of his lectures on the congestion of blood in the brain. Upon removing the membranes it was found to be of a paler colour than usual and so soft that he could not demonstrate more internally. As this was something he had not previously encountered he sent notes of the dissection to Dr Kellie, who had experience in dissecting the brain.³⁶⁴

Monro secundus primarily conducted his anatomy course using only the heads of lectures as he taught from memory and experience. However it is possible to ascertain the contents and structure of the course from some of his notes, now catalogued at the university, and as his son, *Monro tertius*, published a volume of his lectures based upon his essays and correspondence with others in the medical field. A particular area of interest here is his accounts of the dissections of criminals, more specifically his attempts to ascertain the primary cause of their death, which he placed within wider subject areas of his anatomy course. Different opinions were offered in this period as to the cause of death by hanging with some citing dislocation of the cervical vertebrae and others the effusion of blood within the brain as the primary cause of death. From his examinations of the criminal corpses delivered to him, *Monro* claimed that he never detected a dislocation of the neck nor internal congestion alone to be the main cause of death. Instead he argued that death was to be imputed to a stoppage of respiration.³⁶⁵

Elizabeth Hurren has argued that the wording of the Murder Act sentencing the criminal corpse to be anatomised and dissected was carefully chosen as each presented a distinct medico-penal stage. She stated that the hanging of a criminal was their legal death, the anatomisation performed by the surgeon was their medical death and the dissection was the post-mortem part of the sentence. Hurren has found cases where it was the surgeon, and not necessarily the hangman, who was the final executioner of the law. Upon receiving the bodies there were cases where the

³⁶³ Alexander *Monro tertius* (ed), *Essays and Heads of Lectures on Anatomy, Physiology, Pathology and Surgery by the Late Alexander Monro secundus* (Edinburgh; 1840), p. 28.

³⁶⁴ *Ibid.*, p. 97.

³⁶⁵ *Ibid.*, p. 97.

surgeons found the heart still beating and removed it from the body, thus committing euthanasia.³⁶⁶ In the early eighteenth century there were spectacular tales of criminals experiencing a complete revival hours after their execution. The most famous Scottish case was that of 'Half Hangit Maggie' who had been executed for the murder of her illegitimate infant in 1724 but woke up in her coffin on route to her burial. The Scottish records consulted here do not explicitly detail instances of surgeons finding the criminals to be still alive on the dissection table. However, in cases where the bodies were conveyed directly to the universities, as opposed to being held for a short time in a lock-up house as was sometimes the case, it is evident that the effect of hanging on the body and the eventual cause and timing of death was an area of debate.

In this period apoplexy referred to death that was caused by a sudden loss of consciousness, but it could also refer to certain forms of internal bleeding. Monro *secundus* argued that in some cases of executed criminals, though sensation and voluntary motion may have been suspended, secretion, the process by which substances were produced from organs such as the heart, was not necessarily affected.³⁶⁷ During his demonstrations on blood circulation and observations on the causes of sanguineous apoplexy on the brain Monro demonstrated that, while the carotid arteries and jugular veins of hanged criminals were compressed by the rope, the vertebral arteries, being less obstructed, could continue to transmit blood to the brain if the action of the heart continued. Therefore for minutes after suspension, and loss of consciousness, the blood could flow to the brain via the vertebral arteries but its return was interrupted by the pressure on the jugular vein.³⁶⁸ When lecturing upon the inflation caused by the momentum of the blood flow, and attempts to alleviate this in the living patient, Monro cited the possibility of opening a large vein or artery. In terms of the use of criminal corpses to demonstrate this, if they were immediately conveyed to the dissection theatre from the scaffold, as were John Brown and James Wilson in 1773, incisions were made to the jugular to show the blood flow.³⁶⁹ This was similarly the case in 1829 when husband and wife John Stuart and Catherine Wright

³⁶⁶ Hurren, *Dissecting the Criminal Corpse*.

³⁶⁷ Monro, *Essays and Heads of Lectures on Anatomy*, p. xlvii.

³⁶⁸ *Ibid.*, p. xlv.

³⁶⁹ Cozens-Hardy, *Diary of Syllas Neville*, p. 205.

were dissected side by side. Incisions to both of their jugular veins caused profuse bleeding and their blood shot eyes, locked jaws and clenched fists attested to the manner of their death.³⁷⁰

Galvanism, when performed upon the dead human body in the early nineteenth century, was used as an attempt to stimulate the body with an electric current. Professor Giovanni Aldini, a famous proponent of galvanism, claimed that, in order for it to work, he needed access to the bodies of those who had died very recently, although not of any disease. Thus the executed criminal was an ideal test subject. In 1803 he performed a demonstration on the body of an executed murderer in London which lasted over seven hours and produced a quivering of the jaw and convulsions of the face.³⁷¹ The early nineteenth century witnessed experiments in galvanism which were carried out on a few Scottish criminals immediately following execution, the most spectacular of which was that performed upon the body of Matthew Clydesdale in 1818. Clydesdale's body was left to hang upon the scaffold for the usual hour before it was cut down and conveyed immediately to James Jeffray, the Professor of Anatomy at Glasgow University. Jeffray had invited Dr Andrew Ure to assist in the demonstrations and five minutes prior to the arrival of the body he charged the galvanic battery in preparation. The success of the experiments was believed to depend upon the speedy transmission of the body from the scaffold to the commencing of the demonstration.³⁷² Various incisions were made in order to apply the galvanic power. Strong convulsions caused Clydesdale's limbs to be thrown in every direction. Furthermore, after connecting rods to the left phrenic nerve and the diaphragm, his chest heaved and fell as if breathing. The scene caused several of those present to turn away and one man to faint.³⁷³ Dr Ure wrote up his findings and delivered them in a lecture to the Glasgow Literary Society.³⁷⁴ When he received the body of the executed murderer Thomas Weems in Cambridge in August 1819,

³⁷⁰ *Aberdeen Journal*, Wednesday 26 August 1829, p. 4.

³⁷¹ MacDonald, *Human Remains*, p. 17.

³⁷² Experiments in galvanism were carried out on at least a further two executed criminals in Aberdeen and Glasgow respectively but with mixed success due to the dropping of the body temperature. In addition, in 1824 Jeffrey blamed the failed experiments conducted on the body of William Diven to the placement of the rope for his hanging which, he claimed, had destroyed the nerves in the neck and thus defeated the purpose of galvanism. See *Morning Post*, Tuesday 27 July 1824, p. 2.

³⁷³ *Caledonian Mercury*, Saturday 7 November 1818, p. 3.

³⁷⁴ *Northampton Mercury*, Saturday 16 January 1819, p. 4.

Professor Cumming had obtained a powerful galvanic battery “with the intention of repeating some of the experiments lately described by Dr Ure”.³⁷⁵ This demonstrates the wide dissemination of the findings following the experiments on Clydesdale.

In 1771 medical student Syllas Neville recorded that “the melancholy nature of my present studies increases the lowness of my spirits”. His evident trepidation at commencing his studies was to be further exacerbated by the dissection of the first female subject before the class in Monro’s lecture theatre.³⁷⁶ Medical knowledge of the female body, particularly the internal anatomy of the reproductive system, was still an ambiguous and difficult field within the profession as the primary source of practical investigation was the dead female body. Across this period in Scotland the capital punishment of women was quite a rare event and, in terms of the supply of their bodies for dissection, there were only 25 murderous women given the sentence. In addition, table 12 demonstrates that the highest number of female criminals dissected in any one decade was six and, after the mid-eighteenth century, the figures could be as low as one per decade. The situation was similar south of the border as, of the bodies received by the College of Surgeons in London between 1800 and 1832, only seven were women. Of these, five left the College in relatively pristine condition having only received an incision over the sternum labelled a “theatrical cut”.³⁷⁷ Their bodies were then gifted to surgeons in London’s hospitals or private anatomy schools and, as four of these women were deemed to be of reproductive age, their bodies were valuable subjects for dissection.³⁷⁸ In terms of female criminals dissected within the Scottish universities it is to the dissection of Barbara Malcolm in 1808 that we now turn in order to demonstrate how her body was utilised by Monro *tertius* for the acquisition of knowledge of the female anatomy.

Monro *tertius* began taking his father’s anatomy lectures in 1808 and thus Barbara Malcolm would have been the first female criminal he had on his dissection table and, due to the rarity of the occasion, he would not have another until 1813. From a reading of the lecture notes from the time of her case it is evident that special

³⁷⁵ Hurren, *Dissecting the Criminal Corpse*, p. 172.

³⁷⁶ Cozens-Hardy, *Diary of Syllas Neville*, p. 143.

³⁷⁷ MacDonald, *Human Remains*, p. 12.

³⁷⁸ *Ibid.*, p. 20.

preparations were made to the anatomy course in anticipation of her dissection. She had been sentenced on 5th January but, as with all capitally convicted criminals in Scotland, had over a month to wait before her scheduled execution on 10th February. In the first week in February several lectures took place. Those on the first four days looked in-depth at the anatomy of the organs of urine and generation in the female. Interestingly, a lecture on the fifth day changed track to focus more upon the structure of the neck and throat. The dissection of Barbara's body took place the day following execution and Monro particularly focused upon the naval arch and abdomen, providing an examination of the crural hernia, a cellular substance much larger in women than men. He then moved on to an examination of the kidneys, liver and stomach.³⁷⁹ Within the records the lecture was entitled 'Dissection of a Criminal' and Barbara was not named. Additionally, despite the court having sentenced her to dissection as a form of punishment, the fact that the anatomy course was almost certainly adapted so the gender specific parts happened at the same time supports the argument that, for the medical men at least, her dissected body was a valuable means to an end in the acquisition of knowledge. Despite the above cases demonstrating that dissection was used within the universities in the pursuit of anatomical knowledge, the theme of notoriety was often the subject of public debates over the supply of cadavers in the years immediately prior to the Anatomy Act. This chapter will now turn to investigate a case that embodied this notoriety and heaped further public disdain upon the practice of dissection.

The Case of William Burke

The case of William Burke and William Hare has been detailed extensively in print and on screen and subject to elaboration and speculation. Although they were murderers their case has come to epitomise the 'Golden Age of Bodysnatching' in the early nineteenth century. Over roughly a 12 month period they murdered 16 people for the purpose of selling their bodies to Dr Robert Knox, an independent lecturer of anatomy in Edinburgh's Surgeons Square. They lured their victims into the Hares' lodging house in Tanners Close and then waited until they were in a sufficient state of alcohol-fuelled stupor before laying across their chests, covering their mouth and nostrils and

³⁷⁹ ED CRC Lectures and Letters of Professor Alexander Monro *tertius*, Coll 441, D.C.7.120, pp. 234-247.

effectively suffocating them, a method of killing subsequently known as ‘Burking’. Following their apprehension for the crimes, Hare turned evidence for the Crown and thus escaped standing trial. Burke was found guilty and sentenced to be hanged on 28th January 1829 at the Lawnmarket in Edinburgh and his body, in an ironic instance of poetic justice, was given to Monro for dissection.³⁸⁰ This case, more so than any other Scottish criminal in this period, captivated the public and received mass press attention with newspapers and pamphlets before, during and after the trial claiming to provide the most authentic account of the murders. This contemporary thirst for extensive details of the case has also facilitated and informed the large body of more recent popular and academic literature and thus it is not the intention here to reiterate the story at length.³⁸¹ Instead this chapter will demonstrate the significance of the case within a discussion of public dissection as a post-mortem punishment.

When commenting upon Burke’s execution and dissection Sir Walter Scott lamented “the strange means by which the wretch made money are scarce more disgusting than the eager curiosity with which the public have licked up all the carrion details of the business”.³⁸² Burke’s crimes were described as standing out even amongst “the long and black catalogue” of all those before him. They were attributed, not to passion or revenge as others were, but to a “base and sordid love of gain”. As the gallows were erected the day before the scheduled date of execution the crowds gathered to cheer. The joiners in the shop of tradesmen who were employed for the task were described as usually considering the work hateful and as casting lots to decide who would have to undertake it. In Burke’s case many had actively solicited the job. On the morning of the execution Burke was met with shouting and jeering from the crowd that exceeded 20,000 people. When the drop fell, the rope appeared to move and thus he died struggling, with the crowd appearing to “gloat over the dying agonies”. His body was suspended for 45 minutes then cut down and taken to the lock-up house. It was conveyed to Monro’s anatomical theatre early the next day.³⁸³ On the first day of Burke’s dissection Monro stated that he would lecture on the brain.

³⁸⁰ NAS JC8/23/29.

³⁸¹ For a recent in-depth investigation of the case see Rosner, *Anatomy Murders*.

³⁸² MacDonald, *Human Remains*, p. 46.

³⁸³ *Caledonian Mercury*, Thursday 29 January 1829, p. 3

It was described as unusually soft but he acknowledged that this was not uncommon in criminals who had suffered the last punishment of the law.³⁸⁴ His lecture lasted from the early morning until 2.00 pm. The anxiety to obtain a sight of the “vile carcase of the murderer” was great. Although Monro had attempted to accommodate as many as he could, at 2.30 pm a body of medical students, “conceiving themselves to have a preferable title to admission”, began to break the glass windows of the anatomy theatre and the police were sent for. The disturbance lasted until 4.00 pm when it was announced that the young men could go in 50 at a time.³⁸⁵

The general public were admitted into the lecture theatre the following day and security appeared to have been better managed. They entered one side of the theatre, passed the table where the body lay and exited by another set of stairs. By these means no reported inconvenience was felt. A newspaper correspondent counted the numbers who visited and found it to be 68 per minute and 4080 by hour. The theatre was open for six hours so the author estimated that the number of visitors was upwards of 24,000.³⁸⁶ The skull had been taken off to expose the brain during Monro’s lecture the previous day but it had been replaced for the public viewing. His naked corpse was stretched out on the dissecting table with his eyes still half open and instantly recognisable to those who had known him. The whole scene was described as far from agreeable but justified by the view that it may be “plausibly maintained that the exhibition will be more efficacious in preventing crime than the common spectacle on the gallows”.³⁸⁷ Following this display the rest of the dissection was not open to the public. Monro arranged for the final dismemberment of the body, including the removing of the skin. He dipped a quill into the blood of Burke to record “this is

³⁸⁴ In the early nineteenth century proponents of the science of phrenology argued that the brain was not a single organ but instead was made up of 35 organs each representing a specific aspect of someone’s personality. Phrenological observations were carried out on at least 17 Scottish criminals, including murderers such as Burke, to attempt to determine why they had committed their crimes. Examinations, drawings and casts could be done prior to execution and then reflected upon following dissection in the case of murderers. See George Combe, *A System of Phrenology*, Third Edition (Edinburgh: 1830).

³⁸⁵ *Caledonian Mercury*, Saturday 31 January 1829, p. 3.

³⁸⁶ *Caledonian Mercury*, Saturday 31 January 1829, p. 3.

³⁸⁷ *The Scotsman*, Saturday 31 January 1829, p. 6.

written with the blood of Wm Burke...the blood was taken from his head 1st February 1829".³⁸⁸

Following dissection there were cases where parts of the criminal corpse were kept and displayed such as their bleached skeleton or pieces of skin. Following his execution for murder in Glasgow in 1797 James McKean was given to James Jeffrey for dissection after which some local gentlemen, anxious to preserve part of the murderer, successfully obtained the skin of his back from Jeffrey. They sent it to be tanned and Robert Reid, a merchant in the city, recalled that it was then cut into small circles and distributed as a memento.³⁸⁹ Similarly, a police information centre in Edinburgh obtained and displayed a pocket book made from the skin of Burke. In addition, his skeleton continues to be displayed at Edinburgh University's Anatomy Museum. Within William Hogarth's *Four Stages of Cruelty* there are two skeletons belonging to previously dissected murderers hung up in the background to the main dissection. In the 1813 case of Black and Macdonald, when sentencing them to dissection the judges stated that their skeletons would be "preserved to future ages as monuments of youthful depravity".³⁹⁰ A pamphlet published in Edinburgh in the early nineteenth century talked of the medical schools acquiring human skeletons to further the interests of science but compared the practice to hanging in chains.³⁹¹ This continued display, beyond the dissection, raises questions over the point of the legal and social death of these criminals. Whether they were kept as mementos or as reminders of the heinousness of their crimes we can question if these criminals, particularly Burke, are ever really socially dead.

Conclusion

Historically the dissection of the human body occupied an ambiguous position within the medical field and garnered fear and suspicion due to popular anxieties. Despite earlier legislation offering a limited supply of cadavers, 1752 saw dissection as a punishment placed squarely within the criminal justice system. The Murder Act was

³⁸⁸ See Rosner, *Anatomy Murders*, p. 244.

³⁸⁹ David Murray, *Memories of the Old College of Glasgow, Vol. 1* (Glasgow: 1927), p. 180.

³⁹⁰ NAS JC8/9/232; *Scots Magazine*, Thursday 1 July 1813, p. 44.

³⁹¹ ED CRC *The Haddington Cobbler Defended or the Doctors Dissected*, P. 46, X:8.

intended to add a further mark of infamy to executions for the crime. However the chapter has demonstrated the complexity surrounding the capacity of dissection to act as an effective deterrent from crime. For the condemned, the prospect of dissection had not deterred them for committing murder although there were some cases where they appeared to fear this part of the punishment more than the death sentence itself. It was also evident that the use of criminal corpses brought the practice of dissection into public disrepute due to its links with punishment and this was a criticism levelled at the Murder Act during debates over the Anatomy Act.

The study of anatomy had become more established within the Scottish universities in the early eighteenth century with permanent appointments of Professors of Anatomy. As the century progressed, knowledge of the interior of the human body was defended due to its long term benefit for the living by those within the medical profession. However, more generally, dissection continued to be viewed with suspicion and sometimes outright contempt. The incidents that occurred at the scaffold such as criminals calling out for someone to take possession of their bodies rather than allow it into the hands of the surgeons or, in the case of murderers, showing more trepidation for the dissection rather than the execution itself, further attested to the potential effect of dissection as a post-mortem punishment. However, in practice, the majority of criminal dissections in Scotland took place within a university setting as part of lectures on anatomy and the majority of cases were seemingly not open to general public viewing.

In the case of William Burke, despite Monro lecturing on his brain and replacing the top of the skull for the public viewing, the great interest attracted by the case reached a climax with his dissection. The motivation for the murders, namely selling the bodies to the surgeon Robert Knox, was a focal point around which much of the press and the crowd's abhorrence centred. Although he was labelled a most atrocious murderer, we cannot fail to draw the patent link between contemporary fears about bodysnatching for the purpose of dissection which reached fever pitch in the late 1820s. Yet, despite the contempt faced by the medical profession, particularly those practicing dissection, the numbers who visited Monro's anatomical theatre for the purpose of viewing Burke's body were estimated to equal, if not surpass, those who

had attended his execution. His body was viewed with fascination, curiosity and horror, with the capacity of dissection to act as an effective post-mortem punishment increased due to the very abhorrence towards his motive for the crimes. Burke's dissection, perhaps more than any other, served the ends of the Murder Act, namely to provide a further mark of infamy to Scotland's most notorious killer.

Chapter Five:

Displaying the Criminal Corpse: Investigating the Punishment of Hanging in Chains in Scotland.

The enacting of additional punishments upon the criminal corpse such as the displaying of the body, whether whole or in pieces, had been a penal option prior to the mid-eighteenth century. However the 1752 Murder Act made explicit that the bodies of executed murderers were to be either dissected or hung in chains “in the same manner as is now practiced for the most atrocious offences”.³⁹² There were a total of 22 men hung in chains, also referred to as gibbeting, in Scotland between 1746 and the final case in 1810. In 19 of the cases the condemned had been convicted of murder and in the other three they had committed serious property offences. In Scotland the death sentence that was pronounced by the judges in the court stipulated the logistics of the public execution such as the time, date and location at which it would be carried out as well as the details of any post-mortem punishments to be enacted. Throughout this period if an offender was to be gibbeted in Scotland it was invariably stated by the judges that this was to take place at the same location as the execution itself. This was in contrast to practices in England where it was common for executions to occur in one location but the bodies to be gibbeted in another with more discretionary power afforded to local authorities, namely the sheriffs. Comparatively in Scotland, while local authorities such as sheriffs and magistrates were tasked with putting the death sentences into practice and thus possessed some discretion in how the spectacle was carried out, the Scottish judges, perhaps even more so than their English counterparts, still played a crucial role in shaping post-mortem practices.

The first half of this chapter will investigate the implementation of gibbeting, questioning who was sentenced to it, the chronology of the punishment and the locations at which it was carried out. As the Murder Act did not distinguish between dissection and hanging in chains for certain offenders, the decision was left to the discretion of the judges. This chapter will therefore examine the cases in order to

³⁹² *House of Commons Parliamentary Papers* [accessed 25 April 2015] House of Lords Papers, *A Bill intituled an Act for better preventing the horrid Crime of Murder*, (5 March 1752).

highlight why some murderers were sentenced to be hung in chains and will argue that there were often particular aggravations that led to an offender being gibbeted. Table 13 provides a breakdown of everyone sentenced to the punishment by decade and circuit. It is evident that over half of the total cases occurred in the 1740s and 1750s and thus correlated with the peak numbers of executions at the time, particularly as a result of trials before the Northern Circuit. There were then a handful of cases in the 1760s and 1770s before the punishment disappeared apart from one final case in 1810. The chapter will offer explanations for the decline and subsequent cessation of hanging in chains, despite its remaining a penal option until it was abolished by an act passed in 1834 (4 & 5 Will. IV c. 26). One potential explanation can be found if we link the chronology of the punishment with the locations at which it was carried out as in Scotland offenders were always gibbeted at the same place they had been executed. Therefore the bodies were either gibbeted at the common place of execution or close to the scene of the crime. In the early part of the period under investigation here neither of these locations were typically urban centres. However chapter three demonstrated the gradual changes made to the common place of execution across Scotland by the final quarter of the eighteenth century, moving from urban peripheries closer to the places of confinement in town and city centres which were unsuitable gibbet locations.

Table 13: Chronology of Hanging in Chains in Scotland.

	Edinburgh	Northern	Western	Southern	Total
1740-49	2	1	0	0	3
1750-59	3	6	1	1	11
1760-69	0	2	1	0	3
1770-79	0	3	0	1	4
1780-89	0	0	0	0	0
1790-99	0	0	0	0	0
1800-09	0	0	0	0	0
1810-19	0	1	0	0	1
1820-29	0	0	0	0	0
1830-34	0	0	0	0	0
Total	5	13	2	2	22

Source: Figures compiled using Justiciary Court records.

The second half of this chapter will turn to investigate the potential effects of hanging in chains upon both the condemned and the spectator at the gibbet foot. When passing a gibbeted body in Bawtry, England, an early nineteenth-century diarist commented that he regretted the “barbarity of a practice which wounds only the living”.³⁹³ The punishments of dissection and hanging in chains were comparable in that both involved the dismembering of the criminal corpse but during dissection this was carried out before an audience made up of predominantly medical students. For the offender hung in chains their bodies were left to slowly rot in the gibbet cage in full public view. Certainly the sight and smell of the gibbeted body was intended as a stark example of the reward for crime to those who encountered it. However the question of whether the gibbeted body served as a successful deterrent from crime is more complex. Through an analysis of the potential longevity of the punishment, this chapter will highlight cases where the bodies were stolen from their gibbets for reasons varying from a desire to see them buried, to the offence their sight and smell caused to the local area. The final section of this chapter will provide an in-depth investigation into the case of James Stewart who was executed and hung in chains in 1752. His case occurred at a time when post-rebellion tensions were still evident in parts of Scotland and provided a stark example of the courts in Scotland, as well as legal authorities in London, seeking to make a poignant spectacle of the criminal. In addition, it embodied various themes to be highlighted in this chapter, namely the importance of location and potential threats to the security of the gibbet.

Hanging in Chains as a Punishment

Historically the displaying of the criminal corpse was used as the final part of either an aggravated execution or a post-mortem punishment in the most atrocious criminal cases. In Scotland, prior to the mid-eighteenth century, it was used for heinous murders. Hugo Arnot cited the 1601 case of Thomas Armstrong, tried for the murder of Sir John Carmichael, the warden of the west marches, as the first instance in Scotland of a malefactor hung in chains.³⁹⁴ Lord MacLaurin also highlighted the case of

³⁹³ Joseph Mawman, *An Excursion to the Highlands of Scotland and the English Lakes* (London: 1805), p. 29.

³⁹⁴ Arnot, *A Collection and Abridgement of Celebrated Criminal Trials in Scotland*, p. 132.

John Dow Macgregor, hung in chains in 1637 for theft, robbery and slaughter.³⁹⁵ Chapter three argued that executions causing prolonged pre-mortem suffering were waning. Instead, in murder cases, the condemned were to be executed more swiftly but their bodies subject to post-mortem punishment. While there was no one belief system regarding how far post-mortem punishments affected the dead body or the fate of the soul, there is evidence of concerns, in this chapter and others, regarding the disposal of criminal corpses. Within this, the hanging of an offender's body in chains potentially had a multiplicity of impact as it not only denied the corpse a burial but it also put the body in full public view to gradually rot.

If a criminal was to be hung in chains their body would be cut down from the scaffold after hanging for the usual time of about an hour in order that it may be hung up again within the gibbet cage. Often the words gallows and gibbet have been used interchangeably to describe the apparatus on which the criminal was to be executed. However in this thesis the word gibbet describes the structure used for the exposure of criminal corpses, namely an upright post with a projecting arm from which the cage would hang. Sarah Tarlow has conducted an extensive search for surviving details of gibbets used in England in this period. She has demonstrated that gibbet cages were made for individual offenders as they were required, which also seems to have been the case in Scotland as, in some cases, the bodies remained on display for a number of years making reuse impractical. In terms of the cost of gibbeting offenders, Tarlow demonstrated that it was potentially very expensive. For example, the execution and hanging in chains of Edward Miles in 1793 amounted to over £67.³⁹⁶ The most detailed description of the mechanics of the gibbet found within the Scottish cases was that used for Kenneth Leal in 1773. His body was stolen and buried at the gibbet foot but was discovered in 1829 with the cage relatively intact. It consisted of a ring around each ankle, from which a chain passed up each leg and was fastened to a band of strong iron hooped around the body with four straps that passed up the body to the neck. The neck ring was attached to the head cap by four straps passing on each side of the head that met at the top. This was then attached to a strong swivel-link which

³⁹⁵ MacLaurin, *Arguments and Decisions*, p. xi.

³⁹⁶ Sarah Tarlow, 'The Technology of the Gibbet', *International Journal of Historical Archaeology*, Vol. 18, (2014), pp. 668-699, pp. 675-680.

was riveted to allow it to turn. The chains the cage was suspended from had a drop of two feet, all of which was made of iron.³⁹⁷ Certainly a visually impressive form of punishment intended to make a marked impression upon those who encountered it.

Who Received the Punishment?

There were 22 men sentenced to the post-mortem punishment of hanging in chains between 1746 and the final gibbeting in Scotland in 1810.³⁹⁸ Women were not subjected to the punishment in Scotland or in England due to the indecency involved in displaying their corpses, as was similarly the case when women were executed by strangulation and burning as opposed to being hung, drawn and quartered for treason. Following the Murder Act they were exclusively sent for dissection. Of the 22 men, 19 were convicted murderers and three had committed serious property offences. As the Murder Act did not direct who was to be dissected and who was to be hung in chains the decision was left in the hands of the judges. Therefore this chapter will investigate whether we can highlight any discernible explanations, based upon the circumstances surrounding the cases, why certain murderers were hung in chains in Scotland.

An attributing factor that potentially sent an offender to the gibbet was the manner in which the murder was committed. In six of the total 19 murder cases the men had murdered their wives. Nicol Brown had previously beaten his wife with a horsewhip in order to take her ring to sell. He would later kill her by throwing her into the fire.³⁹⁹ John Shirvel had correctly predicted that “some time or other he would be hanged on his wife’s account” following one of their arguments.⁴⁰⁰ In all of the cases, except one instance of poisoning, the wife killers had used excessive and seemingly unprovoked violence in committing the crimes. This was often attested to in the details provided in the courts of the murders and the conditions of the victims’ bodies. Alexander McCowan had stabbed Margaret McLean repeatedly, cut his child’s throat

³⁹⁷ Norman Adams, *Hangman's Brae: True Crime and Punishment in Aberdeen and the North-East* (Edinburgh: Black and White Publishing, 2013), p. 20.

³⁹⁸ Although sentenced to be hung in chains following execution in 1755, Andrew Wilson committed suicide in prison and his body was instead handed over to the surgeons.

³⁹⁹ NAS JC7/30/345.

⁴⁰⁰ NAS JC11/19/81.

and as a result only parts of their mangled bodies were found.⁴⁰¹ However there were other cases of violent murders, such as Robert Keith, who beat and stabbed his step-daughter to death in 1760 or Alexander Provan, discussed in chapter three, whose case was deemed severe enough for him to have a hand severed from his body prior to execution, yet he was sent for dissection rather than being hung in chains. This attests to the discretionary implementation of post-mortem punishment in Scotland.

In addition to the manner in which the murders were committed, a degree of importance can also be found in the victim of the crime or the circumstances surrounding it. As previously discussed in chapter three, in the case of Normand Ross his victim was his employer Lady Billie. He had cut her throat in a botched robbery attempt and, despite an apparent lack of premeditation to murder, he was sentenced to have his right hand struck off immediately prior to execution and his body was to be hung in chains.⁴⁰² Donald McIlroy was convicted of the murder of Kenneth Happy in Urquhart in 1756. On the day of the murder McIlroy was met by two armed constables who had been employed by the commission for executing the late act for recruiting His Majesties forces in the county of Ross and the his name was on their list. When the constables had attempted to take McIlroy he drew a weapon. Kenneth had been passing and attempted to take it from him when he was stabbed.⁴⁰³ Again McIlroy had no apparent malice toward the deceased. However it was his resistance of apprehension that had led to a capital conviction and to his body being hung in chains.

A further factor that potentially explained why an offender was sentenced to be hung in chains was if the crime was financially motivated. In over half of the cases where the victim was not a family member, the murders had occurred with a property offence. In some the premeditation to rob and murder was believed to be evident in the perpetrator's choice of location for the crimes and had prompted the courts to use the gibbet as a reminder of the long arm of the law, especially in more remote areas. John Chappell and Duncan Campbell were soldiers who mortally stabbed James Imrie just south of Perth for the purpose of robbing him.⁴⁰⁴ In 1779 James McLachlan was

⁴⁰¹ NAS JC11/14/168.

⁴⁰² NAS JC7/28/319.

⁴⁰³ NAS JC11/21/30.

⁴⁰⁴ NAS JC11/26/23.

convicted for robbing and murdering Jean Anderson. She had been travelling from Glasgow to Kilmarnock when McLachlan offered to personally escort her on the final leg of her journey from Kilmarnock to her brother's house in Irvine. Her body was later found with marks of violence on the throat and chest with blood coming from her mouth. In addition she had been stripped of her cloak, stockings, silver buckled shoes and all of her possessions.⁴⁰⁵ The fact that his victim was a woman, and she had placed a degree of trust in him to escort her, as well as the fact that he had robbed and murdered her and left her body half exposed, were factors that led to his body being hung in chains. Again there were other murders committed with property offences where the offenders were not hung in chains. John Brown and James Wilson had robbed and murdered Adam Thomson in his own home in 1773 but the High Court in Edinburgh sentenced them to dissection.⁴⁰⁶ A potential explanation for this could be the location as table 13 demonstrates that the High Court had not sentenced anyone to be hung in chains since the 1750s. The previous chapter demonstrated how Edinburgh University had become a centre for medical education by the second half of the eighteenth century and, within this, received a sizeable proportion of all offenders executed for murder across the period. This may partly explain why, after the initial concentration of hanging in chains in the 1750s, the punishment of dissection was more favoured in the capital. An additional explanation can be found when providing an analysis of the locations where offenders were gibbeted. This chapter will argue that the gradual changes made to the locations of executions more generally was a factor in the decline of gibbeting.

Of the 22 men hung in chains in this period, only three were gibbeted for property offences. Comparatively, the research investigating gibbeting in England indicates that there were more offenders hung in chains for property crimes, although not as many as for the crime of murder and many of the cases were concentrated in the mid-eighteenth century.⁴⁰⁷ James Davidson was tried in Aberdeen in May 1748 for robbery and housebreaking. The court heard how he was the captain of a notorious gang of robbers. Davidson, along with at least two accomplices who were not

⁴⁰⁵ NAS JC12/16/51.

⁴⁰⁶ NAS JC7/38/193.

⁴⁰⁷ Dyndor, 'The Gibbet in the Landscape'; Rogers, *Mayhem*, p. 60.

apprehended, forcibly entered the house of Robert Paton armed with broad swords and pistols, weapons that had been banned by legislation in the wake of the late rebellion. They threatened his life and shot his daughter in the arm in order to steal over £5 in silver as well as a quantity of gold and bank notes. He was sentenced to be executed in Ruthriestown. The magistrates chose the most convenient place near to the road leading to Aberdeen in order to erect the gibbet, perhaps as the location offered a marked example for the local residents as well as to those travelling upon the public road.⁴⁰⁸ At his execution he wore a tartan vest and breeches, both banned pieces of Highland dress, along with white stockings and blue ribbons to pay homage to the Jacobite cause. In committing the crimes he claimed he was “revenging himself upon the enemies of the cause he espoused”.⁴⁰⁹ Alexander Cheyne had been capitally convicted by the same circuit for breaking into the house of William Smart, terrorising his family and stealing a quantity of money and clothing.⁴¹⁰ However he was not sentenced to be hung in chains, demonstrating that gibbeting was not a central part of the punishment for property offenders in Scotland and that it was likely used against Davidson due to the fact that he was part of a gang who were armed with banned weapons and had likely been involved in the late rebellion.

In 1773 Alexander MacIntosh was indicted at the circuit court for entering into an association to rob passengers on the highway in Inverness. There were at least four other men called to stand trial, all of whom failed to appear and were outlawed. They were all part of a gang who had committed several robberies and terrorised the area. Prior to the beginning of the trial the Advocate Depute was informed that two principal prosecution witnesses had been taken to prevent their attendance in court. It was strongly believed that Lady Borlum, the wife of one of the men outlawed, had orchestrated the abduction and a military party was required to retrieve the witnesses in time for the trial. MacIntosh was convicted and sentenced to be executed at the common place in Inverness, situated very near to the Edinburgh Road, and his body hung in chains upon the same spot.⁴¹¹ It is clear that MacIntosh and his accomplices

⁴⁰⁸ NAS JC11/13/15.

⁴⁰⁹ *Caledonian Mercury*, Thursday 7 July 1748, p. 2.

⁴¹⁰ NAS JC11/13/28.

⁴¹¹ NAS JC11/29/97.

were well known in the area and, whether they were revered or feared, his gibbeted body would make a stark, and due to the nature and location of his crimes, a very poignant example, especially as he was the only one the authorities were able to successfully apprehend and punish.

The final property offender to be hung in chains following his execution was Kenneth Leal. He was convicted for assaulting and robbing the 16 year old post boy John Smith between Elgin and Fochabers. A number of letters were stolen, including one that contained 50 guineas.⁴¹² Theft from the mail was a crime made capital by special statute in the eighteenth century and, as demonstrated in chapter two, was one of only a few particular instances of theft where specific legislation against the crime was extended to Scotland. In England there were 17 men hung in chains between 1752 and 1834 for robbing the mail, usually at the scene of the crime.⁴¹³ However the fact that the punishment of hanging in chains was rare, especially in the case of property offences in Scotland, suggests that Leal's case can, in part, be attributed to the fact that he was tried by the Northern Circuit at Inverness in May 1773, the same as Alexander MacIntosh. The crimes, both believed to be atrocious in their own rights, taken at the same time called for a stark example to be made in the area.

In England the sheriff's cravings and their associated assize calendars offer information on the claims made by the sheriffs to the Treasury to cover the costs they had incurred when carrying out capital punishments and the gibbeting of offenders in the eighteenth century. Although a similar source is yet to be located for Scotland, it is still possible to discern the role of the various legal authorities involved in shaping execution practices from other sources such as the court records and the newspapers. It was the judges who decided upon the location of gibbeting but the death sentence tasked the sheriffs and magistrates to carry out the executions and subsequent post-mortem punishments within their jurisdictions. The court had ordered that Leal be executed and hung in chains between Elgin and Fochabers as it was on this road that he had committed the crime. The spot chosen by the magistrates was among a large

⁴¹² NAS JC11/29/97.

⁴¹³ Dyndor, 'The Gibbet in the Landscape', p. 164.

cairn of stones on the left side of the road leading from Elgin to Fochabers which was known locally as 'Janet Innes' Cairn' as she had been the last witch to be burnt in the area a number of years before.⁴¹⁴ Thus the location was spatially significant due to the crime committed, as was intended by the courts, but the choice of this specific spot on the road by the local authorities made the spectacle even more poignant due to its previous, and even commemorated, association with crime and punishment.

Chronology of Hanging in Chains

Table 13 provides a breakdown by decade of the Scottish offenders hung in chains across this period. There was a concentration of cases between 1746 and the late 1750s, with some evident links to ongoing attempts to establish control and sustained stability in parts of northern Scotland. The concentrated use of the punishment, with 14 of the 22 cases occurring in the 12 years between 1746 and 1758, correlated with the increase in executions more generally. However there were only a handful of cases in the 1760s and 1770s before the punishment disappeared apart from one particularly atrocious case in 1810. This chapter will now turn to provide an analysis of the chronology of the punishment in Scotland, offering comparisons to its use in England. It will then offer some potential explanations as to why its usage by the courts ceased despite its remaining a penal option until the punishment was formally abolished in 1834.

As discussed in previous chapters, the mid-eighteenth century is an important period of investigation for historians of capital punishment in both Scotland and England. The potential drivers behind the increased use of the death sentence north and south of the border are informative to a discussion of the punishment of hanging in chains. Nicholas Rogers made the argument that the mid-eighteenth century crime wave did not compromise the use of capital punishment in England. Instead it gave rise to calls for more severity in its implementation. He highlighted that between 1748 and 1752 there were 40 criminals hung in chains for the crimes of highway robbery, smuggling and murder in the southern counties of England, twice as many as in the

⁴¹⁴ *Caledonian Mercury*, Monday 24 May 1773, p. 2.

previous four years.⁴¹⁵ Zoe Dyndor has provided a more thorough examination of the punishments meted out to the Hawhurst gang in the late 1740s for smuggling, robbery and murder and has argued that the gibbeted bodies were temporally and spatially specific. She highlighted cases where offenders were executed at Tyburn and other execution locations but gibbeted miles away in East Sussex due to its links with the activities of the gang.⁴¹⁶ In Scotland 14 of the 22 cases occurred in the 12 years between 1746 and 1758, seven of which were prior to the passing of the Murder Act. Again the geography of the punishment was important as seven of the 14 cases were as a result of trials before the Northern Circuit which was sending the most offenders to the scaffold in this period. In the case of James Davidson, discussed above, he was executed and gibbeted at the scene of his latest crime in order to provide an exemplary message especially as his accomplices had not been apprehended.

Following a concentration of hanging in chains in the late 1740s and 1750s, three of the remaining cases occurred in the 1760s, four in the 1770s and one final case in 1810. In terms of comparing the use of the punishment north and south of the border, Tarlow has highlighted that in England and Wales, of 1394 offenders capitally convicted under the terms of the Murder Act, 134 were hung in chains.⁴¹⁷ The proportions found in Scotland were fairly similar as, of 104 convicted male murderers between the passing of the act and the repeal of gibbeting in 1834, 13 were sentenced to be hung in chains. Of the remaining cases that made up the total 22 in Scotland, six murders had occurred prior to 1752 and three offenders were gibbeted for property offences. However the chronology of the punishment of hanging in chains in Scotland needs to be further unpicked. Despite occupying a similarly central role in the criminal justice system as dissection in the two decades following 1752, gibbeting disappeared in Scotland after 1779, apart from one sporadic decision to use it in 1810. Comparatively, although gibbeting was used on a lesser scale than dissection, the collapse of the punishment in England occurred later, in the early nineteenth century.⁴¹⁸ In Scotland following the case of James MacLauchlan in 1779 it would be

⁴¹⁵ Rogers, *Mayhem*, p. 60.

⁴¹⁶ Dyndor, 'The Gibbet in the Landscape'.

⁴¹⁷ Tarlow, 'The Technology of the Gibbet', p. 670.

⁴¹⁸ *Ibid.*, p. 670.

another 31 years before another Scottish offender was hung in chains. This chapter will now turn to provide an in-depth examination of the final gibbeting in 1810 before moving on to question the disappearance of hanging in chains in Scotland.

Alexander Gillan, a farmer's servant in the parish of Speymouth, Elgin, was convicted at Inverness in September 1810 for the rape and murder of 11 year old Elspeth Lamb. She had been herding her father's cattle when Gillan barbarously assaulted her and beat her about the head with a large oak stick. Her mangled body was found concealed in the nearby woods. When addressing Gillan the Lord Justice Clerk stated that "I look upon any punishment which you can receive in this world as mercy". He added that the enormity of the crime called for the most severe and lasting punishment. He was to be executed on the moor, near to where the body had been found, and hung in chains on the spot. The Lord Justice Clerk stated that it was his duty to make the area of vast woods, well calculated for the perpetration and concealment of crimes such as Gillan's, as safe as the streets of the biggest cities. Therefore his gibbeted body would hang "until the fowls of the air pick the flesh off your body and your bones bleach and whiten in the winds of Heaven" to serve as a constant warning of the fatal consequences of murder.⁴¹⁹ A broadside of his execution described how the body had been lowered from the gallows and placed into irons and how it was hoped the example would "strike deep into the minds of the rising generation and tend to prevent the recurrence of such terrifying spectacles".⁴²⁰ From a reading of this evidence one gets the impression that when the author wrote of a desire to prevent the reoccurrence of such a terrifying spectacle they were referring to the nature of the crime as well as to the nature of the punishment. This chapter will now move on to argue that in Scotland, by the last decades of the eighteenth century, hanging in chains increasingly came to be viewed as an unsuitable penal option. Even in the most atrocious cases, where previously the punishment would likely have been hanging in chains rather than dissection, the judges refrained from using this sentence due to their belief that it was potentially harmful, and thus counter-productive, to the public good.

⁴¹⁹ NAS JC11/51/38; *Exeter Flying Post*, Thursday 1 November 1810, p. 3.

⁴²⁰ National Library of Scotland [hereafter NLS] *A Broadside of Gillan's Execution*, 6.314 (23).

In Scotland, with the exception of Gillan's case in 1810, hanging in chains had ceased as a punishment by the end of the 1770s. There were notable examples when the punishment appeared to have been considered by the courts but was not sentenced. In 1770 Mungo Campbell, an excise officer in Ayr, was condemned before the High Court for the murder of Alexander, Earl of Eglinton. On the night of the murder the deceased had been informed that there were two men on his lands who were suspected to be poaching. He rode along the sands and came upon Campbell. He demanded that he give it up his gun but Campbell had refused stating that he was an excise officer looking for smugglers in the area. The Earl then went to get his own gun before advancing upon him. Campbell told the court that, as he was backing away, he tripped over a stone and his gun went off and mortally wounded the Earl.⁴²¹ Following the returning of a guilty verdict one of the judges stated that, due to the circumstances of the case, he did not want to hang Campbell in chains or go further in the post-mortem punishment of the body than was obliged by the Murder Act.⁴²² Campbell was therefore sentenced to be executed and his body sent for public dissection in April 1770.⁴²³ His case had garnered much debate during the court proceedings, especially over the charge of murder as opposed to the non-capital option of culpable homicide. However the status of the victim, in large part, swayed the decision against him. The fact that the judge did not want to hang his body in chains demonstrates a belief at the time that, of the two available post-mortem punishments, hanging in chains was the more harsh and was to be reverted to only in the most atrocious cases.

In England the last instances of hanging in chains occurred in 1832. Convicted murderers William Jobling and James Cook were gibbeted in Jarrow and Leicestershire respectively. However the removal of Jobling's body by his fellow colliers for burial and the order to pre-emptively remove Cook's by the Home Secretary signalled the end of the punishment. Within the calls to abolish the punishment in parliament it was labelled an "odious practice" with Lord Suffield adding that it was "unsuited to the

⁴²¹ NAS JC7/35/405-447.

⁴²² MacLaurin, *Arguments and decisions*, p. 530.

⁴²³ NAS JC7/36/225. Note that he committed suicide in prison prior to his scheduled execution and, unlike in the earlier case of Andrew Wilson, his body was handed over to relatives rather than the surgeons, possibly due to the contentious nature of the case.

present state of public feeling”.⁴²⁴ In Scotland similar attitudes towards hanging in chains had already gone some way to its prevention many years prior to the 1830s. When addressing the court following the conviction of McDonald and Black for the murder of William Muirhead just outside of Edinburgh in 1813, the judges expressed at length their abhorrence for the nature of the crime. They stated that they had intended to order their bodies to be hung in chains so they could “wither in the winds”. However, due to a “consideration of the uneasiness it must occasion to the innocent neighbourhood”, they instead sentenced them to be executed at the scene of their crime and their bodies were to be sent for dissection.⁴²⁵ Spierenburg highlighted a similar argument made in 1770 in Amersfoort, a city in the province of Utrecht in the Netherlands. Although gibbeting did not disappear, the council decided to relocate the standing gallows, which was also used for the exposure of criminal corpses, away from the Utrecht main road. It was stated that the sight of the corpses “cannot be but horrible for travelling persons”. Previously criminal bodies had been displayed upon main roads in order to act as a stark warning for people travelling into the city.⁴²⁶

Following the conviction of William Burke in 1829 the Lord Justice Clerk David Boyle stated that the only doubt in his mind was, whether to satisfy the violated laws of the country and the voice of public indignation, his body ought to be exhibited in chains. However, in taking into consideration “that the public eye would be offended by so dismal a spectacle”, he stated that he was “willing to accede to a more lenient execution of your sentence, and that your body should be publically dissected.” He added that he hoped his “skeleton will be preserved in order that posterity may keep in remembrance your atrocious crimes.”⁴²⁷ While the sentence of dissection for Burke was apt in poetic justice, the fact that Boyle had appeared to consider, yet dismiss, the prospect of hanging his body in chains due to the enormity of his crime is important for two reasons. First, it supports the argument that in Scotland hanging in chains was a post-mortem punishment largely reserved for the most heinous murderers and by

⁴²⁴ Gatrell, *Hanging Tree*, p. 269.

⁴²⁵ NAS JC8/9/232; *Scots Magazine*, Monday 7 June 1813, pp. 36-39.

⁴²⁶ Spierenburg, *Spectacle of Suffering*, p. 191.

⁴²⁷ *Morning Post*, Tuesday 30 December 1828, p. 2.

Boyle's own admission was apparently more severe than dissection. Second, despite Burke's status as perhaps Scotland's most notorious murderer in living memory, by the 1820s there was a belief that the punishment would cause more damage and offence to the public than good, thus undermining and even threatening its deterrent value.

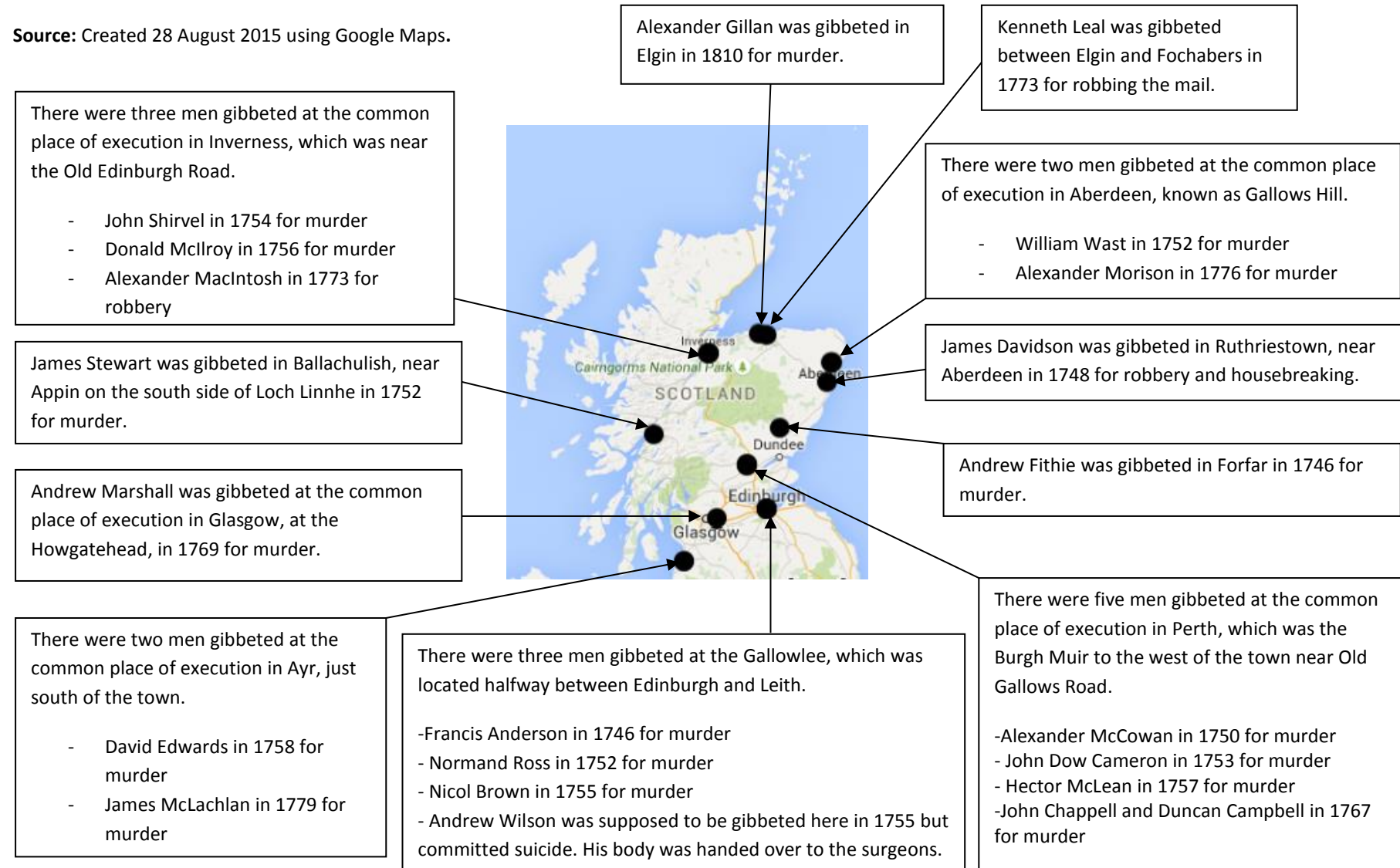
Location of Hanging in Chains

Throughout this period in Scotland, if an offender was sentenced to be hung in chains following execution it was invariably stated, within the judge's sentencing, that this would occur at the same location as the execution. This was in contrast to practices in England where executions could occur in one location but the bodies could be gibbeted in another, which may have been spatially specific due to the crimes committed. Therefore, in Scotland, the implementation of gibbeting was more explicitly linked to the public execution and, crucially, the changes that occurred to its location as this period progressed. Figure two is a map showing the locations at which offenders in Scotland were hung in chains. Taking into consideration the chronology of hanging in chains, this chapter will now turn to question how far the decline, and eventual end, of it correlated with changes made to the locations of executions more generally, namely their gradual move to more central areas which were perhaps unsuitable places to gibbet dead bodies.

Fig. 2: A Map of Offenders Gibbeted in Scotland 1746 to 1810.

Source: Created 28 August 2015 using Google Maps.

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In Edinburgh the common place of execution between 1660 and 1784 was the Grassmarket, a central area within the city's Old Town. However the four men sentenced to be hung in chains as a result of trials before the High Court in Edinburgh between 1746 and 1755 were instead executed at the Gallowlee between Edinburgh and Leith. The historical port of Leith had become a more populated thoroughfare during Cromwell's invasion of Scotland in the mid-seventeenth century. The Gallowlee was situated in Shrubhill, the halfway point of Leith Walk where Edinburgh and Leith met. An 1865 history of the town cited the existence of a permanent gibbet at the site. Prior to the mid-eighteenth century, it appears to have been used predominantly for hanging bodies in chains rather than executions. When Philip Stanfield was executed in 1668 for the murder of his father Sir James Stanfield he was hanged at the Cross in Edinburgh. However his body was taken to be hung in chains at the Gallowlee.⁴²⁸ By the mid-eighteenth century the gibbeting of a rotting corpse in Edinburgh's busy centre remained an impractical penal option and thus the Gallowlee was still viewed as a more appropriate location. It was also more expedient to conduct the executions there following a relatively short procession from the place of confinement in Edinburgh.

In demonstrating the changing nature of public executions in this period chapter three highlighted the importance of location within the whole proceedings and noted the changes made to the place of execution towards the end of the eighteenth century. When investigating both the chronology of gibbeting and the location chosen for it in various parts of Scotland, it becomes apparent that gibbet sites were not within city centres. In terms of the exposure of criminal corpses outside the town walls, Spierenburg argued that this added to the dread for the condemned as their body was to be eternally banished.⁴²⁹ Locations in England were usually chosen due to their proximity to the crime scene and visibility from public roads, thus away from densely populated areas.⁴³⁰ In Scotland, while the motivations behind the choice of location were not always discernible, in the five cases where the punishment was to occur at the scene of the crime it was explicitly stated that this was to add a further

⁴²⁸ *Tales, Traditions and Antiquities of Leith* (Edinburgh: 1865), p. 296.

⁴²⁹ Spierenburg, *Spectacle of Suffering*, p. 90.

⁴³⁰ Tarlow, 'The Technology of the Gibbet', p. 681.

degree of severity to the punishment, often due to the desire to demonstrate the long arm of the law in more remote areas. In the remaining cases the condemned were to be executed between Edinburgh and Leith, if tried in Edinburgh, or at the common place of the circuit city. The common place of execution in Perth was upon a permanent gallows on the Burgh Muir to the west of the town. Now known as 'Old Gallows Road', executions persisted there until they were moved to the High Street in the 1780s. Incidentally the five men hung in chains at the common place in Perth were between 1750 and 1767, prior to the move. Similarly, in Aberdeen two men were hung in chains at Gallows Hill in 1752 and 1776 respectively. The latter, Alexander Morison, would be the last criminal executed here before the common place was relocated to the more central location of Castle Street. A comparable pattern is discernible when chronicling the punishment in other cities such as Ayr, Inverness and Glasgow.

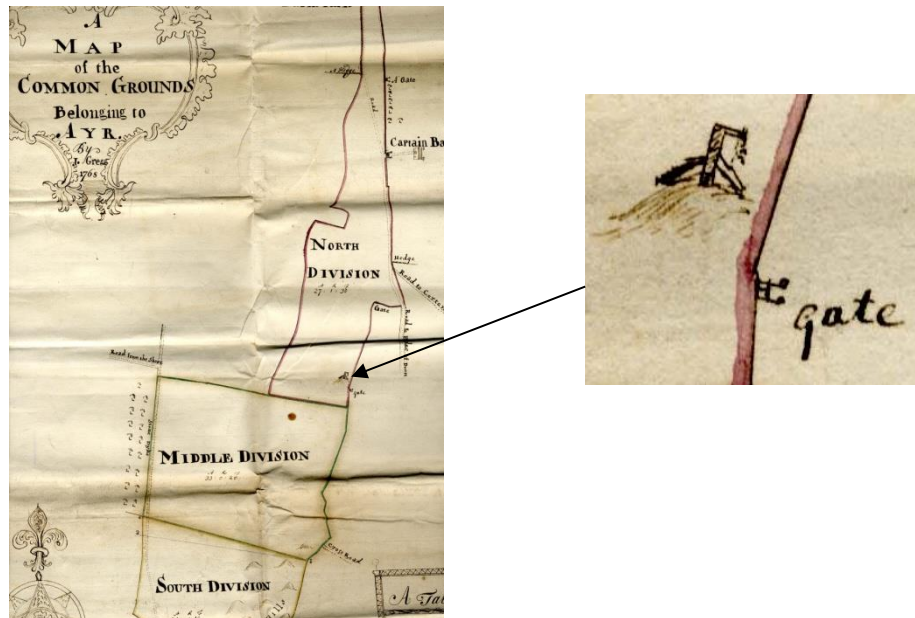
Longevity of the Gibbet

The post-mortem punishment of the body was intended to add a further degree of infamy to the sentence of death for both the condemned and the spectator. However, similar to the punishment of dissection, the theme of deterrence needs to be further unpicked in relation to the gibbeting of the criminal corpse. For the offenders themselves the prospect of their bodies being hung in chains had not prevented them from committing their crimes. However the enacting of post-mortem punishment upon the corpse evoked various reactions from the spectator. By its very nature the hanging of a criminal's body in chains was intended to be a lasting example. The mechanics of the gibbet, such as its height and the fact that the cage was made from iron and the additional measures regarding security that were sometimes taken to prevent any interference with it, aimed to ensure its longevity. David Edwards was executed and hung in chains on the common muir of Ayr in 1758 for the crimes of murder and robbery. Figure three is 'A Map of the Common Grounds Belonging to Ayr' by J. Gregg from 1768. It included the gibbeted body of Edwards demonstrating that it had become a noted part of the local landscape. A diarist recorded that his body was still hanging in the gibbet in 1778.⁴³¹ While Edwards' case provides an example of the

⁴³¹ Young, *Encyclopaedia of Scottish Executions*, p. 47.

potential longevity of the punishment there are numerous others where the bodies were removed for varying reasons.

Fig 3: A Map of the Common Grounds Belonging to Ayr, J. Gregg, 1768.



Source: Reproduced with the permission of Ayrshire Archives, a joint initiative by East Ayrshire Council, North Ayrshire Council and South Ayrshire Council.

Andrew Marshall was executed in 1769 for murder and robbery and was the only criminal to be hung in chains in Glasgow in this period. On the night following the execution his body was stolen from the gibbet and was not recovered. In 1841 the removal of the body was attributed to the Glasgow market gardeners' fear of the decomposing body and its adverse effects due to its proximity to their garden nurseries.⁴³² Similarly, James McLachlan's body was stolen from the gibbet in Ayr only 36 hours after it was hung up in June 1779. The suspicion at the time was that it had been removed in order to protect the kailyards from the flies it would attract, a problem which would likely have been exacerbated by the fact that it was summertime.⁴³³ In the earlier case of David Edwards, surviving records detailing the

⁴³² *Morning Post*, Thursday 29 April 1841, p. 7.

⁴³³ Young, *Encyclopaedia of Scottish Executions*, p. 53.

cost of gibbeting his body include two carts of lime being delivered to the place of execution.⁴³⁴ Lime can be used in the disposal of human remains, especially when the bodies cannot be afforded proper burial. It aids in preventing the strong smell caused by the putrefaction of the body.⁴³⁵ The use of lime when gibbeting the body of Edwards suggests that the authorities were aware of the potential difficulties caused by the putrefying body and thus took preventative measures to ensure the longevity of the punishment.

The above cases suggest that the removal of the bodies from their gibbets was not due to a belief in the injustice of the punishment or any real concern for the condemned person. Rather the presence of the gibbeted body was an inconvenience and was thus removed. However an evident motivation for the removal of criminal corpses from their gibbets that reoccurs in the following cases was the desire to see the body buried. In some instances this appears to have been more premeditated, and thus more successful, than in others. Nicol Brown was executed and his body hung in chains in April 1755 between Edinburgh and Leith at the Gallowlee for the murder of his wife. In the night between 7th and 8th June his body was taken down and carried off but was soon found again in the Quarry-holes near the Gallowlee. The following day it was hung up again.⁴³⁶ However in the night between 19th and 20th June the body was carried off for a second time and, though diligent search was made, it was not found.⁴³⁷ In stealing the body the first time it appeared that the perpetrators may have attempted to give him a makeshift burial in a shallow grave in the Quarry. However what is also likely is that they just did not want the sight or presence of a dead body gradually decaying where they would see it daily and so they stole it a second time and successfully disposed of it.

Unlike in Brown's case, there are examples where bodies were taken from their gibbets and remained successfully buried for up to a century. The *Dundee Courier* reported upon the life of Robert Bain, a man who had died in 1865 at the age of 107,

⁴³⁴ Ibid., p. 47.

⁴³⁵ Lime was listed among the Red Cross Emergency Relief Items Catalogue for 2002 for the disposal of corpses that could not be given a sufficiently deep burial. See www.procurement.ifrc.org.

⁴³⁶ *Caledonian Mercury*, Monday 9th June 1755, p. 3.

⁴³⁷ *Caledonian Mercury*, Monday 23rd June 1755, p. 3.

and included his reminiscences of the case of Kenneth Leal. Bain would have been 15 at the time of Leal's execution in 1773 and stated that "according to the barbarous laws of the times he was sentenced to be hung in chains on the spot the deed was committed". He recalled the body hanging from July to mid-winter, with the place of execution coming to be known as 'Kenny's Hillock', and how the "clanking of the chains at night terrified the surrounding inhabitants". One morning it was discovered that the body had been removed.⁴³⁸ In 1829, during cultivation of the overgrown land by John Sellar, it was reported that flooding had uncovered the body buried about three feet under the surface. The bones and the gibbet cage had been buried wholesale and were reinterred in the same manner except for the head and the chain, which were hung up outside Sellar's workshop.⁴³⁹

When Alexander Gillan was executed in 1810 he garnered no sympathy from the crowd due to the horrific nature of his crimes. Despite this, and the fact that the authorities had ordered his gibbet to be a great height to act as a stark deterrent, his body was removed. However the location was still easy to find as part of the iron work of the cage had been hung in a tree when the wooden gibbet post had been cut down. In 1911 the *Aberdeen Journal* reported that the cage was ordered to be removed by the Duke of Richmond and in its place a slab erected to mark "Gillan's grave-November 1810". When carrying out the job workers found the skeleton of Gillan buried about two feet eight inches deep, with part of the chains still encasing the body. It was ordered that no further investigation be done on the grave and the remains were reburied along with the chain.⁴⁴⁰ There are some notable similarities in these cases that can shed light upon the motivations behind their removal from the gibbet. In both instances the bodies were buried at the foot of the gibbet. While it may have increased the risk of detection to attempt to transport the bodies to a more desirable location, it may also suggest a simple desire to have them out of sight without regard for the condemned criminal. In addition, both were buried sufficiently deep to conceal them, unlike in Brown's case. However they remained encased, or at least partly so, in the gibbet cage, again the fact that the cage was made of iron may

⁴³⁸ *Dundee Courier*, Tuesday 5 December 1868, p. 2.

⁴³⁹ Adams, *Hangman's Brae*, p. 20.

⁴⁴⁰ *Aberdeen Journal*, Friday 16 June 1911, p. 5.

have prevented removing the bodies from it. But it may also have been the case that the perpetrators had no further desire to interfere with the body other than to have it removed from sight. Furthermore, as argued above, by the time of Leal's execution in 1773, and especially by Gillan's in 1810, the punishment was a rarity and, as Bain commented, believed to be barbarous despite the offence committed. Attending an execution was one thing but witnessing this prolonged punishment and having it entrenched within the landscape indefinitely was quite another.

The Case of James Stewart

The case of James Stewart in 1752 embodied various themes running throughout this chapter, including the importance of the crime committed, the location of the gibbet and the risks to its security. His case occurred during the post-rebellion tensions still evident in the political management of parts of Scotland. The highest legal authorities in Scotland, as well as those in London, monitored its progress from his apprehension to his trial and subsequent execution. Despite deficiencies in the case against him there was an evident determination to see him receive swift and exemplary punishment. James had been active for the rebels during the 1745 Jacobite Rebellion and was the illegitimate brother of Charles Stewart of Ardshiel, the exiled leader of the Lochaber and Appin Stewarts. Prior to the murder James was employed by Colin Campbell of Glenure, also known as the 'Red Fox', as his assistant. Campbell was the Crown Factor on the forfeited estates of Ardsheal, Callert and a portion of Lochiel and Stewart helped to oversee the properties, which had once belonged to members of his clan. When investigating the government's relationship with the Highlands prior to 1745 Rosalind Mitchison cited the non-cooperation rife among the Appin Stewarts. However she argued that their Jacobitism was motivated more by their disdain for the typically pro-government Campbells than by any personal affection for the deposed Stuart King.⁴⁴¹ The determination of the authorities, and powerful members of Clan Campbell, to prosecute and convict James Stewart, despite the deficiencies in the

⁴⁴¹ Rosalind Mitchison, 'The Government and the Highlands 1707-45', in N.T. Phillipson and Rosalind Mitchison (eds.), *Scotland in the Age of Improvement; Essays in Scottish History in the Eighteenth Century* (Edinburgh: Edinburgh University Press, 1970), pp. 24-46, p. 25.

evidence against him, demonstrated this continued tension in the area even after the Jacobite cause was soundly defeated in 1746.

On 14th May 1752 Colin Campbell was on route to Lochaber in order to carry out evictions of Stewart tenants in the area. One of his travelling companions and kinsman, Mungo Campbell, provided an account of the events that led to his murder to the court. They were travelling through Lettermore Wood, on the south side of Loch Linnhe. As the road was too narrow to accommodate two horses riding abreast Colin rode behind him. Mungo heard two gunshots and turned to find Colin had been shot in the back. Although Mungo told the court that he caught a brief glimpse of the assailant he was only able to recall his dark coat. Despite attempts to get him medical attention, Colin died shortly after.⁴⁴² The events that followed led to perhaps one of the most well-known, yet still contentious, cases in Scottish legal history. Immediately following the murder the case attracted widespread attention. On 18th May Charles Areskine, the Lord Justice Clerk, wrote to the Earl of Holderness, the Secretary of State, in London to assure him that a vigorous enquiry would be made in order that the “barbarous wretches, actors and accomplices of this assassination may be discovered and exemplarily punished”.⁴⁴³ In reply Holderness had warned Areskine of the dangerous consequences should this “notorious attack” on the government go unpunished.⁴⁴⁴ James Stewart was accused as he and the deceased had previously engaged in public disputes despite working together. Stewart had claimed Campbell was “no friend of his” as he carried out his business with a “high hand”.⁴⁴⁵

From the beginning of the legal proceedings the odds were stacked against Stewart as he was to be tried before the Western Circuit at Inveraray, a Campbell stronghold, as opposed to the High Court in Edinburgh which may have been more appropriate for such a high profile case. In addition, 11 of the 15 jurors in the case had the last name Campbell and the presiding judge was Archibald Campbell, the Duke of Argyll and Chief of Clan Campbell. Stewart was indicted and convicted of being guilty “art and part” of the murder and this in itself demonstrates the determination of the

⁴⁴² NAS JC13/10/25.

⁴⁴³ TNA SP54/42/9A.

⁴⁴⁴ TNA SP54/42/12.

⁴⁴⁵ NAS JC13/10/61.

authorities to see someone capitally punished for the crime as the suspected principal actor, Allen Breck Stewart, was never found nor tried for the murder. During debates over the reform of Scots law in the 1820s a particular critique expressed by Whigs such as Henry Cockburn centred upon the Scottish system of jury selection. 45 persons would be gathered from the surrounding areas and named in the circuit court as potential jurors. From these the presiding judge would choose the 15 to hear the case. In his critique of the system in 1822 Cockburn used Stewart's case to highlight the defects of the system as he claimed there were several qualified jurors who had no affiliation to either side and could have been balloted to be on the jury but instead a Campbell judge was allowed to appoint a Campbell jury in what Cockburn called a "mockery of justice".⁴⁴⁶

Following a lengthy trial James was sentenced to be taken back to the prison of Inveraray until 5th October when he was to begin the journey through Argyleshire to Inverness and then onto Fort William. On 7th November he was to be escorted by three companies of soldiers on the ferry to Ballachullish in Appin, on the south side of Loch Linnhe and there to be executed upon a gibbet to be erected on a "conspicuous eminence" on the 8th November. His body was to be subsequently hung in chains on the same spot.⁴⁴⁷ The location was chosen due to its proximity to the murder scene and as the nearby Ballachullish was the home of Stewart. Due to the political tensions surrounding the case, largely attributable to the doubts over his guilt, his gibbeted body was to be guarded by 16 men from the command at Appin. A military guard built a hut at the scene and it was continually guarded until April 1754. In January 1755 it was reported to the High Court that the body had blown down but the Lord Justice Clerk ordered it to be speedily hung up again before the news spread and attempts could be made to bury the body.⁴⁴⁸

The case of James Stewart provides a further layer to the investigation of hanging in chains as a post-mortem punishment in Scotland. His trial occurred just prior to the time when the Murder Act came into effect yet he was sentenced to be

⁴⁴⁶ Henry Cockburn, *Observations on the Mode of Choosing Juries in Scotland* (Edinburgh: 1822), pp. 90-92. In 1825 the criminal law was reformed to permit the balloting of juries in Scotland.

⁴⁴⁷ NAS JC13/10/165.

⁴⁴⁸ *Scots Magazine*, Monday 6 October 1755, p. 48.

hung in chains, as were others at the time, due to the believed heinous nature of his crime and the need to make a stark example. Immediately following the murder the correspondence between the highest legal authorities in Scotland and London demonstrated the widespread concern over finding the perpetrator. Shortly after the capital conviction was returned reports of the trial had been sent to London. Holderness wrote to the Lord Advocate to commend how the whole had been conducted and stated that “nothing could be more material to the future wellbeing and governing of distant parts of Scotland”. Furthermore he hoped the exemplary punishment of this notorious criminal would convince those “previously misled that hitherto the only true and solid happiness was founded on His Majesty’s authority and protection”.⁴⁴⁹ From this correspondence we can discern undertones that Stewart’s case was being billed as almost treasonous in nature. Despite standing trial, and facing death and hanging in chains, for murder his execution was to make a lasting political statement. The case continues to garner debate today with a general consensus that neither James Stewart, nor even Allen Breck Stewart, committed the murder. Some years following his execution and hanging in chains the body was taken down from the gibbet and secretly buried in the chapel of Keil which was situated on the shore of Loch Linnhe. Today Stewart’s case continues to attract visitors to the scene of the execution and believed location of his burial. A memorial was erected in 1911 poignantly stating that he was executed “for a crime of which he was not guilty”.

Conclusion

To conclude, this chapter has provided an in-depth examination of the post-mortem punishment of hanging in chains in Scotland, in terms of its administration and potential effects upon both the condemned and the spectator, between the mid-eighteenth and early nineteenth centuries. In charting the chronology of the punishment it is evident that there was a concentration of cases on the eve of the Murder Act in the wake of the 1745 rebellion. The fact that the Northern Circuit accounted for half of the total offenders hung in chains in the late 1740s and 1750s demonstrates a correlation with the increased numbers being sent to the scaffold as a result of trials there. However the sentencing of hanging in chains and the numbers of

⁴⁴⁹ TNA SP54/42/34.

executions did not follow the same trajectory as the eighteenth century progressed. In the 1760s and 1770s there were a handful of cases before the punishment all but disappeared apart from one final atrocious case in 1810. Despite the relatively low number of offenders hung in chains, this chapter has shown that, between the passing of the Murder Act and the late 1770s, gibbeting occupied an equally central role in the criminal justice system as the other post-mortem option of dissection. Between 1752 and 1779 there were a total of 25 men capitally convicted for murder. There were 12 sentenced to be hung in chains and 13 to be dissected. This suggests that there did not appear to be any aversion on the part of the Scottish authorities to sentence the punishment. Thus its disappearance after the 1770s required further exploration.

Chapter three cited a gradual move of the common place of public execution in Scotland from urban peripheries to more central locations closer to the places of confinement in the final quarter of the eighteenth century. This chapter has shown that following these moves in circuit cities such as Aberdeen, Inverness, Perth, Ayr and Glasgow there were no more offenders sentenced to be hung in chains and instead murderers were exclusively sent for dissection. Furthermore, the removal of the penal option of dissection following the passing of the Anatomy Act in 1832 was in order to ensure the better supply of cadavers to the medical profession. While the dissection of criminals was criticised during debates over the act it was not the practice itself that was targeted, instead it was the inadequate number of bodies it yielded. However the punishment of hanging in chains differed from dissection in that it had all but disappeared in Scotland half a century before it was formally repealed by legal statute. The act of 1834 had been largely prompted by the difficulties the English authorities had faced in gibbeting the bodies of Jobling and Cook in 1832. In the wake of the cases the *Leicester Journal* summed up the debates over the punishment of hanging in chains in the newspapers, calling it an “old practice...worthy of an era of profound barbarity” and questioned how justice could continue to “disgrace herself by acts which public decency repudiates”.⁴⁵⁰ In Scotland, while the rhetoric was not quite as strong, some of the sentiments can be found in the previously cited cases where the

⁴⁵⁰ *Leicester Journal*, Friday 24 August 1832, p. 2.

punishment of gibbeting appeared to have been considered yet was dismissed in the courts.

The preamble to the Murder Act stipulated that the post-mortem punishment of the criminal corpse was intended to add a further mark of infamy to the punishment of death. This chapter has shown that a key variable of this was the spectator at the gibbet foot. While it is difficult to gauge exactly how people felt about the gibbeted body, it is evident that it did evoke some reaction, although not always the deterrent desired by the authorities. A couple of bodies were apparently removed for the simple reason that they disturbed the local crops. Others were taken and afforded some kind of burial, even if this was makeshift at best. In the case of James Stewart, the correspondence between key Scottish legal figures with authorities in London reveals a large degree of satisfaction at his conviction and execution. While a constant guard being required at the gibbet for eighteen months does not necessarily suggest that his gibbeted body answered the purposes of deterrence, the staging of the death sentence and subsequent post-mortem punishment near the crime scene, but also in an area populated by many who sympathised with his plight, did act as a marked example of justice being seen to be done.

Chapter Six:

“Pitying Them as Men but Rejoicing Their Fate as Rebels”: The Punishment for Treason 1715-1820.

Historically the distinction attached to the crime of treason by legal statute had been matched by the nature of the punishment meted out upon the scaffold. The death sentence was intended to answer the heinousness of the offence with the most severe and exemplary punishment available, namely to be hung, drawn and quartered. The traitor’s death thus encompassed both an aggravated execution and subsequent post-mortem punishment, although it was a fine, and often indeterminate, line where one ended and the other began. The focus of this chapter is to investigate the changing nature of the punishment for treason across the eighteenth and early nineteenth centuries through an analysis of the Jacobite rebellions of 1715 and 1745 and the treason trials conducted in Scotland in 1794 and 1820.

In providing an analysis of the changes gradually made to the punishment of treason across this period this chapter will question the context in which the trials and executions took place and, within this, the attitudes of contemporaries towards the condemned. In turn it will demonstrate that, while the legal death sentence pronounced against the convicted traitor remained relatively unchanged, the executions were adapted upon the scaffold. Utilising the available sources providing details of the executions it is evident that, due to the multiple stages of the death sentence, the legal death of the traitor was not instantaneous. Instead it was a process that was subject to discretionary implementation. In the wake of the Jacobite rebellions the executions were conducted at various locations in England and there were evident variations, including the enacting of the multiple stages of the executions in different orders, which could occasion death more swiftly. In 1794 and 1820 the traditional traitor’s death sentence was passed against the convicted men. However the sentence was altered prior to the date of execution so that the condemned were to be hanged until dead and the severing of their heads from their bodies was to be a more definitive post-mortem punishment.

The 1715 Jacobite Rebellion

The death of Queen Anne in August 1714 was followed by the peaceful succession of the Elector of Hanover as King George I of Great Britain. However in September 1715 John Erskine, the Earl of Mar, proclaimed the 'Old Pretender' James, son of the deposed James II, the King. Within weeks he had mobilised a military force of around 16,000, including 26 Highland clans. The Secretary of State's office dispatched official warnings of an impending rising, Habeas Corpus was suspended and the government arrested suspected Jacobites in England. In Scotland an 'Act for Encouraging Loyalty' was passed and required suspected persons whose principal residence was in Scotland to appear in Edinburgh. There were 21 peers and 41 gentlemen listed, of whom only 2 appeared and were put in jail.⁴⁵¹ By October 1715 the Jacobites were at the peak of their strength with Mar gathering a considerable force in Perth. The regular government troops stationed in Scotland, numbering approximately 1000 men, was rapidly increased and the Duke of Argyle was sent to Scotland as the army Commander-in-Chief with forces closer to 10,000 by January 1716.

There were two main battles fought almost simultaneously during the rebellion: one in England and one in Scotland. The Battle of Sheriffmuir was fought on 13th November 1715. Although Argyle's forces were outnumbered it was inconclusive yet demoralising for the rebel army as they had been prevented from progressing to the River Forth. Following Sheriffmuir neither side had adequate battlefield facilities to treat the wounded and were disinclined to take large numbers of prisoners, with estimates of as few as 133 government troops taken and 82 Jacobites, including 30 officers.⁴⁵² Further reinforcements to the government army forced the Jacobites into retreat and by January 1716 the 'Old Pretender' and Mar disbanded their forces and made their escape on a small ship from Montrose. In comparison to this drawn out retreat of the rebels, the Battle of Preston was a decisive government victory. Fought between 9th and 14th November 1715 it was the only real clash of the armies on English soil. A rising had been planned in Northumberland but had been thwarted by

⁴⁵¹ John Baynes, *The Jacobite Rising of 1715* (London: Cassell, 1970), p. 64.

⁴⁵² Margaret Sankey, *Jacobite Prisoners of the 1715 Rebellion; Preventing and Punishing Insurrection in Early Hanoverian Britain* (Aldershot: Ashgate, 2005), p. 104.

early arrests of those suspected of treachery. On 6th October insurrection had broken out in Northumberland but the rebels had failed to take control of Newcastle. From there the English rebels joined with those from Scotland under the command of William Gordon and marched towards Lancashire then Preston where were met by the government army. Despite the rebels claiming victory in the first round of attacks, government reinforcements meant a Jacobite surrender. Unlike Argyle's reluctance to take prisoners, after Preston there were 1468 prisoners taken by the army, 386 of whom were English soldiers and 75 lords and gentlemen along with 143 Scottish lords and gentlemen and 862 others.⁴⁵³ In addition, unlike those taken and held in Scotland, the fate of the prisoners taken at Preston was entirely in the hands of the government in London, the question was then how and on what scale to punish them.

Early historiography pointed towards the relative leniency of the government following the '15 as a factor that had allowed for the occurrence of another Jacobite rebellion in 1745.⁴⁵⁴ However, more recently, Margaret Sankey and Daniel Szechi have focused more in-depth upon the government's strategy in punishing those involved in the rebellion, careful management of which was important in England but thought to be crucial in Scotland. Respectively they demonstrated that a bloody show of force was impossible due to political and kin ties and that the state faced obstacles in not only bringing the rebel prisoners held in Scotland to trial but also difficulties in the confiscation of forfeited estates.⁴⁵⁵ Duncan Forbes, Advocate Depute in Scotland, commented that "there were not 200 gentlemen in the whole kingdom who are not very nearly related to someone or other of the rebels".⁴⁵⁶ It was hoped that discretionary treatment would bind certain rebels, through those who had interceded on their behalf, in a duty of loyalty to the state in the future. Contextually the rebellion occurred during the infancy of the Hanoverian regime which was already facing popular protest which had prompted the passing of legislation such as the Riot Act (1 Geo. 1 st2 c.5). In terms of a Scottish perspective, the Jacobites continually used

⁴⁵³ *A Compleat History of the Late Rebellion* (London: 1716), p. 76.

⁴⁵⁴ Devine, *Scottish Nation*, p. 40; Baynes, *The Jacobite Rising*, p. 200.

⁴⁵⁵ Sankey, *Jacobite Prisoners*; Daniel Szechi, *1715: The Great Jacobite Rebellion* (London: Yale University Press, 2006).

⁴⁵⁶ Devine, *Scottish Nation*, p. 40.

opposition to the Union, and their promises to dissolve it, as a mechanism to gain support.

Following the victory at Preston the state had the task of organising the 1468 prisoners they had taken. 100 of the most elite prisoners were sent to London for trial but the vast majority remained in overcrowded gaols in and around Preston. It was neither practical nor desirable for the state to put all of the prisoners on trial due to the difficulty in obtaining sufficient witnesses to secure convictions against them all and the cost of the proceedings. Therefore an order was issued on 13th December 1715 stating that those who were not gentlemen or men of estates or had distinguished themselves by an extraordinary degree of guilt were to draw lots. Thus one in twenty would stand trial while the others could petition for the King's mercy.⁴⁵⁷ Of the list of 33 who were selected to stand trial, 15 had distinguished themselves by their degree of guilt. The remaining 18 were gentlemen, only one of whom was Scottish. The rest were from English Catholic gentry families.⁴⁵⁸ As a result of the drawing of lots, 47 of the 65 men who drew the "lot of justice" stood trial along with 27 of the 33 who had been selected for trial. Of the 74 tried, 67 were found guilty, with 40 executed, 7 acquitted and the rest subsequently pardoned.

Of those sent to London for trial there were seven peers tried before the House of Lords and 62 of the remaining gentry tried in three batches before the Court of Common Pleas. As a result of these proceedings there were six lords condemned with two subsequently executed at Tower Hill and four men hung, drawn and quartered at Tyburn. Although initially sentenced to be hung, drawn and quartered, the condemned peers had their sentences commuted to beheading.⁴⁵⁹ The first of the peers to be executed was the Earl of Derwentwater, a young illegitimate descendent of Charles II and part of a wealthy Catholic family in Northumberland. The other was William Gordon, Viscount Kenmure, who was a Nonjuring Scottish Episcopalian. Derwentwater died with only one stroke of the axe and his body was taken to his ancestral home at

⁴⁵⁷ TNA TS20/44/2.

⁴⁵⁸ TNA KB33/1/5. See also Sankey, *Jacobite Prisoners*, p. 49.

⁴⁵⁹ *The Speech of the Lord High-Steward, upon Proceeding to Judgement against James, Earl of Derwentwater, William, Lord Widdrington, William, Earl of Nithisdale, Robert, Earl of Carnwath, William, Viscount Kenmure and William, Lord Nairn* (Dublin: 1716), p. 2.

Dilston Hall, Northumberland. The appearance of the Aurora Borealis over northern England was widely taken as an indication of God's displeasure at his execution.⁴⁶⁰ A pamphlet published following his execution admonished his lack of contrition and accused Derwentwater of being ungrateful to the King for his having commuted the sentence to beheading rather than the more painful and disgraceful sentence for traitors and for allowing his corpse to be delivered to his relatives.⁴⁶¹

Of the remaining prisoners sent to London there were four men hung, drawn and quartered at Tyburn in May and July 1716. Colonel Henry Oxburgh, executed on 14th May, was an Irish papist and had been a key messenger in the early planning of the rebellion. His head was fixed upon Temple Bar.⁴⁶² Richard Gascoigne, also a Catholic who had been involved in the planning of the rebellion, was executed on 25th May still proclaiming his loyalty to the Stuarts.⁴⁶³ At the execution of John Hall, a Northumberland Justice of the Peace, and Reverend William Paul on 13th July, the vast mob made no attempt to rescue the condemned men but there were instances of them throwing stones at the under-sheriffs.⁴⁶⁴ Of the 100 elite prisoners who had been sent from Preston there were only six executions, including the two peers, which numerically speaking would suggest some restraint when deciding upon the level of punishment to be meted out. This was possibly due to the tensions already running high in London with clashes between pro-Jacobite Tory mobs and their Whig rivals having escalated in the summer of 1716.⁴⁶⁵ Tensions culminated in the Read's mughouse incident of July 1716 in Salisbury Court which led to the execution of five men under the terms of the Riot Act, demonstrating that more executions of Jacobite rebels in London may have caused further unrest.

Following the trials before a special commission of Oyer and Terminer in Liverpool in January 1716 there were 40 executions conducted in six Lancashire towns and cities to impress upon the minds of the inhabitants of the area the perils of entering into a traitorous rebellion. The bill for the executions alone was £132 15s 4d,

⁴⁶⁰ Szechi, *1715: The Great Jacobite Rebellion*, p. 206.

⁴⁶¹ *Remarks on the Speech of James, Late Earl of Derwentwater* (London: 1716), p. 4.

⁴⁶² *Stamford Mercury*, Thursday 17 May 1716, p. 9.

⁴⁶³ *Stamford Mercury*, Thursday 31 May 1716, p. 4.

⁴⁶⁴ Sankey, *Jacobite Prisoners*, p. 88.

⁴⁶⁵ William Matthews, *The Diary of Dudley Ryder 1715-1716* (London: Methven and Co, 1939), p. 41.

including a fee of £60 for the two executioners. There was also £515 5s 10d spent on messengers, lodgings and the living costs of the various legal authorities.⁴⁶⁶ The cost and logistical problems caused in detaining so many prisoners meant a swift example needed to be made. There were 18 executions in Preston between January and October 1716, five in Manchester, five in Wigan and four each in Garstang, Liverpool and Lancaster in February. From a reading of the available records detailing the executions it is possible to ascertain that not all of those executed in Lancashire suffered the full weight of the sentence. Those executed in Wigan, Liverpool, Garstang and Lancaster only appear to have been hanged.⁴⁶⁷ However at the first round of executions in Preston and those in Manchester, the full sentence was carried out as the head of one rebel executed in Preston was fixed upon the Town Hall there.⁴⁶⁸ In addition, the accounts of the Lancashire executions show that £5 10s 6d was spent on putting up Richard Chorley's head in Preston.⁴⁶⁹ Thomas Syddall, a blacksmith who became known as the 'mob captain of Manchester', had been one of five men executed there at the request of the Manchester authorities. His head was fixed upon the Market Cross in the city while the heads and quarters of the others were taken away and buried.⁴⁷⁰ Archibald Burnet, the only Scottish gentleman to be included on the Lancashire list of those exempted from the lotting process, was hung, drawn and quartered as per the sentence in Preston. It was later reported that his screams could be heard a mile away.⁴⁷¹ During the full sentence for treason the point at which the punishment went from an aggravated execution to a post-mortem punishment was blurred. The length of time they were left to hang could affect whether or not they were alive or conscious during the drawing, burning of entrails and quartering. If Burnet was conscious and screaming, presumably during his disembowelling, it would suggest that he had not been left to hang for very long. This may have been done on

⁴⁶⁶ *Preston Chronicle*, Saturday 21 November 1846, p. 3.

⁴⁶⁷ *Derby Mercury*, Friday 18 July 1746, p. 3.

⁴⁶⁸ *Newcastle Courant*, Saturday 4 February 1716, p. 11.

⁴⁶⁹ *Preston Chronicle*, Saturday 21 November 1846, p. 3.

⁴⁷⁰ *Newcastle Courant*, Saturday 18 February 1716, p. 9.

⁴⁷¹ Sankey, *Jacobite Prisoners*, p. 52.

purpose by the state as before his execution he had managed to send a pamphlet for publication in Paris in which he presented a scathing critique of the government.⁴⁷²

The executions in England were conducted with relative speed and efficiency not only from necessity, due to the sheer numbers of prisoners taken, but also as these rebels were at the complete mercy of the state. This could not be said for those taken in Scotland as there were no rebel executions in Scotland following the '15. Sir James Stewart, the Secretary of State for Scotland, explained that holding trials there was not practical as "since the Union we are strangers to the treason laws". In 1708 the Treason Act (7 Ann c.21) had extended England's treason laws to Scotland but no trials had been conducted by the time of the '15. Stewart also warned that the rebels detained in Scotland would have to be set at liberty soon in accordance with the law.⁴⁷³ Habeas Corpus was back in effect in June 1716 and, while the 1701 Scottish Act *for preventing wrongful imprisonment and against undue delays in trial* allowed the crown an additional 40 days on top of the 60 specified by Habeas Corpus, the time was coming to an end. Therefore it was decided in August 1716 to transmit 80 of the elite prisoners to Carlisle for trial. The Scottish reaction was one of outrage as the moving of prisoners out of Scotland for trial breached clause XIX of the Union which protected Scotland's legal system. Lord Advocate Dalrymple and Advocate Depute Duncan Forbes were opposed to the move and provided no legal assistance in prosecuting the rebels when asked to do so.⁴⁷⁴ Subscriptions for the prisoners' defence were taken up from all sections of society and they were to be provided with legal counsel which would contest various elements of the cases against them in Carlisle.⁴⁷⁵ When the trials eventually began in December, 25 of the first 37 indicted pleaded guilty but upon their conviction no date was specified for their execution. A further 12 were indicted but had refused to confess and the remaining numbers were not brought to trial. They were all eventually released by the 1717 Act of Grace (4 Geo I).⁴⁷⁶

⁴⁷² *A Paper left by Mr Burnet of Carllops Some Time before he was Executed for being in Arms at Preston* (Paris 1717), pp. 1-2.

⁴⁷³ TNA SP54/12/96. A Letter from Sir James Stewart dated 7 August 1716.

⁴⁷⁴ TNA SP54/10/31. Sir David Dalrymple to Secretary Stanhope 8 Nov 1715.

⁴⁷⁵ Szechi, *1715: The Great Jacobite Rebellion*, p. 204.

⁴⁷⁶ Sankey, *Jacobite Prisoners*, pp. 125-26.

The final punishment for treason to be discussed targeted not the physical body of the traitor but their source of income through estates and property. The Commission for Forfeited Estates was established in the summer of 1716 and was split into two branches, one for England and one of Scotland. In northern England the Commission targeted mainly Catholic property in order to reduce their local influence. It confiscated the large Derwentwater estate following his execution and was able to uncover and confiscate property held by other landed Catholic families and also properties secretly dedicated to supporting the underground Catholic Church in northern England.⁴⁷⁷ In Scotland the situation was more complex. Many estates targeted by the Commission owed, or claimed to owe, others who could legally petition the courts not to sell the estates until the debts were paid. There were others where the legal ownership of the property was argued to have been vested in feudal superiors who could repossess forfeited property under the terms of the 1715 Clan Act.⁴⁷⁸ Even when forfeitures were successful, the Scottish Court of Session co-operated with the families who manoeuvred to buy, and thus maintain ownership, of the property. However Sankey highlighted that with this closing of ranks in Scotland, larger kin groups entangled themselves into an obligation of duty which could have been, and in some instances was, more valuable in preventing their involvement in future rebellion.⁴⁷⁹ By the time the legal expenses, commissioner's salaries, accountants and surveyors had been paid, in ten years the Commission in Scotland had only made a net profit of £1,107.⁴⁸⁰ Following the '15, it would be another 30 years before Jacobitism would rise again to threaten the state.

The 1745 Jacobite Rebellion

On 23rd July 1745 Charles Edward Stuart arrived on the Scottish island of Eriskay, in the Outer Hebrides, with the intention of reclaiming the throne in the name of his father James Stuart the 'Old Pretender'. The military presence in Scotland at this time was commanded by Sir John Cope who had around 3,850 men. The factors that allowed the '45 to develop included the poor defences in Scotland, along with the

⁴⁷⁷ Szechi, *1715: The Great Jacobite Rebellion*, p. 230.

⁴⁷⁸ Sankey, *Jacobite Prisoners*, p. 138.

⁴⁷⁹ *Ibid.*, p. 149.

⁴⁸⁰ Szechi, *1715: The Great Jacobite Rebellion*, p. 234.

military emasculation of Clan Campbell and the unpopularity of the government even amongst non-Jacobites.⁴⁸¹ Although the total numerical strength of the armed forces in 1745 was greater than in 1715, 35 regiments and three troops of horse guards were on active service abroad.⁴⁸² The weakness of Cope's forces meant he had to avoid confronting the rebels and Charles was able to march into Edinburgh and hold court in the city for five weeks without encountering any great resistance. Following the surrender of Edinburgh the rebels won another victory at the Battle of Prestonpans on 21st September with Cope forced to flee south.

During the '45 the only English regiment to raise troops for the Jacobite cause was the Manchester regiment who raised around 300 men. The rebels had seized Carlisle in November 1745 before progressing onto Preston and then Derby. Although Charles wanted to continue marching on to London he grudgingly took the advice of those around him and retreated back towards Scotland to consolidate their position. The Manchester regiment were left to hold Carlisle but on 30th December, after the government army surrounded them, the rebels had hung the white flag and sent a messenger to discuss terms of surrender. However the Duke of Cumberland, the leader of the government army and the youngest son of George II, refused to negotiate and instead had four prisoners hanged in sight of the castle.⁴⁸³ Any prisoners taken by the army in their pursuit of the Jacobites were supposed to be sent to prison however, in a letter to the Duke of Newcastle, Cumberland remarked "I have encouraged the country people to do it [execute rebels] as they may fall into their way".⁴⁸⁴ There was a rebel hanged at Cheadle and the body was bought for 4s 6d by an apothecary surgeon in Macclesfield to have "leather of the skin" which he gave to the tanner to dress. The skin of another captured Highlander was used to make a pair of breeches.⁴⁸⁵ By March 1746 Charles set up base at Inverness and Cumberland at Aberdeen. Their final meeting was to come at the Battle of Culloden on 16th April 1746

⁴⁸¹ Lenman, *The Jacobite Risings in Britain 1689-1746*, p. 249.

⁴⁸² Jonathan Oates, *The Jacobite Campaigns: The British State at War* (London: Pickering and Chatto, 2011), p. 27.

⁴⁸³ W.A. Speck, *The Butcher; the Duke of Cumberland and the Suppression of the '45* (Oxford: Basil Blackwell, 1981), p. 102.

⁴⁸⁴ *Ibid.*, p. 95.

⁴⁸⁵ *Ibid.*, p. 96.

which, unlike its 1715 counterpart at Sheriffmuir, resulted in a decisive government victory.

Following the decisive defeat of the rebellion at Culloden, the growing number of prisoners detained in both Scottish and English prisons meant that attention was turned towards either releasing or legally prosecuting and punishing them. The estimated number of prisoners taken during the '45 is 3,471. This included men, women and children, although some, especially women and children, had been gradually released before Culloden.⁴⁸⁶ As in 1715 Habeas Corpus had been suspended (19 Geo 11 c.1) along with the Scottish act preventing wrongful imprisonment and undue delay of trials. There was then the additional problem of where to conduct the trials as from early on in the judicial process there were fears about conducting them in Scotland due to the belief that Scottish juries would not convict the rebels. The difficulties the state had faced in prosecuting the rebels held in Scotland after the '15 and the refusal of key figures in the legal system there would have also been a consideration. In addition, as the majority of rebels were imprisoned in England, it was argued that it would be more logistical to hold trials there. Therefore the Jurors (Scotland) Act 1745 (19 Geo 11 c.9) meant that anyone accused of treason during the rebellion could be tried anywhere the King may appoint.

Following the precedent set in 1715 John Sharpe, solicitor to the Treasury, proposed the drawing of lots to decide which prisoners would stand trial and which would be allowed to petition for the King's mercy. Using the example of Carlisle he stated "there is no evidence against them but what hath been collected from amongst the rebels themselves and it cannot be expected this sort of evidence will be sufficient to convict them all".⁴⁸⁷ The implication being, in order to secure sufficient convictions, and thus executions, allow the rest to petition for transportation which removes them from Britain without the need of a trial. Every twentieth man would be appointed for trial while the remaining number would be allowed to petition for transportation.⁴⁸⁸

⁴⁸⁶ See the three volumes of Sir Bruce Gordon Seton and Jean Gordon Arnot, *Prisoners of the '45* (Edinburgh: T & A Constable, 1928-29).

⁴⁸⁷ TNA TS20/44/1. Note that only those confined in English prisons or upon the transports at the time were lotted. Those still in Scottish prisons were not.

⁴⁸⁸ TNA TS20/44/3.

Lots were drawn by 607 people at York, Carlisle, Tilbury Fort and on board the transport vessels with 30 drawing the “lot of justice”.⁴⁸⁹ However it appears that only two people who drew the “lot of justice” were subsequently executed, the rest were reprieved and transported. The remaining number of those executed was comprised of men who were “distinguished by degree of guilt” and the executed peers. This demonstrates that the state had little need or desire to execute mass numbers of the rank and file Jacobite rebels and were instead more selective in who they chose to punish with death.

When reporting upon the executions at Penrith, the *Derby Mercury* made the observation that the spectators behaved with the greatest decency “pitying them as men but rejoicing at their fate as rebels”.⁴⁹⁰ Similarly, when reporting upon the execution of two of the peers at the Tower, the *Newcastle Courant* reported that the spectators behaved in a decent manner showing “how much the people entered into the rectitude of the execution, though they were too humane to rejoice in the catastrophe”.⁴⁹¹ This was the balance the government had to achieve in order to conduct sufficient numbers of executions in the manner reserved for the traitor without inciting sympathy or perpetuating the argument that the executed were martyrs to their cause. There were 79 rebels executed following the '45. Four peers were executed at Tower Hill, one man was executed at Tyburn, 17 at Kennington Common (who had been tried at Southwark), 24 at York, 19 at Carlisle, seven at Brompton and seven at Penrith (those at Penrith and Brompton having been tried at Carlisle).⁴⁹² If we take the total number of those sentenced to death at York, Carlisle and Southwark, which was 203, there were 74 people subsequently executed, 36.5 per cent of the number sentenced to death. Of course we must keep in mind that, had the hundreds of people who had drawn blank lots been tried, the total number of death sentences would have been higher. Therefore this supports the argument that, although the executions and post-mortem punishments of the condemned were

⁴⁸⁹ See TNA TS20/44/4 and TS20/44/7. There have been suggestions that the lots were fixed however this has not been proven.

⁴⁹⁰ *Derby Mercury*, Friday 7 November 1746, p. 2.

⁴⁹¹ *Newcastle Courant*, Saturday 16 August 1746, p. 3.

⁴⁹² There were also 38 government soldiers executed as deserters as a result of trials before a court martial. Executions were carried out in Edinburgh, Inverness and Perth.

particularly barbarous, the number of executions was relatively lenient. The ages of those executed varied from the youngest, Benjamin Mason aged 19, to the oldest of the condemned James Innes who was executed at Bampton at the age of 70. Although no women were judicially executed, there are numerous examples of women and children suffering as a result of the army's policy of sword and fire in the Highlands in the aftermath of the rebellion.

At Southwark those tried were officers or persons particularly distinguished in guilt as there had been no lotting. There were a total of 69 trials, with 54 resulting in death sentences, 12 acquittals, two people died in prison before sentencing and one person escaped.⁴⁹³ As a result of the proceedings there were 17 people executed: nine officers from the Manchester regiment and eight Scottish officers (four of whom had been a part of the Carlisle garrison). Those from the Manchester regiment will be further discussed later. The eight Scottish officers were executed in August and November 1746. James Nicolson and Donald McDonald were hanged in Highland plaids along with Walter Ogilvie.⁴⁹⁴ There was some respect shown in the disposal of their corpses as their heads and bodies were ordered by the Duke of Newcastle to be interred in one grave in the new burying ground at St George's, Bloomsbury.⁴⁹⁵

At Carlisle there were 133 people brought to trial, 50 of whom were convicted, a further 41 had pleaded guilty and 36 were acquitted upon trial. The rest were stated to be too sick to stand trial.⁴⁹⁶ As a result of the proceedings at Carlisle there were 33 executions, 19 conducted in Carlisle, 7 in Bampton and 7 in Penrith in order to provide an example to the people there. It is also possible that Bampton was chosen as it had been here that the keys to Carlisle were surrendered to the 'Pretender'. As Carlisle had been captured and held by the Jacobites it was a focal point for the punishment of the rebels but was overcrowded with prisoners and officials who had to be accommodated. Most of the rank and file prisoners were held in Carlisle castle. The mortality rates in the prisons and upon the transports, while difficult to accurately

⁴⁹³ TNA TS20/102/2.

⁴⁹⁴ *Caledonian Mercury*, Thursday 28 August 1746, p. 2.

⁴⁹⁵ *Newcastle Courant*, Saturday 30 August 1746, p. 3.

⁴⁹⁶ TNA TS20/112/7. Note that there had been a greater number of prisoners in Carlisle who had been captured when government forces took back control upon the Jacobite army's retreat back to Scotland. Large numbers of women and children were among those taken prisoner but released.

quantify, were high with numerous stories of ill-nourishment, over-crowding and bad treatment peppering the pages of the *Lyon in Mourning*.⁴⁹⁷ The *Lyon in Mourning* was a collection of speeches, letters and other correspondence related to the Jacobite rebels that had been compiled by Reverend Robert Forbes between 1746 and 1775. As Forbes supported the Jacobite cause the source was likely subject to bias. Despite this it offers some insight into the treatment of the rebels in the immediate aftermath of the rebellion.

The executions in Carlisle took place in October and November 1746. The condemned were carried in black hurdles through the English Gate and executed.⁴⁹⁸ Sir Archibald Primrose pleaded guilty and was executed, along with eight others, on 15th November 1746. The same day James Wright wrote to Primrose's sister and assured her that he was buried at St Cuthbert's churchyard on the north side along with Patrick Murray and Charles Gordon.⁴⁹⁹ In a letter to his wife Charles Gordon assured her "my butchered body will be taken care of and buried as a Christian".⁵⁰⁰ The death sentence passed against the convicted traitor stated that their bodies were to be at the King's disposal and thus could be displayed at prominent locations. The fact that some of the rebels after the '45 were afforded a decent burial was in stark contrast to the aftermath of Monmouth's Rebellion in the late seventeenth century where rebel remains were widely displayed.

Following the trials at Carlisle the judges passed through the English Gate, where the heads of two of the Manchester rebels executed in London were fixed, in order to proceed to York to preside over the trials of 74 rebels.⁵⁰¹ 24 people were executed as a result of the trials in York, 31 pardoned upon enlistment and three convicted but died in prison. Dorothy Johnson, a resident in York, commented upon the arrival of the rebel prisoners: "the mobs are anxious to feast their eyes with them

⁴⁹⁷ Reverend Robert Forbes, Bishop of Ross and Caithness, *The Lyon in Mourning or a Collection of Speeches, Letters, Journals etc Relative to the Affairs of Prince Charles Edward Stuart*. Three volumes published by Henry Paton (Edinburgh: Scottish History Society, 1895).

⁴⁹⁸ *Caledonian Mercury*, Tuesday 4 November 1746, p. 4.

⁴⁹⁹ 'James Wright – letter dated 15th November 1746', *Lyon in Mourning*, Vol. I, p. 222.

⁵⁰⁰ 'Charles Gordon writes to his lady', *Lyon in Mourning*, Vol. I, p. 253.

⁵⁰¹ TNA TS20/74.

that they have lined the streets these two days”.⁵⁰² The following is an account of the executions of ten of the rebels. Captain Hamilton and Daniel Fraser, leaders among the rebels, mounted the ladder first. The rest were tied up and stood upon boards which were drawn away. They were all left to hang for ten minutes before the executioner cut them down, laid the bodies on a “stage built for that purpose” and removed their clothes. Captain Hamilton was the first whose heart was taken out and the executioner threw it into the fire crying out “behold the heart of a traitor” before proceeding down the line. He then scored their arms and legs but did not quarter them. He cried “good people behold the four quarters of a traitor”. The article reported that when that “part of the operation” was completed the executioner chopped off their heads, ending with Hamilton.⁵⁰³ The heads of William Conolly and James Maine were put up at Micklegate-Bar in York. As a rebel leader Hamilton’s head was boxed up and sent to Carlisle. The others had their heads put into the coffins with their bodies and were buried behind York castle.⁵⁰⁴ There were a further 14 rebels executed in York in November.

As per the order of council detailing the drawing of lots in order to efficiently bring the rebels to justice there were those who did not draw a lot as they had distinguished themselves in their degree of guilt and thus the risk was not taken that they may have drawn a blank lot. The ill-fated Manchester regiment were perhaps the main group the government sought to make an example of in the aftermath of the rebellion. Of the total 79 executions, 24 were stated to have been part of the Manchester regiment. There were nine officers executed at Kennington Common, four men executed at York, four at Carlisle, three at Brampton and four at Penrith. One of their former comrades Samuel Maddox had been a key witness in securing convictions against eight of the Manchester regiment officers in exchange for a pardon.⁵⁰⁵ Upon their being taken back to the New Goal after sentencing, the *Caledonian Mercury* commented that if they had not been guarded “tis probable the prisoners would have

⁵⁰² Jonathan Oates, *York and the Jacobite Rebellion of 1745* (York: Borthwick Publications, 2005), p. 9.

⁵⁰³ *Caledonian Mercury*, Tuesday 11th November 1746, pp. 2-3.

⁵⁰⁴ *Derby Mercury*, Friday 7 November 1746, p. 2.

⁵⁰⁵ TNA TS20/103/1 through 11; *An Authentick Narrative of the Whole Proceedings of the Court at St Margaret’s Hill, Southwark in the Months of June, July and August 1746*, Third Edition (London: 1746).

been torn to pieces”.⁵⁰⁶ On 30th July the nine officers were executed at Kennington Common before a crowd the largest “in memory of man”. They had hung for about three minutes when the soldiers began pulling off their clothes. The executioner then cut them down, severed their heads from their bodies and took out their hearts and entrails and threw them into fire. Their limbs were scored but not severed from their bodies. The corpses were then taken back to the New Goal.⁵⁰⁷ During the trials specific reference had been made to the capturing of Carlisle where 300 people armed and arrayed in a warlike manner “did slaughter faithful subjects.” In the records this particular passage is printed with blank spaces to fill in the names of the accused, suggesting that charges relating to Carlisle would be levied against a number of the rebels brought to trial.⁵⁰⁸ This again supports the argument that, due to their being part of an English regiment attacking an English town, the Manchester rebels were chosen specifically for exemplary punishment.

As per the existing treason laws, the death sentence pronounced against the traitor was that they be hung, drawn and quartered, with the bodies left to the King’s disposal. However the argument here is that the executions were subject to discretionary implementation and, in turn, this blurred the line between execution and post-mortem punishment. At York the rebels were hanged for ten minutes before having their hearts taken out and burnt, their arms and legs scored and finally their heads severed from their bodies. Some of the Scottish officers executed at Kennington Common were hanged for 14 minutes whilst the nine officers of the Manchester regiment executed there were only hanged for three minutes but their heads were severed from their bodies before they were dismembered. However the *Newcastle Courant* reported that when Francis Townley was cut down after five minutes he showed signs of life and so the executioner struck him several times on the breast, presumably as a form of mitigating the punishment, before cutting off his head and taking out the bowels.⁵⁰⁹ In addition, at Brampton the rebels had their bowels burnt,

⁵⁰⁶ *Caledonian Mercury*, Tuesday 22 July 1746, p. 2.

⁵⁰⁷ *Newcastle Courant*, Saturday 2 August 1746, p. 1.

⁵⁰⁸ TNA TS20/102/31.

⁵⁰⁹ *Newcastle Courant*, Saturday 2 August 1746, p. 2.

their heads severed from their bodies and one article reported that their arms and legs were cut off rather than just scored.⁵¹⁰

These variations of the punishment lead to questions surrounding the extent to which the condemned were sensible of any of the punishment beyond the hanging part. It can be argued that those hanged for three minutes would have been more likely to be sensible of, or even conscious, if they were disembowelled. However as their heads were severed first this was not the case. We can therefore question if this was done to quicken the process and to prevent these men from physically suffering the taking out of their entrails as, although they were receiving the traitor's death, they were officers rather than the rank and file. Whereas at York the men were hanged for ten minutes and the description of the executioner making his way down the bodies in order to carry out each separate element of the punishment implies the time taken was not an issue. He even had time to hold up the hearts to the crowd before throwing them into the fire, suggesting that the crowd accepted, or at least did not show disaffection, with the implementation of the punishment. Archibald Cameron was the last of the rebels to be executed at Tyburn in June 1753. He was the only one of the 41 people found guilty of treason by the 1746 Act of Attainder (19 Geo 11 c. 26) to be executed. He was hanged for 24 minutes then cut down, his head cut off and his bowels taken out although his body was not quartered. His body and head were then put into a hearse and carried to the undertaker.⁵¹¹ In not displaying his head and allowing for a large and public funeral it can be argued that with the execution of Cameron the state put the final nail in, by 1753 the well-sealed, Jacobite coffin.

Aside from the standard traitor's death there were those who received the post-mortem punishment of having their severed heads displayed. Unsurprisingly many of these were from the Manchester regiment. The heads of John Berwick, Thomas Chaddock and the Reverend Thomas Coppoch were preserved in spirits and sent to be fixed upon the English Gate of Carlisle. Coppoch had previously stated "I should rejoice beyond measure if this simple head of mine could be fixed upon all the

⁵¹⁰ *Derby Mercury*, Friday 24 October 1746, p. 4.

⁵¹¹ *Derby Mercury*, Friday 8 June 1753, p. 3.

cathedral and parish churches in Christendom to satisfy the whole Christian world of the honesty of my intentions".⁵¹² The head of Donald McDonald, a Scottish colonel tried and executed at Carlisle, was fixed upon the Scots Gate. The head of George Hamilton, executed at York, was also sent to Carlisle to be displayed. During the rebellion Francis Townley had been appointed by Charles as the Commandant of Carlisle and was nicknamed the 'sham governor'.⁵¹³ Following his execution at Kennington Common his head was fixed upon the Temple Bar in London along with that of George Fletcher and David Morgan on 2nd August.⁵¹⁴ The heads of Thomas Deacon and Thomas Syddall, executed at Kennington Common, were displayed in Manchester at the same place the head of Syddall's father had been displayed following the '15. He expressed joy at following in his martyred father's pious example.⁵¹⁵ Among the great number who were reported to have rushed to see the heads was Deacon's father, a Non-Juring priest who had been multiple times with his flock.⁵¹⁶ The heads of William Connolly and James Maine were fixed upon Micklegate-Bar in York. They were to remain there until January 1754 when they were stolen and never recovered.⁵¹⁷ Although the death sentence stated that their quartered bodies were at the King's disposal there are no records found thus far that any other body part, other than the heads, were displayed and in most cases they were afforded some type of burial. This was in stark contrast to the displaying of quartered bodies following Monmouth's Rebellion in the previous century and demonstrates a gradual move away from execution practices more characteristic of the Early Modern period, even for the heinous crime of treason.

In addition to the rebels executed elsewhere in England there were four peers beheaded at the Tower. They were initially sentenced to be hung, drawn and quartered but the sentence was commuted to beheading "on account of their quality".⁵¹⁸ William Boyd, the Earl of Kilmarnock was executed on 18th August 1746.

⁵¹² 'Speech of Rev. Thomas Coppoch', *Lyon in Mourning*, Vol. I, p. 63.

⁵¹³ TNA TS20/102/25.

⁵¹⁴ *An Authentick Narrative of the Whole Proceedings of the Court at St Margaret's Hill*, p. 40.

⁵¹⁵ 'Speech of Thomas Siddell', *Lyon in Mourning*, Vol. I, p. 27.

⁵¹⁶ *Derby Mercury*, Friday 26 September 1746, p. 2.

⁵¹⁷ *Caledonian Mercury*, Monday 10 June 1754, p. 1.

⁵¹⁸ *Derby Mercury*, Friday 1 August 1746, p. 3.

His head was severed with one blow and was wrapped in a scarlet cloth.⁵¹⁹ The scaffold was then cleared of his blood in order to bring up his scaffold companion Lord Balmerino, Arthur Elphinstone.⁵²⁰ When recalling his execution, a Non-Jurant clergyman stated that “amazement seized the crowd theatre, struck with the awful scene”.⁵²¹ Both peers were to be interred in the same grave in the Chapel at the Tower. Although the Lieutenant of the Tower had informed the sheriff that the stage was to be left up, that night the mob had pulled it down and had stolen away the boards.⁵²² However this was arguably not so much about objecting to the executions as a desire to obtain a keep-sake from the occasion of witnessing a beheading at the Tower. Charles Radcliffe, the Earl of Derwentwater, and brother to the previously executed Earl in 1716, was executed on 8th December 1746. His coffin was brought to the scaffold covered in black velvet. A black cushion covered the block and it was surrounded by sawdust, presumably to soak up his blood. He was reportedly joined in prayer by the large crowd before it took three blows to cut off his head, which was wrapped in a scarlet cloth as the others had been.⁵²³ The final of the four peers was Simon Fraser, Lord Lovat, who was beheaded on 9th April 1747. An indication of the government’s determination to secure a conviction against Lovat can be ascertained from the fact that the crown witnesses in his case were given a daily rate of five shillings, the usual amount being only two per day.⁵²⁴

A key difference in the punishments following the ’15 and the ’45 was the lack of any large scale prevention of the forfeiture of estates in 1746. As well as the estates of those arrested and either executed or conditionally pardoned the estates of the 41 men named in the Act of Attainder (19 Geo II c. 26) were liable for forfeiture. While a few had managed to save their estates through legal loopholes the state was able to seize a large collection ranging from vast properties such as the Duke of Perth’s to the

⁵¹⁹ *Newcastle Courant*, Saturday 23 August 1746, p. 1.

⁵²⁰ *Newcastle Courant*, Saturday 16 August 1746, p. 3.

⁵²¹ ‘A Non-Jurant clergyman commenting upon the execution of Balmerino’, *Lyon in Mourning*, Vol. I, p. 58.

⁵²² *The Trials of William, Earl of Kilmarnock, George, Earl of Cromartie, and Arthur, Lord Balmerino, for High Treason before the House of Peers at Westminster Hall*, Fourth Edition (London: 1746), p. 40.

⁵²³ *Newcastle Courant*, Saturday 6 December 1746, pp. 2-3.

⁵²⁴ Seton and Arnot, *Prisoners of the ’45*, Vol. I, p. 127.

humblest of holdings.⁵²⁵ There were a few reasons why the forfeiture of estates was more successful following the '45. The forfeited estates were not put up for immediate purchase, as had been the case following the '15 which had proved to be a source of difficulty. Instead after the '45 the estates remained the property of the crown. In addition, Lenman highlighted that "no really great Scottish magnate ever committed himself to the '45".⁵²⁶ This supports the argument that the punishment of the earlier rebellion had created a web of obligation which had prevented many from 'coming out' for the '45. In turn the state did not face the complex maze of powerful family and kin ties on the government side interceding on the part of rebellious relatives to prevent the forfeitures on the same scale as in 1716.

A notable difference between the rebellions of 1715 and 1745 was the levels of violence in the aftermath, particularly in northern Scotland. Following Culloden, Cumberland had set up base at Fort Augustus and had issued a proclamation ordering a diligent search for all persons that had taken up arms and for the surrendering of all weapons. Rebels found in arms were to be shot and their houses and those of people found concealing them burned. There were also examples of rebels being executed without trial if found in arms, such as the case of three men hanged by Captain Scott in June 1746.⁵²⁷ Unlike in 1715, when Argyle had advocated negotiation with the rebels, in terms of regaining stability in the area Cumberland stated "nothing will cure this but some stroke of military authority and severity".⁵²⁸ During the rebellion the Scottish Highlands were viewed with widespread suspicion and disdain and there were numerous examples of non-combatants, including women and children, suffering during the suppression of the area in its wake. Maggie Craig detailed multiple stories of rape, murder and plunder committed by the government army with few legal repercussions.⁵²⁹ The contempt for northern Scotland remained for some years after the defeat of the rebellion and the continued efforts to suppress and sustain stability in the area were evident in some of the criminal cases discussed in chapters two and five respectively.

⁵²⁵ Lenman, *Jacobite Risings*, p. 277.

⁵²⁶ Ibid., p. 255.

⁵²⁷ *Lyon in Mourning*, Vol. III, p. 16.

⁵²⁸ TNA SP54/29/16. Letter dated 15 March 1746.

⁵²⁹ Maggie Craig, *Damn Rebel Bitches: The Women of the '45* (Edinburgh: Mainstream Publishing, 1997).

The Execution of Robert Watt in 1794

Following the extension of England's treason laws to Scotland, the first proceedings to be held on Scottish soil came in 1794, from which one man, Robert Watt, was executed. He was a prominent member of the Society of the Friends of the People established in Edinburgh in 1792. The society sought, among other things, the extension of the electoral enfranchisement and had branches in England and Scotland, with the latter having lower subscription rates and thus attracting a wider membership. Watt had spent his formative years working as a clerk in Edinburgh before taking an interest in the activities of the Society. In a declaration he wrote following his conviction he spoke of ambition having induced him to carry on correspondence with the Lord Advocate regarding the activities of the Society when he was ignorant of the "many abuses of the administrative" that were contrary to true liberty. However in September 1793 he spoke of changing his mind in favour of reform and entering into, and becoming the leader of, a sub-committee of the Friends, often referred to as the Committee of Union and Ways and Means.⁵³⁰ His case occurred at around the same time as the numerous and heavily debated sedition trials conducted before the High Court in 1793 and early 1794. Among those transported as a result of the trials were the 'Scottish Martyrs', a group of five men, perhaps the most famous of whom was Thomas Muir, for writing and publishing seditious pamphlets discussing the need for parliamentary reform.

An order had been sent from Westminster on 24th July 1794 for the Edinburgh authorities to set up a commission of Oyer and Terminer to try Robert Watt and David Downie. The Lord Justice General Ilay Campbell addressed the jury at the beginning of the proceedings in August 1794 and stated that "it has been our good fortune to be little acquainted with high treason" but warned that it must be remembered "we are at war with an enemy whose intention is to spread desolation far and wide, if it be true that they have set up a National Convention to overthrow every government in

⁵³⁰ *By Authority. The Declaration and Confession of Robert Watt* (Edinburgh: Bell & Bradfute, 1794), pp. 13-16.

Europe”.⁵³¹ The charge against Watt and Downie was that on 1st March 1794 the committee, with Watt as the leader and Downie as the treasurer, had formed for the purpose of wickedly and traitorously “contriving to break and disturb the peace and to change, subvert and overthrow the government happily established in this kingdom and to excite, move and raise insurrection and rebellion and to dispose of our lord the King from the government of Great Britain and to put him to death on the first day of March last.” Mr Anstruther, for the prosecution, was anxious to clarify the charges as laid out by the statute of Edward III (25 Edw 3 st5 c.2) which stated “no man shall be found guilty of compassing and imagining the death of the King unless he be proveably attaint by open deed”. He explained that if a person barely conceived the idea of imagining the King’s death then this was not treason but it became so the moment he employed any means to effectuate this purpose of his mind.⁵³² He was effectively fixing the crime upon the intention rather than any act committed.

John Barrell has provided an in-depth examination of the treason trials held in England and Scotland in the mid-1790s in order to demonstrate the complexities surrounding the charge within the 1351 treason laws of “when a man doth compass or imagine the death of our lord the king”. In this work he explored the intricacies in the arguments made by the prosecution and defence in various cases which centred upon intent to commit treason, which had to be proven through evidence of overt acts.⁵³³ In the case of Watt and Downie this intention was to be proved in relation to a total of 18 overt acts listed in the charge. These included meeting on 1st March to conspire to hold a meeting of subjects who had assumed themselves the power of government and legislation, to conspire with other false traitors to alter the measures of the government, to seize Edinburgh Castle, attack banks, imprison the Lord Justice Clerk and other legal authorities in order raise arms and levy money for their cause. This was to be done in order to force the King to end the war with France and to change his ministers in government. However, following the meeting on 1st March, the discussed

⁵³¹ T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours*, Vol. XXIII, 1793 and 1794 (London: T.C Hansard, 1817), p. 1171.

⁵³² Ibid., p. 1190.

⁵³³ John Barrell, *Imagining the King’s Death; Figurative Treason, Fantasies of Regicide 1793-1796* (Oxford: Oxford University Press, 2000). For the chapter focused upon the trial of Watt and Downie see pp. 252-284.

plans were discovered in May and a search of Watt's house uncovered weapons including daggers and pikes. Watt, Downie and others were arrested, with the latter subsequently recruited to act as witnesses for the Crown.

In the aftermath of the Jacobite rebellions there had been more urgency on the part of the state to quell the rebels and, for the political and logistical reasons already cited, for bringing the rebels to a speedy trial and conviction. Unlike the much larger scale of the rebellions which had the express purpose of overthrowing the Hanoverian monarch, those tried for treason in 1794 had been found to have the intention to raise insurrection to force the King to alter his government, and were considered to be serious and dangerous especially due to the context in France, but did not have the means or desire to carry out an open war. The length and debate of the trials of Watt and Downie in 1794 demonstrate that there had been more time and scope for the authorities to establish and justify the charge of treason based upon intent rather than in the trials of many in 1715 and 1745 where the charge could be being found in arms or even in the company of rebels. It was noted in court early on in the proceedings with seeming pride that, although the treason laws may have been changed for the better in 1708, the Scottish courts had no legal precedent to call upon in the trials. A report had been made by Mr Bruce in 1794 regarding treason in Scotland since the Union. It provided information on the legislation passed to try the Jacobite rebels in England which may have been used as a reference in the 1794 trials, but again it served to highlight the lack of precedent tried on Scottish soil.⁵³⁴ Mr Cullen, the defence for Downie, stated to the court that when he had first been appointed to act as the defence counsel he felt perplexed and anxious having a man's life in his hands when dealing with the law of another country with which he was less acquainted, whereas the prosecution had received aid from English lawyers.⁵³⁵ When justifying the charge the prosecution had cited legal statutes as well as legal commentaries such as Judge Foster's *Crown Laws* which stated that "every insurrection which, in judgement of law, is intended against the person of the King, be it to dethrone or imprison him or to oblige him to alter his measures of government" amounted to the levying of war,

⁵³⁴ TNA HO102/62.

⁵³⁵ T.B. Howell, *A Complete Collection of State Trials*, Vol. XXIV, 1794 (London: T.C Hansard, 1818), p. 121.

whether attended with open war or not.⁵³⁶ This would suggest that any attempt to restrain the King, in this instance through his power in government, was akin to a conspiracy against his life and was merely masking these attempts with ideas of reform. These detailed, well researched and argued debates in the court demonstrate that, although the nation feared the revolutionary fervour abroad and its potential to spread, the trials and execution of those involved in the 1794 conspiracy were to be restrained and well justified in the eyes of the public.

Following their trials Watt and Downie were sentenced to be hung, drawn and quartered, the standard traitor's death, on 15th October.⁵³⁷ However two days prior to the execution date a one month respite arrived for Downie and all parts of the original sentence against Watt were remitted except the hanging and severing of the head from his body.⁵³⁸ This effectively meant that the severing of the head would be a definitive post-mortem punishment. On the day of execution the magistrates, along with a number of constables, town officers and the city guard were lining the streets when a message was sent to the sheriff that they were ready to receive the prisoner. He was taken from Edinburgh Castle and placed in a hurdle with the executioner who held the axe in his hand. He was taken to the tolbooth and once inside a considerable amount of time was spent in devotional exercises before he was brought out onto the platform to be hanged. The body was left to hang for about 32 minutes before being cut down and stretched upon a table. It was reported that the body was "completely lifeless" when the executioner came forward with the axe and with two strokes severed the head, which was received into a basket. It was then held up to the exclamation of "this is the head of a traitor" before being placed into a coffin with the body and taken away.⁵³⁹ As demonstrated in chapter three, by the end of the eighteenth century the scene of an execution was often described as solemn with the crowd sometimes reported to have attended due to curiosity or even sympathy with the condemned rather than through a desire to witness excess suffering. However the *Caledonian Mercury* reported that it was "observable that there appeared less

⁵³⁶ Howell, *A Complete Collection of State Trials*, Vol. XXIII, 1793 and 1794, p. 1176.

⁵³⁷ TNA KB8/81.

⁵³⁸ *Caledonian Mercury*, Monday 13 October 1794, p. 3.

⁵³⁹ *Caledonian Mercury*, Thursday 16 October 1794, p. 3.

sympathy towards the unfortunate sufferer than is usually manifested upon similar occasions".⁵⁴⁰ Similarly, the *Northampton Mercury* observed that when the drop fell "little agitation was perceptible amongst the spectators; there was evidently a becoming acquiescence in the justice of the sentence".⁵⁴¹ Downie was eventually remitted in March 1795 meaning that Watt's execution alone served as a stark warning against the dangers of rising against the state. Furthermore, unlike in previous instances of insurrection, the authorities had felt confident to allow proceedings to be conducted in Scotland and the execution to be carried out before a Scottish crowd.

Contextually Watt's execution occurred at a time when events in France were very much in the British press. The Revolutionary Tribunal was sentencing people from all ranks to death, including King Louis XVI and Marie Antoinette, by the guillotine. British newspapers stated that "the enthusiasm of the nation, as it is called, sends as many victims to the scaffold...as it does troops to the field".⁵⁴² Therefore the British state had to temper the justice required in 1794 with the reason and humanity they accused the French of lacking. A report of Watt's execution described the reaction of the crowd upon the appearance of the axe, "a sight to which they were totally unaccustomed, produced a shock as instantaneous as electricity" numbers had rushed away from the scene to avoid the sight of the severing of the head from the body. The article lamented "how unlike is this behaviour to that of the blood-thirsty savages of France" who exulted in the sufferings of those executed. Furthermore it hoped that this "great national example [would] strike deep into the minds of those who inculcate the principles that induced this infatuated man to commit the crimes for which he suffered" and allow all Britons to continue to enjoy genuine freedom and security.⁵⁴³

Trials for Treason in 1820

The Scottish insurrection of 1820, often referred to as the 'Radical War', occurred at the time of an economic downturn in the wake of the Napoleonic Wars, with artisan workers, especially Scottish weavers seeking parliamentary reform, Scottish

⁵⁴⁰ *Caledonian Mercury*, Thursday 16 October 1794, p. 3.

⁵⁴¹ *Northampton Mercury*, Saturday 25 October 1794, p. 4.

⁵⁴² *Norfolk Chronicle*, Saturday 25 January 1794, p. 3.

⁵⁴³ *Northampton Mercury*, Saturday 25 October 1794, p. 4.

independence, universal male suffrage and better working conditions. Due to the uncovering of the Cato Street conspiracy in London which resulted in the execution of five men for conspiring to murder the British Cabinet and Prime Minister in May 1820, the state was eager to check the rebellious fervour in western central Scotland. Furthermore, as previously demonstrated, the western central belt made up a sizeable proportion of offenders being capitally convicted more generally by the 1820s which had raised concerns over the area. Major-General Sir Thomas Bradford had been appointed to manage military affairs in Scotland in July 1819. There were four government agents who had managed to infiltrate the growing number of radical committees in 1820 and who would play a significant part in drawing out key leaders, they were Duncan Turner, John King, John Craig and a man only referred to as Lees. As a result of the week of risings and disturbances in April there were special commissions of Oyer and Terminer set up in Glasgow, Stirling, Dumbarton, Ayr and Paisley, as a result of which three men were executed.

In Scotland a 28 man 'Committee for Organising a Provisional Government' had been formed by leaders appointed from numerous radical committees, John Baird was elected in Condorrat. They were to appoint officers and embark upon the military training of their recruits. The rising itself was to be properly planned for about a year. But on 21st March 1820 the committee met in a Glasgow tavern, among those in attendance was John King, a weaver but also a government informer. He left the meeting early and within minutes the magistrates, police and soldiers arrived and arrested the committee. Little is known regarding their fate as they were not charged with treason along with the radicals to be subsequently arrested. However, the sheriff of Lanarkshire's assertion that "the whole system of the combination of the disaffected people here will be fully disclosed" proved incorrect.⁵⁴⁴ Instead, on 1st April 1820 an *Address to the Inhabitants of Great Britain and Ireland* had been put up in Glasgow, Dumbarton, Stirling, Renfrew, Lanark and Ayr. It lamented the "torpid state in which we have been sunk for so many years" and due to the contempt heaped upon any petitions for redress it asserted that it was their right to take up arms to

⁵⁴⁴ Malcolm Chase, *1820: Disorder and Stability in the United Kingdom* (Manchester: Manchester University Press, 2013), p. 117.

force consideration of their common grievances. It claimed to have but a few principles founded in “our constitution which were purchased with the dearest blood of our ancestors...equality of rights, not of property”. They called for all soldiers to defend their country and their King against the power of those that have held it too long in thralldom. They asked all to desist from their labour and not to recommence until in possession of their rights.⁵⁴⁵ Gordon Pentland stated that the wide distribution of the *Address* was evidence of the “considerable level of organisation” it had entailed.⁵⁴⁶ The proclamation did not explicitly state any grievance against the King nor make any threats to his life or his throne. In fact it used him to call for the aid of all loyal subjects. However, similar to the cases in 1794, the intention to force and compel the King was debated over in court and an act (36 Geo III c. 7) had been passed in 1795 which made it treason to levy war in order to compel the King to change his measures or to put any force upon either of the houses of parliament.⁵⁴⁷

On 3rd April work had ceased over many areas of western central Scotland, especially in weaving communities. The *Glasgow Herald* reported “we are extremely sorry to state that at no time since the beginning of radicalism has there been such a general apprehension of danger as within these last ten days in Glasgow”. It warned that well-disposed and peaceable people had been forced onto the lists of the disaffected.⁵⁴⁸ Andrew Hardie took command of a group who were to meet up with those following John Baird, a radical leader from Condorrat, in order to launch an attack on Carron Iron works as they believed that the workers there were already out on strike and would provide them with arms and ammunition. However, following a skirmish with a combined troop of hussars and yeomanry at Bonnymuir, 18 of the radicals were arrested and five muskets, two pistols and 18 pikes were seized from them.⁵⁴⁹ During the trials of Hardie and Baird their defence, Mr Jeffrey, stated “I cannot but think that now that the alarm and the immediate danger is over in the

⁵⁴⁵ *Stamford Mercury*, Friday 14 April 1820, p. 4.

⁵⁴⁶ Gordon Pentland, *The Spirit of the Union: Popular Politics in Scotland, 1815-20* (London: Pickering & Chatto, 2011), p. 99.

⁵⁴⁷ The act was in reaction to an attempt to stone the King on his way to open parliament and was coupled with the Seditious Meetings Act. It was supposed to expire upon George III’s death but was made permanent in 1817 by act 57 Geo III c. 6.

⁵⁴⁸ *Glasgow Herald*, Monday 3 April 1820, p. 2.

⁵⁴⁹ Chase, 1820, p. 119.

country, we shall have a fairer chance than at an earlier period” to look at merciful circumstances which would allow the “forfeiture of esteem and respect” to be enough punishment.⁵⁵⁰ This again links back to the cases tried in 1794, where there was time and scope for the more specific building up of evidence which allowed for more lengthy and thorough debates by both the defence and the prosecution in the court and demonstrates less need for large numbers of executions in order to maintain security.

James Wilson, aged 63, was executed in Glasgow on 30th August 1820. He had been in politics since 1792 when he joined the Friends of the People movement. John Stevenson, a handloom weaver who wrote a contemporary account of the Strathaven rising, stated that the Strathaven men, particularly Wilson, had acted out of the noblest of sentiments in 1820 and had been misguided in their actions due to the actions of government-funded spies in starting the rising.⁵⁵¹ They had marched towards Kilbride, intending to join with other radicals, but learned that the Yeomanry Cavalry was nearby. Wilson suspected that they had been betrayed and upon hearing news of the defeat at Bonnymuir he advised the radicals to return home. However many of their homes were raided and Wilson and 12 others were arrested and taken to Glasgow.⁵⁵² Special commissions of Oyer and Terminer were to sit in Glasgow, Stirling, Ayr, Dumbarton and Paisley in order to try the radicals. In total there were true bills found by the grand jury against 98 men, 51 of whom had not appeared in court. However there was also in excess of 200 prisoners still being held in various jails who were not brought to trial, demonstrating the discretion exercised by the state.⁵⁵³ John Hullock, a London barrister, was to conduct the prosecution despite this being contrary to the Union as he had not completed a Scottish law degree. As a result of the subsequent trials there were 24 capital convictions, two men tried but found not guilty and 21 acquitted without trial. There were three executions with the remaining 21 pardoned and transported.

⁵⁵⁰ John MacDonell, *Reports of State Trials, New Series, Vol. 1 1820-1823* (London: Eyre and Spottiswoode, 1888), p. 756.

⁵⁵¹ John Stevenson, *A True Narrative of the Radical Rising in Strathaven* (Glasgow: Miller, 1835), p. 5, p. 15.

⁵⁵² P. Berresford and Seumas Mac A' Ghobhainn, *The Scottish Insurrection of 1820* (London: Victor Gollancz, 1970), p. 188.

⁵⁵³ *Ibid.*, p. 232.

Trials opened in Stirling on 13th July with 22 men brought to the court, including the 18 prisoners taken at Bonnymuir. Hardie was tried first, followed by Baird. Similar to the trials in 1794, the intention behind the actions of the accused was a focal point of debate in the court with the Lord President highlighting the difference between levying war and committing a riot. A riot was defined as a tumult where people had the intention of accomplishing a private purpose but did not call into question the King's authority. He argued that in this case whole communities were resisting a general and national measure which constituted treason.⁵⁵⁴ Hardie and Baird were proven to be leaders of the radicals and found guilty. The remaining Bonnymuir prisoners pleaded guilty. We can question if there was an understanding that the leaders Hardie and Baird would suffice as a suitable public example and by pleading guilty the remaining prisoners had saved the state the time of going through a lengthy trial for each of them. In turn, convicting but subsequently pardoning them allowed the state to demonstrate the generosity of the Royal mercy. There were a handful of trials conducted on 4th August where the prisoners pleaded guilty and six were dismissed without trial. Following which all 22 men convicted were brought into court for sentencing. The Lord President stated that the sentencing of such a large number at one time was unprecedented in Scottish history and added that he hoped never to witness a similar event again. He told Hardie and Baird that they could not expect mercy as "you were selected for trial as the leaders of that band" however he trusted that mercy would be extended to the remaining 20. The punishment for treason had been amended by the Treason Act 1814 (54 Geo III c. 146) which meant that those convicted would be hanged until dead with any severing of the head and quartering of the body to be carried out post-mortem. This was the sentence pronounced against the radicals and was to be carried out on 8th September.⁵⁵⁵

Trials began in Glasgow on 20th July with James Wilson tried on similar charges as Hardie and Baird. Witnesses attested to his being a leader in Strathaven and while his defence argued that there was no evidence that the party had acted in obedience to the treasonable address he was found guilty but unanimously recommended

⁵⁵⁴ Ibid., p. 623.

⁵⁵⁵ *Morning Post*, Wednesday 9 August 1820, p. 3.

mercy.⁵⁵⁶ He was sentenced to be drawn on a hurdle to the place of execution on 30th August and after being hung by the neck until dead, his head to be severed from his body and his body to be quartered and be at the disposal of the King.⁵⁵⁷ On 24th July six others were found not guilty and dismissed. The remaining trials conducted in Dumbarton, Ayr and Paisley demonstrated that after securing the convictions of three of the radical leaders the courts were not as willing or, due to a deficiency of admissible evidence, as able to secure the same against the remaining radicals against whom true bills had been found. A number of the men were acquitted without standing trial and the judges in other cases had all but assured the jury that the few men who were capitally convicted would receive a pardon. This again demonstrates that the conviction and punishment of the radical leaders was believed to meet the ends of justice.

Early on the morning of James Wilson's execution on 30th August the scaffold had been erected in front of Glasgow jail with an additional extension on the front to allow a distinct view. Mr Ewing addressed the crowd, magistrates and Wilson in the court hall, where the devotional exercises were conducted before progressing out to the scaffold, to state that "no government could be true to its trust if it allowed itself to be insulted with impunity, and whatever might be the opinions of those present, he hoped they would all unite in wishing they might never witness another exhibition of the kind". Wilson was then seated in the hurdle facing the executioner and taken the very short distance to the scaffold. As the drop fell the crowd set up a vehement cheer of "murder" and "he died for his country". After hanging for half an hour the body was lowered onto three boards laid across the coffin with the face turned down. The head was severed with a single stroke and held it up "streaming with blood...the ghastly and distorted purple visage towards the crowd exclaiming this is the head of a traitor". Since his condemnation there had been increasing public sympathy for Wilson and in the wake of his execution the statement "may the ghost of butchered Wilson haunt the pillows of his relentless jurors-murder murder murder!" was posted upon walls all over the city.⁵⁵⁸ This again demonstrated the tension felt by the authorities over

⁵⁵⁶ *Caledonian Mercury*, Thursday 17 August 1820, p. 4.

⁵⁵⁷ *Glasgow Herald*, Monday 24 July 1820, p. 2.

⁵⁵⁸ *Caledonian Mercury*, Saturday 2 September 1820, p. 4.

Wilson's execution, perhaps even more so than during that of Hardie and Baird. His remains were immediately buried in the pauper's churchyard near Glasgow High Church by order of the sheriff despite protest from his family. However the same night the body was dug up by his daughter and accomplices and taken for burial in the parish church of Strathaven.⁵⁵⁹ The authorities took no action which suggested that they were content to settle for his already controversial execution and to force the issue of his interment, especially in Strathaven where feeling was already pro-radical, was perhaps as undesirable as it was ineffectual.

Hardie and Baird were executed on 8th September in Stirling following a procession from Stirling Castle down Broad street attended by the sheriff-depute and the magistrates with troops lining the streets to allow it to pass undisturbed. During the procession they were joined by the crowds in singing a hymn. As Wilson was only taken from the nearby court house to the front of the jail for execution there was arguably less scope for disorder. However their procession from Stirling Castle required guards all the way. On their arrival at the scaffold there was dead silence among the crowd, as was the case in Wilson's execution before he appeared on the drop. Their coffins had been placed at the side of the scaffold, with a tub filled with saw dust ready to receive the heads. Baird addressed the crowd claiming he had acted with truth and justice. Similar to Wilson they were hanged for half an hour before being cut down and placed over their coffins. Again on the appearance of the executioner there were cries of "murder!" The executioner for Wilson as well as Hardie and Baird was 20 year old medical student Thomas Moore, but unlike the precision he had attained in severing Wilson's head, it took him three blows for Hardie and two for Baird. The heads were again held up to the crowd.⁵⁶⁰ Their bodies were interred in a nearby pauper's graveyard. However in 1847 their remains were re-interred in Sighthill cemetery in Glasgow and a monument erected which stated in the inscription that the government had agreed but stipulated that no public notice was to be given. The state arguably allowed their re-burial due to the surfacing of accusations that they had used government spies to infiltrate the radicals. A monument was also

⁵⁵⁹ BL 8135.bb.86. *An Exposure of the Spy System Pursued in Glasgow during the years 1816-17-18-19 and 20, with Copies of Original Letters of Andrew Hardie* (Glasgow: Muir, Gowans and Co, 1833), p. 48.

⁵⁶⁰ *Caledonian Mercury*, Saturday 9 September 1820, p. 4.

erected in memory of Wilson at Strathaven in 1846. In addition, Pentland has demonstrated that over the past two centuries the commemoration of the martyrs of the 'Radical War' has come to be intertwined with the struggle for Scottish national rights, even into the early twenty-first century.⁵⁶¹

Conclusion

Within the annals of penal history the distinction afforded to the crime of treason in legal statute has been matched by the nature of the punishment for it upon the scaffold. The standard death sentence pronounced against the convicted traitor was that they be hung, drawn and quartered with their bodies left at the King's disposal. Chapter one cited the work of Garland, who argued that between the Early Modern period and the nineteenth century the purpose of capital punishment had altered from being an "instrument of rule, essential to state security" to becoming a "penal policy".⁵⁶² In placing the punishment of treason within this model chapter three demonstrated that the late seventeenth century, following unrest and rebellion in both England and Scotland, witnessed sanguine execution spectacles characteristic of the punishment for treason in the Early Modern period. The 1715 and 1745 Jacobite rebellions were direct challenges to the rule of the Hanoverian King through the levying of open war and rebellion. Therefore, in this sense, they required swift suppression and exemplary punishment. However this chapter has demonstrated that, while the traditional death sentence remained throughout the eighteenth century, it was subject to discretionary implementation. Furthermore it has shown that the gradual adaptations to the punishment for treason occurred at the same time as the long term changes to capital punishment.

Following both Jacobite rebellions the multiple stages of the traitor's death were not conducted with any strict uniformity. In some cases the condemned were left to hang longer, making it less likely they would be conscious, or even alive, during the disembowelling. In others their heads were severed from their bodies prior to this element of the execution, effectively making it a post-mortem punishment. In the case

⁵⁶¹ Gordon Pentland, 'Betrayed by Infamous Spies? The Commemoration of Scotland's Radical War of 1820', *Past and Present*, Vol. 201, (2008), pp. 141-173.

⁵⁶² Garland, 'Modes of Capital Punishment', p. 31.

of Francis Townley, and perhaps others, this had been a conscious decision on the part of the executioner as, when the condemned had showed signs of life, he beat him about the chest before severing his head from his body. As has been shown, the line where an aggravated execution became a post-mortem punishment was often unclear but this could have been important in terms of the crowd in attendance as the witnessing of a conscious, and screaming in agony, man as opposed to an unconscious, and to the naked eyes and ears, an unfeeling one, being disembowelled could have been the difference between an acquiescent and a disapproving crowd.

By the time of the executions in 1794 and 1820 those selected for trial and punishment were exclusively the radical leaders. In addition, in 1794 the death sentence had been changed prior to the scheduled day of execution and by 1820 it had been changed by law so that the condemned were hanged until dead and the severing of their heads was made a more definitive post-mortem punishment. Furthermore, in 1820 the executioner held up the severed heads to the crowd as was traditionally done but this was met with cries of murder. Reports of the executions suggested a desire for the proceedings to be conducted as quickly as possible in contrast to examples in 1746 of the executioner taking his time when conducting each part of the execution spectacle. Following both Jacobite rebellions a select few of the severed heads were chosen for display but even in the few instances where the bodies were quartered, rather than the limbs only scored, they were not displayed. In 1794 and 1820 the bodies and heads were immediately put into waiting coffins, again suggesting a desire to conduct the proceedings with haste rather than excessive elaboration. The adaptations to the carrying out of the executions for treason across this period demonstrated the state's desire to maintain the infamous distinction attached to the traitor's death whilst also showing itself to be a merciful, legitimate and perpetually powerful modern nation.

Conclusion

To conclude, this thesis is the first in-depth investigation into the use of capital punishment in Scotland between 1740 and 1834. Through the extensive gathering and analysing of the court records it has provided a quantitative study of the fluctuations in the use of the death sentence over almost a century. In addition, it has explored gallows culture in this period and participation in the event on the part of the criminals condemned to death and the large crowds that gathered to witness the spectacle. Furthermore, it has examined the gradual changes that occurred to the carrying out of capital punishment across this period, from those relating to the logistics of the public execution such as its location, to those relating to execution practices. Finally it has analysed the use of post-mortem punishment within the criminal justice system, from its implementation to its potential effects upon both the condemned and the spectator. The aim of this conclusion is to synthesise the key findings of the thesis. In doing so it will first explore how a study of the Scottish experience fits into, and sometimes challenges, the broader historiography of the changing nature of capital punishment between the mid-eighteenth and early nineteenth centuries. It will then demonstrate that a particular strength of this study is its investigation of, not only Scotland's distinctive use of the death sentence and post-mortem punishment, but also the comparisons it enables us to make with practices in England.

Within the historiography focused upon capital punishment in Western Europe, the Early Modern period has been characterised by spectacles of suffering upon the scaffold with executions such as burning, boiling alive and breaking on/with the wheel used to further punish heinous crimes.⁵⁶³ However, by the eighteenth century, Evans argued that "similar changes in penal practice happened virtually everywhere at roughly the same epoch" with the "banishing of the more baroque cruelties from the scene of the scaffold".⁵⁶⁴ Executions that inflicted prolonged pre-mortem suffering were declining or were adapted in order to bring about the quicker death of the condemned, for example by breaking an offender 'from above' or strangling women

⁵⁶³ Friedland, *Seeing Justice Done*, p. 119; Spierenburg, *Spectacle of Suffering*, p. 71; Sharpe, *Judicial Punishment*, p. 32; MacLaurin, *Arguments and Decisions*, p. xxxviii.

⁵⁶⁴ Evans, *Rituals of Retribution*, pp. 894-895.

before they were burned.⁵⁶⁵ While the Scottish experience provides a reinforcement of this argument of a gradual decline, this study has also identified the last vestiges of older execution practices as late as the mid-eighteenth century in Scotland. Executions by burning had been used in Scotland in the sixteenth and seventeenth centuries but were very rare by the turn of the eighteenth century.⁵⁶⁶ The decision to sentence Alexander Geddes to the punishment in 1751 was due to the heinous and unnatural nature of his crime of bestiality but was the final instance of a declining practice as burning disappeared following his case. In addition, while mutilation as a punishment in itself had fallen into disuse, there were four men sentenced to have a hand severed from their bodies as a prelude to their execution in the mid-eighteenth century. Similar to burning the punishment was used sporadically in the eighteenth century and, by the time of the final case in 1765, there was an evident ambivalence on the part of the scaffold authorities and a desire to sever the hand of Alexander Provan and hang him as quickly as possible. The disappearance of these aggravated forms of execution demonstrates that the Scottish experience reinforces the wider European narrative of a gradual move away from scaffold cruelties that were more characteristic of the Early Modern period. However their survival in the mid-eighteenth century demonstrates the later timing of the final break with certain older execution practices in Scotland. It also further serves to highlight Scotland's distinction, when compared to England and Wales, where there were no cases of offenders having a hand severed prior to execution.

Garland provided a three stage model of capital punishment in the west between the Late Middle Ages and the present day. In his Early Modern period he argued that newly emergent states afforded the death penalty a central role in the task of state building and security. Within this, his model supported the broader argument in the historiography, namely that Early Modern executions were intended to be very public spectacles of physical suffering. He then argued that the gradual disappearance of these aggravated executions, with the transition into his Modern period, was due to an alteration of the primary purpose of capital punishment, from

⁵⁶⁵ Evans, *Rituals of Retribution*, p. 122; Spierenburg, *Spectacle of Suffering*, p. 72; Devereaux, 'The Abolition of the Burning of Women'.

⁵⁶⁶ Louthian, *Form of Process before the Court of Justiciary*, p. 54; Hume, *Commentaries*, Vol. 1, p. 443.

an instrument of rule to a penal practice with the narrower goals of “doing justice and controlling crime”.⁵⁶⁷ Within this change executions were not aimed at terrorising onlookers with spectacles of suffering and the body in prolonged pain ceased to be a desired part of the process.⁵⁶⁸ Therefore this investigation into Scottish execution practices, and the disappearance of punishments such as burning and pre-mortem mutilation, does fit into his framework of analysis. However Garland’s model, and the broader historiography of capital punishment in the eighteenth and nineteenth centuries, has failed to question where we place the passing of the Murder Act in 1752 into this narrative of the changes that occurred to execution practices. In passing the act Britain was unique in placing post-mortem punishment at the centre of the criminal justice system’s reaction to homicide, yet this has been largely ignored. In providing the first investigation into the use of post-mortem punishment in Scotland in this period, this study has demonstrated that we need to add an intermediate stage into the changing nature of capital punishment between the mid-eighteenth and the early nineteenth centuries.

The post-mortem punishment of the criminal body had been a penal option prior to the mid-eighteenth century but it was subject to discretionary implementation. In both Scotland and England the late 1740s and early 1750s witnessed an increase in the use of gibbeting in order to add further severity to the death sentence. In Scotland the punishment was used during the peak numbers of executions in the wake of the 1745 Jacobite Rebellion and in England it was intended to act as an exemplary punishment for the crimes of smuggling and violent robberies that were believed to be endemic in London and south-east England.⁵⁶⁹ Interestingly, the increased use of gibbeting and the subsequent passing of the Murder Act occurred at around the same time as the final instances of aggravated executions in Scotland. Thus this further highlights the existence of an intermediate stage, where the infliction of pre-mortem suffering upon the condemned may have been declining in favour of a quicker death. However the punishment of the body continued to be a cornerstone of the criminal justice system as both dissection and hanging in chains placed the criminal

⁵⁶⁷ Garland, ‘Modes of Capital Punishment’, p. 30.

⁵⁶⁸ Ibid., p. 54.

⁵⁶⁹ Dyndor, ‘The Gibbet in the Landscape’; Rogers, *Mayhem*, p. 60.

corpse on display and they each involved the public dismemberment of the body, whether this was under the surgeon's lancet or rotting in the gibbet cage.

The Murder Act stipulated that the post-mortem punishments of dissection and hanging in chains were intended to "impress a just horror in the mind of the offender and on the minds of such as shall be present of the heinous crime of murder".⁵⁷⁰ This thesis has shown that contemporary fears over the disposal of the dead body could be rooted in religious or theological questions over the fate of the soul and questions of whether earthly intervention with the body could affect the afterlife. They could also stem from the anxiety felt towards the visceral dismemberment of the body. In the eighteenth century Francis Hutcheson made the argument that an "easy death" of the condemned with subsequent infamies enacted upon the corpse would have a greater effect on the crowd than horrid execution spectacles.⁵⁷¹ Similarly, in the early nineteenth century, Scott argued that the post-mortem punishment of their body had the potential to affect the criminal more than the death sentence itself.⁵⁷² Chapter four highlighted examples where this appeared to be the case as the knowledge that their body was destined for the dissection table seemed to cause the criminal greater psychological torment than the execution itself. Furthermore there were adverse crowd reactions to post-mortem punishments such as the attacking of the people responsible for delivering the bodies to the universities for dissection or the illegal removing of the bodies from their gibbet cages. As the Scottish sources provide only limited evidence 'from below' we cannot assume that all offenders or spectators were similarly affected and therefore cannot definitely conclude that these punishments met the aims outlined in the Murder Act, namely for these punishments to impress upon the minds of every person condemned and the minds of all those who witnessed them. However we can conclude that, in placing the Murder Act within a discussion of the changing nature of capital punishment between the mid-eighteenth and early nineteenth centuries, this thesis has challenged the meta-narrative that the decline in aggravated executions meant that prolonged bodily

⁵⁷⁰ *House of Commons Parliamentary Papers* [accessed 25 April 2015] House of Lords Papers, *A Bill intituled an Act for better preventing the horrid Crime of Murder*, (5 March 1752).

⁵⁷¹ Hutcheson, *System of Moral Philosophy*, p. 337.

⁵⁷² Douglas, *The Journal of Sir Walter Scott*, p. 219.

punishment ceased to be a desired part of the death sentence. Instead it has shown that there was an intermediate stage where, despite the decline in pre-mortem suffering on the part of the condemned, the body remained an important means of setting apart the crime of murder through the use of post-mortem punishment.

Within the historiography of capital punishment in the eighteenth and early nineteenth centuries a particular area of study that has remained peripheral is the punishment for treason. Focusing upon the period between the 1715 Jacobite Rebellion and the 1820 Scottish treason trials this study has demonstrated the changes that occurred to executions for treason. It has then used this analysis to question where these changes fit within the pattern of a gradual decline of aggravated executions and the increased use of post-mortem punishments. Historically the distinction afforded to the crime of treason in legal statute was matched by the most severe punishment upon the scaffold. Throughout the eighteenth century the death sentence passed against the convicted traitor remained the same as it had been since the fourteenth century, they were to be hung, drawn and quartered. However a reading of the available sources detailing the executions of the Jacobite rebels following the '15 and the '45 highlighted that, while there were some examples of the full sentence being carried out, in most cases they were subject to discretionary implementation. For example, in some cases the heads were severed immediately following the hanging which effectively made the disembowelling part of the sentence a post-mortem punishment. By the time of the executions in 1794 and 1820 in Scotland the men were hanged until they were dead and the severing of their heads was made a definitive post-mortem punishment. The holding up of the heads to the crowd was done quickly and without great ceremony rather than being characterised by deliberate elaboration.

Chapter six demonstrated that we need to go further than merely recognising the changes that occurred to the punishment for treason between 1715 and 1820 and explore potential explanations for them in relation to those occurring to capital punishment more widely. It is evident that this study's findings do reinforce the broad pattern of a gradual decline of aggravated executions. However, due to the unique nature of the crime of treason, the break with older execution practices was more

complex. The Jacobite rebellions of 1715 and 1745 were direct challenges to the stability of the country, yet the state had to balance justice with the potential revulsion of its citizens at overt cruelty when punishing the rebels. In this sense Elias' model of a "civilising process" is applicable to a discussion of the punishment of treason to an extent.⁵⁷³ During both rebellions the government had argued that the despotic rule of the Stuart monarchy and, in particular, the bloodthirsty punishments meted out following Monmouth's Rebellion in the late seventeenth century had legitimised the events of the Glorious Revolution.⁵⁷⁴ Therefore the state could not punish the Jacobite rebels en masse and with the very same prolonged and sanguine execution spectacles they argued had delegitimized the Stuart monarchy. Furthermore, by the late eighteenth century, Scotland was internally stable. Therefore the use of capital punishment as an "instrument of rule, essential to state security", which was more characteristic of the Early Modern period, was less justifiable.⁵⁷⁵ The newspapers reporting upon the execution of Robert Watt in 1794 made numerous references to the revolution in France. One article took satisfaction in stating that, while the crowd accepted Watt's fate, they were unaccustomed to the spectacle which was in stark contrast to the "bloodthirsty savages in France" who exalted in the sufferings of those who were put to death by the guillotine.⁵⁷⁶ In only executing the rebel leaders in 1794 and 1820, and in greatly adapting the traditional traitor's death sentence, the authorities managed to carry out exemplary punishments but avoided inflicting excessive pre-mortem suffering which may have called into question the very legitimacy of the whole proceedings.

K.E. Wrightson stated that much of the research into Scottish history in the eighteenth century can be placed into two distinguishable, yet overlapping, interpretive traditions. The first highlighted Scotland's unique institutions, society and culture. The second stressed Scottish participation or incorporation in the making of

⁵⁷³ Elias, *Civilising Process*.

⁵⁷⁴ Zook, 'The Bloody Assizes', pp. 373-396.

⁵⁷⁵ Garland, 'Modes of Capital Punishment', p. 30.

⁵⁷⁶ *Northampton Mercury*, Saturday 25 October 1794, p. 4.

modern Britain.⁵⁷⁷ Within this, key topics that have received substantial attention include the passing of the 1707 Union and its potential effects upon Scotland's economic and, later, cultural identity. The continued distinction of Scotland's legal system after 1707, and the fact that many of the criminal statutes passed in Westminster in the wake of the Union were not extended to Scotland, has also been acknowledged by historians.⁵⁷⁸ However this study provides the only extensive investigation into the country's implementation of capital punishment. In focusing upon the whole of Scotland, rather than just one particular area, across almost a century it has demonstrated that there were intra-Scottish factors, such as social and political context, population growth and industrialisation that affected the use of the death sentence in particular areas at different intervals. In addition, this study has used the unique Scottish experience in order to offer notable comparisons with practices in England. For example, the peak periods of execution discussed in chapter two, namely the mid-eighteenth century, the 1780s and the early nineteenth century, were also times of increased executions in England. Although the chapter provided a further exploration of Scotland's distinction in its application of the criminal law in these periods, it also demonstrated the notable comparisons with England, an area of research that has been largely neglected by Scottish and English crime historians alike.

In both England and Scotland the mid-eighteenth century was a period of peak numbers of executions. However the reasons for this differed. In England there were fears over the negative effects of demobilisation in the late 1740s and a moral panic in the newspapers over the believed prevalence of certain crimes, notably violent robbery. However chapter two demonstrated that the peak numbers of executions between the late 1740s and the 1750s in Scotland were linked to the aftermath of the late Jacobite Rebellion. The Northern Circuit accounted for more than half the total number of executions and the decade witnessed the highest percentage of those capitally convicted who were subsequently executed, showing the determination of the authorities to make a stark example in the area. Certain property offences such as

⁵⁷⁷ K.E. Wrightson, 'Kindred Adjoining Kingdoms: An English Perspective on the Social and Economic History of Early Modern Scotland', in R.A. Houston and I.D. Whyte (eds.), *Scottish Society 1500-1800* (Cambridge: Cambridge University Press, 1989), pp. 245-260, p. 250.

⁵⁷⁸ See in particular Innes, 'Legislating for Three Kingdoms'.

cattle theft and robberies committed by men who were notorious in the area were particularly prevalent in the numbers sent to the gallows with 2.1 executions for property offences per 100,000 of Scotland's population occurring in the Northern Circuit. This figure is put into even sharper focus when we compare it to the figure for property offences at the Edinburgh circuit which was only 0.5 per 100,000 of Scotland's population. In their recent study of the use of capital punishment in the third quarter of the eighteenth century King and Ward argued that there were stark regional variations in the use of the Bloody Code for property offences, with large areas on the peripheries sending markedly low numbers to the gallows. They included Scotland in their analysis between 1755 and 1770, in order to avoid the mid-eighteenth century peak, and found that, although the numbers of executions in Scotland as a whole were low, there were regional variations. The Northern and Western Circuits had very low execution rates for property offences at 0.05 compared to the figure for Edinburgh which was 0.21.⁵⁷⁹ Therefore, while this thesis provides a reinforcement of their centre-periphery dichotomy, especially in the early nineteenth century, it also demonstrates that the mid-eighteenth century in Scotland provides a caveat wherein capital punishment was used to establish control in the peripheral north.

While the mid-eighteenth century increase in executions was due to the specific context and location of northern Scotland, the potential explanations for the increased use of capital punishment in the 1780s were comparable with England. Executions for property offences in Scotland tripled from 24 in the 1770s to 73 in the 1780s. Similarly, in England there was an increase in capital convictions following the end of the American War of Independence and, by the mid-1780s, the number of executions per year in London had reached a high of 80.⁵⁸⁰ Following the end of the American War both countries faced the problem of demobilisation.⁵⁸¹ In Scotland 15.8 per cent of those capitally convicted were stated to have been part of the army or navy and all of the convictions were for property offences. An additional problem facing both countries in the 1780s was the end of the penal option of transporting

⁵⁷⁹ King and Ward, 'Rethinking the Bloody Code', p. 169.

⁵⁸⁰ Beattie, *Crime and the Courts*, p. 584; Devereaux, 'Imposing the Royal Pardon', p. 120.

⁵⁸¹ For a study of England see Hay, 'War, Dearth and Theft'.

convicts to the American colonies. Donnachie stated that, prior to the 1780s, transportation had been used relatively infrequently by the Scots and even after the establishment of transportation to Australia he estimated that they made up just over 5 per cent of convicts sent from Britain and Ireland.⁵⁸² However, this seemingly low proportion of offenders was more reflective of the lower numbers tried by the Scottish courts for capital or transportable offences rather than an aversion to the use of the punishment. It could also be due to the fact that not all offenders sentenced to transportation were sent across the seas as some were still imprisoned in Scotland years after their original sentence. In Scotland the lack of the option of transportation had a direct impact upon the numbers of capital convictions for property offences in the 1780s. This was, in part, due to the fact that it removed the option for the court to restrict potentially capital cases prior to the accused standing trial and left limited penal options between the death sentence and short-term prison sentences or corporal punishments.

Despite the evident similarities in Scotland and England's increased capital convictions in the 1780s, there was not the same determination to send offenders to the gallows in Scotland as there appeared to be in England. In the mid-1780s in London the judges were determined that no one capitally convicted in the Home Counties would be pardoned. Although this extreme policy received criticism, and was quickly modified, it did increase the rate of execution.⁵⁸³ Instead in Scotland, despite the number of capital convictions increasing by three times compared to the 1770s, the proportion of those capitally convicted who were executed in the 1780s did not increase. In fact the proportion of convicted property offenders who were executed slightly decreased compared to the figure in the 1770s. Furthermore, a study of the pardoning material highlighted how the judges often advocated mercy and pointed towards potential mitigating circumstances in some cases. In addition, there was not the same level of moral panic over the believed prevalence of crime in the Scottish newspapers as there was in their English counterparts. Therefore, despite the similar

⁵⁸² Donnachie, 'Scottish Criminals and Transportation to Australia', p. 22.

⁵⁸³ King and Ward, 'Rethinking the Bloody Code', p. 172.

causes for the increased numbers of capital convictions north and south of the border, Scotland maintained distinction in its use of the death sentence.

The second decade of the nineteenth century witnessed the number of executions in Scotland double compared to the previous decade, an increase that continued in the 1820s. Broken down by category of offence it is clear that the number of executions for murder remained stable until the late 1820s and early 1830s, when it became one of the only crimes sending offenders to the gallows. However executions for property offences increased markedly in the second and third decades of the nineteenth century, with the majority occurring as a result of trials in Edinburgh and those before the Western Circuit, chiefly the sitting at Glasgow. Chapter two demonstrated that the increase in Scotland's population, which was especially dense across the country's central belt and was particularly rapid in Glasgow, was of central importance to the analysis of property offences as it happened in precisely the area that was experiencing massive industrial growth and very rapid industrialisation. Of the total capital convictions at the Western Circuit between 1810 and 1829 around 90 per cent were for property offences. Furthermore, executions for property offences per 100,000 of Scotland's population rose from 0.2 in the 1750s to 1.4 in the 1820s at the Western Circuit. Comparably the figures for murder presented a much less dramatic increase, rising from 0.08 in the 1750s to 0.1 in the 1820s. In addition, the figures for the Northern Circuit show a reverse pattern as executions for property offences per 100,000 of Scotland's population decreased from 2.1 in the 1750s to 0.2 in the 1820s. Therefore, unlike the caveat presented during the mid-eighteenth century peak, the situation in the early nineteenth century reinforces King and Ward's argument that executions for property offences were markedly higher in the centre than on the peripheries.⁵⁸⁴

In terms of comparing Scotland and England, it is clear that both countries saw rising numbers of capital convictions in the early nineteenth century. However English crime historians have pointed towards a widening of the gap between the numbers capitally convicted and the number who were subsequently executed.⁵⁸⁵ Gatrell

⁵⁸⁴ King and Ward, 'Rethinking the Bloody Code'.

⁵⁸⁵ Emsley, *Crime and Society*, pp. 265-267.

argued that the authorities could no longer plausibly execute 56 per cent of offenders as they had done in the 1780s and thus the system became increasingly unworkable.⁵⁸⁶ However an analysis of Scotland again presents a different situation as the proportion of those capitally convicted who were subsequently executed had consistently been 60 per cent or above since the 1770s and the figure was still 52 per cent in the 1820s. Therefore this thesis enhances the argument briefly made by Crowther, namely that, rather than keeping executions to a socially acceptable level, as Gatrell suggested, there were fewer capital convictions in Scotland and thus, in the face of rising numbers of them, it was necessary to keep up a certain level of exemplary punishment.⁵⁸⁷ Prior to the late eighteenth century, crime reporting in Scotland had been minimal and offered limited journalistic opinion. Furthermore, the moral panics that had characterised English crime reporting in the mid-eighteenth century and the 1780s did not occur in Scotland. However this study has identified a similar moral panic in the early nineteenth century in Scotland. Within this, it has highlighted the reoccurring lamentations at the unprecedented numbers being sent to the scaffold whilst also demonstrating the repeated calls for more severity in the face of rising levels of capital convictions. This desire for some further punishment beyond the death sentence offers a potential explanation for the increased use of crime scene executions in Scotland in the early nineteenth century.

Between 1740 and 1834 there were a total of 53 criminals sentenced to be executed at or near the scene of their crime in Scotland. There had been a concentration of cases in the mid-eighteenth century, particularly as a result of trials before the Northern Circuit. However 32 of the total 53 cases, over 60 per cent, occurred between 1801 and 1834. In his investigation of crime scene executions in England Poole found that they were more of an eighteenth-century feature which declined after the 1790s, apart from some sporadic cases in the early nineteenth century.⁵⁸⁸ Therefore the concentration of crime scene executions in Scotland in the first third of the nineteenth century presents an entirely different pattern. Chapter three highlighted the changes that gradually occurred to the location of public

⁵⁸⁶ Gatrell, *Hanging Tree*, p. 103, p. 544.

⁵⁸⁷ Crowther, 'Crime, Prosecution and Mercy', p. 233.

⁵⁸⁸ Poole, 'For the Benefit of Example', p. 101.

executions, with the common place shifting from the peripheries to outside the places of confinement by the end of the eighteenth century. In turn there was a decline in the need for traditional elements of the public execution such as the lengthy procession of both the condemned and the crowd to the scaffold, a practice which had previously attracted criticism. However crime scene executions often required a lengthy procession and the authorities often incurred further expense due to the logistics of this. From a reading of the Home Office records and the newspapers it is evident that the courts intended crime scene executions to be stark and lasting examples. Often the towns in which they were to be conducted had not witnessed an execution in living memory and, in the case of John Watt who was to be executed in Dundee in 1801, the judges stated that this fact made the spectacle all the more “awful and impressive”.⁵⁸⁹ The concentrated use of crime scene executions in early nineteenth-century Scotland not only presents a very different pattern to their use in England, it also challenges the broader assumptions within the historiography focused upon the public execution. It demonstrates that the Scottish authorities were willing to make use of a punishment that had not been used to a similar extent since the mid-eighteenth century. Furthermore, in their pursuit of a more exemplary punishment in the face of rising numbers of capital convictions, the authorities were willing to forego more modern concerns for efficiency.

In addition to providing an extensive study of the use of the death sentence in Scotland, this study has also conducted the first in-depth investigation into the post-mortem punishment of the criminal corpse. Whilst acknowledging that Britain as a whole was unique in its placing of post-mortem punishment at the centre of the criminal justice system with the passing of the Murder Act, it is important to explore the similarities and distinctions in its use north and south of the border. Hurren has demonstrated that, in England, criminal bodies could be used as a lucrative means for medical men to charge entrance fees for the dissections and in turn that they could attract large audiences.⁵⁹⁰ However this thesis has shown that in Scotland it was the main universities of Edinburgh, Glasgow and, to a lesser extent, Aberdeen who had a

⁵⁸⁹ *Caledonian Mercury*, Monday 15 June 1810, p. 3.

⁵⁹⁰ Hurren, *Dissecting the Criminal Corpse*.

monopoly on the supply of executed criminals with over 76 per cent of the bodies being handed over to one of their professors of anatomy. Although the number of cadavers yielded by the Murder Act was not enough to adequately supply the universities, and there is evidence of their acquiring them through a number of other means, the bodies were used in the teaching of anatomy courses. Furthermore, they were used to conduct original research into areas such as the cause of death when a person was hanged and the effects of blood congestion upon the brain. In addition, due to the fact that capitally convicted criminals in Scotland had around a month to wait between their sentencing and execution, there is evidence that special arrangements were made for certain dissections. For example, Monro *tertius* rearranged his course so that the parts looking at the female anatomy would occur during the week before he received the body of Barbara Malcolm in 1808. Therefore this thesis supports the argument made by Cunningham that, by the end of the eighteenth century, dissection was intended to show the complexity of the human body and that anatomical demonstration had become more of a teaching event.⁵⁹¹ Within this, there was scope for original research using criminal bodies in the main Scottish universities despite the fact that they were limited in number.

As the Murder Act did not stipulate which offenders should be subjected to dissection and which to hanging in chains the decision was left to the discretion of the judges. In England, of 1394 offenders capitally convicted for murder between 1752 and 1832, 134 were hung in chains.⁵⁹² The proportions found in Scotland were fairly similar as, of 104 convicted male murderers between the passing of the act and the repeal of gibbeting in 1834, 13 were sentenced to be hung in chains. However chapter five demonstrated that the chronology of the punishment of hanging in chains in Scotland needed to be further unpicked. Despite occupying a similarly central role in the criminal justice system as dissection in the two decades following 1752, gibbeting disappeared in Scotland after 1779, apart from one sporadic decision to use it in 1810. Comparatively, although gibbeting was used on a lesser scale than dissection, the collapse of the punishment in England occurred later, in the early nineteenth century.

⁵⁹¹ Cunningham, *Anatomist Anatomiz'd*, p. 384.

⁵⁹² Tarlow, 'The Technology of the Gibbet', p. 670.

Chapter five offered potential explanations for this, a key one being the importance of location. In England criminals could be gibbeted miles away from the place at which they were executed. However if a criminal was to be hung in chains in Scotland they were always gibbeted at the place of execution. Therefore this thesis has demonstrated that the gradual changes occurring to the location of public executions more generally were important in the disappearance of gibbeting after 1779. For example, the circuit cities of Perth, Aberdeen, Inverness, Glasgow and Ayr had all witnessed the use of hanging in chains between the mid-eighteenth century and the late 1770s. However, crucially, all of these cases had occurred prior to the gradual shift in the common place of execution across Scotland from peripheral areas, perhaps more suitable to be used as gibbet sites, to locations closer to the places of confinement that were often in urban centres. In addition, when Alexander Gillan became the final criminal to be gibbeted in Scotland in 1810, the location chosen was the scene of the crime as the judges explicitly stated that they wanted to demonstrate the long arm of the law in a remote area.

The Anatomy Act of 1832 removed the penal option of dissection and, in order to ensure the better supply of cadavers to the medical profession, it made available the unclaimed bodies of those dying in public institutions such as the workhouse. While the dissection of criminals was criticised during debates over the act, it was not the practice itself that was targeted, rather the inadequate number of bodies it yielded. However the punishment of hanging in chains differed from dissection in that it had all but disappeared in Scotland half a century before it was finally repealed by legal statute. Furthermore, the act of 1834 had been largely prompted by the difficulties the English authorities had faced in gibbeting the bodies of Jobling and Cook in 1832. Jobling's body had been illegally removed by his fellow colliers and Cook's was ordered to be taken down for fear it would also be stolen. However the argument made by Lord Suffield in parliament that gibbeting was "unsuited to the present state of public feeling" had already been used in Scotland in the late eighteenth and early nineteenth centuries.⁵⁹³ For example, the judges in the case of McDonald and Black had decided to forgo the punishment of hanging in chains in 1813

⁵⁹³ Gatrell, *Hanging Tree*, p. 269.

out of a “consideration of the uneasiness it must occasion to the innocent neighbourhood”.⁵⁹⁴ Again this can be linked to the location as they were to be executed at the scene of their crime, which was only a couple of miles outside of Edinburgh’s city centre. Therefore an analysis of the earlier disappearance of gibbeting in Scotland serves to further demonstrate that, despite the potential for comparison with practices in England, Scotland was unique in its implementation of post-mortem punishment following the passing of the Murder Act.

In conclusion, this thesis has provided an original and pioneering study of capital punishment in Scotland between 1740 and 1834. It has progressed beyond the filling of a scholarly gap and has instead demonstrated that a study of the unique Scottish experience can advance, and challenge, the broader historiography focused upon the changing nature of capital punishment between the mid-eighteenth and early nineteenth centuries. Through an in-depth investigation into post-mortem punishment, an area previously neglected by crime historians, the thesis has established an intermediate stage within the meta-narrative of the decline in the public punishment of the body. In addition, a key strength of this study is that it has provided the most extensive analysis of the administration of the criminal law in Scotland between the mid-eighteenth and early nineteenth centuries to date. In focusing upon the whole of Scotland across almost a century the thesis has highlighted the importance of geographical context, population growth and industrialisation in affecting the use of the death sentence in different areas at varying intervals. Furthermore, whilst demonstrating Scotland’s distinctiveness, it has also explored the potential for comparison with practices in England, an area that has been largely neglected by Scottish and English crime historians alike. In summary, the researching and writing of this thesis has offered a valuable contribution to the historiography of capital punishment in the eighteenth and nineteenth centuries. In turn it has shown that the study has the potential to act as a platform upon which future research into crime and punishment in Scotland can build.

⁵⁹⁴ NAS JC8/9/232; *Scots Magazine*, Monday 7 June 1813, pp. 36-39.

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