State Formation, Criminal Prosecution and the Privy Council in Restoration Scotland

I

The rise of the ‘state’ in early modern Europe is one of the most thoroughly worked of historiographical tropes. While conventional discussion tended to focus on the concept of ‘absolutism’ and the emergence of overweening central administrations, more recent research has permitted historians to think about the state in much more complex and creative ways, for example by exploring the role of social elites or geographical peripheries in legitimising, shaping and sustaining institutional developments.¹ Within these more sophisticated narratives, criminal law can be afforded a significant role. In part, this is rooted in the Weberian conception that ‘states’ need to secure a monopoly over the legitimate uses of violence and force, meaning that punishing criminals has to become the exclusive privilege of government, broadly defined. Perhaps more importantly, criminal prosecution arguably played a role in entrenching the authority of emergent state structures by ensuring universal subjugation to them, while also allowing the state to map out and police the limits of acceptable behaviour.² Historians of England have been particularly receptive to these ideas, suggesting that the criminal justice system not only provided a common set of behavioural standards and a mechanism for their enforcement, but also a platform for popular participation that helped to diffuse and normalise

¹ An attempt to synthesise these ideas from a continent-wide perspective is J. Black, Kings, Commoners and Nobles: State and Societies in Early Modern Europe: A Revisionist History (London, 2004).

the state’s authority down into the locality. This interpretation can be situated within a broader historiographical discussion about the nature of the early modern state in England. Jettisoning conventional ideas about the ‘state’ as being analogous with centralising, coercive bureaucracies, the English state has instead tended to be viewed as a partnership, whereby a wide cross-section of the public (although with social elites necessarily dominating) actively participated in the business of government, primarily as local office-holders but also, for example, as participants in litigation. These people, whose involvement was underpinned by a conviction that state structures or authority could be useful to them, served to pull the state down to the local level, while also giving the locality a stake and a voice in state-formation.

In the case of Scotland, conceptualising criminal law as a state-forming agency is problematic, not least because, after the union with England, there was no Scottish state in place. But even discounting the problem of 1707, Scotland’s early modern legal system has acquired a rather unsavoury reputation for backwardness, viciousness and ineffectiveness – hardly the raw materials for a successful or admirable state-forming project. More pertinently,

---


historians have not been slow to recognise that criminal justice in Scotland was unusually disparate and decentralised, with a great deal of criminal or quasi-criminal prosecution taking place either in Church courts, or in the various forms of private franchise court maintained by many Scottish landholders until the abolition of heritable jurisdictions in 1747. It is not clear, however, that such diffusion of authority diminished the theoretical supremacy of royal justice, and indeed, this primacy was powerfully signalled by the formation in 1672 of the High Court of Justiciary as an unambiguously supreme criminal court.6

Diffusion of power and authority was in any case a feature of all aspects of early modern Scotland, but it has not stopped scholars from detecting signs of state-formation, especially during and after the adult reign of James VI (c.1585-1625). But the emergent Scottish state was different from its more familiar English counterpart, since its bureaucratic under-development militated against the use of office-holding and formal participation to meld state with society. Instead, the Scottish state relied upon the informal acquiescence and support of powerful social groups, especially the nobility and the Church, whose innate authority – sometimes legitimated through office-holding, often not – could be used as a proxy mechanism of state formation so long as their interests remained aligned with the government’s. If participatory bureaucracy was central to the English model of early modern statehood, working informally through pre-existing elites was at the core of Scotland’s version, an approach more reminiscent, for example, of Swedish government under the absolutism of Karl XI than of England.7

---


Within this model of an informal participatory state, there are some embryonic suggestions that the criminal courts could play a role analogous to that mapped out for England, in the sense that prosecution helped identify those behaviours deemed incompatible with community harmony, while also providing a forum for people to participate in the negotiation of these boundaries and of power relations more broadly. This article seeks to build on these tentative foundations by exploring the criminal justice activities of government’s main executive organ, the Privy Council. Focusing on the reigns of Charles II and James VII – a politically self-contained and source-rich period that lends itself well to a close, exploratory survey – it seeks to understand what role the Privy Council played in the prosecution of crime, and what consequences this had for criminal justice in Scotland and for the shaping of the Scottish state. It begins by assessing the Council’s jurisdiction and activities as a court of first instance, as well as considering its wider importance as an appellant and supervisory body. In this latter capacity, the article pays particular attention to the Council’s role in creating judicial commissions. The Restoration Privy Council’s judicial activities were wide-ranging and multi-faceted, and careful assessment of them allows its importance to be appreciated. Perhaps more


9 Throughout this article, all references to the Privy Council registers are given initially to the manuscript volumes, which are fuller than the printed versions and have not undergone editorial interference and reordering. For ease of verification, however, references to the printed registers are also included in square brackets; in all case these refer to *The Register of the Privy Council of Scotland, Third Series, 1661–91* ed. P.H. Brown et al, (16 vols., Edinburgh, 1908–70) [RPCS].
significantly, it also demonstrates that the Council calculatedly exploited its judicial role in an effort to forge and sustain the authority of a state with quasi-absolutist ambitions.

II

Oddly, since it eventually became one of the central structures of Scottish government, the origins of the Privy Council are uncertain. There is little to suggest the existence of a formal Council before the sixteenth century, but James V (r.1513-42) was clearly ruling with the assistance of one by the early 1540s, even if its exact composition and function are difficult to establish.¹⁰ The Privy Council came more clearly into focus under Mary (r.1542-67), particularly during her minority, and it solidified its position as the main executive organ of the kingdom (next to the crown) under James VI.¹¹ Following the regal union of 1603 and consequent absence of the monarch, the Council of necessity assumed much of the day-to-day business of government, although there is some uncertainty as to whether this made it simply a rubber-stamp for decisions taken in London, or left it with sufficient latitude to influence and initiate policy.¹² What is not in doubt, however, is that the Council retained a significant role as a court, derived ultimately from the conventional right of the monarch (or in Scotland’s case, his nearest resident proxy) to administer justice. As one commentator sweepingly argued in 1691, citing Parliamentary precedent from the reign of James VI, ‘his majestie, and Council


[are] Judges competent, To all persons Spiritual and Temporal, in all matters’.13 This judicial function made it a rather different from the English Privy Council, whose character, certainly by the Restoration, was almost wholly administrative. Its judicial activities had largely been farmed out to the court of Star Chamber, an institution which, prior to its dissolution in 1641, aimed to enforce justice and ‘public’ good in a way that cut through the strictures of common law, jurisdictional conflict or local power networks.14

Yet the nature of this superiority in practice was unclear; indeed, in the view of one historian, Peter McNeill, the Council had in practice almost no meaningful role, being confined merely to rerouting business sent its way to more competent jurisdictions – a conclusions which the following discussion challenges.15 Certainly, as a supervisory and appellate body, the Privy Council’s remit was potentially very broad. Anybody convicted of a crime in Scotland was entitled to appeal to the Council, and, on rare occasions, doing so resulted in a conviction being quashed.16 The Justice General’s court found George Graham guilty of stealing a money bond worth £100 Sterling from Isobel Seaton, Lady Bairfoord in 1663, but he was absolved later that

---


year on the (unexplained) intervention of the Council. More usually, however, conciliar action was limited to modification of sentences. Few were as fortunate as James Purdy, who appealed to the Council in 1666 after having been acquitted of usury by the Justice General, but convicted of accepting irregular interest on a loan; while not overturning his conviction, the Council ordered that he should suffer no penalty at all. Others had to settle merely for commutations. Jon Young, a convicted thief, escaped execution in 1668 when he appealed to the Council, which noted that he was ‘a young man’ committing his ‘first fault’ and therefore sentenced him to be transported to the Americas instead. A slightly different justification underlay the appeal in 1676 of Robert Lowry of Maxweltoun, who had been ordered to contribute towards a fine of 5,000 merks levied collectively on the heritors of Dunscore, Dumfriesshire for failing to protect their minister from assault. Since he was actually a heritor in a neighbouring parish, and had only petty interests in Dunscore, his liability was reduced, although not (as he had wished) dropped completely.

---

17 Edinburgh, [N]ational [R]ecords of [S]cotland, High Court Books of Adjournal, 1661-6, JC2/10, fo. 128r, fo. 142r, fos. 143v-146r and at fos. 150r-152r.

18 The fact that the Council generally restricted itself to suspending or reducing sentences has led McNeill to claim that, in practice, it had no meaningful appellant jurisdiction. McNeill, ‘Jurisdiction of the Scottish Privy Council’, pp. 66-7.


20 NRS, Privy Council Acta, 1667-73, PC1/40, p. 117 [RPCS, ii. p. 513].

21 NRS, Privy Council Decreta, 1672-8, PC2/19, pp. 388-9 [RPCS, iv. p. 536]. ‘Heritor’ strictly refers to a landed proprietor formally liable for public burdens connected with their parish, for example in administration of poor relief or education, but more broadly refers to any land-owner.
As well as enjoying extensive appellate jurisdiction, the Privy Council exercised a
general supervisory function over other courts. Some of this was judicial in character, so that,
for example, other jurisdictions might appeal to the Council for guidance on sentencing or other
matters. In 1673, the regality court of Argyll resolved to appeal for advice in the case of John
Crawford and Marie McLauchlane, who had been convicted of notorious adultery but whom
the assize – apparently applying desuetude, but wildly exceeding their authority by interfering
with sentencing – ‘assolye[d] […] from the punishment contayned in the acts of parliament
In respect they nevir knew it was put in practice’.22 Even the highest courts occasionally sought
clarifications of this kind. In 1662, the Justice General’s court was flummoxed in the case of
John Watson, who was accused of stealing forty sheep but who swore that he had already
provided compensation. His eventual execution was only carried out after the judges had
consulted with the Council.23 A more intriguing dynamic was on display in 1670, when the
Court of Session uncovered three cases of forgery during an unrelated civil trial and referred
them to the Council. The guilt of the three men (Alexander Steill, Jon Rosse and Alexander
Ferguson) was taken as read, and the Council’s involvement was expected to be limited to
doling out punishment – as indeed it was, since the accused were all banished to the plantations,
in line with Court of Session’s recommendations.24

22 NRS, Inveraray Sheriff Court, SC54/17/2/3/1. The outcome of this appeal, regrettably, is not
known.

23 NRS, JC2/10, fos. 106v-107r and at fo. 111r-v.

24 James Dalrymple, The decisions of the Lords of council & session in the most important cases
debate before them with the acts of sederunt as also, an alphabetical compend of the decisions : with
an index of the acts of sederunt, and the pursuers and defenders names, from June 1661 to July 1681
(Edinburgh, 1883), p. 665; NRS, PC1/40, p. 322 [RPCS, iii. pp. 132-3].
The Privy Council could also be rather more proactive. When Parliament was not sitting, the Council was responsible for sanctioning judicial torture, which it did occasionally (usually against political dissidents, although under tight legal constraints and with increasing squeamishness) during the Restoration. This, however, was atypical, and most supervisory interventions were fairly mundane.\textsuperscript{25} Robert Ferguson was indicted before the Justice General for false coining in 1665, but appealed to the Council for relief on the grounds that his crime was unintentional, he being ‘a poor chopman boy travelling in England [who] was deceived by a smith who gave him some layed shillinges and two pences’. Apparently persuaded, the Council suspended all proceedings against him.\textsuperscript{26} While discharging some cases, the Council on rare occasions took others over, as it did in 1665, when proceedings intended before the Justice General related to the murder of John Graham in Stirling were halted so that the Council itself could hear the case by way of precognition, although quite why this was felt necessary is not clear.\textsuperscript{27} A more usual activity on the Council’s part was to issue orders for the initiation of trials. When, for instance, James Gray and a number of other individuals who were alleged to have murdered William Fraser of Balbeny were captured at Beauly in 1680, the Council

\textsuperscript{25} C. Jackson, ‘Judicial Torture, the Liberties of the Subject, and Anglo-Scottish Relations’ in T.C. Smout, ed., \textit{Anglo-Scottish Relations from 1603 to 1900} (Oxford, 2005), pp. 75-102. The infrequent use of torture – or, more accurately, officially-sanctioned torture – is demonstrated by Brian Levack’s calculation that only thirty-nine conciliar warrants were issued in the century after 1591, of which eleven came under Charles II or James VII. B.P. Levack, ‘Judicial Torture in the Age of Mackenzie’, in H.L. MacQueen, ed., \textit{The Stair Society: Miscellany IV} (Stair Society; Edinburgh, 2002), pp. 185-98, at p. 191.

\textsuperscript{26} NRS, Privy Council: Decreta, 1661-6, PC2/17, p. 595 [RPCS, ii. p. 11].

\textsuperscript{27} NRS, PC1/39, p. 478 [RPCS, ii. pp. 58-9].
instructed that the prisoners be transported to Edinburgh, preparatory for trial. Slightly differently, attempts to hurry along sluggish proceedings were in evidence; when in 1664 James Smart petitioned from Edinburgh Tolbooth that he had been awaiting trial on theft charges for some time, the Council responded by ordering the Lord Advocate to speed up the process. An alternative response to petitions of Smart’s type was to release the petitioner under caution until such time as they were recalled for trial. The Council did this, for example, in the case of Thomas Scott, a suspected conventieler who had spent six months in 1677 imprisoned at Jedburgh. Indeed, the Council clearly regarded itself as having a wider responsibility for the treatment of prisoners. Englishman Giles Thayre, for instance, was in 1665 allocated an allowance of 1 merk per day out of his own means for his maintenance while in prison awaiting trial for murder, while seven years later, John Cunningham, a prisoner in Dumbarton Castle, was granted liberty to go riding once a day to help tackle a stomach complaint – a favour apparently also granted to him during a previous stretch of incarceration at Stirling Castle.

On occasion, the Privy Council’s supervision of the wider criminal justice system was complicated by its combined executive and judicial identities. The most striking example of this was in 1681, when it heard a petition from the Lord Advocate, George Mackenzie of Rosehaugh, against fifteen men. These individuals had served as were part of a High Court jury hearing a particularly complex case of rebellion involving more than 70 co-accused from Lanarkshire, of whom thirty had been acquitted. Rosehaugh believed that evidence against nine of those not convicted had been compelling, and he sought the prosecution of the jurors for ‘assize of error’, that is, deliberately returning an incorrect verdict. The Council agreed, and

28 NRS, Privy Council Acta, 1678-82, PC1/42, fo. 173r [RPCS, vi. p. 454].
29 NRS, PC2/17, p. 505 [RPCS, i. p. 550].
ordered Rosehaugh to raise citations before the High Court – although the eventual trial, only pursued against seven of the assizers, proved fairly circumspect, with none of them receiving significant punishments, although most were convicted.32 This willingness to sanction trial was noteworthy, since ‘assize of error’ was a controversial and somewhat arcane charge that touched upon sensitive Restoration-era debates about judicial independence and the extent of royal authority. On the other hand, the early 1680s were a period of extreme tension during which, in the aftermath of the abortive Covenanter rebellion of 1679, the Scottish government was determined to face down seditious and rebellious elements.33 It seems likely, therefore, that the hard-line approach adopted in 1681 was more a reflection of the political and policy imperatives weighing on the Council, and their need to demonstrate governmental resolve, than of their aversion to ‘assize of error’ per se; certainly, a previous petition related to wrongful acquittal, heard in 1671 and involving a suspected murderer in Dumfries, had elicited the more measured response of simply asking the assizers for an explanation.34 The whole case reinforced the uneasy tension inherent in the Privy Council’s position as both Scotland’s primary executive organ and its highest judicial authority – while also, as we will see, mirroring the it willingness to use of its own judicial powers as a tool of policy.

Yet if the Privy Council’s function was reasonably clear in terms of appeals and supervision, its role as a court of the first instance was rather more complex.35 The College of Justice, established in 1532, gradually cemented its position as the main forum for civil cases,


leaving the Privy Council to develop a loosely-defined extraordinary jurisdiction. In criminal matters, serious offences – especially those known as the ‘four pleas of the crown’, namely murder, rape, fire-raising and robbery – were generally heard in the Court of the Justice General, remodelled in 1672 as the High Court of Justiciary, while lower courts (primarily sheriff courts, justice of the peace courts, and franchise courts) held primary responsibility for most other transgressions. The Council’s direct jurisdiction in both civil and criminal affairs, according to its own judgement, lay in ‘matter[s] of Government’, wherein councillors were the ‘only competent Judges’. Rosehaugh, twice Lord Advocate and arguably the most prominent lawyer of the Restoration period, agreed that the Council’s jurisdiction extended only to affairs with direct implications for ‘the publick Peace’, but attempted to offer rather more detail by arguing that this meant, in practice, that its primary interest was in the crime of ‘riot’. This was a particular offence in Scots law which Rosehaugh defined at some length:

A Riot is a Breach of the Peace, committed by Oppression, or wronging his Majesties Lieges, by Force and Violence; instances whereof, are the dispossessing any of his Majesties Subjects, by a Convocation of Lieges, or otherwise; the affronting of Magistrats, by raising Tumults against them, & c. ... where the publick is wounded, in breaking its Peace, and privat persons are wronged, by the prejudice done.

---


37 Davies, ‘Courts and the Scottish Legal System’.

38 NRS, Privy Council Acta, 1678-1682, PC1/42, fo. 341r [RPCS, vii. pp. 409-10].

39 Mackenzie, Laws and Customs, p. 188.
Riot, in this understanding, was an elastic transgression that potentially overlapped with a large number of other crimes such as homicide, theft, robbery, assault or hamesucken (assault in the home) – a fact that Rosehaugh himself acknowledged when he observed, with some irritation, that conciliar attention was increasingly being held by ‘too many Causes’. Rosehaugh further emphasised the broadness of ‘riot’ by observing that it was not unique to conciliar jurisdiction, but rather could also be tried in civil, ecclesiastical and lower criminal courts, with no clear rule as to which route should be taken in any given case. Entrenched jurisdictional overlap was the result, and equivalents for all of the crimes tried before the Restoration Privy Council can be found being tried in other criminal courts.40

In the absence of firm jurisdictional divisions, it is often impossible to discern the criteria used to judge which cases had implications for ‘public peace’, therefore constituting ‘riots’, and which did not. The rationale was clear in the case of narrowly political crimes, as well as for religious offences that contravened the Restoration Church settlement. But why, for example, should charges of hamesucken against David Gordon of Auquhonoynie in 1668, who had allegedly attacked William Jamesone in his home with a dirk, have come before the Council, when, two years earlier, another hamsucken case with prima facie clearer ‘public’ implications, involving the beating in his home of John Murray of Aberforse by a group of vagabonds, who subsequently kidnapped him and extorted goods and money from his tenants, had been heard before the Justice General?41 Similar overlap is observable for several other

40 See, for example, the array of robberies, assaults, religious offences, animal thefts and others tried by the various jurisdictions of Argyllshire. A. Kennedy, ‘Crime and Punishment in Early-Modern Scotland: The Secular Courts of Restoration Argyllshire, 1660-1688’, *International Review of Scottish Studies*, xli (2016), pp. 1-36.

41 NRS, PC2/18, pp. 135-6 [*RPCS*, iii. p. 415]; NRS, High Court Books of Adjournal, 1666-9, JC2/12, fos. 24r-25r.
crimes, including homicide, theft, robbery, deforcement (attacking or impeding royal officials in the course of their duties) and false imprisonment. One possible explanation for the division of cases is that the Council, as the highest authority, would be drawn into more serious or legally complex cases. It certainly had access to the requisite legal expertise. Although heavily peopled by aristocrats (who made up between two-thirds and three-quarters of its membership across the four Restoration-era commissions in 1661, 1674, 1676 and 1685), the Council increasingly included professional lawyers – excluding nobles, a bloc of at least six Senators of the College of Justice sat on the Council at any one time, while legal officials like the Justice Clerk and the Lord Advocate were constant presences. Such men, moreover, were often among the most active and assiduously-attending of the councillors. Yet the presence of lawyers and judges among its members hardly made the Privy Council uniquely expert, and there is, in fact, little to suggest that it was drawn to more complex cases. Indeed, quite the opposite; proceedings in 1682 against William Lowry of Blackwood for reset of rebels were, for example, remitted by the Council to the High Court specifically because ‘the Crymes lybelled are of so high a Nature and the probation so full’. Here was a tacit admission that the Council’s very omnicompetence meant its ability to handle complex cases or large bodies of evidence was limited.


Analysis of the Council’s judicial activities instead suggests a number of criteria might have been in play when judging the extent of a given case’s public implications and, therefore, its fitness to be heard by the Council. Privy Council trials often involved an elite accuser or panel, for whom appealing to, or being heard before, the supreme judicial authority was a reflection of their privileged status, as well as a tacit recognition that cases involving such individuals, who remained very politically important, were likely to have wider implications. So, for example, the complaint of John Lyon of Muiresk in 1663 that his lands had been invaded and despoiled came before the Council, largely because the alleged perpetrator was an aristocrat, Charles Gordon, earl of Aboyne. Secondly, the Privy Council often dealt with cases that blurred the line between civil and criminal action, for example in 1677, when George Young of Winchburgh raised a complaint against John Hope of Hopetoun for invading his lands and uplifting much of his victual as part of a broader land dispute. Here was a potentially riotous offence occasioned by a civil disagreement, to which the Council responded by declining to make any criminal judgement and remitting the civil component to the Court of Session. Thirdly, and most usually, cases originating before the Council often had distinctly political overtones. Take, for example, a case coming from Perth in 1676, which involved a claim against more than thirty of the town’s residents for rioting in protest at the election of Patrick Threipland as provost, and for illegally holding a rival election. Here was a case that touched on the very structures of political power and legitimacy, and it is not hard to understand why the Council might have taken an interest in it. However, as the following discussion will make clear, a more generalised explanation may well be that the Privy Council selected the cases it heard from a consciously state-building position, moulding its judicial activities in such

---

45 NRS, PC2/17, pp. 376-8 [RPCS, i. pp. 391-2].


a way as to enhance the power of central government or to enforce policy decisions, most obviously related to ecclesiastical structures. In other words, cases ended up being heard by the Privy Council not only because it was the court properly competent, but also because councillors’ political responsibilities moved them to exploit criminal justice in explicit service of the state.

Cutting across all of this, the Council was rather more likely to hear cases originating in and around its usual home of Edinburgh; the most common county of origin of the 648 recorded individual cases was Midlothian, accounting for approximately 14% of the total. The next most common was neighbouring Fife, whose c.8% outmatched the c.6% of Lanarkshire, which occupied third place. Together, the four counties closest to the capital – Midlothian, West Lothian, East Lothian and Fife – produced around 27% of all Privy Council cases. Committing a crime in or near Edinburgh, therefore, probably made it slightly more likely to catch the Council’s attention, whether politically or judicially driven, than if that same crime had occurred elsewhere in Scotland.

III

With these issues in mind, it is possible to reconstruct the business of the Restoration Privy Council as a criminal court of first instance, albeit the absence of surviving Privy Council registers for most of James VII’s reign mean that data is only available for the years 1661-85. Caution must be exercised, however, since distinguishing between the Council’s ‘civil’ and ‘criminal’ activities is difficult, largely because the Council, being competent in both, was relaxed about differentiating between them. Moreover, it was, as we have seen in the case of George Young of Winchburgh, perfectly possible for individual cases to straddle the divide. As a general rule, the cases tabulated below are those insisted upon not only by the aggrieved
parties, but also by the Lord Advocate acting for the king’s interest. This is not methodologically fool-proof. The ‘criminal’ component in some of the cases moved by the Lord Advocate is difficult to detect. It is for example not clear why the disputed guardianship of Janet Kennedy should have been insisted upon by the Lord Advocate in December 1685, when the Council itself determined this to be a civil matter properly belonging within the competence of the Court of Session. There were, admittedly, potential ‘public’ implications to such cases, since intervention in matters of this kind often aimed to restore community harmony or address the consequences of poor or inadequate lordship, but that merely serves to underline how the distinction between ‘civil’ and ‘criminal’ was blurred as far as the Privy Council was concerned. Conversely, the data incorporates some cases not naming the Lord Advocate, but which involved clearly criminal charges – the citation in February 1666 of eight Highlanders for stealing cows and horses from the tenants of James Campbell of Lawers fits within this category. The resulting figures are therefore subject to a degree of uncertainty, and should be regarded as indicative rather than precise.

[INSERT FIGURE 1 HERE]

---


49 This dynamic has for example been noted in the convention of forfeiting the good of suicide victims, a civil procedure that had clear public implications of this type. R.A. Houston, *Punishing the Dead? Suicide, Lordship, and Community in Britain, 1500-1830* (Oxford, 2010), pp. 30-94.

50 NRS, PC2/17, pp. 707-8 [RPCS, ii. p. 137].

51 Data for this, and all subsequent figures and tables, was extracted from *RPCS*, checked against the relevant manuscript volumes.
Uncertainty notwithstanding, a total of 648 individual cases and 3,638 separate indictments have been recorded, and these are broken down by category in figure 1. It is immediately apparent that, from both perspectives, the Privy Council’s business as a criminal court was dominated by religious and broadly political offences. The former accounted for around 20% cases and c.32% of indictments, while the latter made up c.36% of both totals. Put another way, c.56% of criminal cases and c.68% of indictments involved either political or religious offences. Other categories of transgression were some way behind; c.18% of cases and c.16% of indictments involved crimes against property, while the figures for interpersonal offences were c.20% and c.12% respectively. Economic offences (c.2% by both measures) were much less common.

A rather clearer picture can be gained from looking beneath these headline categories, and accordingly table 1 breaks down the same data into more specific offences. Doing so is not entirely straightforward, since conciliar indictments often did not specify the precise laws under which an offence was prosecuted, relying instead upon vague assertions that the behaviours under review were punishable by law. Indictments often, moreover, referenced multiple offences at the same time; the prosecution in 1676 of nineteen men for invading the lands of Violet, Barabara and Janet Riddell in Berwickshire was for instance overlain by multiple counts.

52 While the classes of ‘Interpersonal’, ‘Property’ and ‘Economic’ offence are fairly self-explanatory, the ‘Political’ and ‘Religious’ categories are less-clear cut. Inevitably there is significant overlap between them, and indeed it might be argued that, in a confessional age, ‘religious’ offences constituted merely a subset of ‘political’ crime. They are separated here to better highlight the range of Privy Council activity, with ‘Religious’ offences involving forms of nonconformity with the Restoration Church settlement, and ‘Political’ offences incorporating similar sorts of resistance to public authority but where religion was not directly involved.
of assault and deforcement. The categorisations below, therefore, are to some extent arbitrary and approximate. Nonetheless, they make it clear that by some margin the most common single offence dealt with by the Restoration Privy Council was conventicling, which on its own accounted for c.16% of cases and c.27% of indictments – considerably more than the next most common offence, invasion, which made up c.9% of cases and c.8% of indictments. Moreover, most of the remaining religious offences were similarly connected with securing the period’s Episcopalian ecclesiastical settlement, be it by upholding the terms of the various Indulgences aiming to incorporate moderate nonconforming ministers into the Church, enforcing the Test Act of 1681, or cracking down on general covenanting sentiment. Only a very small minority of religious cases – principally related to irregular marriages, but also involving one case of Quakerism – were not directly anti-Presbyterian in character. None of this is especially surprising. The seventeenth century was characterised across much of Europe by the growth of confessional states for whom religious uniformity, and universal submission to the government’s chosen denomination, was seen as vital to the integrity and security of the state. This was certainly true for Restoration Scotland, whose Erastian settlement made it imperative that nonconformity, particular of the Presbyterian variety, was stamped out, ensuring the emergence of repressive religious policies. In prosecuting nonconformists, and conventiclers in particular, the Privy Council was playing its part in advancing this platform, thereby advertising its willingness to use criminal justice as a state-building tool.

[INSERT TABLE 1 HERE]


54 Black, Kings, Commoners and Nobles, pp. 37-43.

55 The most sustained treatment of this theme remains J. Buckroyd, Church and State in Scotland 1660-1681 (Edinburgh, 1980).
If religious cases were dominated by a single kind of offence, a rather broader range of political crimes was prosecuted. The most common was malversation or related forms of negligence in public office, which accounted for about one-fifth of political cases and indictments. Duncan Campbell, charged with uplifting the Covenanting-era land tax known as the monthly maintenance from Argyllshire, was for instance cited for embezzling up 5,000 merks in 1662. In Perth, an intractable dispute between the long-time provost, Sir Patrick Threipland, and several other magistrates led to two malversation cases, one in 1679 against Threipland’s enemies, alleging various forms of maladministration and embezzlement, and one levying similar allegations against Threipland himself in 1683. More typically, accusations of malversation related to insufficient rigour among public officials in tackling Presbyterian-inspired disorders (a neat example, incidentally, of the strong overlap between ‘political’ and ‘religious’ offences). Thus, nearly thirty heritors in New Monkland parish were collectively fined £200 Sterling for failing to protect the Episcopalian minister of neighbouring Old Monkland, John Rosse, who had been dispatched there in 1675 to preach in the vacant church. He had been attacked by a hostile crowd and forced to abandon his efforts. Others were prosecuted for failing to prevent conventicles (as happened to seven Edinburgh magistrates in 1676), allowing the escape of covenanting prisoners (including two Canongate jailers who in 1681 permitted the rebel Thomas Weir of Greenrigg to abscond), or failing to punish seditious actions within their jurisdiction (for example in 1682, when twelve of Lanark’s magistrates

56 NRS, PC2/17, pp. 198-9 [RPCS, i. p. 200].


58 NRS, PC2/19, pp. 270-3 [RPCS, iv. pp. 389-91].
were indicted for turning a blind eye to a tumult orchestrated by local covenanters. A rather different form of malversation was alleged against a selection of magistrates from four towns – Ayr, Cupar, Queensferry and Irvine – for failing to elect succeeding town councillors in 1681 and 1682, their negligence being interpreted as an attempt to destabilise the social order and damage the Restoration settlement.

Much of the rest of the Privy Council’s political caseload involved crimes that similarly touched on protecting the integrity and security of public offices. Deforcement, involving the abuse, assault or impeding of royal officials, was an obvious challenge to government authority, a challenge its prosecution aimed to tackle – as in 1685, when twelve individuals were cited for attacking the messenger sent to deliver letters of poindng against Archibald Seton, master of Kingston. A similar rationale underpinned proceedings for usurpation of royal authority (as in 1662, when William Sinclair of Dunbeath established a breakaway justice of the peace court in Caithness) and for generic disobedience to lawful authorities (such as the indictment of the Rosses of Balnagown in 1665 for flouting the authority of the sheriff of Ross, Kenneth Mackenzie, 3rd earl of Seaforth). Simultaneously, some prosecutions were informed by a desire to uphold the behavioural standards of office-holders themselves. There were, for instance, at least thirty-two indictments against local officials, mainly urban magistrates, for


61 NRS, PC2/22, pp. 206-9. ‘Letters of poindng’ were legal orders for the impoundment of goods in payment of an outstanding debt.

62 NRS, PC2/17, pp. 408-13 [RPCS, i. pp. 335-7] and at pp. 599-609 [RPCS, ii. pp. 18-26].
holding office without taking the oaths of loyalty imposed by Parliament in 1662. Prosecutions of oppression were rather different. Oppression was generally regarded as simply ‘a Quality of other crimes’, but as an offence in its own right it was commonly associated with abuse of power by office-holders or social elites. For example, Alexander Mill, a former provost of Linlithgow, was fined 100 merks in 1677 after being convicted of oppression against Jean Moor, a poor widow whom he had terrorised by illegally confiscating her goods and raising multiple lawsuits in pursuit of alleged debts. The fact that the Council spent a noteworthy proportion of its time prosecuting offences of this character speaks to the institutional underdevelopment of early modern states in general, and Scotland in particular. Heavy reliance on social elites and largely unsalaried officials to perform the functions of local government was on one level mutually beneficial, but it also meant that upholding standards or enforcing policy could be difficult. That the Privy Council used its judicial powers in an attempt to do so is reflective of the limitations of government, but also of the Scottish state’s emerging ambition to secure control over the structures of authority.

Aside from reflecting supervision of public officials, political prosecution also involved crackdowns on more overt acts of disaffection. Treason was not generally within the Council’s remit, being normally reserved to the High Court or, in high-profile cases, to Parliament, but it did hear one case, against Robert Baillie of Jerviswood in 1684, although this ended only in

---

63 RPS, 1661/1/88 and at 1662/5/70.
64 Makenzie, Laws and Customs, pp. 162-3.
66 This theme has been more fully explore for England than for Scotland, and it is a major theme, for example, in Braddick, State Formation in Early Modern England. Perhaps the fullest attempt to subject Scottish evidence to these ideas, despite reliance on the unhelpful terminology of ‘absolutism’, is J. Goodare, State and Society in Early Modern Scotland (Oxford, 1999).
the accused’s conviction on a restricted libel. The related offence of rebellion, however, appeared slightly more commonly before the Council, although the 188 extant prosecutions for this crime were spread across only four cases, none of them connected to the period’s two most significant insurrections, the Pentland Rising of 1666 and the Covenanter Rising in 1679. Instead, two related to the MacLeans’ rebellion in the mid-1670s, one pertained to an abortive Covenanting insurrection in Fife (1678), and one followed from Argyll’s rebellion of 1685. Less dramatic instances of political resistance might also come before the Council. Twenty people were cited for reset of (that is, harbouring) rebel ministers in 1685; James Daes of Coldenknowes was fined 5,000 merks in 1678 for making seditious speeches criticising the government’s anti-Covenanting activities; and a Presbyterian-inspired popular tumult in Edinburgh’s Parliament Close during the course of 1674 attracted the citation before the Council of seventeen female participants. A final type of political crime – desertion – was more contextually particular, since all 90 cases and 168 individual indictments related to

---

67 NRS, PC1/43, pp. 477-82 [RPCS, ix, pp. 133-8].

68 For modern accounts of these risings, see I.B. Cowan, The Scottish Covenanters 1660-88 (London, 1976), pp. 64-72 and at pp. 94-102; T. Harris, Restoration: Charles II and His Kingdoms, 1660-1685 (London, 2005), pp. 118-19 and at 331-8; D.S. Ross, The Killing Time: Fanaticism, Liberty and the Birth of Britain (Edinburgh, 2010), pp. 84-93 and at pp. 134-44.


70 NRS, PC2/22, pp. 54-5 [RPCS, x, pp. 156-7]; NRS, PC2/20, pp. 174-6 [RPCS, vi. pp. 86-7]; NRS, PC2/19, p. 200 [RPCS, iv. pp. 261-2].
alleged failure to attend the royal army raised to quell the Covenanting rebellion of 1679, a spasm of prosecution occupying much of 1680 and reflecting the regime’s post-Popish Plot anxiety about sedition (anxiety that may have been overblown, given that fully 82% of these prosecutions ended in acquittal). Political cases constituted the Privy Council’s most overt involvement in trying ‘public’ offences, but they were also the clearest instances of criminal prosecution being used specifically to shore up government authority. Since the Council, in essence, embodied that authority, its punishment of malversation, treason, rebellion, and sedition inevitably took on a distinctly political, state-building character. The early modern tendency of relying on private initiation of criminal prosecutions may well have acted as a drag on this trend, mandating a largely reactive posture, but clearly it was not a total brake.

Taken together, religious and political prosecutions would tend to confirm the Privy Council’s own assessment that its jurisdiction lay primarily in matters of governance. The relative prominence of property offences, however, on the face of it suggests the opposite. Easily the most common of these was ‘invasion’, a term used here for a form or robbery in which the accused individual(s) claimed to be recovering their own rights or goods, and usually characterised by armed incursions into the accuser(s) lands. By way of example, William Denistoun of Colgraine raised a complaint against John Semple, younger of Fulwood in 1670 for coming to his lands ‘in fear of weir with gunes, swords, pistolls and other weapones invasive’ and attempting to eject him from the house of Campsescan, held by Colgraine but to which Fulwood claimed right. Cases like this – or like that of John Hope of Hopetoun, cited above – were almost invariably characterised by an overlap between civil and criminal law, and this sense of uncertainty characterised many accusations of property-destruction as well. Thus, the complaint by William More of Hilton in 1680 that Robert Udney of Auchterallan had destroyed his pew in Ellon parish church and broken up fencing around Hilton’s lands in
‘Coockstoune’ was countered by Auchterallan with the assertion that his actions were justified because both structures had infringed his own rights.\footnote{NRS, PC2/20, pp. 323-8 \textit{(RPCS, vi. pp. 388-94)}.}

Where cases were more securely criminal in nature, their appearance before the Council was often explicable in other ways. Theft, robbery and animal theft (considered a form of robbery) were ordinarily heard elsewhere, but might be considered to have public implications in certain circumstances. The prosecution of nine men in 1680 for stealing cash, weapons, clothing and horses from James Lundy and Daniel Achnoutie might well have been heard in a sheriff court or by the High Court, were it not for the fact that the robberies in question had taken place while the accused had been in rebellion as part of the 1679 rising.\footnote{NRS, PC2/20, pp. 414-15 \textit{(RPCS, vi. pp. 521-2)}.} The robbery of the Edinburgh indweller Alexander Cleland in 1683 was of public interest for a rather different reason, since it was claimed to have been committed in order to stop him delivering letters of caption against his alleged attackers.\footnote{NRS, PC2/21, pp. 582-3 \textit{(RPCS, vii. pp. 285-6)}.} More broadly, many of the animal theft cases heard before the Council involved Highland robbers, like the thirteen men accused of lifting cattle from the tenants of Thomas Mackenzie of Pluscarden in 1667, or the twelve people cited for multiple thefts against Alexander Campbell of Lochnell in 1678.\footnote{NRS, PC2/18, pp. 82-4 \textit{(RPCS, ii. pp. 320-21)}; NRS, PC2/20, pp. 8-14 \textit{(RPCS, v. pp. 361-4)}.} Highland banditry was regarded as a major public problem throughout the Restoration period, cast as a challenge to government authority and subject to a raft of often robust policy initiatives.\footnote{A. Kennedy, \textit{Governing Gaeldom: The Scottish Highlands and the Restoration State, 1660-1688} (Leiden, 2014).} Highland-related animal theft cases brought before the Privy Council therefore carried a degree of political...
interest that might not be superficially apparent. In other instances, however, the rationale for
citation before the Council remains elusive. The ‘public’ interest in the Berwickshire highway
robbery committed in 1674 against the servant Gavin Jacksone is difficult to discern, while,
since no details about their crimes are recorded, it is impossible to know why the robberies
alleged against William Stevensone, William Craigie, James Craigie and William Cuming in
1684 should have been deemed appropriate for conciliar attention. A final type of property
crime had vaguely political overtones. Wrongful intromission involved confiscation of goods
under spurious authority, as in the case of James Guthrey, who was accused in 1680 of
confiscating victual, livestock and household goods from the manor house of Bogie,
Aberdeenshire, pertaining to Anna Aytoun and James Weems, under the authority of invalid
letters of poinding. Touching on issues of governance and legitimacy, it is not hard to see
why cases like this should have been deemed to meet the criteria for ‘public’ interest. While
the large number of property crimes heard before the Privy Council superficially suggests a
departure from its remit over ‘matters of government’, the nature of these offences,
characterised by straddling of the civil/criminal divide or subliminal political considerations,
in fact underlines the Council’s broadly political interests.

The same was true of the small number of economic offences brought before the
Council. These all involved instances of false or illegal trading that in some way contravened
government strictures. For example, the twenty-nine men prosecuted for illicitly exporting fish
in 1672 had done so in contravention of the privileges granted to the Company and Society of
Fishing, while seventeen East Lothian skippers indicted in 1683 had allegedly exported staple
goods to Rotterdam, thereby undercutting the monopoly of the Scots staple at Campveere.

---

76 NRS, PC2/19, pp. 123-4 [RPCS, iv. p. 128]; NRS, PC1/43, pp. 293-4 [RPCS, viii. p. 423].
77 NRS, PC2/20, pp. 463-7 [RPCS, vi. 586-8].
78 NRS, PC2/19, pp. 28-30 [RPCS, iii. pp. 601-2]; NRS, PC2/21, pp. 341-4 [RPCS, viii. pp. 3-5].
More puzzling is the Council’s involvement in interpersonal offences. A potential ‘public’ interest can be detected in some of these cases, often because they involved elites or officials among the accused. The citation in 1664 of John Gordon and James Wright for kidnapping and falsely imprisoning William Fraser of Mid Belty, for example, quite aside from involving the convocation in arms of around forty individuals, potentially implicated a peer, Charles Gordon, earl of Aboyne, who was accused of orchestrating the attack.\textsuperscript{79} Other cases involved victims with public profiles, or at least positions commanding some public interest. The trial of seven individuals for hamesucken against John Row in 1669 could have fallen into this category because Row was minister of the Dumfriesshire parish of Balmaclellan, and his assailants might therefore have been suspected of nonconformist sentiment.\textsuperscript{80} More overtly, when Alexander Spotswood was convicted in 1682 of defaming the commissioners of supply for Berwickshire by accusing them of excessive exactions, he was potentially challenging the government’s fiscal policy.\textsuperscript{81} A rather different form of challenge to legitimate authority might explain why the false imprisonment of Elizabeth Ogilvie came before the Council in 1670. She had earlier obtained a Court of Session decreet against certain creditors of her late husband James Morison, minister of the Orkney parish of Rendall, and the attack on her occurred while she was in Kirkwall attempting to execute it.\textsuperscript{82}

Much of the time, however, it is difficult to see why the Privy Council should have heard a particular case. The fact that bailie Robert Elliot was slandered as a ‘knave’ during a meeting of Selkirk burgh council in 1665 was no doubt detrimental to the tranquillity of that

\textsuperscript{79} NRS, PC2/17, pp. 541-5 [RPCS, i. pp. 585-6].

\textsuperscript{80} NRS, PC1/40, pp. 290-93 [RPCS, iii. pp. 99-101].

\textsuperscript{81} NRS, PC2/18, pp. 827-30 [RPCS, iii. pp. 557-8].

\textsuperscript{82} NRS, PC2/18, pp. 470-1 [RPCS, iii. p. 118].
town, but it is not clear how it met the Privy Council’s test of being a matter of ‘government’. There was surely little peculiarly ‘public’ interest in the common assault committed on Irishman John McMillan, who was beaten in 1663 at the instigation of a creditor, or in the bludgeoning of Edinburgh vintner Alexander Borthwick in 1682. Equally, there was nothing about the three recorded cases of rape – which did not refer to non-consensual sexual intercourse in the modern sense, but rather involved engineering elopements and unsanctioned marriages – to explain why they were not, as would have been usual for a ‘plea of the crown’, tried before the High Court. In instances like these, the elasticity of the Council’s specialist crime of ‘riot’ was probably at fault, allowing those who had suffered personal violence wide latitude to justify an appeal to it, perhaps in the hope of swifter justice or attracted, for whatever reason, by the absence of a jury. In any case, the Council itself appears to have been conscious that some of the interpersonal cases brought before it did not really fall within its remit. When in 1681 two men were cited for kidnapping and falsely imprisoning John Pearson, an apprentice apothecary in Edinburgh (whom they initially lured out of his lodging with a promise to watch the Riding of Parliament), the Council declined to give any judgement, instead telling both parties to pursue legal action in alternative courts if they so wished. The Privy Council, then, tried a broad range of crimes that generally related, with varying degrees of intimacy, to its overall remit for the ‘public peace’, and with much of this prosecution, particularly relating to political and religious offences, being informed by a clear

83 NRS, PC2/17, pp. 670-71 [RPCS, ii. pp. 96-7].
86 NRS, PC2/21, pp. 39-41 [RPCS, vii. pp. 276-7].
political imperative to enforce or protect the authority of central government. It remains to ask what the fate of those cited before it was likely to be. The thesis of judicial harshness in early modern Scotland is based more upon the legislative underpinnings than the courts’ actual operation. A basic test is to establish conviction rates, and in the Privy Council’s case, with 712 of the recorded indictments ending in cases being dismissed or panels assoilyied (that is, the accused being acquitted), this was roughly 20%. That was rather lower than was typical in England – another legendarily ‘harsh’ jurisdiction, at least on paper – but, in the absence of detailed studies of other Scottish courts, it is difficult to judge how it compared domestically.87 One recent study of the various jurisdictions in Restoration Argyll, however, suggests that the acquittal rate there might have been as low as 11%, making the Privy Council markedly more likely to acquit.88 Of the remaining indictments, 900 led to the accused being outlawed because they failed to answer their summons, and for a further 728 no punishment is recorded. That leaves 1,293 indictments resulting in convictions and for which penalties are recorded, and the punishments imposed in these cases are set out in figure 2.

[INSET FIGURE 2 HERE]

The most striking point about this data is what it omits; there was not a single case of the Restoration Privy Council imposing a sentence of death. In some instances that was hardly surprising, since the offences being tried were not capital; even under the notoriously harsh ‘Clanking Act’ of 1670, conventicling, for example, was in most cases punishable by a fine or banishment, with execution only being mandated for seditious preachers themselves.89

---


88 Kennedy, ‘Crime and Punishment in Early-Modern Scotland’.

89 *RPS*, ‘Act against Conventicles’, 1670/7/11.
Offences such as deforcement, malversation and slander were similarly punishable only by fining or confiscation. Other crimes, however, ordinarily would have been expected to attract death sentences, including rebellion, seditious speeches, robbery, forgery and assault. That Councillors refrained from executing convicts can hardly be attributed to squeamishness or incorrigible mercy on their part – this was, after all, the body that happily ratified the death sentence passed by a judicial commission against the Dumbarton-stationed soldier John Frazer in 1677, warmly commended John Graham of Claverhouse in 1683 for his brutal tactics in suppressing nonconformity in the south-west, and repeatedly sanctioned judicial torture. A potential explanation was offered by Rosehaugh, who noted that ‘riot’ as a crime was classed as an ‘arbitrary’ offence, meaning that its punishment was at the discretion of the judge, but could not include execution. Since most of the Privy Council’s cases were ‘riotous’ by definition, it seems that capital punishment came to be regarded as lying beyond its competence.

Whatever the explanation for the lack of capital sentences, the absence of this penalty meant that other punishments had to be used. The most usual recourse was to impose a financial penalty, either in the form of a direct fine or an order to provide compensation to victims. Together, these accounted for 58% of recorded sentences, and they were attached to a diverse range of offences. John Maxwell was fined 1,000 merks in 1664 after assaulting John Anderson with a ‘great battoun’ in Paisley; for hamesucken against Brechin’s Robert Strachan and his wife, David Donaldson was ordered to provide compensation and expenses of £60 in 1675; also in 1675, Charles Lindsay’s slanders against Kirkcudbrightshire minister Robert Bowes,

---


which included labelling him a thief and a drunkard, earned him a fine of 1,000 merks; the fifteen men convicted of multiple animal thefts against John Campbell of Airds in 1677 were punished by means of an order to make good Aird’s losses; and Patrick Hepburn received a fine of £200 Sterling in 1681 for reset of the rebel preacher Gilbert Semple. Overall, at least one financial penalty of this kind was imposed for twenty-eight of the distinct crimes itemised in table 1 above.

Besides fining and compensation orders, the only other punishment imposed with any real regularity was banishment. Very occasionally this only meant banishment from a particular locale, as for example in 1674, when a large group of people, many of them women, convicted of tumult in Edinburgh were banned from entering the capital. In other cases, banishment involved ejection from the kingdom; Alexander Lockhart suffered this fate in 1673 after he confessed to assaulting his master, Hugh Campbell of Cessnock. Increasingly, however, sentences of banishment were coupled with orders for transportation overseas, usually to the Caribbean colonies, but sometimes to mainland America. Although the first such punishment during the Restoration was imposed in 1666, it was not until the late 1670s that transportation really came into its own; no fewer than 235 of the 252 recorded sentences – more than 90% – came in or after 1678. This is a pattern readily explicable by transportation’s close association with religious nonconformity, a crime which accounted for nearly three-quarters of extant cases (most of the rest related to Argyll’s rising) and which, moreover, attracted a sentence of transportation in just over 50% of cases where punishment is recorded. While, then, financial


95 NRS, PC1/40, p. 676 [RPCS, iv. p. 13].
penalties were imposed in a wide range of cases, transportation became closely associated with Presbyterian dissidence.

Banishment and financial penalties between them accounted for more than 80% of extant sentences. Much of the remaining 20% was made up of orders for imprisonment. Custodial sentencing remained unusual in the seventeenth century, partly because prisons were expensive and difficult to maintain, but also because they fitted poorly with a contemporary conception of criminal justice that still emphasised punishment over rehabilitation, the halting development of houses of correction notwithstanding.96 It is, consequently, not surprising that many of the Privy Council’s apparently custodial sentences were in fact little more than holding orders. Thus, when Evir Campbell was committed back to prison in Dumbarton after being convicted of absconding from ward there in 1671, this was specifically described as a temporary expedient until further orders could be given.97 An analogous situation faced the conventicler Andrew Wedderburn, who in 1673 was imprisoned at Edinburgh until he could find sufficient caution for future good behaviour, failing which he would be banished, while three years later two further conventiclers – William Bell and Robert Dick – suffered temporary incarceration at the Bass Rock while awaiting final adjudication as to how they should be punished.98 Nonetheless, deprivation of liberty as a punishment in and of itself was certainly not unknown. James Sangster, convicted in 1675 of using a pitchfork to assault James Harvey, minister of New Machar, was sentenced to a token stretch of four days’ imprisonment at

97 NRS, PC2/18, pp. 660-62 [RPCS, iii. p. 375].
98 NRS, PC1/41, p. 26 and at p. 381 [RPCS, iv. p. 98; RPCS, v. pp. 43-4]; NRS, PC2/19, pp. 493-5 [RPCS, v. pp. 47-8]. In Dick’s case, the penalty eventually decided upon was transportation. NRS, PC2/20, pp. 102-3 [RPCS, vi. pp. 12-13].
Edinburgh Tolbooth before being released. At the other end of the scale, John Philip, who in 1683 was convicted of making treasonable remarks defaming James, duke of Albany, was condemned to life imprisonment at the Bass Rock, alongside an eye-watering fine of £2,000 Sterling.

Other sentences, while unusual, tended to be symbolically or contextually logical. The punishment imposed on William Cockburn, who was ordered to be pilloried in Edinburgh while wearing a paper reading ‘This is a person declared infamous for slandering a person of honour and inteiir fame’, was part of a long tradition of shaming penalties, designed in this case to restore harmony and reputational balance between Cockburn and the victim of his slanders, namely Henrietta Livingston, Lady Oxfuird, whose breeding and manners he had questioned in 1674. In a similar vein, it made sense in cases like that of James Riddell, the provost of Rutherglen convicted of several malversations in 1671, for the accused to be ejected from office or to otherwise lose their privileges. In other instances, however, the Privy Council’s reasons for imposing an unusual punishment are obscure. Why the convictions of Alexander Pickman for assault in 1673 and Alexander MacKinnon for slander in 1680 should have been the only two to attract sentences of judicial mutilation – nailing of the ear in both cases – cannot be known. Another physical punishment was scourging, most instances of which arose from a single case of tumult tried in 1682. Eleven people accused of trying by force to inhibit William Biggar from taking possession of the estate of Woolmet in Midlothian, to which he had been


100 NRS, PC2/21, pp. 437-9 [RPCS, viii. p. 91].

101 NRS, PC2/21, pp. 298-9 [RPCS, viii. pp. 583-5]. Cockburn was ultimately spared the pillory on the intercession of Lady Oxfuird herself, who was willing to accept an apology instead.

102 NRS, PC2/18, pp. 626-30 [RPCS, iii. pp. 644-6].

served heir, were ordered to be publicly whipped at Edinburgh’s correction house, and it is not clear why this rarely-deployed punishment should have been used in this case.  

IV

Most first-instance cases heard by the Privy Council were dealt with by means of a trial which, the lack of a jury notwithstanding, was procedurally similar to trials heard elsewhere in the Scottish judicial system. Occasionally, however, the Council chose to invoke a unique power and grant a ‘precognition’. This is a term still used in modern Scots Law, where it refers to a formal, though judicially inadmissible, statement taken before trial in order to gauge the scope of a witness’s evidence. In the early modern period, however, a grant of precognition allowed the Council to undertake a semi-formal preliminary investigation into the facts surrounding a given case, usually by taking relevant witness statements. The point of this exercise was to decide whether criminal prosecution was justified; if not, the Council could summarily dismiss the case or impose a light punishment, but if a trial was deemed appropriate, it would have to proceed purely on the strength of the evidence presented to the Council, with no new material appearing before the judge. Precognitions were thus highly advantageous to accused parties, and as a result were generally granted only in very specific circumstances. Firstly, they might be employed where the accused was of elite status and it was feared that a full trial would be injurious to the public peace. These were the grounds upon which Patrick Grant, tutor of Grant, won a precognition in 1677 for several killings alleged against him by the Mackintoshes, having argued that the supposed crimes were committed while he was


executing a conciliar commission for pacifying the Highlands, and that public prosecution could therefore undermine the Council’s authority.\textsuperscript{106} Secondly, precognitions could function as a means of protecting individuals from weak or frivolous prosecution. Thus, Thomas Menzies persuaded the Council to grant him a precognition in 1676 for the alleged murder of William Halliburton because the prosecution case lacked direct evidence and was based upon ‘some remote and extrinseck presumptions’.\textsuperscript{107} Thirdly, and most usually, a precognition could be awarded where it was felt likely that there were significant mitigating circumstances. So, for example, George McLair, an ensign in the Haddington militia, won a precognition in 1670 for his alleged murder of Alexander Adinson after claiming that the killing was justified on the ground of self-defence, Adison having attacked McLair while the latter was trying to stop him from deserting.\textsuperscript{108} Precognition was a controversial procedure, largely because the advantages it afforded to accused parties were often judged excessive. Grants were usually made upon an accused’s petition, and gave to them power to decide when hearings occurred. The frequent result was that they either delayed setting a date, or selected one when hostile witnesses would be unavailable. The consequent lack of prosecution evidence would naturally result in the case being dismissed. Rosehaugh, indeed, claimed never to have seen ‘any who pursued a precognition brought to condigne punishment’, and although he may well have been exaggerating, there can be little doubt that winning a grant of precognition was an enormous boost to an accused individual’s chances of acquittal.\textsuperscript{109}

In some cases, the Privy Council chose to deal with criminal complaints brought to its attention not directly through trial or precognition, but indirectly by means of a judicial

\textsuperscript{106} NRS, PC2/19, p. 612 \textit{[RPCS, v. p. 138].}

\textsuperscript{107} NRS, PC1/41, pp. 320-21 \textit{[RPCS, iv. pp. 517-18].}

\textsuperscript{108} NRS, PC2/18, pp. 524-5 \textit{[RPCS, iii. pp. 218-19].}

\textsuperscript{109} Mackenzie, \textit{Laws and Customs}, pp. 190-1.
commission. This was a procedure that allowed for a temporary delegation of the Council’s judicial authority to an institution, official or panel of individuals who would not normally have the requisite competence, with the grant always being limited to a specific case. Their scope can be gleaned from a typical example, dating from 1677 and mandating the trial for witchcraft of two women from Prestonpans, Agnes Kelly and Marjorie Anderson, before a bench of three local gentlemen:

With power to [the commissioners] to meet at such times and places as they shall think expedient, and then and there to affix and hold courts, creat serjants, dempsters and other members of court needfull, to call ane assyse and witnesses of persons best understanding the truth of the said mater, absents to amerciat, unlaws and amerciaments to uplift and exact, and in the saids courts to call the said Agnes Kelly and Marjorie Andersone and putt them to the tryall and knowledge of ane assyse, and, if they shall be found guilty ... cause justice administrat upon them conforme to the lawes of the kingdome.\textsuperscript{110}

As this grant implies, commissions allowed the Council to tap into the sort of local knowledge that was often vital in properly unravelling criminal cases, and it may therefore be the case that commissions were used whenever the Council encountered an accusation about which it felt inadequately informed. At the same time, commissions were a convenient way of overcoming geographical challenges. When the magistrates of Ross petitioned in 1686 for a judicial commission against John Glass, suspected of witchcraft, and assorted other villainies on the Black Isle, they pressed their suit by claiming that, without a commission, ‘the Criminals

\textsuperscript{110} NRS, PC1/41, p. 692 \textit{[RPCS, v. pp. 449-50]}. 
cannot miss to escape: in respect of the Distance of the place, so that multitudes of witnesses (many of whom are Old) and Assizers cannot come up.\textsuperscript{111}

[INSERT FIGURE 3 HERE]\textsuperscript{112}

Between 1661 and 1688, the Privy Council granted a total of 182 judicial commissions. These are categorised by alleged offence in figure 3. By far the most common crime delegated to commissions was witchcraft, which accounted for just under 50\% of the total. This is hardly surprising since witchcraft was something of a legal anomaly. In part as a legacy of the chaotic witch panic of 1597, its prosecution grew to become heavily regulated by central government, and while trials could – and did – still come before the central justiciary court, in practice that judicial commissions became the standard vehicle for prosecuting witches. Combined with the fact that the Restoration covered most of Scotland’s biggest witch hunt (c.1659-c.62), this means that discovering a large number of witchcraft commissions is not unexpected.\textsuperscript{113} The

\textsuperscript{111} Representation by the Sheriff Depute of Ross, Commissioners of the Justiciary and Supply, and of the justices of the peace within the district of Ardmanach. To the committee of His Majesties most honourable Privy Council, to whom the consideration of the petition anent the witches in the parish of Kilernan was remitted (1686), p. 2. The absence of extant Privy Council registers for the years 1686-88 mean we cannot confirm whether this petition actually resulted in a commission. The fact that many of the panels and witnesses were Gaelic-speaking was also cited as a potential difficulty in the absence of a commission.

\textsuperscript{112} Tabulated from RPCS, checked again relevant manuscript volumes.

next most common offence attracting a judicial commission was murder, accounting for about 30% of commissions, and since these represented the vast majority of murder cases brought before the Council, it seems likely that this was another crime for which commissioning, rather than direct trial, was regarded as the normal response. Other crimes were some way behind in terms of the number of commissions generated. Theft and robbery accounted for about 10% of commissions, and the remaining 10% or so dealt with a range of other offences, including bestiality (3%), generic riot (2%), assault, incest (both 1%), animal theft, deforcement, rape, and religious nonconformity (all less than 1%).

[INSERT FIGURE 4 HERE]

On average, the Privy Council issued thirteen judicial commissions annually between 1661 and 1685. This, however, conceals striking chronological variation, as demonstrated in figure 4, which breaks down the grants by year. Commissioning activity was heavily concentrated in the 1660s. By far the biggest spike occurred in 1662, with almost all of that year’s 57 commissions dealing with witchcraft prosecutions generated during the Great Hunt. Of the other notable spikes, 1661 (nineteen commissions) again reflected the witch panic, while 1667 (nineteen), which might be assumed to represent a crack-down following the Pentland Rising the previous year, actually involved a rather inexplicable surge in murder and infanticide cases, which together accounted for two-thirds of that year’s total. Judicial commissions became much less frequent after 1670, largely reflecting the total absence after that date of witchcraft commissions, but also perhaps a result of the Council’s increasing use of extraordinary jurisdictions that had the effect of channelling crimes like homicide and robbery away from its attention.

Commissions for trial were not, however, the only type of commission available to the Privy Council. Instead of mandating for trial, the Council might alternatively order merely the
apprehension of named suspect, with trial itself still being reserved to the normal channels. In 1663, for example, James Johnstone, 1st earl of Annandale was required to ‘search, seik, take and apprehend’ Jon Brown, ‘a trafficking papist’ who had been wandering around the south-west attempting to win Catholic converts, and then to dispatch him to Edinburgh for trial.114 Similar orders for a diverse range of transgressions followed: George Livingston, 3rd earl of Linlithgow was in 1668 commissioned to apprehend a group of four women suspected of assaulting a minister in Calder; John Campbell of Glenorchy received instructions to arrest the suspected Highland bandit Finlay MacNab in 1676; and a blanket order to all magistrates for the capture of Elspeth Kinnaird, believed to have uttered ‘several slanderous expressiones against the Lord Kinnaird’, was issued in 1683.115 Individuals apprehended under the authority of one of these orders were not necessarily tried before the Council itself, although for some that was clearly the intention. John Ross, an excise collector in Ross suspected of embezzlement, was ordered to be transported to Edinburgh in 1684 explicitly to be dealt with by the Council.116 But, for example, when Andrew Ramsay, Lord Abbotshall was commissioned to arrest five people suspected of stealing papers from his house, the terms of the commission implied that Abbotshall himself was to conduct their trial, subsequently enrolling them in the army if found guilty.117

If commissions for apprehension were a watered-down version of the judicial commission, then commissions of fire and sword were a distinctly augmented variety. The broadness of these grants is apparent from the terms of a typical one, given in 1681, against a

114 NRS, PC1/39, p. 242 [RPCS, i. p. 350].
116 NRS, PC2/21, pp. 703-4 [RPCS, viii. pp. 472-4].
group of Highlanders, mainly MacDonalds, denounced as rebels for failing to vacate certain lands claimed by Lachlan Macintosh of Torcastle:

[The commissioners are granted] our full power and command, express bidding and charge to convocat our lieges in arms and to pass, search, seek, hunt, follow, take, apprehend, imprison or present to justice, and, in case of resistance or hostile opposition, to pursue to the death the forenamed persons wherever they can be apprehended.118

In effectively empowering named commissioners to wage war on purported rebels with total impunity, commissions of fire and sword were criticised – for Lord Advocate Rosehaugh, they were open to abuse in private feuds, and were moreover legally questionable because they denied their subjects the right to have their cases heard.119 At the same time, there was a danger that commissions of this type would simply exacerbate the problems they aimed to solve. As Torcastle observed in relation to the Keppoch dispute, repeated commissions of fire and sword dating back decades, while not eradicating the MacDonalds, had had the effect of entrenching them in their lawlessness and denying them any opportunity of living peaceably.120 The Council, as a result, used commissions of fire and sword infrequently, generally only against more intractable criminals in the remoter regions of the kingdom – so, for example, only fifteen were granted during the busiest decade, the 1660s, with all but one of them relating to hardened

118 NRS, PC1/42, fos. 275v-276v [RPCS, vii. pp. 191-4].

119 Mackenzie, Laws and Customs, pp. 200-01.

120 NRS, Mackintosh of Mackintosh Papers, GD176/593.
outlaws in the Highlands.121 Commissions of fire and sword were, then, a sparingly-deployed but nonetheless consequential weapon in the Council’s judicial arsenal.

The commissioning strategies discussed so far were targeted at specified individuals or groups. But when facing what it considered to be the most serious law and order challenges, the Council sometimes deployed a more general approach by creating entirely new temporary jurisdictions over defined geographical spans. The two most important examples of this during the Restoration emerged in the 1680s, in both cases as a response to long-standing domestic headaches – Highland banditry and militant nonconformity. In the case of the Highlands, concerns about ‘the many herships theifts robberies and depredations’ committed by ‘louse and lawlesse persons’ had been evident from the earliest days of the Restoration, and indeed long pre-dated Charles II’s accession.122 Various policy responses, especially the appointment of special lieutenants charged with hunting down thieves, failed to eradicate the problem, and so


in 1682 the Privy Council created an entirely new jurisdiction, known as the commission for securing the peace of the Highlands. Naming a panel of 66 commissioners, later revised to 67, it divided the region into four zones, creating in each of them a new justiciary court whose formal competence rivalled that of the High Court in Edinburgh. In the event only one of these divisions, the southernmost centred on Argyll, enjoyed any significant success in tackling crime, and even then only really in its first two years. Nonetheless, the emergence of the Highland commission demonstrates the willingness of the Council to institute entirely new jurisdictions in a bid to tackle certain law-and-order issues. It also reflects the clear relationship between criminal jurisdiction and state-building, since creating the new Highland courts, over which councillors claimed explicit rights of supervision, was overtly intended to help extend the reach, and realise the goals, of central government.123

The Highland commission was conceptualised and presented as plugging a jurisdictional gap, and as such it made little attempt to bypass existing local power structures, instead attempting to exploit them by appointing exclusively local gentry – and one peer, John Campbell, 1st earl of Breadalbane – as commissioners, while also enjoining the cooperation of sheriffs, justices of the peace, and other pre-existing legal officials. The other new jurisdictions created in the 1680s were of a quite different stamp. In April 1683, the entirety of Scotland south of the river Earn was divided into six zones, within each of which a circuit court was empowered to sit during the following summer to try both nonconforming Presbyterians and Covenanting rebels still at large after the rebellion of 1679. Although most of the 61 people

specifically named in the commission were local lairds, their authority was to be shared with
privy councillors, all existing judges and, crucially, military officers.\footnote{124 NRS, PC1/43, pp. 87-91 [RPCS, viii. pp. 133-8].} As such, the
commission represented the continuation of a trend apparent since the previous year of relying
on soldiers to enforce anti-Presbyterian laws, for example John Graham of Claverhouse in
Galloway, Major Andrew White in Lanarkshire and Ayrshire, the commander-in-chief,
Linlithgow, for West Lothian, and Captain Adam Urquhart of Meldrum for Berwickshire,
Roxburghshire, Selkirkshire and, later, East Lothian.\footnote{125 NRS, PC1/42, fos. 320v-321r, fos. 322v-323r, fos. 332v-333r, fos. 334v-335r and at fo. 357r-v
[RPCS, vii. pp. 326-7, pp. 333-4, p. 373, p. 384 and at pp. 435-6]; NRS, PC1/43, pp. 2-4 and at pp. 25-7 [RPCS, vii. pp. 497-9 and at pp. 565-6]. Nor would this stop in 1683; Colonel Thomas Buchan
was for example commissioned to ‘assist’ (a thinly-veiled euphemism for supervise) the magistrates
in and around Ayrshire with the apprehension of rebels in April 1684. NRS, PC1/43, pp. 343-5
[RPCS, viii. pp. 504-5].} The commission, moreover, would not
be the last creation of its type. Another, naming thirteen individuals, was created to conduct
further trials in the shires Roxburgh, Selkirk, Peebles, Berwick, Stirling, Dumfries and
Kirkcudbright in November 1683. The western shires, particularly Lanark and Dumfries, were
subject to another commission in January 1684, and yet another special justiciary court, sitting
in Glasgow, was created the following month.\footnote{126 NRS, PC1/43, pp. 167-9, pp. 195-6, pp. 254-5 and at pp. 263-4 [RPCS, viii. pp. 289-90, pp. 318-19, 372-3 and at pp. 380-81].} An even more robust expedient came in
September 1684, when privy councillors themselves were named as justiciary commissioners
in four circuits: Lanarkshire, Renfrewshire and Dunbartonshire; Ayrshire; Dumfriesshire,
Wigtownshire and Kirkcudbrightshire; and Roxburghshire, Berwickshire, Selkirkshire and
Peeblesshire.\textsuperscript{127} These jurisdictional innovations was explicitly justified on the grounds that too many existing magistrates demonstrated ‘remisness in discharge of their duties’, allowing rebels and nonconformists ‘to live in quiet and to possesse their owne rents lands and moveables ... without being brought to Justice’.\textsuperscript{128} The involvement of military resources allowed these various measures to achieve a fair degree of success in suppressing militant nonconformity, at least in the short term. But they also reflected the breadth of the Privy Council’s competence in terms of creating new jurisdictions for law-and-order purposes, as well as its willingness to use these powers not just to uphold justice, but baldly to enforce political conformity.\textsuperscript{129}

By the Restoration, the Privy Council had, in both theory and practice, carved out a significant role in Scottish criminal justice, thanks to its position as the supreme executive organ of government. Its supremacy was most obvious at one remove. Wide appellate jurisdiction allowed it to review verdicts and sentences from lower down the court hierarchy, although in practice this was a power that seems to have been used cautiously. Similarly, broad rights of supervision saw the Council intervene in various ways to co-ordinate and direct the course of

\textsuperscript{127} NRS, PC1/43, pp. 487-92 [RPCS, ix, pp. 154-9].

\textsuperscript{128} NRS, PC1/43, p. 32 [RPCS, vii. pp. 572].

justice, even if, again, it appears to have done so, most of the time, for modest ends. The same dynamic can be traced in the Council’s commissioning strategy, since in delegating the authority required for specific trials and actions, or in creating new jurisdictions for law-and-order purposes, councillors demonstrated the judicial supremacy they enjoyed by virtue of channelling royal authority. The Council’s latitude, however, was functionally narrower as a court in and of itself. Although by some accounts theoretically competent in almost anything, the general expectation, confirmed by close analysis of day-to-day activities, was that their attentions should be restricted to actions with some bearing on political or public affairs, with such cases being classified under the catch-all offence of ‘riot’. The rigidity of this restriction should not be exaggerated, however, since the very broadness of ‘riot’ as a crime permitted some complaints with few or no identifiable public implications to be heard, particularly in terms of interpersonal transgressions.

Reconstructing the Restoration Privy Council’s judicial activities ties it into wider discussion about the role of criminal prosecution in the state-building processes of the early modern period. Partly, this is a question of participation. Criminal cases were generally initiated by private individuals, and, as the evidence above makes clear, this generally held true for the Restoration Privy Council. A wide range of private grievances were heard, and moreover it is clear that one did not have to be part of the elite to have access to conciliar justice; while the most august of peers could raise complaints, so could modest individuals like John Pearson, the apprentice apothecary whom we saw complaining about false imprisonment in 1681. Equally, of course, Privy Council processes drew in a wider pool of individuals as witnesses, and the council dealt with cases from every part of Scotland, from Shetland to Kirkcudbrightshire, from the Hebrides to Aberdeen. In its interactions with these people, the Council offered a shared forum for justice that provided a sense of commonality, but it also, and perhaps more importantly, gave ordinary Scots a stake in the structures of the state.
There is, however, an important caveat that must be attached to this picture of wide participation and penetration. In 1661, the Lord Advocate, acting in the public interest, was a co-accuser in about one-quarter of cases, and sole initiator of none. By 1685, he was named among the complainants in fully 77% of cases, and sole accuser nearly one-fifth of the time.\(^{130}\) While, as noted above, the reasons for the Lord Advocate’s interest in particular cases is sometimes difficult to understand, the overall trend suggests a shift in emphasis over time, so that, by the end of the Restoration, conciliar prosecution was more often initiated by the Crown and tended more closely to reflect the government’s political priorities than it had at the start of the period. The increasing proactivity of the Lord Advocates needs to be viewed in its wider context, and doing so highlights another link between Privy Council prosecution and state formation. Across Britain and Ireland, the reigns of Charles II and James VII, and the 1680s in particular, were marked by persistent anxiety about a potential return to the political disintegration and turmoil of the Civil War period. In Scotland, this spawned a political culture that valued the preservation of order above all other goals and identified strong monarchical government as the best means of achieving it.\(^{131}\) While this did not overturn the Scottish state’s participatory framework, it did represent an effort to introduce a more intrusive and controlling ethos. The Privy Council’s judicial activities flowed from that overarching framework; despite McNeill’s insistence that the Council was a scrupulously fair court that hardly ever interfered with criminal justice, the Restoration-era evidence suggests an approach that was both much more proactive and significantly more political attuned.\(^{132}\) Prosecution of conventicling and related challenges to the Erastian religious settlement of the early 1660s was the most obvious

\(^{130}\) This is calculated from a survey of the relevant Decreta registers. NRS, PC2/17, pp. 1-107; NRS, PC2/22, pp. 1-274.

\(^{131}\) Jackson, *Restoration Scotland*.

embodiment of this posture, but across its business the Council betrayed growing determination
to use its judicial powers as a means of shoring up government authority, protecting or
supervising social and office-holding elites, and enforcing policy decisions. The criminal law,
in short, was increasingly being used by the Privy Council as the tool of a government that
displayed distinctly authoritarian tendencies.

The politicised nature of the Privy Council’s judicial activities during the Restoration
fits with the period’s broader political culture, which tended to prize order and the maintenance
of monarchical authority and which, consequently, lent itself to repressive policies.133 In that
sense, the Restoration may represent a unique moment in the Privy Council’s history, at least
in judicial terms. It seems plausible, however, that further research into the under-studied
Scottish regime of William of Orange, often (although not universally) regarded as equally
authoritarian, might in fact reveal a continuation of the pattern.134 If so, there are potentially
longer-term implications, since the Council’s willingness to let politics influence its
administration of justice suggests that the abolition of the Council in 1708 could have had even
more wide-ranging ramifications in terms of governance and control in Scotland than historians
have hitherto allowed.

In more general terms, the data discussed here has wider implications for our
understanding of early modern state-formation. The Scottish case demonstrates that, even in a
highly decentralised state with a correspondingly diffuse judicial system in which private

133 Jackson, Restoration Scotland.

134 For a recent restatement of this view on William II’s regime in Scotland, see A.I. Macinnes,
‘William of Orange – Disaster for Scotland?’ in E. Mijers and D. Onnekink, eds., Redefining William
III: The Impact of the King-Stadholder in International Context (Aldershot, 2007), pp. 201-23. A
more positive perspective of the 1690s is D. Onnekink, ‘The Earl of Portland and Scotland (1689-
jurisdiction remained extensive, the criminal law could be used as a mechanism for rebalancing the relationship between rulers and ruled in the direction of more coercive state power. Discussion of state-building in this period tends to focus on a recurring set of key mechanisms: the growth of standing armies, more intense fiscal exaction, expanded bureaucratic machinery, and, in some cases, the emergence of embryonic national identities. All of these factors are observable in the case of Restoration Scotland, although generally only weakly, and it was arguably in its exploitation of the criminal justice system via the Privy Council that the government made its most consistent and overt efforts to entrench state power. It is not just historians of England, therefore, who need to be alert to the role of criminal prosecution in helping shape the state. Equally, the growth of the state was not necessarily reliant upon the creation of new structures or institutions on the part of central government; in retooling an existing power for more consciously politicised ends, the Restoration Privy Council demonstrated that state-formation was potentially just as reliant upon behavioural change. Historians do not have to search just for grand reforms or ambitious projects in institution-creation, but must also pay attention to subtle, often veiled shifts in the way pre-existing structures were used if they are fully to understand the process of state-formation in the early modern world.