



University of Dundee

Crime and Punishment in Early-Modern Scotland

Kennedy, Allan

Published in:
International Review of Scottish Studies

DOI:
[10.21083/irss.v41i0.3581](https://doi.org/10.21083/irss.v41i0.3581)

Publication date:
2016

Licence:
CC BY-NC

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Kennedy, A. (2016). Crime and Punishment in Early-Modern Scotland: The Secular Courts of Restoration Argyllshire, 1660-1688. *International Review of Scottish Studies*, 41, 1-36.
<https://doi.org/10.21083/irss.v41i0.3581>

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from Discovery Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain.
- You may freely distribute the URL identifying the publication in the public portal.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

**CRIME AND PUNISHMENT IN EARLY-MODERN SCOTLAND:
THE SECULAR COURTS OF RESTORATION ARGYLLSHIRE,
1660-1688**

Allan Kennedy*

The study of crime in the early-modern period has become increasingly sophisticated in recent decades. This is particularly true in England, where a growing body of research, often taking the form of local case-studies, has shed significant light on the dynamics of criminal activity and the workings of the criminal justice system.¹ By contrast, our knowledge of Scottish criminality remains very under-developed. No sustained effort to reconstruct Scotland's experience of crime before the eighteenth century has so far been published—one very useful case-study of late-sixteenth-century Aberdeen notwithstanding—with interest before this period focusing largely on discrete themes, such as female crime, witch-hunting, feuding, and sexual and moral deviance as revealed through Church court proceedings.² As a result, Scottish historians have been unable properly to engage with some of the big issues with which their English counterparts have been grappling for years. What crimes were prosecuted in early-modern society, by

* A graduate of the University of Stirling, where he gained his Ph.D. in 2012, Allan Kennedy has been Research Associate in British/Scottish History at the University of Manchester since 2013, where he has been attached to an AHRC-funded research network on Scottish migration to early modern England. He has published a number of articles and book chapters on aspects of early modern Scotland, and his first book, *Governing Gaeldom. The Scottish Highlands and the Restoration state, 1660-88* (Leiden, 2014), was awarded the 2015 Frank Watson Book Prize by the Guelph Centre for Scottish Studies.

The author would like to thank Dr Siobhan Talbott and the anonymous referees for their useful comments on earlier drafts of this article.

2 Crime and punishment in early-modern Scotland

whom, and how were they dealt with? What does criminal activity reveal about broader social dynamics, particularly in terms of the relationship between social groups? What was the purpose of criminal prosecution? How, and by whom, was it directed? How far, if at all, can the trial and punishment of criminals be linked to the emergence of the early-modern “state”?³ This article hopes to make an initial contribution towards addressing these key questions, and it will do so by way of a regional case-study of Argyllshire, a county whose unique judicial infrastructure, discussed below, and unusually rich corpus of surviving judicial records makes it an appropriate subject for such close attention. Discussion centres on the Restoration between 1660 and 1688, with this chronological focus being dictated largely by the vagaries of record-survival, it being the earliest period for which a sufficient volume of judicial material has survived from the county. Utilizing trial data, principally 1,489 extant indictments gathered from the region’s local public courts, supplemented by Argyllshire cases appearing in central jurisdictions, the article begins by exploring the jurisdictional set-up, before moving on to analyze patterns of both criminal activity and judicial punishment, placing each of these themes within their wider contexts.⁴ The quantitative approaches used to achieve this analysis represent a methodology with long-recognized limitations which are discussed more fully below, but it has the advantage of allowing for the recovery of broad patterns in prosecuted criminality and the response to it. In uncovering these, the article seeks to understand the local experience of crime and punishment in early-modern Scotland, thereby also sketching out some parameters for further research.

Jurisdictions

Early-modern systems of criminal justice were not distinguished by bureaucratic clarity. Having developed organically over time, most displayed a high degree of complexity and jurisdictional overlap, while still retaining a basic division between superior courts competent in more serious crimes, and inferior bodies interested in lesser offences.⁵ The Scottish situation, in which Argyllshire partook, shared in this general structure, although naturally displaying local peculiarities.⁶ Parliament and the Privy Council

exerted supreme authority, although generally neither got involved in day-to-day criminality, exercising their jurisdiction mainly in matters of national interest. In the case of Restoration Argyllshire, this meant that they limited themselves to two major interventions: the treason trial of Archibald Campbell, marquis of Argyll in 1661, and prosecutions related to the rebellion in 1685 of his son, Archibald Campbell, 9th Earl of Argyll (a Scottish echo of the better-known Monmouth Rising).⁷

In the normal course of events, the supreme criminal court in Scotland was the high court of justiciary based in Edinburgh (the court of the justice general before 1672), but in Argyllshire this jurisdiction was devolved wholesale to be held as a heritable regality by the Earls of Argyll, who thus ran their own justiciary court usually based at Inveraray.⁸ The Argyllshire regality was the most extreme example of the Scottish phenomenon of the “heritable jurisdiction.” This referred to judicial privileges enjoyed by many Scottish landholders as part of their charters. Emerging during the Middle Ages, these franchise courts, covering the vast majority of the country, had complemented the relatively limited network of royal courts and done much of the everyday donkey-work of criminal prosecution. Most reflected grants *in liberam baroniam*, meaning that the holder was entitled to convene a “barony” court which could try a limited array of criminal matters, although, in practice, most barony courts had by the seventeenth century evolved into tools of estate management. A few franchise courts, however, derived from charters held *in liberam regalitatem*, implying a right to hold far more powerful “regality” courts that could hear crimes up to and including the “four pleas of the crown,” meaning those crimes—murder, arson, rape and robbery—usually reserved to the central royal courts.⁹ The Earls of Argyll’s judicial rights in Argyllshire reflected this latter class of privilege, and they represented by far the most geographically extensive regality in Scotland.

The main inferior jurisdictions were the sheriff and justice of the peace (JP) courts. The former, again run by the Earls of Argyll as heritable sheriffs, theoretically held jurisdiction over all crimes save treason and the “four pleas.” JPs, meanwhile, were competent, according to the lawyer and lord advocate George

4 Crime and punishment in early-modern Scotland

Mackenzie of Rosehaugh, in “petty ryots, servants fies, and many such like, relating to good neighbour-hood;” in other words, theirs were the lowest of the public jurisdictions, often in fact concerned more with local administration and, when turning to crime, confined to petty transgressions.¹⁰ There was also a patchwork of small courts with even more geographically or jurisdictionally limited competencies, among them the burgh courts, dealing with civil and criminal matters in urban areas, and the aforementioned barony courts. None of these, however, have left records from the Restoration, and so are not considered in this article.

The existence of multiple, overlapping jurisdictions could be a recipe for friction.¹¹ Thus, proposals in 1671 to reform the justiciary court by extending its use of circuit courts were resisted by the 9th Earl of Argyll, who sought to ensure that this would not undermine his own position as hereditary justice general in Argyllshire.¹² Perhaps more importantly, the demarcations between jurisdictions were very uncertain in practice. The “pleas of the crown,” which should in theory only have been tried by the justiciary court, turned up fairly often amongst the inferior courts’ business. One case of fire-raising, against Duncan Stewart in 1687, was heard before the sheriff court.¹³ Similarly, while the majority of indictments for murder—nineteen—were heard before the superior jurisdiction of the justiciary court, seven appeared before the sheriff.¹⁴ The same was true of animal theft, which was theoretically equivalent to robbery and thus reserved to the superior courts, none of which stopped the sheriff court from hearing more than 100 cases, approximately one-fifth of the total number.¹⁵ Just one of the “four pleas,” rape, never appeared before the inferior courts, but since John Campbell of Lerags’ appearance before the justiciary court of Edinburgh in 1673 was the only extant prosecution for this crime during the Restoration, there is a limit to what this can tell us.¹⁶ In fact, the only crimes unambiguously reserved to superior jurisdictions in practice were rebellion and treason, all 151 of the extant cases of which (nearly all related to Argyll’s rebellion) were tried either in the justiciary courts or before the Privy Council and parliament. In the rest of Scotland it was certainly possible for lower courts to try the “pleas of the crown” in this way, but only upon petition to either the high court

of judiciary or, more commonly, the privy council, which would then grant a special, one-off commission permitting inferior judges to hear the case.¹⁷ There is no evidence of similar petitions operating in Argyllshire, and the mechanism by which it was decided to hear the “pleas of the crown” before inferior jurisdictions remains opaque – if, indeed, one existed at all.

If jurisdictional blurring meant that the sheriff court sometimes tried “pleas of the crown,” the JP court similarly found itself dealing with a rather broader range of cases than might be expected. Certainly, it dealt with many of Rosehaugh’s offences “relateing to good neighbour-hood.” For instance, John Culter was a native of Antrim who had come to Argyllshire “to visit and see Persones seek and deseased, and could under God Cure the Kings evel [scrofula] and severall other dangerous deceases.” He could however produce no proof to back up his claims of miraculous healing ability, and the justices, deciding he was nothing but a charlatan and a vagrant, had him incarcerated in 1686.¹⁸ Yet some of the JP cases would more typically have been expected to appear before a sheriff. Into this category might be placed the theft of butter from John McIllehallum, ascribed to Donald McIntyler, John McIntyler and Soerlie McAllister, or the taking of a barrel of herring by Angus McEchrine and John McIlchenzie.¹⁹ Even more strikingly, the justices raised a total of twenty-two indictments for animal theft, alongside eighteen for assault, two crimes which stood most definitely outside the typical remit of a JP. Too much interpretive weight should not be placed on such details, since only a small number of JP indictments survive, all of them dating to the period 1685-86 when the chaos of Argyll’s rising no doubt played havoc with governmental and judicial structures. Nevertheless, the fact that Argyllshire’s JPs devoted some of their time to hearing serious criminal cases underlines the sense of jurisdictional imprecision, while also, incidentally, reinforcing the historiographical trends towards a more positive reassessment of the role of the Scottish JP.²⁰

The extent to which jurisdictions merged can be seen most clearly in the treatment of poaching. Such prosecutions were essentially about enforcing elite privileges by stopping tenants from damaging or unduly exploiting the natural resources on their lords’

6 Crime and punishment in early-modern Scotland

estates. As such, they were commonly pursued in barony courts.²¹ But in Argyllshire, poaching was habitually tried in the higher courts; the sheriff and justiciary courts handled nearly 200 cases each during the Restoration. This perhaps hints at an explanation for the marked jurisdictional imprecision of Argyllshire. Judicial authority was strongly concentrated in the hands of the Earls of Argyll, reinforced by the Campbell kindred's dominance of JP appointments, of which they secured nearly two-thirds across the Restoration; with all the courts firmly under the influence of Argyll, there may have been little reason to worry about precise jurisdictional demarcations.²² The extent of judicial concentration may well have been unique to Argyllshire, although further investigation of other localities, in particularly the smaller regalities, will be needed before this can be known for certain. In qualitative terms, however, such a pattern is not especially surprising, since it reflected the standard practice across early-modern Europe whereby magistrates were always drawn from the ranks of pre-existing social elites. This served to meld their innate authority at a local level—social, political and jurisdictional—with formal legal powers, thereby creating what Michael Braddick has termed a “magisterial” state of benefit to both government and elites.²³ The pattern was especially pronounced in Scotland, not only on account of heritable jurisdictions and the tendency of sheriffships likewise to become hereditary, but also because secular magistrates were often also elders involved in ecclesiastical discipline. This ensured that the secular courts formed part of a wider system of social control which, through the interconnectedness of its personnel, had the potential of working in pursuit of common values and following a consistent approach to wrongdoing.²⁴

Nonetheless, there were palpable contemporary concerns that the jurisdictional matrix in Argyllshire had become unhealthily focused on a single person in the form of the Earl of Argyll. This issue was examined by Rosehaugh in a petition to parliament in 1681:

The office of shirreffship of the shire of argyll and
the office of iustice Generall over the wholl Isles ar

established in the person of this Earle of Argyll [...] wherby not only is the dependence of a fourth part of the Kingdome of Scotland taken off the King but the 4th part of his Majesties subjects ar subjected to tryalls for their lyves and fortunes in Remote places wher they can neither have advocats and wher the Earle is both judge and partie.²⁵⁰⁰

Rosehaugh's attack reflected long-standing unease about heritable jurisdictions in general. The expansion of the Scottish state from the later sixteenth century meant that franchise courts came to be seen as a challenge to order and royal control, as well as to the impartial exercise of justice. At the same time, franchise holders, whose privileges derived solely from land-ownership, rarely boasted legal training, and as such their brand of justice was vulnerable to charges of irregularity. Franchises came under some (largely ineffective) pressure in the first half of the seventeenth century, and vanished altogether under the Commonwealth regime of the 1650s, but they were restored as part of a wider conservative reaction upon the recall of the Stuart monarchy in 1660, and would remain in existence until 1747.²⁶ The more immediate context for Rosehaugh's intervention, however, was widespread concern about Argyll's political influence in the Restoration polity. He was a key ally of John Maitland, duke of Lauderdale, Charles II's politically dominant secretary of state for Scotland, entrusted with almost vice-regal authority over the Highlands, and it was feared that his jurisdictional stranglehold over Argyllshire allowed him to use the courts in illegitimate or destabilizing ways.²⁷ The problem was graphically demonstrated during the 1670s, when a protracted quarrel between Argyll and the Macleans of Mull, rooted in the latter's indebtedness to the former, spiralled into an open feud and, ultimately, a miniature war on the western seaboard.²⁸ Argyll's judicial dominance, and his ruthless exploitation of this advantage, were widely recognized as key reasons for the escalation of the conflict; as John Lauder of Fountainhall, one of the senators of the college of justice, explained, Argyll had "gotten letters of fyre and sword against [the Macleans], and neir forced them to the fields in their oune defence, and all upon patched-up clames and decreets in

his oune Courts.”²⁹ The concentration of judicial power in Argyll’s hands thus spoke to wider concerns about the unhealthy extent of the earl’s political power, particularly within the Gaeldom.

Jurisdictional ambiguity in Argyllshire was not helped by the tendency of the Restoration regime to create extraordinary or temporary jurisdictions. Sometimes this was done through the well-worn expedient of one-off judicial commissions, a standard practice in early-modern Scotland whereby specified persons were granted licence to apprehend and/or try a named individual or group.³⁰ Although not considered in this survey because they were often geographically fluid, some of these, such as the fifteen-strong commission to arrest several members the Maclean family in July 1675, affected Argyllshire residents and necessarily formed a significant component of its overall ordering matrix.³¹ Since these bodies rarely left paperwork, it is impossible to quantify their impact on standard court business, although since commissions usually involved serious crimes like homicide or robbery, it is possible that they had the effect of reducing the number of these transgressions appearing before ordinary judges.

Other extraordinary jurisdictions were more wide-ranging and displayed more significant overlap with existing courts. In 1669, James Campbell of Lawers was granted a broad-based commission to apprehend thieves within the Highlands, including Argyllshire. This commission remained in force until 1678, although the identity of the commissioner occasionally changed, and it included a judicial element, since Lawers was accorded the right to try those he apprehended in a special court that would of necessity compete with existing jurisdictions. Something similar happened in 1682, with the creation of the 67-strong commission for pacifying the Highlands, charged with tackling disorder within Gaeldom, again including Argyllshire by, among other approaches, trying thieves in special courts.³²

Lack of records mean that no cases tried before these jurisdictions are considered in the quantitative discussions below, but the records of the final special jurisdiction of the Restoration period, the lieutenancy court, are included. A lieutenant for Argyllshire, initially John Murray, second marquis of Atholl, was appointed in 1684, and this office was periodically re-created

across the remainder of the decade. While lieutenancies of this kind had in the past been used fairly frequently to supplement weak royal control in outlying parts of Scotland, this particular lieutenancy was an emergency response to a local political crisis; the Earl of Argyll had been convicted of treason three years previously as part of a bungled attempt by Charles II to reduce his political power, and had fled overseas. By 1684 he was widely expected to launch a rebellion in the west Highlands (he would do so, to little effect, the following year).³³ Functioning essentially as a direct replacement for Argyll's now-defunct justiciary and shrieval jurisdictions, the lieutenancy was designed to fortify Argyllshire against the anticipated insurrection. As such, it competed not only with existing local courts, but also with the commissioners for pacifying the Highlands, since nobody seems to have been quite sure which of them was ultimately superior.³⁴ The formation of extraordinary jurisdictions was often justified through claiming that the existing judicial infrastructure was too slack or confused to suppress criminal activity effectively. It is however doubtful whether the creation of additional, often ill-defined, jurisdictions did very much to clarify the already tangled structure of secular courts.

Crimes and Criminals

Scotland's judicial infrastructure may have been confused, but according to some conventional readings it must also have been effective, since Scottish society in the early-modern period used to be considered as relatively less prone to criminality than many other parts of Europe.³⁵ Such conclusions, however, always sat uneasily with the concurrent historiographical model (itself subject to challenge) of pre-modern Scotland being particularly violent, thanks in no small part to the persistence of inter-family conflict alongside localized disorder in the Highlands and Borders.³⁶ Moreover, they emerged in the absence of detailed empirical research into Scottish criminality, with more recent work beginning to call them into question and instead recognizing crime as not only relatively common, but by some interpretations—notably that of Falconer—a central, even necessary component of everyday social interactions.³⁷ More generally, the kind of quantitative analysis

required to underpin any assessment of historic crime rates is inherently problematic. Some of this uncertainty is rooted in the ubiquitous issue of non-survival of records, but a more profound difficulty surrounds the “dark figure,” meaning criminal activity that was never prosecuted or even recorded in the first place, which inevitably means that recorded crime, as revealed through judicial records, significantly under-states actual levels of deviance. The reasons for this phenomenon have been extensively discussed, with explanations generally revolving around the bureaucratic limitations of early-modern states, the prevalence of informal, extra-judicial punishment, and the fact that authorities tended to view prosecution as an exemplary tool. The upshot is that robust reconstructions of actual crime rates are generally regarded as unattainable.³⁸ Conclusions, in short, can only ever be considered indicative of a much wider, unrecoverable criminal experience.

Nonetheless, historians have attempted to use prosecution material to outline patterns of criminal behaviour, especially in England. English felony prosecutions related strongly to property offences, which probably accounted for more than three-quarters of assize business—and more in London, where property crime was overwhelmingly dominant.³⁹ Concentrated local studies have added nuance to this overarching pattern. In Essex, property crime fell in relative importance across the seventeenth century, with other misdemeanours—violent offences, drink-related crime and, especially, refusal to work—becoming proportionately more important.⁴⁰ By contrast, property crime, especially grand larceny, remained the most common type of offence tried in Surrey and Sussex, although petty assault was also quite common in the more urbanized parts of Surrey, while violent crime, including murder, was disproportionately frequent in eastern Sussex.⁴¹ Meanwhile, crimes against the peace (breach of the peace, assault, riot and defamation) accounted for about 50% of misdemeanour-level indictments in Middlesex.⁴²

Clear patterns such as these are not yet discernible from the historiography of Scottish crime in the early-modern period, even if some preliminary observations have been made. For Chris Whatley, murder and other homicides occurred relatively infrequently, but assaults on government officials were very common, as were

vagrancy and “everyday” and “comparatively minor crimes” like drunkenness, petty assault, and neighbourly disputes, a conclusion with which Anne-Marie Kilday broadly concurs, albeit she notes that individual crimes could still be extremely violent.⁴³ Bill Knox’s analysis of homicide suggests a fairly low and static rate overall which conceals spikes at times of acute social or political turmoil, albeit his work is restricted to the eighteenth century.⁴⁴ Brian Levack, meanwhile, points out that sexual offences appear much more frequently in Scotland than in many other countries, but suggests this was due less to an incorrigibly licentious population than to a uniquely intrusive and successful prosecuting framework maintained by the Church.⁴⁵ In the most detailed extant study, Falconer has shown that, taken together, verbal and physical assaults were the most common crimes prosecuted in post-Reformation Aberdeen, although regulatory transgressions such as statute-breaking were almost as ubiquitous, while offences involving disobedience to authority and unspecified “strubulance” (disturbance) grew in prominence across the later sixteenth century, albeit remaining relatively rare.⁴⁶

But these surveys, few though they are, deal largely with the situation in Lowland Scotland; criminality in the Highlands, of which Argyllshire was of course part, is still less well-served, and has often been discussed in the most generalized terms. Clanship is usually blamed for Highland disorder, although most historians agree that the classic model of lawlessness rooted in incessant clan feuding is no longer tenable as regards the later seventeenth century. Historiographical attention is much more often caught by banditry and cattle theft, crimes which were supposedly endemic throughout the Highlands, facilitated as much by lax governmental control as on-going clan tensions.⁴⁷ Recent research has however cast doubt upon the extent of Highland banditry, suggesting instead that the problem was much more marginal and localized than historians and contemporary polemicists imply.⁴⁸ Highland criminality therefore remains difficult to pin down, and close analysis of Argyllshire’s extant court records could suggest the beginnings of a more nuanced assessment.

A total of 1,489 indictments have been located relating to Restoration Argyllshire.⁴⁹ These offences are broken down by cate-

12 Crime and punishment in early-modern Scotland

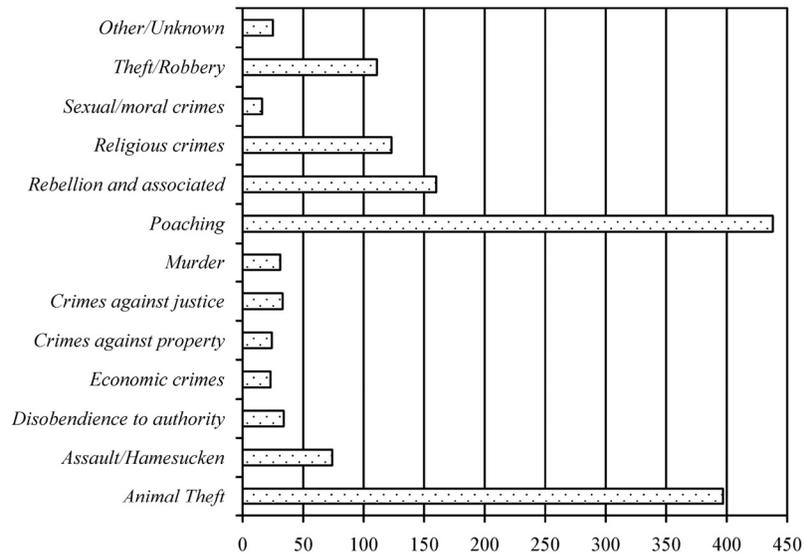


Figure 1: Types of crime tried in Argyllshire jurisdictions, 1660-1688

gory in Figure 1. This graph does not claim to offer a comprehensive typology of Scottish crime, and certainly it is not expected that the classifications offered here could straightforwardly be applied to other jurisdictions. Instead, they represent an attempt to render the disparate pattern of prosecutory activity in Argyllshire intelligible to modern readers, which inevitably means that the categories used are to some extent both arbitrary and anachronistic.⁵⁰ Moreover, since contemporary definitions of “crime” in Scotland were generally rooted in statute, there are many other potential crimes that do not appear in the Argyllshire records and so are not included in these figures, for example false coining or forestalling (hoarding goods to inflate their price).⁵¹ The graph is nonetheless serviceable for illustrative purposes, and it suggests that the majority of offences involved poaching (438) or theft of animals (397), which together accounted for over 50 percent of all indictments. Rebellion and associated offences were the next most common crimes (160; 11%), followed

by religious misdemeanours (122; 8%) and theft or robbery of goods other than livestock (111; 7%). The remaining fifth of indictments involved a range of more unusual offences, including, in descending order, assault and hamesucken (74; 5%), disobedience of lawful authority (34; 2%), crimes against justice (33; 2%), murder (31; 2%), property crimes aside from theft and robbery (24; 2%), economic offences (23; 2%), and sexual and moral crime (16; 1%).

Of course, the exact nature of the crimes denoted by these headline categories varied enormously.⁵² Assault, for example, often involved simple interpersonal violence, as in the case of Duncan Fisher, an Inveraray merchant who was fined £50 in 1678 for beating townswoman Margaret McDougall with a wooden cane.⁵³ But violence was a flexible tool that could be used for multiple purposes, and “assault” could therefore denote a range of very different behaviours. Thus, when James McNachtan and Dougall McIllechowann were convicted of assaulting one another in 1687 after becoming involved in a brawl, the charge reflected not an act of domination imposed on one individual by another, but rather mutual transgression of accepted behavioural codes; here was violence used as a mark of insufficient civility.⁵⁴ In the rather more one-sided case of Alexander McIlvernock, who in 1684 suffered a gang assault from three Campbells who were later fined for the incident, violence was probably being used to uphold a sense of familial honour or solidarity.⁵⁵ Differently again, John Wylie, whose attack on Donald Mclea in 1687 was reputedly informed by Mclea’s position as collector of the excise at Campbeltown, was almost using violence as a form of personal rebellion, and thus “assault” in his case took on a distinctly more political edge.⁵⁶

Hamesucken—an offence peculiar to Scots law and defined as assault in one’s home—similarly encompassed a spectrum of activity with a range of meanings. The assault suffered by Ann Stirling of Taynish, attacked in her house by John Campbell in 1684 and forced to sign a money bond, was probably rooted in a family dispute that seems to have stretched back upwards of twenty years, and looks rather different, both in form and in purpose, from the siege ordered by Robert Campbell of

Silvercraigs on the house of Marie Mckerras in 1685, an action presumably connected to Argyll's rebellion.⁵⁷

A similar point can be made about those tried for stealing. Most indictments centred on fairly petty theft, often with an opportunistic aspect. This applied, for example, to the chapman Hugh McLean, who was cited in 1673 for breaking into the house of John McNicoll at Loch Striven and stealing a small amount of cloth and cash.⁵⁸ Foodstuffs were even more commonly subject to impulsive theft, and in some cases the motivation may not have been profit; the fact that John Tinkler, accused of stealing "corn" in 1685, was probably a vagrant might suggest he was simply desperate for food.⁵⁹ Some crimes were certainly more calculated. David Carriders's indictment in 1683 for stealing goods from the booth of a fellow Inveraray merchant probably had less to do with opportunism than indebtedness or mercantile rivalry, especially since Carriders, as a burgher, was a member of the urban elite.⁶⁰ Thefts by deception (such as Donald McMaith's indictment for cheating a Kintyre tailor in 1686) or committed by gangs (like the nine-strong group who in 1687 stole a selection of victuals from Angus MacDoanld of Islay) were equally testament to the wide range of behaviours involved in theft prosecutions.⁶¹

The variable nature of criminal activity is easily seen through an examination of the most high-profile crime of them all, animal theft. The majority of offences in this category were small-scale; it was the theft of a single horse that occasioned the appearance of Donald Glesse McEachaireid before the JP court in 1686, and his case could stand for numerous others in which apparently first-time perpetrators lifted only a very small number of animals.⁶² Theft of this kind was often opportunistic and sometimes had a transparently subsistence motive. During the trial of Archibald and Mary McIndeor in 1674 for stealing a sheep, it was specifically recorded that the pair, described as long-term "tinkers," stole the animal in order to eat it.⁶³ Of course, in some cases animal theft was more about making money. John and Patrick McConachie, tried together in 1674, stole a number of animals in Argyllshire and subsequently drove them over the county border into Perthshire, where they sold them for a total of around £40.⁶⁴ Such activity could easily evolve into career criminality. We know

that hardened bandits operated in other parts of Restoration Scotland,⁶⁵ and Argyllshire had its own cohort of more persistent robbers. Among them were the trio of Hew Camerone, Donald Camerone and Duncan McAphie, tried and convicted together in 1676 for a litany of thefts stretching back to the late 1660s.⁶⁶

However, the statistical prominence of animal-theft cases is attributable neither to hardened criminals nor to the plethora of small-time thieves. Rather, the county-wide spasm of disorder that accompanied Argyll's rebellion in 1685 occasioned a large proportion of the extant prosecutions. Although this rising was a minor affair, lasting less than two months and involving no major military actions, the damage inflicted on Argyllshire by both the rebel and royal forces, particularly in terms of livestock theft, was extensive and widely decried.⁶⁷ The court records reflect this; six animal-theft indictments survive from 1684, thirty-four from 1686 but 187 from 1685, representing nearly half of all extant prosecutions (although not all of the 1685 cases were linked to Argyll's rising). Unsurprisingly, crimes committed against this backdrop tended to represent the most audacious of all animal-lifting activity, either because of the sheer scale of the theft (Gilleis McGilleis of Glenmore lost fifty-five animals in one incident) or because of the preponderance of gang-based attacks (such as the forty-four-strong party indicted for raiding the lands of the Campbells of Inverliver). As such, the 1685 rebellion artificially inflates the animal-theft statistics, but the importance of this effect should not be exaggerated; even if all prosecutions in 1685 are omitted, the remaining 210 animal theft cases would still make the second most-common transgression after poaching.

If all this points towards the variability of criminal activity in Restoration Argyllshire, it should also be noted that the figures contain a number of prosecutions for crimes that were very similar to one another. The best example of this is the prevalence of poaching offences, almost all of which involved illegal killing of livestock, especially fish, or damaging natural resources like timber, moors, or pasture. In the context of Restoration-era religious controversies, characterized by repeated attempts to suppress Presbyterian nonconformity by an Episcopalian establishment, it should equally be no surprise that most religious

prosecutions were for Presbyterian nonconformity—although, since 100 of the 123 recorded religious transgressions actually related to the same event, namely attending a pair of “seditious” Presbyterian sermons preached at Lochhead in 1685, the extent of anti-dissenting activity in the courts was arguably quite limited (perhaps reflecting the earl’s own private Presbyterian proclivities).⁶⁸

Given that no early-modern legal systems could possibly hope to catch and prosecute all law-breakers, it is worth asking what the purpose of all these trials was. Falconer’s work on sixteenth-century Aberdeen interprets crime and criminal prosecution from a social perspective. In his reading, both crime, particularly petty crime, and its prosecution were part of an ongoing power dialogue; people committing or prosecuting crimes did so in an attempt to demonstrate or secure dominance over their neighbours or wider communities, and as such were engaged in a “negotiation of [...] social power.”⁶⁹ Falconer’s work has not so far been followed up by additional detailed studies within a Scottish context, and it is not yet clear that his understanding of prosecution holds true outwith his particular setting of Reformation-era towns. Some trials certainly could be made to fit his paradigm; the aforementioned theft conviction of David Carriders in 1683—perhaps significantly taking place within another, albeit much smaller urban setting, Inveraray—is a good example.⁷⁰ In other cases, however, sociological explanations seem rather less convincing. Hugh McLean, executed in 1673 for robbery, was a “chapman” and his (apparently uncaught) accomplice, Gillicalum McNeilas, a “tinker.” This probably made them strangers, and while punishment of such people might be interpreted as a mechanism for maintaining social cohesion and reinforcing normative behavioural codes, it is difficult to view their crimes as part of an ongoing power dialogue between established members of the local community.⁷¹ A more satisfying explanation might be constructed by noting that, the complexities of individual criminal activity notwithstanding, the Argyllshire data demonstrates a clear overall focus on crimes against property; taken together, poaching, theft, robbery and other property offences account for some two-thirds of extant indictments.⁷² Such a focus on property crime was quite common in the early-modern period, and underpins the thesis

proffered by Douglas Hay in an English context that public courts represented a key bulwark of conventional social elites insofar as they allowed them to protect their control over economic resources.⁷³ The Argyllshire evidence suggests that the conceptual understanding of early-modern justice systems as tools of elite control has potential resonance in a Scottish context. This suggests that, if criminal prosecution can be seen as part of an ongoing dialogue about power and status between peers, it can just as easily be interpreted as a tool of socio-economic dominance by the elite specifically.

It is considerably easier to establish overarching patterns of prosecution than to build profiles of the criminals themselves, about whose personal details the sources are rarely explicit; most accused individuals are known only by their names. Nonetheless, some very broad points can be made. Most appear to have been from the lower strata of society, probably small tenants or cottars, and some, like John Tinkler, were certainly very poor—hardly surprising, since the limited existing research on Scottish prosecution patterns would tend to suggest that lower-status individuals predominated, and the same could be said about the much better understood English situation.⁷⁴ Identifiably more august individuals tended to receive citations only infrequently, usually for crimes reflecting their greater wealth. For instance, Duncan Campbell of Ardbeg (on the island of Islay) was tried in 1675 for orchestrating an attack on some soldiers sent to quarter on his lands for tax deficiencies.⁷⁵ The majority of criminals seem to have lived in rural communities, although a few town residents, such as the aforementioned Inveraray burghess Duncan Fisher, did receive citations. While partly explicable by the non-survival of any burgh court records, this also reflected the social make-up of a very lightly urbanized county, and the same can be said about the predominance of Gaelic names. Nearly 1,000 of the indictments—about two-thirds—were raised against individuals whose names began with “Mac” or “Nic,” and many more bore potentially Gaelic designations such as Campbell or Cameron. This, of course, is a crude means of measuring the Gaelic presence since there is no guarantee that people with Gaelic-sounding names were ethnically or linguistically Gaels, but in the absence of more detailed information

it does provide a useful indicator that the majority Highland component of Argyllshire society may also have made up the lion's share of the recorded criminal population.

Given the predominance of Gaelic names, as well as the frequency of animal theft, it is worth returning to the conventional historiographical model of clan-based banditry and asking how far it accords with Argyllshire's experience. Clannish thievery does raise its head occasionally, for example in 1677, when Alexander Campbell of Lochinell recorded that he had recently lost more than 2,000 cows, sheep, horses and goats through raids launched by his enemies, principally the Camerons and Macleans.⁷⁶ Such instances do not however appear in the judicial records, which usually treat criminals as individuals rather than potential or actual members of wider kin groupings. This dichotomy might be thought to vindicate the long-cherished historiographical assumption of a fundamental separation between clanship and the formal jurisdictions of the Scottish state; in this reading, clanship and the legal system represented two distinct structures for addressing grievances; the former utilizing ritualized violence to settle disputes, the latter using the courts.⁷⁷ Yet this interpretation should be treated with caution, and not just because historians are increasingly sceptical about notions of a stark divide between Highland and Lowland society.⁷⁸ Lochinell's case, as well as most other instances of apparent clan banditry in Restoration Argyllshire, took place against the backdrop of conflict, specifically the campaign waged by the Campbells of Argyll (backed by the government) against the allegedly rebellious Macleans. These were regarded as acts of war, not simple banditry, and can shed little if any light on the normal workings of criminal justice. In any case, notions of a division between clanship and officialdom wholly underestimate the degree of Highland integration by this period, which was sufficiently far advanced that regional elites were as comfortable as anybody else in Scotland with exploiting the law, to which most resorted much more frequently to than the sword.⁷⁹ Thus, the absence of a significant degree of clan-based banditry from the court records, while certainly not suggesting it did not occur, does support recent historiographical assertions that we must not endow it with greater significance than it merits; most crime in Restoration Argyllshire

probably really was the sort of individual or small-group law-breaking recorded by the courts.

One point that can be made with greater certainty is that the overwhelming majority of indictments were raised against men—a pattern common to most jurisdictions in this period, and which has been argued to reflect a gendered interpretation of criminality that tended to remove agency from female criminals, with contemporaries often assuming instead that women caught up in crime must have been hoodwinked or forced into it.⁸⁰ Only thirty-five of the accused were female, meaning that fully 1,458, nearly 98 percent, were male. It would traditionally have been expected that female crimes would be concentrated at the less violent end of the spectrum, and that women would most likely be prosecuted for sexual or moral offences (even if such transgressions were generally tried in ecclesiastical rather than secular courts), or for verbal assaults.⁸¹ Yet empirical research has increasingly destabilized this crude typology of “female” crime, and previous exploration of Scottish sources from the sixteenth and eighteenth centuries, as well as earlier medieval evidence, has in fact suggested that women were as capable of committing as diverse a range of crimes as men, including violent crime. As Figure 2 shows, the admittedly scant data from Argyllshire suggests this thesis might also be valid for the Restoration.⁸² Certainly typical “female” crimes were in evidence. Janet McNicoll was strangled after being convicted of practising witchcraft on Rothesay in 1673; the same year saw Mary NcThomas executed for incest; Catharein McLeod was accused of murdering one or more of her illegitimate babies in 1685; Janet Armour was acquitted in 1680 of helping her sister to commit infanticide; and three women, Mary NcLauchlan in 1673, Mary Macmillan in 1679, and Finvall NcCannill in 1680, faced charges of adultery.⁸³

These, however, accounted for only one-fifth of female prosecutions appearing in the records. The remaining proportion was composed of many of the same crimes as committed by men (the big exception being poaching, for which no women were indicted), and indeed, some women were accused of surprisingly vicious acts. Marie NcLean, for example, was in 1670 fined 40s for

20 Crime and punishment in early-modern Scotland

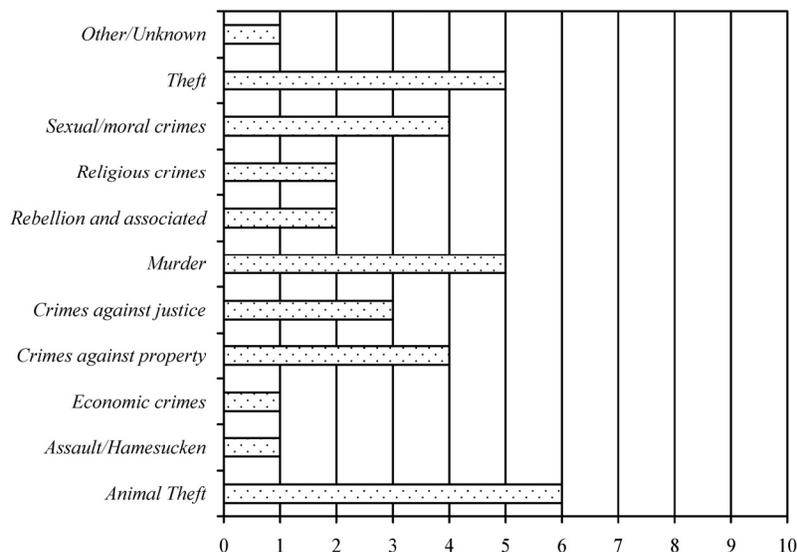


Figure 2: Female criminality in Argyllshire, 1660-1688⁸⁴

entering the house of her daughter-in-law, Marie Camerone, and beating her, allegedly in collusion with her son (Camerone's husband), Jon Mcolchaynich.⁸⁵ Two women, designated only as "Memhonich" and "Ncinturnor," were convicted of assisting in the violent destruction of property belonging to one heritor, John McCorcaddall, in retaliation for his confiscating fifty head of livestock in 1684.⁸⁶ Finwall MacRank, meanwhile, was indicted for fire-raising in 1680, one of only three known cases of this crime, while Margaret Macilchallum was accused, alongside two male accomplices, of murdering Donald Maclucas of Achluachrach in 1679.⁸⁷ Substantial historiographical discussion exists about the nature of female criminality and its prosecution, and the above examples would tend to accord with the suggestion of both Ewan and Falconer that early-modern women were as capable as their male counterparts of using crime and violence as tools of social or interpersonal positioning.⁸⁸ In terms of the wider perception of female criminality, historians have repeatedly noted the contemporary expectation that women should conform to norms of

submissive femininity, which ensured that serious female law-breaking was seen not just as deviant, but also unnatural, resulting in it being proportionally more heavily prosecuted. By the same logic, deliberately dishonourable physical punishments, up to and including execution, tended to be imposed more readily on female criminals.⁸⁹ The strong presence of serious offending amongst indicted women might suggest that the particular horror felt for female violence did indeed extend into Argyllshire, while the marked presence of scourging as a punishment (imposed on 15 percent of indicted women, against a general proportion of 2 percent) similarly implies a desire to make an example of “unfeminine” women. In truth, however, the number of recorded female criminals is much too small to support meaningful conclusions. All that can be said, even tentatively, is that women seem to have been less likely to face prosecution than men—perhaps reflecting gender assumptions about the relationship between women and deviance—but when they did, they were not limited to any particular crime.

Punishments

In his *Institutions of the Law of Scotland* (1684), Rosehaugh observed that “Crimes are in Scotland either punished capitally, by death; or pecunially, by a certain fine; or Arbitrarily, at the discretion of the Judge.” He went on to note the specific punishments typically imposed for different types of crime. Capital crimes incorporated a wide range of offences including treason, blasphemy, manslaughter, murder, robbery (including animal theft), notorious adultery, incest, duelling, assault, hamesucken, witchcraft and several others. Pecuniary crimes generally referred to transgressions such as slaying red fish or cutting green wood which might be grouped together as poaching. Most remaining crimes—common adultery, petty theft, slander, breaking the king’s protection and so on—were subject to Rosehaugh’s “arbitrary” or discretionary punishment, but there were others for which no statutory punishment was laid down and which were generally dealt with by means of confiscation. In this class were offences such as bigamy, perjury, usury and inhibiting messengers from performing their duties.⁹⁰ Rosehaugh thus presented a clear hierarchy of crimes

and statutory punishments, and one which is noteworthy for its harshness; the range of offences that could conceivably result in a sentence of death was strikingly broad.

Rosehaugh's schema is reflected in long-established historiographical assumptions about the comparatively harsh nature of Scotland's courts. According to this line, convicted criminals were not only likely to face serious sanctions, such as execution, but once cited, panels were relatively less likely than in many other jurisdictions to be acquitted.⁹¹ Although sometimes tested by empirical research, this belief in systemic harshness is generally rooted in the wording of the legislative underpinning, echoed in works of codification such as those of Rosehaugh.⁹² But there are grounds for doubting that such sources accurately reflected the situation on the ground; they certainly did not in several other European jurisdictions, for example in Germany, where the harsh terms of the *Carolina* law code, dating from 1523, were increasingly diluted in practice during the seventeenth century.⁹³ That something similar may have been happening in Scotland has previously been demonstrated in reference to sexual crimes, which rarely attracted the statutory sentences of execution, instead generally being punished with fines.⁹⁴ In light of this, the extent to which Scotland's fabled stringency held true remains unclear, and it is therefore worth asking whether judicial punishments in Argyllshire followed prescribed or logical patterns.

Of the 1,489 indictments recorded in relation to Argyllshire, 158 (11%) resulted in verdicts of not guilty or not proven. This does indeed appear to be a very low acquittal rate, certainly in comparison with English courts, where about one-third of cases typically ended in a verdict of not guilty.⁹⁵ Nonetheless, a note of caution should be sounded because there are 484 cases (33%) for which no verdict is recorded, usually because the case survives only in the form of an indictment or a collection of depositions; had verdicts been recorded for these, it is possible that the proportion of acquittals would be different.

This leaves 847 cases resulting in guilty verdicts and for which punishments are recorded. Figure 3 summarizes the sanctions imposed in these cases. Easily the most common form of punishment was fining, accounting for 508 cases, or nearly 60

percent of extant penalties. Orders for convicted parties to provide compensation to their victims were the next most common punishment (150; 18%). Execution (71; 8%), transportation (63; 7%), outlawry (28; 3%) and scourging or whipping (22; 2%) made up the bulk of the remaining punishments. The sentences grouped together in Figure 3 as “other” represent the most novel forms of penalty. They include two instances of what might be termed “community service,” although this was not as lenient a punishment as might be imagined. Both cases came before the sheriff court in 1684, one concerning petty theft and the other animal theft, and both of the accused (Robert Thomsone and Donald Mcneill respectively) were sentenced to serve as public executioner for Argyllshire—a punishment that reflected both the inherent unpleasantness of this duty and the deep dishonour conventionally associated with those performing it.⁹⁶ Two cases of mutilation, involving branding the letter “T” onto the faces of two thieves, John MacConchie in 1672 and John Maclean in 1673, are also recorded, while the dearth of sentences for imprisonment, imposed just once for the rather unusual case of the immigrant vagabond John Culter, reflects the broader unpopularity of this expensive form of punishment until the modern era.⁹⁷

If the data are further distilled in terms of connecting particular crimes with their punishments, some clear patterns emerge. Several of the transgressions described as capital by Rosehaugh were invariably treated as such in practice. Murder and witchcraft were always punished by death, as were the two extant cases of treason and solitary recorded punishments for incest and bestiality. Rosehaugh’s description of poaching-type offences as pecuniary was similarly accurate, since those convicted of such crimes were always fined, the penalty usually fixed in the range of £5-£20, although in isolated cases as high as £50. Yet inconsistencies did arise, especially as regards capital offences. Finvall MacCallen’s conviction for notorious adultery in 1680 was punished by scourging, not death.⁹⁸ This reluctance to execute for adultery was well-established; in 1673, the case of John Crawford and Mary McLauchlan, both convicted of this crime, was remitted to the Privy Council specifically because the assize refused to impose the statutory punishment.⁹⁹

24 Crime and punishment in early-modern Scotland

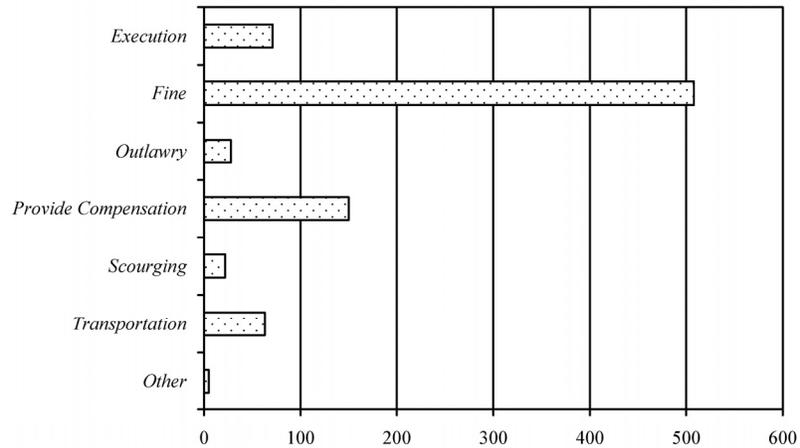


Figure 3: Punishments in Argyllshire cases, 1660-1688¹⁰⁰

Animal thefts were only occasionally treated as a capital matter, and in many of the thirty cases where execution was ordered there were exacerbating factors. John McConachie VcKaig, executed in 1674 after stealing a single horse from Soroba, near Oban, was the same man who had been branded two years earlier, and thus he already had a criminal record. Similarly, Donald McIlmichell, executed in 1677, was not only a thief, but reputedly a vagabond and bandit.¹⁰¹ Conversely, an unblemished record might facilitate the reduction of a death sentence, as happened to David McDavie when he was tried before the justiciary court in 1680 for stealing two cows—past innocence was specifically cited in the court’s decision to grant him a commutation to mere scourging.¹⁰² Overall, though, the most common punishment for animal theft was a simple order to provide compensation, or in other cases the imposition of a hefty fine, sometimes up to £400. The distance between theory and practice was even starker in cases of assault or hamesucken. Also capital crimes, there are nonetheless no examples of them attracting a sentence of execution in Restoration Argyllshire—in almost all cases where a conviction is recorded, the accused was fined, even when the crime seems to have been particularly vicious; for example, John McLucas’ attack on Hugh

Macewan with an iron bar in Barbrek in 1684 earned only a financial penalty.¹⁰³

If there was some variety in the punishment of capital crimes, there was obviously much more scope for it in dealing with “arbitrary” or “miscellaneous” offences. The treatment of petty theft illustrates this point most clearly. Seventy-three punishments are recorded, of which seven were sentences of outlawry imposed for non-attendance at court. Of the remaining sixty-six, most involved reimbursing the victim, sometimes alongside providing a compensatory payment. Thus, Donald McPherson, Lauchlan McEan and Hector McPherson, jointly convicted of stealing household goods from Lord Neil Campbell in 1685, were each ordered to make good the losses and pay an additional £100 between them.¹⁰⁴ The preference for settling theft cases through compensation reflects a well-established pattern of what Falconer has called “restorative” justice, by which transgressors were required to take action to re-establish the *status quo ante* and thereby restore harmony between individuals and, by extension, the community at large; in this sense, apparently “private” settlements were thoroughly “public” in their implications.¹⁰⁵ However, a minority of theft cases attracted punitive rather than compensatory sanctions, even if the criteria upon which this decision rested is obscure. One of those sentenced to judicial mutilation, John McConachie in 1673, was for instance a thief. Fining was slightly more common, occurring five times in total.¹⁰⁶ Finally, in three cases convicted thieves were sentenced to death, on each occasion because they were perceived as somehow hardened, either because they were repeat offenders (John dow Maclean in 1673 and Hugh Leitch in 1680), or because they were also vagrants (Hugh McLean in 1673).¹⁰⁷

What emerged from all of this is a system in which theory and practice often diverged. Here it is useful to consider Cynthia Herrup’s work on the definition of crime. Addressing the long-acknowledged gap between those convicted of capital crimes in early-modern England and those actually executed, Herrup suggests that contemporaries made a conscious distinction between mere “law-breakers,” whose actions were seen as isolated slips reflective of the inherent weaknesses of human nature, and true criminals,

whose behavior was with deliberate malice, often compounded by additional factors like violence. This led, Herrup contends, to two parallel definitions of criminality—a rigid “technical” definition by which anyone committing a capital offence was liable for execution, and a more flexible “operative” definition which left significant room for mercy and which assumed that perpetrators might be able to return to being valued members of the community.¹⁰⁸ While Herrup’s schema does not hold true for Scotland’s central criminal jurisdictions, whose preoccupation with the most serious crimes led to consistently high rates of execution (in a sample of criminal cases heard before the court of the justice general between 1661 and 1668, 80 percent of extant sentences were for death), it has been applied to some evidence from local Scottish courts, for example by Falconer to sixteenth-century Aberdeen.¹⁰⁹ The Argyllshire data suggest a similar pattern. Rosehaugh’s “technical” hierarchy of capital, pecuniary and arbitrary offences failed to match “operative” reality. Execution remained an uncommon sentence, usually reserved for serious or serial offenders (Herrup’s “true” criminals), and courts were in most cases likely to show a degree of indulgence by imposing lesser, though still heavy punishments which did not result in permanent social exclusion. This meant, in practice, that Argyllshire’s courts tended to opt for material sanction, which they imposed on nearly four-fifths of recorded occasions. As a result, Scotland’s system of criminal justice, at least as it functioned in Argyllshire, was more “pecuniary” than “capital,” consequently providing much greater space for the rehabilitation and reintegration of offenders than the letter of the law implied.

Conclusion

Historians of crime, particularly in England where the field is most fully developed, have demonstrated the value of this theme in achieving a fuller understanding of the dynamics of early-modern society, the nature of authority and processes of social and political change. Research into criminality in Scotland is as yet too underdeveloped to test fully the applicability of these conceptual and methodological advances to the Scottish evidence. Yet this case-study of Argyllshire has highlighted a number of points meriting

further exploration. The judicial infrastructure, characterized by overlapping jurisdictions whose activities often strayed beyond their formal remits, was imprecise, a feature enhanced by the government's tendency to create temporary jurisdictions, although it is not clear that this was inherently problematic. A fluid structure exploited the generally magisterial nature of authority in Scotland, and it might also, as Stephen Davies suggests, have offered both litigants and panels potentially useful loopholes or ambiguities to exploit.¹¹⁰ The Argyllshire evidence is however largely silent on this latter claim and in any case the extraordinary concentration of judicial authority in the hands of the comital house may well have rendered it moot. This unwieldy court system spent a reasonable amount of its time dealing with a parade of near-identical poaching offences, although it also prosecuted a host of other crimes that reflected a varied range of criminal activities, especially concentrated around the theft of goods and livestock. The people committing these crimes were almost always male (although female criminals were not unknown), and seem to have been largely rural dwellers from the lower strata of society, probably including a substantial number of Gaels. Once indicted, they were very likely to be convicted, but much less likely than is often supposed to face the hangman's noose; material punishments were considerably more common, even for supposedly capital offences. All of this suggests a court system which was in essence moderate and malleable, focused heavily on the protection of private property and rather less concerned with violent or interpersonal crime. In all of these ways, the Argyllshire evidence is comparable with our admittedly incomplete picture of Scottish criminality derived from an as yet underdeveloped historiography, but only further empirical research will establish the extent to which this model holds true, in turn allowing Scottish historians to take fuller advantage of the insights offered by their counterparts working on other early-modern jurisdictions. In the meantime, the unremarkable nature of Argyllshire's criminal records is suggestive in another way, for it adds weight to the growing body of evidence calling into question the existence of a stark Highland/Lowland divide in the late seventeenth century.¹¹¹ Perhaps, in terms of criminality at least,

early-modern Scotland was a more coherent entity than is sometimes assumed.

NOTES

¹ Amongst the most significant of these are J. A. Sharpe, *Crime in Seventeenth-Century England: A County Study* (Cambridge: Cambridge University Press, 1983).; J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Oxford: Oxford University Press, 1986).; C. B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987).; J. M. Beattie, *Policing and Punishment in London 1660-1750: Urban Crime and the Limits of Terror* (Oxford: Oxford University Press, 2001).; R. B. Shoemaker, *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, c.1660-1725* (Cambridge: Cambridge University Press, 2008). For a Welsh perspective, see S. Howard, *Law and Disorder in Early Modern Wales: Crime and Authority in the Denbighshire Courts, c.1660-1730* (Cardiff: University of Wales Press, 2008).

² The Aberdonian case-study is J. R. D. Falconer, *Crime and Community in Reformation Scotland* (London: Pickering & Chatto, 2013). The most important eighteenth-century work is A.-M. Kilday, *Women and Violent Crime in Enlightenment Scotland* (Woodbridge: Boydell, 2007). See also W. W. Knox, "Homicide in Eighteenth Century Scotland: Numbers and Theories," *Scottish Historical Review*, 94:1 (2015): 55-62. Other significant contributions include Y. G. Brown and R. Ferguson (eds.), *Twisted Sisters: Women, Crime and Deviance in Scotland since 1400* (East Linton: Tuckwell Press, 2002); J. R. D. Falconer, "'Mony utheris divars odious crymes': Women, Petty Crime and Power in Later Sixteenth Century Aberdeen", *Crime and Punishment*, 4, no. 1 (2010): 7-36.; E. Ewan, "Disorderly Damsels? Women and Interpersonal Violence in Pre-Reformation Scotland," *Scottish Historical Review*, 89, no. 2 (2010): 153-71.; E. Ewan, "Impatient Griseldas: Women and the Perpetration of Violence in Sixteenth-Century Glasgow", *Florilegium*, 28 (2011), 149-68.

³ The best introduction to the significance and rationale of historical research into crime remains J. A. Sharpe, *Crime in Early Modern England 1550-1750* (London: Routledge, 1984), 1-28.

⁴ These data, which are also the basis of the tables below, are drawn from the following sources: Inveraray Sheriff Court: Processes, 1671-1699,

SC54/10/1/10/1, National Records of Scotland [NRS]; Dornoch Sheriff Court: Processes, 1582-1735, SC9/7/1, NRS [wrongly catalogued; actually Inveraray]; Argyllshire Justice of the Peace Court: Processes, 1686, JP36/5/1, NRS; Justiciary Court of Argyll: Processes, 1685, SC54/17/2/6/2, NRS; Justiciary Court of Argyll: Books of Adjournal, 1664-1711, SC54/17/1/1-2, NRS; K. M. Brown *et al* (eds.), *The Records of the Parliament of Scotland to 1707* (St Andrews, 2007-2014), www.rps.ac.uk [RPS]; P. H. Brown *et al.* (eds.), *The Register of the Privy Council of Scotland, Third Series, 1661–91*, 16 vols. (Edinburgh: H.M. Stationary Office, 1908–70); W. G. Scott-Moncrieff (ed.), *The Records of the Proceedings of the Justiciary Court, Edinburgh, 1661–1678*, 2 vols. (Edinburgh: Scottish History Society, 1905).

⁵ For discussion of jurisdictional patterns in particular territories, see M. Weisser, “Crime and Punishment in Early Modern Spain” in *Crime and the Law: The Social History of Crime in Western Europe since 1500*, ed. V. A. C. Gatrell, B. Lenman and G. Parker (London: Europa, 1980), 76-96.; J. R. Ruff, *Crime, Justice and Public Order in Old Regime France: The Sénéchaussées of Libourne and Bazas, 1696-1789* (London, 1984), 24-37.; Sharpe, *Crime in Early Modern England 1550-1750*, 21-25.; U. Rublack, *The Crimes of Women in Early Modern Germany* (Oxford: Oxford University Press, 1999), 46-54.

⁶ F. Bigwood, “The Courts of Argyll, 1664-1825,” *Scottish Archives* 10 (2004): 27-38.; Kilday, *Women and Violent Crime*, 25-38. The most useful modern summary of Scottish courts and their jurisdictions is S. J. Davies, “The Courts and the Scottish Legal System, 1600-1747: The Case of Stirlingshire” in *Crime and the Law*, 120-54. Davies’ arguments can be traced in more detail in S. J. Davies, “Law and Order in Stirlingshire, 1637-1747” (PhD diss., University of St Andrews, 1983). For another very useful reconstruction of the jurisdictional matrix at the local level, albeit for a slightly earlier period, see H. J. Cornell, “Gender, Sex and Social Control: East Lothian, 1610-1640” (PhD diss., University of Edinburgh, 2012), 41-81. G. Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (Edinburgh, 1677), recently edited in a scholarly edition as O. Robertson (ed.), *The Laws and Customs of Scotland in Matters Criminal by Sir George Mackenzie* (Edinburgh: Stair Society, 2012), offers the most important contemporary view.

⁷ RPS, M1661/1/58; RPCS, xi, 129-130.

⁸ J. M. Thomson (ed.), *The Register of the Great Seal of Scotland*, 11 vols. (Edinburgh: H.M. General Register House, 1882–1914), ix, 559.

⁹ A. Grant, “Franchises North of the Border: Baronies and Regalities in Medieval Scotland” in *Liberties and Identities in Medieval Britain and Ireland* ed. M. Prestwich (Woodbridge: Boydell, 2008), 155-199.

¹⁰ Mackenzie, *Institutes of the Law*, 18-33; J. Findlay, *All Manner of People: The History of the Justices of the Peace in Scotland* (Edinburgh: Saltire Society, 2000), 50–54; J. G. Harrison, “The justices of the peace for Stirlingshire 1660 to 1706,” *Scottish Archives* 12 (2006): 42-52, at 46. The designation of those crimes tried before JPs as “petty” and should not be taken to imply that such acts were insignificant. As the work of Falconer on sixteenth-century Aberdeen has demonstrated within a Scottish context, petty crime could have a powerful impact on both the material circumstances and social dynamics of local communities. Falconer, “Mony utheris divars odious crymes”; Falconer, *Crime and Community*, 7-8.

¹¹ This was true elsewhere as well. See Harrison, “Justices of the peace,” 46-7.

¹² Lauderdale Mss, Add. Mss. 23135, ff.3-4, British Library.

¹³ SC54/10/1/10/1, NRS.

¹⁴ SC9/7/1, NRS; SC54/10/1/7/23, SC54/10/1/8/8, NRS.

¹⁵ Admittedly, the law did allow sheriffs to hear cases of murder and robbery where the perpetrator had been caught red-handed, which no doubt accounts for some, but certainly not all of the cases highlighted here.

¹⁶ Scott-Moncrieff, *Proceedings of the Justiciary Court*, i, 168-9.

¹⁷ See, for example, the Privy Council commission of 5 September 1661 empowering the sheriff-depute of Angus to preside over the trials of John Marshall, John Lyon and Patrick Laird for murdering Alexander Steven of Forfar. *RPCS*, i, 32-3.

¹⁸ JP36/5/1/21, NRS.

¹⁹ JP36/5/1/10, NRS; JP36/5/1/28, NRS.

²⁰ J. Goodare, *The Government of Scotland 1560–1625* (Oxford: Oxford University Press, 2004), 203-7; Bigwood, “Courts of Argyll,” 34-7; Harrison, “Justices of the Peace,” 47-50.

²¹ C. A. Whatley, “Order and disorder” in *A History of Everyday Life in Scotland, 1600-1800* ed. E. Foyster and C. A. Whatley (Edinburgh: Edinburgh University Press, 2010), 199.

²² Bigwood, “Courts of Argyll,” 28-29; A. D. Kennedy, “Reducing That Barbarous Country: Center, Periphery, and Highland Policy in Restoration Britain,” *Journal of British Studies* 52:3 (2013): 606.

- ²³ M. J. Braddick, *State Formation in Early Modern England, c.1500–1700* (Cambridge: Cambridge University Press, 2000), 347-55; K. M. Brown, *Kingdom or Province? Scotland and the Regal Union, 1603–1715* (Basingstoke and London: Palgrave Macmillan, 1992), 33-40. A. Kennedy, *Governing Gaeldom: The Scottish Highlands and Restoration State, 1660-1688* (Leiden: Brill, 2014), 48-56.
- ²⁴ Falconer, *Crime and Community*, 65-66; Kilday, *Women and Violent Crime*, 29; M. F. Graham, *The Uses of Reform: “Godly Discipline” and Popular Behaviour in Scotland and Beyond, 1560-1610* (Leiden: Brill, 1996), 73-129.
- ²⁵ Supplementary Parliamentary Papers, 1681, PA7/11/21, NRS.
- ²⁶ Goodare, *Government of Scotland*, 181-89; K. M. Brown, *Noble Power in Scotland from the Reformation to the Revolution* (Edinburgh: Edinburgh University Press, 2010), 107, 112-3; F. Dow, *Cromwellian Scotland* (Edinburgh: John Donald, 1979), 179; R. A. Lee, “Government and Politics in Scotland, 1661-1681” (PhD diss., University of Glasgow, 1995), 27.
- ²⁷ Kennedy, *Governing Gaeldom*, 199-201.
- ²⁸ P. Hopkins, *Glencoe and the End of the Highland War* (Edinburgh: John Donald, 1990), 56-70.
- ²⁹ John Lauder, *Historical Notices of Scottish Affairs, Selected From the Manuscripts of Sir John Lauder of Fountainhall* ed. D. Laing, 2 vols. (Edinburgh: Bannatyne Club, 1848), i, 108.
- ³⁰ D. M. Walker, *A Legal History of Scotland*, 7 vols., (Edinburgh: Tottel, 1988–2004), iv, 141.
- ³¹ *RPCS*, iv, 432–425.
- ³² Kennedy, *Governing Gaeldom*, 208-9, 243.
- ³³ A. J. Mann, *James VII: Duke and King of Scots, 1633-1701* (Edinburgh: John Donald, 2014), 144-5.
- ³⁴ Breadalbane Muniments, GD112/39/136/6, Anonymous to Breadalbane, 31 August 1684, NRS; GD112/39/136/7, Atholl to Breadalbane, 31 August 1684, NRS.
- ³⁵ S. J. Connolly, “Unnatural Death in the Four Nations: Contrasts and Comparisons” in *Kingdoms United? Great Britain and Ireland since 1500: Integration and Diversity* ed. S. J. Connolly (Dublin, 1999), 203-5; Whatley, “Order and Disorder,” 191-2.
- ³⁶ For a well-known expression of the ‘violent Scotland’ thesis, which implies that the lack of recorded criminality arose from the near-absence of meaningful central government before the late-seventeenth-century, see

T. C. Smout, *A History of the Scottish People 1560-1830* (London: Fontana, 1998), 94-110.

³⁷ A.-M. Kilday, "The Barbarous North? Criminality in Early Modern Scotland" in *The Oxford Handbook of Modern Scottish History* ed. T. M. Devine and J. Wormald (Oxford: Oxford University Press, 2014), 401; Falconer, *Crime and Community*.

³⁸ B. Lenman and G. Parker, "The State, the Community and the Criminal Law in Early Modern Europe," in *Crime and the Law*, 17-8.

³⁹ Sharp, *Crime in Early Modern England*, 53-6.; Beattie, *Policing and Punishment*, 12.

⁴⁰ Sharpe, *Crime in Seventeenth-Century England*, 182-210.

⁴¹ J. M. Beattie, "The pattern of crime in England 1660-1800," *Past and Present*, 62 (1974), 47-95.; Herrup, *Common Peace*, 26-9.

⁴² Shoemaker, *Prosecution and Punishment*, 127-31.

⁴³ Whatley, "Order and disorder," 191-93; Kilday, "Barbarous North?," 399-400.

⁴⁴ Knox, "Homicide in Eighteenth Century Scotland," 55-62.

⁴⁵ B. P. Levack, "The Prosecution of Sexual Crimes in Early Eighteenth-Century Scotland," *Scottish Historical Review* 89, no. (2010): 180.

⁴⁶ Falconer, *Crime and Community*, 94.

⁴⁷ D. Stevenson, *Highland Warrior: Alasdair MacColla and the Civil Wars* (Edinburgh: John Donald, 2003), 277.; Hopkins, *Glencoe*, 28-9.; M. Fry, *Wild Scots: Four Hundred Years of Highland History* (London: John Murray, 2005), 34.; M. Lee, "Dearest Brother:," *Lauderdale, Tweeddale and Scottish Politics, 1660-1674* (Edinburgh: John Donald, 2010), 178.

⁴⁸ Kennedy, *Governing Gaeldom*, 66-111.; A. I. Macinnes, *Clanship, Commerce and the House of Stuart, 1603-1788* (East Linton: Tuckwell, 1996), 32-5, 124-5, 133.; D. McCormack, "Highland Lawlessness and the Cromwellian Regime" in *Scotland in the Age of Two Revolutions* ed. S. Adams and J. Goodare (Woodbridge: Boydell, 2014), 115-34.

⁴⁹ The statistics presented in this article relate to offending rates, rather than number of cases, meaning that, for example, an incident involving twelve accused individuals would be treated as twelve separate cases. This is an imperfect approach, chiefly because it inflates the crime rate, but it has been used because the limitations of the sources are such that it is often impossible to link accused individuals to shared transgressions.

⁵⁰ Sources: see note 3. General categories incorporate the following offences: Economic crimes: false trading, handling stolen goods and wrongful intromission; Crimes against property: fire-raising and

destruction of property; Crimes against justice: attempting to defeat the ends of justice, perjury, prison-break and wrongful imprisonment; Religious crimes: nonconformity, contumacy and breaching the sabbath; Sexual/moral crimes: adultery, bestiality, deserting a spouse, incest and rape; Other/Unknown: bodysnatching, breach of the peace, slander, vagabondage and witchcraft.

⁵¹ For the primacy of statute in defining crime, see John Skene, *Regiam Majestatem: The auld lawes and constitutions of Scotland, faithfullie collected furth of the Register, and other auld authentick bukes, fra the dayes of King Malcolme the second, vntill the time of King James the first, of gude memorie: and trewlie corrected in sundrie faults, and errors, committed be ignorant writers. And translated out of Latine in Scottish language, to the vse and knowledge of all the subjects within this realme. with ane large table of the contents therof, be Sr. John Skene of Curriehill, clerk of our Sovereigne Lordis Register, Counsell, and Rollis. Quhereunto are adjoined twa treatises, the ane, anent the order of proces observed before the Lords of Counsell, and Session: the other of crimes, and judges in criminall causes* (Edinburgh, 1609), f.130r; Mackenzie, *The Laws and Customes*, 1-3

⁵² Connolly, “Unnatural Death” 202.; Kilday “Barbarous North?,” 400.

⁵³ SC45/17/1/1, 135, NRS.

⁵⁴ SC54/10/1/10/8, NRS.

⁵⁵ SC54/10/1/7/4, NRS.

⁵⁶ SC54/10/1/13/3, NRS.

⁵⁷ SC54/10/1/7/17, NRS; SC54/10/1/7/5, NRS.

⁵⁸ SC54/17/1/1, 39-40, NRS.

⁵⁹ SC54/10/1/8/1, NRS.

⁶⁰ SC54/10/1/6/8, NRS.

⁶¹ JP36/5/1/21, NRS; SC54/10/1/13/12, NRS.

⁶² JP36/5/1/5, NRS.

⁶³ SC54/17/1/1, 43-4, NRS.

⁶⁴ SC54/17/1/1, 56-7, NRS.

⁶⁵ Kennedy, *Governing Gaeldom*, 84-6.

⁶⁶ SC54/17/2/6/2, NRS.

⁶⁷ See Anon., *An Account of the Depredations Committed on the Clan Campbell, and Their Followers, During the Years 1685 and 1686* ed. A. Kincaid (Edinburgh, 1816).

⁶⁸ SC54/17/4/2/3, NRS. On the religious tensions of the Restoration, see I.B. Cowan, *The Scottish Covenanters 1660-1688* (London: Victor

Collancz, 1976).; J. Buckroyd, *Church and State in Scotland 1660-1681* (Edinburgh: John Donald, 1980).; A. Raffe, *The Culture of Controversy: Religious Arguments in Scotland, 1660-1714* (Woodbridge: Boydell, 2012).

⁶⁹ Falconer, “Mony utheris divars odious crymes.”; Falconer, *Crime and Community*, 149-55. This perception of crime as part of a wider process of social jockeying echoes some work on early-modern England, for example Shoemaker, *Prosecution and Punishment*.

⁷⁰ SC54/10/1/6/8, NRS.

⁷¹ SC54/17/1/1, 39-40, NRS.

⁷² This is at odds with the pattern uncovered for Stirlingshire, the only other Scottish locality whose criminal records have been comprehensively surveyed for the post-Restoration period and where prosecutions for violent crime easily outnumbered those for theft. Davies, “Law and Order in Stirlingshire,” 277.

⁷³ This point has been made most extensively in D. Hay, “Property, Authority and the Criminal Law” in *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* ed. D. Hay, P. Linebaugh, J. G. Rule, E. P. Thompson and C. Winslow, (Harmondsworth: Penguin, 1975), 17-65.

⁷⁴ Knox, “Homicide in Eighteenth Century Scotland,” 68. On England, see Beattie, *Policing and Punishment*, 32-40, 63-71; Herrup, *Common Peace*, 38-41; Sharpe, *Crime in Seventeenth-Century England*, 166-81; Shoemaker, *Prosecution and Punishment*, 201-16.

⁷⁵ SC54/17/1/1, 60-2, NRS.

⁷⁶ Papers of the Argyll family, dukes of Argyll, bundle 54, National Register of Archives for Scotland 1209.

⁷⁷ See, for example, Stevenson, *Highland Warrior*, 19.

⁷⁸ R. A. Dodgshon, *From Chiefs to Landlords: Social and Economic Change in the Western Highlands and Island, c.1493-1820* (Edinburgh: Edinburgh University Press, 1998); Kennedy, *Governing Gaeldom*, especially 17-65.; Macinnes, *Clanship*.

⁷⁹ Kennedy, *Governing Gaeldom*, 37-9.

⁸⁰ J. R. Ruff, *Violence in Early Modern Europe 1500-1800* (Cambridge: Cambridge University Press, 2001), 125; G. Walker, “Women, Theft and the World of Stolen Goods” in J. Kermode and G. Walker (eds.), *Women, Crime and the Courts in Early Modern England* (London: UCL Press, 1994), 81-105, 82-3

⁸¹ A. Knox, “‘Barbarous and Pestiferous Women:’ Female Criminality, Violence and Aggression in Sixteenth- and Seventeenth-Century Scotland and Ireland” in *Twisted Sisters*, 13, 21.

⁸² Falconer, “Mony utheris divers and odious crymes”; Ewan, “Impatient Griseldas”; Ewan, “Disorderly Damsels?”; Kilday, *Women and Violent Crime*, 147-8; Kilday, “Barbarous North?,” 395.

⁸³ SC54/17/1/1, 22-3 and at 28-9, NRS; SC54/17/1/2, 3-5 and at 20-1, NRS; SC54/10/1/8/8, NRS; SC54/17/2/10/13, NRS.

⁸⁴ Sources: see note 3

⁸⁵ SC54/10/1/2/6, NRS.

⁸⁶ SC54/10/1/7/15, NRS.

⁸⁷ SC54/17/2/10/24, NRS; SC9/7/1, NRS.

⁸⁸ Ewan, “Disorderly Damsels?”; Falconer, *Crime and Community*.

⁸⁹ Y. G. Brown and R. Ferguson, “Introduction” in *Twisted Sisters*, 3; Kilday, *Women and Violent Crime*, 62-3, 133-4, 147-8.

⁹⁰ G. Mackenzie, *The Institutions of the Law of Scotland* (Edinburgh, 1684), 377-83.

⁹¹ Whatley, “Order and Disorder,” 191-93.

⁹² For instances of empirical testing, see the work of Anne-Marie Kilday, especially Kilday, *Women and Violent Crime*, which relies heavily upon the records of the high court of justiciary to reconstruct serious female criminality and its punishment. Knox, “Homicide in Eighteenth Century Scotland,” also adopts an empirical methodology towards justiciary court material, although his methodology is slightly different. For an entirely alternative approach, which emphasises public shaming as the central feature of judicial punishment, see Cornell, “Gender, Sex and Social Control,” 91-109.

⁹³ R. van Dülmen, *Theatre of Horror: Crime and Punishment in Early Modern Germany* (London: Polity, 1990), 83-4.

⁹⁴ Levack, “Prosecution of Sexual Crimes,” 173-80.

⁹⁵ Sharp, *Crime in Early Modern England*, 65.

⁹⁶ J. F. Harrington, *The Faithful Executioner: Life and Death, Honour and Shame in the Turbulent Sixteenth Century* (London: Bodley Head, 2013), 15-6.

⁹⁷ SC54/17/1/1, 17-19, NRS; JP36/5/1/3, NRS.

⁹⁸ SC54/17/2/10/17, NRS; SC54/17/1/2, 20-21, NRS.

⁹⁹ SC54/17/2/3/1, NRS; SC54/17/1/1, 22-23, NRS.

¹⁰⁰ Sources: see note 3.

¹⁰¹ SC54/17/1/1, 56-57 and at 111-112, NRS.

¹⁰² SC54/17/1/2, 28, NRS.

¹⁰³ SC54/10/1/7/1, NRS.

¹⁰⁴ NRS, SC54/17/2/12/16, NRS.

¹⁰⁵ Falconer, *Crime and Community*, 58-61.

¹⁰⁶ SC54/17/1/2, 16, NRS; SC54/10/1/5/8, NRS; JP36/5/1/21, NRS.

¹⁰⁷ SC54/17/1/1, 25-7 and at 39-40, NRS; SC54/17/1/2, 11-3, NRS;

SC54/17/2/10/10, NRS.

¹⁰⁸ C. B. Herrup, "Law and Morality in Seventeenth-Century England," *Past and Present*, 106 (1985), 102-23; Herrup, *Common Peace*, 165-92

¹⁰⁹ Falconer, "Mony utheris divars odious crymes," 34; Falconer, *Crime and Community*. The figure of 80 per cent is derived from JC2/10, High court books of adjournal, 1661-1668, NRS.

¹¹⁰ Davies, "Law and Order in Stirlingshire," 280.

¹¹¹ For further discussion of this issue with relation to the later seventeenth century, see Kennedy, *Governing Gaeldom*.