The Making of Trials and Plays in the Context of Show Trials†

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1. Introduction

In his 1966 article 'The Trial as One of the Performing Arts' American attorney – and future Associate Justice of the Minnesota Supreme Court - John E. Simonett strikingly affirmed that '[l]ike a play, a trial must be produced'.[1] This comparison draws a sharp parallel between the making of a trial and a play, and highlights their respective sets of theatrical elements, use of rhetorical techniques and purposes as the measure of their correspondence.

The best way to analyse this relationship is by looking at so-called 'show trials', thanks to their hybrid nature that encompass elements of exhibition and legal proceeding alike.[2] Accordingly, this paradigm permits us to observe the interchange of features in the making of both trials and plays, and to evaluate the ensuing reflections.

Understanding this relationship is important, as it will allow us to scrutinise the trial and show that focusing on extralegal goals interefers with strict compliance to the rule of law. Therefore, this essay aims to demonstrate the validity of the considered statement – according to which '[l]ike a play, a trial must be produced' –, and to highlight its even greater defensibility using the case of show trials.

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[1] John E. Simonett, 'The Trial as One of the Performing Arts' (1966) 52 American Bar Association Journal 1145, 1145-1147.

[2] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', (2007) 48 Harvard International Law Journal 257, 260-270.

2. Preliminary Clarification

An inquiry about the relationship between play and lawsuit requires a preliminary clarification of the concept of a show trial. Many scholars have provided different definitions and analysed the issue from distinct perspectives.[3] Otto Kirchheimer classifies it as an absolute form of lawsuit, which reaches over the limits of the political trial.[4] In the same realm, Ron Christenson advocates the existence of 'partisan trials'[5] and approximates this type to the idea of show trials.[6] Lawrence Douglas defines it as a criminal case that entails a predetermined guilty verdict and an inexistent possibility of acquittal, applied by authoritarian states and characterised by public exposure.[7] This explanation roughly complies with the analogue definition given by Jeremy Peterson, who nonetheless submits that a show trial must not be determined by extremes. [8] In fact, a show trial does not necessarily require certainty of conviction and attention directed only towards the public outside the courtroom, for the term encompasses different degrees in respect to both of these elements.[9] In accordance with these premises, Peterson submits a comprehensive definition, arguing that

> [A] show trial can be defined by the presence of two elements. The first element is increased probability of the defendant's conviction resulting from the planning and control of the trial. The second element is a focus on the audience outside of the courtroom rather than on the accused – the extent to which the trial is designed or managed for the benefit of external observers rather than for securing justice for the defendant. The first element could be termed the reduction of the "element of risk to the authorities" that the defendant will be acquitted. When there is no risk to the authorities, the content of the trial is predetermined, and the verdict is a foregone conclusion. The second element could be termed the "show."[10]

[3] ibid.
[4] Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press 1961) 46.
[5] Ron Christenson, *Political Trials: Gordian Knots in the Law* (Transaction Books 1986) 10.
[6] ibid.
[7] Lawrence Douglas, 'show trials', *The New Oxford Companion to Law* (Oxford University Press 2008) <www.oxfordreference.com/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-2012> accessed 6 April 2019.
[8] Peterson (n 2) 264.
[9] ibid.
[10] ibid 260.

An extensive survey on the different conceptualisations of the considered topic would prove excessively far-reaching in this essay, given that, according to Allo, 'there cannot be a definition that is at once broad, elastic, or narrow enough as to encapsulate the numerous juridical, political, motivational or epistemological considerations that render a given trial a "show trial"'.[11]

Therefore, for the scope of the current inquiry, I will focus on those characteristics of show trials that are commonly deemed part of the model: namely, the scarcity of chances of acquittal and the aspect of show itself.[12]

3. Theatrical elements

John Simonett in his article recognises that the format fulfils a pivotal role in the analysis of the parallelism between the making of trials and plays.[13] In fact, they both traditionally present protagonists and antagonists, recount competing stories revolving around a narration, and they both generally identify a problem that must be resolved.[14] This shared hero's journey[15] is conjoined by mythology and folklore with underlying archetypical themes (e.g. struggle and growth) and with a vast array of persuasive techniques,[16] which may be displayed on trial as well as in other 'ritualistic aspects of life'.[17]

Ball highlights the same outline in his assessment of judicial theatre, and further pinpoints how the trial encompasses two distinct plays:[18] a narrower one, the lawyer production of their client's case, played principally to the judge or the jury, and a broader play, which is the

[11] Awol K. Allo, 'The 'Show' in the 'Show Trial', Contextualizing the Politicization of the Courtroom' (2010) 15 Barry Law Review 41, 63.
[12] Peterson (n 2) 260.
[13] Simonett (n 1) 1145.
[14] ibid.
[15] The reference is to the classic story structure known as the Hero's Journey or Monomyth proposed by mythologist Joseph Campbell. For a detailed account, see Joseph Campbell, *The Hero with a Thousand Faces* (3rd edn, New World Library 2008).
[16] Ruth Anne Robbins, 'Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey' (2006) 29 Seattle University Law Review 767, 768-777.
[17] ibid 774.
[18] Milner S. Ball, 'The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre' (1975) 28 Stanford Law Review 81, 88-89.

representation of the entire trial in front of the public.[19] Consequently, the various participants can switch and perform different roles in distinct contexts; for example, while the judge generally poses as the director of the action in the proceeding, overseeing its pace and evolution, yet on certain occasions he may also participate as an actor (i.e. when calls and questions witnesses *ex officio*, when comments upon the evidence). The same holds true for the jury, when renders the verdict, and for the lawyer, who switches from the role of director in the production of their cases' presentation to that of actor in courtroom.[20] The law takes place through action, and the judicial performance is the common ground that holds together fiction and reality.[21]

However, the courtroom is not a sanitised laboratory in which the law is experimented with, since the result of the case is often influenced by multiple non-evidentiary factual details, such as the defendant's demeanour or the quality of the advocate's presentation.[22] Simonett recognises this, and highlights the substantive dissimilarity between the format of play and trial: playwright invents their story and characters whereas the lawyer is given a situation which they are unable to edit.[23] As such, the former can depart from reality, while the latter must adhere to it, in compliance with its objective.[24]

This is where the comparison partly clashes, due to the intrinsic artificial features included in a show trial.[25] In fact, this kind of lawsuit intrinsically encompasses surreptitious elements, like 'a story to tell, a theatre to show, an image to create, and an agenda to perform, with consequences that go far beyond the courtroom (…)', which render it particularly prone to political exploitation.[26] As Peterson recognises, the show trial serves as a means to an end,

[19] ibid 88-90. There is an intrinsic degree of artificiality within the presentation of the case, taking into consideration not only the need for a lawyer to resort to an accurate individuation of facts and law favourable to his client, but the imperative necessity of delivering a convincing presentation in court. Such a presentation, according to the author, must be developed taking into consideration 'the rules of evidence, the case of the opposing side, the dynamics of the proceeding (including surprise and improvisation), the quality of evidence and witnesses, and the compellingness of the law'.
[20] ibid.
[21] Alan Read, *Theatre and Law* (Palgrave 2015) 12.
[22] Laurie L. Levenson, 'Courtroom Demeanor: The Theatre of the Courtroom' (2008) 92 Minnesota Law Review 573, 574-576.
[23] Simonett (n 1) 1146.
[24] ibid.
[25] Peterson (n 2) 269.
[26] Allo (n 11) 65.

which is to convey a message to those outside the court of law.[27] This type of lawsuit necessarily requires conviction and public awareness in order to be effective.[28] Accordingly, it is usual to use devices such as curtailing the defendant's right to recount his own version of the events, exploitation of the rules of evidence, and management of the entire proceeding by means of the prosecution.[29] In contrast with an ordinary trial, reality counts only as a 'small peg, at best'[30], insofar as it helps to impart a specific lesson.[31] The entire format of a show trial is set up consistent with this view.[32]

This sort of arrangement is clearly underscored by the example of agitation trials (*agitsudy*) in early Soviet Union.[33] These were indeed mock trials, plays specifically produced to teach a working class audience about the correct, law-abiding behaviour required under the new communist regime, and to spur vigilance towards perceived internal and external enemies.[34] The genre presented a fixed format, with standard positive and negative characters,[35] calculated narration, and unvarying performance practices.[36] In these fictional and indoctrinating prosecutions, almost everyone and everything could be summoned as defendant and be indicted: prostitutes, thieves, murderers, lazy workers and fascists were all suitable for condemnation, but even pigs, cows, mosquitos, Henry Ford, the Old Russian Empire and God Himself had been tried.[37] Authors and directors of such plays strived to loyally mirror the real functioning of a Soviet courtroom, in order to have fictional trials mistaken for real ones by the audience.[38] As quoted by Cassiday, 'The performance turns into a trial. The trial turns into life.'[39]

[27] Peterson (n 2) 269.
[28] ibid.
[29] ibid.
[30] Kirchheimer (n 4) 46.
[31] ibid.
[32] Peterson (n 2) 277-278..
[33] Julie A. Cassiday, *The Enemy On Trial: Early Soviet Courts on Stage and Screen* (Northern Illinois University Press 2000) 51-54.
[34] ibid.
[35] ibid 57.
[36] ibid 59.
[37] ibid 64.
[38] ibid 69-70.
[39] Vsevolod Vishnevskii 'Dvadtsatiletie sovetskoi dramaturgii' in *Sovetskie dramaturgi o svoem tvorchestve. Sbornik statei* (Iskusstvo, 1967) 150 (as cited in Cassiday (n 33) 58).

Otherwise, Michael Bachmann proposes a different level of analysis of the common format of trial and play, and of the possible departure of the former from reality, in his evaluation of Hannah Arendt's *Eichmann in Jerusalem* theatrical aspects.[40] He underlines a distinction between good theatricality, equated with drama, and bad theatricality, assimilated with artificiality.[41] Within this framework, Bachmann argues, Arendt perceives the trial of Adolf Eichmann[42] as an example of the former, since it exceeded, both legally and philosophically, the boundary of the good type, which she considers the rule of law in the adversary system.[43] A trial can resemble a play, inasmuch as it follows a dramatic outline, but it should not overlap into it.[44] Where this happens, the process decays into a 'bloody show'.[45]

The same point is vividly highlighted by Shoshana Felman who, analysing Arendt's perspective on the Eichmann trial, draws out the existence of 'two competing masters' dramatically confronting each other throughout the proceeding: justice and political power.

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[40] Michael Bachmann, 'Theatre and Drama of Law: A "Theatrical History" of the Eichmann Trial (2010) 14 Law Text Culture 94, 95-96.

[41] ibid 97.

[42] *Attorney-General of the Government of Israel v Adolf Eichmann (Judgement)* District Court of Jerusalem (12 December 1961) 36 ILR 18.

In May 1960 Karl Adolf Eichmann, former head of the 'Jewish Affairs and Emigration' Section of the Reich Central Security Office during most of World War II, was abducted from Argentina by Israeli secret agents and brought to Jerusalem. Before the District Court, he faced prosecution for his role in the Nazi regime, as he was considered the main responsible for the implementation of the 'Final Solution' policy in Germany and occupied territories.

Charged on 15 counts, including crimes against humanity and crimes against the Jewish people, he was found guilty on all of them and sentenced to death. The sentence was carried out on 1 June 1962, after the Supreme Court of Israel and the Israeli President both rejected the appeals presented by the defendant.

For an overview of the case and its legal issues (abduction, jurisdiction and merit), Santiago M Villalpando, 'Eichmann Case', *Max Planck Encyclopedia of Public International Law* (Oxford University Press February 2007)<opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e783?rskey=i9xtfm&result=1&prd=MPIL> accessed 19 August 2020. See also Zad Leavy, 'The Eichmann Trial and the Role of Law' (1962) 48 American Bar Association Journal 820, 820-825; Hans Wolfgang Baade, 'The Eichmann Trial: Some Legal Aspects' (1961) 3 Duke Law Journal 400, 400-420.

On the legacy of the trial in the field of International Law, William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 Leiden Journal of International Law 667, 667-699. See also Matthew Lippman, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law' (1982) 5 Houston Journal of International Law 1, 1-34; Leora Bilsky, 'The Eichmann Trial; Towards a Jurisprudence of Eyewitness Testimony of Atrocities' (2014) 12 Journal of International Criminal Justice 27, 27-57.

[43] Bachmann (n 40) 98-99. According to the author, '[i]f Arendt is not entirely opposed to a 'theatre of justice' this legal theatricality is only 'good' as long as it follows a dramatic structure, that is, as long as the performance has no value in itself and is true to the rules allegedly inscribed in the presumed drama.'

[44] ibid 99-100. For Arendt, Bachmann argues, ''bad' theatricality in a trial begins when theatrical elements (eg the witnesses' testimonies) detach themselves from the presumed dramatic structure and function of legal proceedings, and become a value in themselves.' This ultimately happened, in her opinion, during the Eichmann trial.

[45] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006) 9.

Where this happens, and the courtroom becomes the stage for theatrical exposure of lurking extralegal intents (viz., demonstrative purposes), thus the regular criminal lawsuit originates a two-faceted 'courtroom drama', where not only the accused, but also the very idea of justice is summoned as defendant before the state.[46]

Therefore, the show trial's format, taken to extremes by the aforementioned Soviet travesties, underlines the distinction between trial and play as a murky concept, since the production of such kind of trial can encompass not only the preparation and presentation of story and characters, as in a regular lawsuit, but even their whole creation.[47] These considerations highlight, in accordance with Simonett and Ball's view, the common format that both realms draw on, and the thin line that divides stage and courtroom.[48]

The same conclusions hold true for other theatrical elements considered by Simonett[49] and Ball[50] – namely space and audience. Regarding the former, the kinship between courtroom and stage seems close, as they are bound by the common necessity to obtain dramatic effects.[51] The joint efforts of props, robes and rite create the appropriate ambience for administering justice, as well as for staging a play.[52] However, Ball notices, the setting must be in accordance with different necessities, for both trial and drama.[53] As for the legal proceeding, a lack in court-like characteristics can undermine the perception of the representation as the location where justice is delivered.[54]

Gidlay analyses the issue in the context of the Extraordinary Chambers in the Courts of Cambodia (ECCC), where the UN Secretariat's concerns of procedural fairness prompted the refusal to hold the trial in the locally-renown Chaktomuk Theatre - where a government-

[46] Shoshana Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust' (2001) 27 Critical Inquiry 201, 207-208.
[47] See nn 35, 36, 38, 41.
[48] ibid.
[49] Simonett (n 1) 1145-1146.
[50] Ball (n 18) 83-88.
[51] ibid 83-84.
[52] ibid.
[53] ibid.
[54] ibid.

sponsored process for genocide had been previously held in 1979.[55] However, the problem of appropriate spaces for judicial enterprise emerged even more clearly in this case, since the final choice of the ECCC's setting fell on the outskirts of the capital Phnom Penh, in a cordoned off compound of the Royal Cambodian Armed Forces (RCAF) Headquarters.[56] The author suggests that this location saw the international tribunal 'practically and symbolically sidelined',[57] since it exposed the judicial space to the ambiguous influence of the ruling Cambodian People's Party and hindered the potentially edifying effects that would have been fostered if a new, unprecedented Palais de Justice had been selected instead.[58]

This kind of uncertainty - or craftiness - in the setting of a judicial space is particularly emphasised in the phenomenon of show trials. However, this feature appears particularly singled out in the province of Soviet political persecutions, since the regime endeavoured to perfect strategies for the individuation of appropriate trial locations, spectators, and advertising stratagems, meticulously created in order to excite 'feelings of disgust, outrage and shock'.[59]

Elizabeth Wood presents, as an example, the prosecution of the heads of the Orthodox Church, charged with deficiency in donations during the famine of 1921-1922.[60] In fact, its setting could have presumably misled more than one spectator, since it was held in the Polytechnic Museum of Moscow – a large lecture hall, which had previously been the place of many mock trials.[61] The author suggests that this aroused the doubt whether or not that was a real trial for real persons, or instead a political and religious controversy.[62]

In contrast, the Shakhty Affair, the first show trial with mass media coverage, both Soviet and Western, was hosted in the luxurious House of Soviets, formerly the Moscow Nobles club, where the decorated marble hall neatly contrasted with the red drapes placed throughout the

[55] Rebecca Gidlay, 'Trading a Theatre for Military Headquarters: Locating the Khmer Rouge Tribunal' (2018) 40 Contemporary Southeast Asia 279, 286.
[56] ibid 290.
[57] ibid 293.
[58] ibid 294.
[59] Allo (n 11) 57; Ernest Clark, 'Revolutionary Ritual: A Comparative Anlysis of Thought Reform and the Show Trial' (1976) 9:3 Studies in Comparative Communism 226, 233.
[60] Elizabeth A. Wood, *Performing Justice: Agitation Trials in Early Soviet Russia* (Cornell University Press 2005) 82.
[61] ibid.
[62] ibid.

room, and where a scenic platform for judges, witnesses and accused had been built.[63] Foreign journalists described it as 'a courtroom modeled on the theatrical stage but ready for the movie camera'.[64] In the same vein, Hannah Arendt heavily criticises the auditorium in which Adolf Eichmann had been tried, for she considers it like a real theatre, with its stage, orchestra, gallery, side entrances and usher's announcements – everything functional for the production of a show trial.[65]

Therefore, the choice of appropriate spaces for the delivery of justice, courtroom or theatre, is anything but an innocent task, for it involves the compelling necessity to keep trial and play on separated realms.[66] The risk, Ball argues, is the misinterpretation of the judicial theatre with another, inappropriate venue – thus permitting the staging of a show trial.[67]

Accordingly, even the audience appears to be a vital part in the production of a trial or a stage play.[68] A performance in a play must take place in front of an audience in order to fulfil its live-ness.[69] In a trial, the same holds in order to vouch its fairness.[70] Under the frame of legal proceedings, judges, jurors and spectators represent the three possible audiences.[71] Read furthers the issue, and pinpoints how the necessity of law as a live representation is tantamount to that of a play.[72] In fact, the author remembers that 'law has to be *seen* to be done'[73] and, consistent with this view, he highlights a subsequent meeting point between law and theatre – the perception of the functioning of justice.[74] These statements add a new perspective for the assessment of the audience, which Simonett confirms.[75] The same spectators of a trial, he recalls, citing critic Stanley Kaufmann, wish both to see justice served and, metaphorically, blood shed.[76] In the production, hence the preparation, of a case, this aspect must not be

[63] Cassiday (n 33) 113-114.
[64] ibid.
[65] Arendt, *Eichmann in Jerusalem* (n 45) 4.
[66] Ball (n 18) 85.
[67] ibid.
[68] Simonett (n 1) 1145.
[69] Ball (n 18) 86.
[70] ibid.
[71] ibid.
[72] Read (n 21) 14.
[73] ibid 8.
[74] ibid 13.
[75] Simonett (n 1) 1146.
[76] ibid.

overlooked, since spectators tend to be, duly or unduly, influenced by a theatrical, purposefully crafted courtroom demeanour, and by its opposite as well.[77]

These mentioned concepts seem to overlap and to be further refined in the context of show trials. In contrast with Ball's reflection, the production of this type of trial focuses more on a fourth kind of audience, which is the public outside the courtroom, the true intended audience of the message embedded in the proceeding itself.[78] This is why Arendt notices how the audience at the trial of Adolf Eichmann in Jerusalem did not maintain the authorities' expectations.[79] In fact, after the media frenzy at the beginning, the ranks of the spectators were later mostly composed of survivors of the Holocaust, thus not the audience filled with international journalists and ready-to-be-instructed young Jews that the organisers wished for in order to convey their lessons.[80]

Even more strikingly, the role of the audience seems intensely exploited and subverted in the *Trial of the Industrial Party* (1930), a documentary film of the Soviet show trial.[81] In that context, far from being mere spectators or safeguard of a due process, the audience sides unanimously with the prosecution against the treacherous crime allegedly committed by the defendants – counter-revolutionary collusion with foreign countries.[82] This partiality is clearly highlighted by the careful use of different camera angles in order to counterpose, even cinematographically, audience and accused – numerous and ordered the former, few and isolated the latter.[83] Accordingly, the film deliberately indulges on scenes depicting the zealous participation of citizens in the process, expressed through demonstrations, military parades and extensive use of red banners.[84] A wider movie audience, Cassiday observes, appeared to be the target for which this type of show trial was being staged.[85]

[77] Levenson (n 22) 581-588.
[78] Peterson (n 2) 264-265.
[79] Arendt, *Eichmann in Jerusalem* (n 45) 8.
[80] ibid.
[81] Cassiday (n 33) 169.
[82] ibid 169-170.
[83] ibid 170-171.
[84] ibid 173.
[85] ibid 169.

Hence, the switching role of the audience needs to be in accordance with the purpose of the different representations, trial and play, so as not to become a mere, useful tool within the production of a show trial.[86]

4. Rhetorical Techniques

In conformity with the previous inquiry, the entire judicial performance cannot remain truly insulated in this environment. *The Trial as One of the Performing Arts* underlines the reliance of lawyers on dramatic devices, such as exposition, conflict and climax, whose aim is to obtain the interest of the audience and to reinforce the counsel's own legal arguments.[87]

From this perspective, it is no wonder that Skinner notices the use of forensic rhetoric in Shakespearian plays, which reveals the Poet's conceivable knowledge of classical techniques such as the Ciceronian *inventio*, *dispositio* and *elocutio*.[88] The author suggests even the label of 'forensic plays'[89] for some of the pieces considered, and especially for *Hamlet*, *Othello* and others among Shakespeare's Jacobean plays, where the story seems largely intermingled with legal rhetoric.[90] As Skinner notices, these are plays 'in which accusations are put forward, in which they are met with counter-arguments and debated *in utramque partem*, and in which there is often no final agreement as to how the questions at issue should be assessed.'[91] These considerations further remark the existence of a common share in the knowledge and use of techniques between trial and play, since oral arguments are as pivotal in courtroom as performance is on stage.[92]

However, as classical authors such as Quintilian or the anonymous author of the *Rhetorica Ad Herennium* advise, rhetorical devices are two-faced means, viable for either better or worse

[86] See nn 78, 79, 81.
[87] Simonett (n 1) 1145.
[88] Quentin Skinner, *Forensic Shakespeare* (Oxford University Press 2014) 1-6. Invention (*inventio*), arrangement (*dispositio*) and style (*elocutio*) are three of the individual activities of the orator, according to Cicero. See Marcus Tullius Cicero, *On the Ideal Orator* (James M. May and Jacob Wisse trs, Oxford University Press 2001) 32-38.
[89] Skinner (n 88) 1.
[90] ibid 7.
[91] ibid.
[92] Ball (n 18) 82.

aims alike.[93] The context of show trials emphasises this issue and the aforementioned point of convergence at the same time.

A prominent case of this hybrid format is the Shakhty Affair, the very first to earn the moniker of 'show trial',[94] in which fifty-three engineers were accused of sabotage and wrecking in the Donbass industry.[95] The prosecution followed almost to the letter the structure of an *agitsudy*, since it focused entirely on stigmatising the defendants as the embodiment of menaces for the state, depicting them as villains, thus contrasting the heroic protagonists that were the Soviet nation and its citizens, who oppose their treason.[96] The finding of real evidence was completely overlooked by the prosecution, whereas fictional proofs were instead admitted to comply, in the words of prosecutor Nikolai Krylenko, with the 'lesson of the case'.[97] Moreover, there was no possibility to recount their own versions for the accused, who were required to rehearse and recite prewritten scripts of their parts[98] or to improvise in the same tone.[99] This completely undermined the subsistence of an adversarial narration in the process - exactly like in the type of play known as an agitation trial.[100]

Accordingly, Cassiday analyses how during the Shakhty Affair the characters, prosecutor and defendants, strived to present themselves in diametrically opposite ways, thus pursuing the building of their own *ethos* for the audience.[101] The accused, although high ranking engineers, wore common workers' clothing in order to inspire sympathy in the people's judges, while Krylenko almost shocked the Western correspondents with his hunting outfit, used for the entire trial, and purposefully prepared to have him identified as the hunter of proletariat's enemies.[102] The process held in Jerusalem relied on the same rhetorical framework, with its imbalanced face-off between the two characters' presentations.

[93] Skinner (n 88) 14-16.
[94] Wood (n 60) 193.
[95] ibid.
[96] ibid 194.
[97] ibid 193.
[98] Cassiday (n 33) 115.
[99] Wood (n 60) 195.
[100] ibid.
[101] Cassiday (n 33) 114.
[102] ibid.

The opening address of Attorney General Gideon Hausner, prosecutor in the Eichmann trial, operated in this fashion when he claimed to speak alongside six million dead Jews. This not only broadened the scope of the trial itself, but also attempted to arouse strong feelings in the audience and judges (*pathos*) through the figure of speech known as *prosopopoeia*.[103] This poses a sheer contrast with the treatment of the defendant in the same case, Adolf Eichmann, who had been represented, according to Arendt, as if he were a Shakespearian foe, like Iago or Macbeth.[104] However, the use of such techniques may largely serve the construction of the accused's *ethos*, up to the point to erode the layer of legality that legitimises and justifies a rigged trial.

Such a result is crystal-clear in the case of the Rivonia trial, where 'Accused No. 1', Nelson Mandela, famously commenced his opening statement by building up his *persona* as nuanced, recalling his heritage as an educated man of law, as an unrepentant political prisoner, and as a proud African partisan.[105] His 'transformative intervention' thus resulted in a complete re-signification of himself and his beliefs in front of the court. Mandela rebutted the portrayal of him as a brutal communist agitator, craftily designed by the authorities, and undermined from the very outset by the misleading façade of law and order intentionally staged to vindicate Apartheid and its abuses.[106]

These are inexhaustive but still significant examples of how rhetorical means are equally employable in the making of both a trial and a play, as Simonett recognises.[107]

However, among the rhetorical structures present in a trial, the narration occupies a pivotal position.[108] It is the gist of the adversarial system, the medium through which different parts

[103] Gideon Hausner, *Justice in Jerusalem* (4th edn, Herzl Press 1977) 323.
[104] Arendt, *Eichmann in Jerusalem* (n 45) 287. In Arendt's opinion, the trial should have been centred on the acts that Eichmann committed. In contrast, she argues, the defendant was treated as a scapegoat, either made to stand in the dock for the whole of Nazism or depicted as an unrestrained criminal. Therefore, she considers that the trial ultimately failed to comprehend the man and his actions, up to the point that the material circumstances of the defendant's deeds never fully emerged throughout the entire proceeding.
[105] Awol K. Allo, 'The Courtroom as a Site of Epistemic Resistance: Mandela at Rivonia' (2016) Law, Culture and the Humanities 1, 3, 6-7
[106] ibid 6 ff.
[107] Simonett (n 1) 1145-1146.
[108] Peterson (n 2) 270-271.

can put forth their own account of the story.[109] If the process seeks to 'ascertain the truth',[110] as quoted by Simonett,[111] then the confrontation between contrasting narratives is an essential element to manipulate and to reinterpret – that is to say, to produce – a trial.[112] Narration's disruptive and hijacking force relies on the possibility of introducing a different truth, and challenging the counterpart even on the ground of what is otherwise acknowledged.[113]

This becomes all the more important in the context of processes concerning military conflicts or massive human rights violations, where this rhetorical device stands on the border between impunity and show trial.[114] In the latter, the state endeavours to seize control of the narration in the proceeding in order to impart its message.[115] As Arendt confirms, a show trial requires a plainly circumscribed outline of what happened and how, even more than a traditional legal proceeding does.[116] Thus, the doer must occupy the heart of the trial itself and, in this perspective, he represents the hero of the play.[117] This arrangement is vividly underlined by what Martti Koskenniemi, citing J.F. Lyotard, calls *Différend*, a situation in which acceptance of the framework automatically means acceptance of the adversary's narration.[118] This technique can severely undermine the history told in the process, thus revealing itself even more pernicious for the outcome of a show trial, since justice has to be perceived first in order to be served.[119]

[109] ibid.
[110] Erwin N. Griswold, 'The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered' (1962) 48 American Bar Association Journal 615, 616.
[111] Simonett (n 1) 1147.
[112] ibid 1145.
[113] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1, 33-34. As the author pinpoints, '[a] Court cannot avoid taking judicial notice of a certain number of background facts. But the moment it does this, it will seem to be conducting a political trial to the extent that what those facts are, and how they should be understood, is part of the conflict that is being adjudged.'
[114] ibid 1, 19.
[115] Peterson (n 2) 270.
[116] Arendt, *Eichmann in Jerusalem* (n 45) 9.
[117] ibid.
[118] Jean-François Lyotard, *The Differend: Phrases in Dispute* (Georges Van Den Abbeele tr, Minnesota University Press 1988) 9 (as cited in Koskenniemi (n 113) 17).
[119] Read (n 21) 13-14.

This is the principle applied in the aggressive defence device known as trial of rupture, theorised by the French lawyer Jacques Vergès, which entails a demolition of the opponent's narration and interpretation of facts and context.[120]

Indeed, this is the same scheme that was deployed by Marwan Barghouti, Palestinian Parliament Member and former right-hand man of Yasser Arafat, to oppose the show trial that Israel built against him after his arrest during the Second Intifada in 2002.[121] In the first day of pre-trial motions, he opposed the indictment of terrorism, arraying more than fifty charges against Israel for multiple violations of human rights and overtly appointing himself as plaintiff for the Palestinian people against the Israeli State.[122] This way he aimed to impair the political reprimand represented by his trial, which the government wanted in order to delegitimise the Palestinian Authority and to warrant the occupation of Gaza and the West Bank,[123] through a counter-prosecution that overturns the narration and derecognises the legal framework of the process.[124] In this regard, he made wise use of the rhetorical technique colourfully named by Heinrichs 'definition judo'.[125] In fact, Barghouti reversed the Israeli dialectic of peace, security and freedom through their re-signification in a narrative chain - 'No peace, no security, with occupation'[126] – that contrasted the very same concepts used to justify the military invasion and the trial itself.[127] Moreover, to uphold this frame and to further undermine the counterpart's account and legitimation of the proceeding, Shammai Leibowitz, the defendant's Jewish lawyer, startled judges and audience when he dared to draw a parallelism between Barghouti

[120] Jacques M. Vergès, *Strategia del processo politico* (Clara Lusignoli tr, Einaudi 1969) 49-50. Koskenniemi (n 113) 26.
[121] Awol Allo, 'Marwan Barghouti in Tel Aviv: Occupation, Terrorism and Resistance in the Courtroom' (2016) 26 Social & Legal Studies 47, 47-48.
[122] Lisa Hajjar, 'The Making of a Political Trial: The Marwan Barghouti Case' (2002) 225 Middle East Report 30, 31.
[123] ibid.
[124] Allo (n 121) 57. This peculiar use of the rupture defence seems particularly effective when deployed by insurgents - such as independence movements or terrorist groups - to bolster their causes, as in the cases of the Algerian FLN, the Irish Sinn Féin or the Colombian FARC. For an overview of the utilisation of 'disruptive litigation' as a mean of 'lawfare', see Frank Ledwidge, *Rebel Law: Insurgents, Courts and Justice in Modern Conflict* (C. Hurst & Co.. Publishers 2017) 85-105. For an account of the deployment of rupture before Italian courts and International Tribunals, see, e.g., Teresa Bene, 'La verità giudiziaria e i suoi rapporti con il potere', in Luca Lupària and Luca Marafioti (eds.) *Confessione, liturgie della verità e macchine sanzionatorie Scritti raccolti in occasione del Seminario di studio sulle «Lezioni di Lovanio» di Michel Foucault* 41-45 (Giappichelli 2015); Michela Miraglia, *Diritto di difesa e giustizia penale internazionale* (Giappichelli 2011) 94-117.
[125] Jay Heinrichs, *Thank You for Arguing* (Three Rivers Press 2007) 113. He describes this technique as the use of terms contrasting with your opponent's, in order to create a juxtaposition that makes them 'look bad'.
[126] Allo (n 121) 58.
[127] ibid.

and Moses; hence between the Israeli government and the Pharaoh; thus unsettling the narrative that endorsed the entire prosecution.[128] This marshalling of rhetorical devices did not increase the chances of acquittal of the defendant, but this was not his principal intention.[129] By contrast, he 'performatively reinverted'[130] the already staged show trial, introducing his own counter-story in the courtroom, and boycotting the juridical and political significance of the case brought against him.[131]

Another crystalline example of rupture is highlighted by the trial held in Moscow against three members of the feminist art collective known as Pussy Riot, namely Maria Alekhina, Ekaterina Samutsevich and Nadezhda Tolokonnikova, for hooliganism driven by religious hatred, in the aftermath of the performance of their 'Punk Prayer for Freedom' in the Cathedral of Christ the Saviour in 2012.[132] Their exhibition consisted of dancing and singing their piece around one of the altars, while wearing bright dresses and using evocative gestures.[133] Meanwhile, a video of the action was being filmed in order to be released online afterwards, alongside the full song 'Mother of God, Put Putin Away.'[134] For most of the ensuing trial, the three defendants did not strive to respond to their indictments, but to use the trial as a stage to shed light on the deeper meaning of their performance,[135] which had been otherwise blatantly stigmatised by the Russian authorities and unduly flattened by the Western media.[136] Through their political art, they certainly criticised Putin and the government, but also Putin's supportive, mundane establishment, as well as the Russian Orthodox Church, and reclaimed a space for unrestrained self-expression and genuine creativity, in contrast, in the defendants' view, with the oppressive ambience of Russia.[137] Particularly during their closing arguments, the group managed to re-frame the sanctioned narrative of the prosecution to unmask the real message behind it – the repression of dissent against the regime - and establish their own characters as prisoners of

[128] ibid 61-63.
[129] Hajjar (n 122) 36.
[130] Allo (n 121) 64
[131] ibid.
[132] Ekaterina V. Haskins, 'Places of Protest in Putin's Russia: Pussy Riot's Punk Prayer and Show Trial' (2015) 18 Advances in the History of Rhetoric 227, 227-228.
[133] ibid.
[134] ibid.
[135] ibid 242.
[136] Desmond Manderson, 'Making a Point and Making a Noise: A Punk Prayer' (2013) 12 Law Culture and the Humanities 17, 23.
[137] ibid 23-27.

conscience.[138] As Maria Alekhina pointed out months after her release in a conversation with Judith Butler, 'in Russia we lack a space – stage – for making political statements. Because of this, (…) the court became such an unexpected site'.[139]

These cases of rupture, Marwan Barghouti and Pussy Riot, illustrate how rhetorical techniques can be fruitfully employed in order to disrupt their counterparts' argumentation and narration.[140] Thus, the defendant can score the production of their opponent's trial while underpinning the making of their own.

5. Purposes

Simonett[141] and Ball[142] concord on affirming that, regardless of multiple and remarkable similarities in format and use of dramatic devices, trials and plays diverge on one fundamental point, which is the purpose. Whereas theatre intends to entertain, the trial aims to discern the truth, and hence deliver justice.[143] The former reaches the heart, while the latter points first at the head.[144]

These notions, although apparently simple, are worth questioning in the framework of the production of both trials and plays, and the context of show trials provides a useful critical medium. In fact, Arendt underlines part of Simonett's concept, when she remarks that 'The purpose of a trial is to render justice and nothing else'.[145] Further considerations, she argues, can only lead justice astray from its goal, that is, to inflict a rightful punishment pursuant a correct judgement.[146]

[138] Haskins (n 132) 242-244.
[139] The First Supper Symposium, 'Pussy Riot Meets Judith Butler and Rosi Braidotti' (21 May 2014) <www.youtube.com/watch?v=BXbx_P7UVtE> accessed 18 April 2017 (as cited in Haskins (n 132) 238).
[140] See nn 130, 131, 135.
[141] Simonett (n 1) 1146-1147.
[142] Ball (n 18) 99.
[143] Simonett (n 1) 1146-1147.
[144] ibid.
[145] Arendt, *Eichmann in Jerusalem* (n 45) 253.
[146] ibid.

However, it is established that most criminal trials, especially at the international level, may pursue both political and legal ends; the controversy is which goal takes precedence when a conflict between the two arises.[147]

In fact, on the other end, multiple legal theorists disagree with Arendt, as evidenced by Daphne Eviatar in her survey of show trials on the *New York Times*.[148] She highlights how Lawrence Douglas, in his book *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, submits Arendt's opinion regarding a trial's goal is faulty.[149] In fact, he argues that the process, in the context of post-genocide prosecutions, should not aim only at the strict application of the law to the defendant, but also at the formation of a stage for survivors, where facts and narration can be registered and preserved for future memory.[150] Douglas recognises that this way, truth and accused's rights are likely to be endangered; however, he claims, 'A trial can be staged with didactic purposes without degenerating into a political farce, (…) so long as the judge-director makes good use of legal procedure.'[151] This arrangement endeavours to originate a national drama for the widest audience possible.[152] Mark Osiel agrees with this view, for he remarks how, in order to uphold their educational goal, these trials must be produced like great exhibitions,[153] although the author still safeguards the value of procedural fairness.[154] By contrast, the position of Arendt is defended by Martha Minnow, who admits that the process intrinsically encompasses storytelling, but adds that crossing the threshold of fiction compromises its judicial role.[155]

However, the picture appears even murkier because, while these statements suggest the existence of a possibility for trials to pursue other goals apart from justice, the reverse holds for theatre.[156] In fact, William Acree Jr analyses the so-called trial of theatre, and assesses it as

[147] Jenia Iontcheva Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials' (2008) 48 Virginia Journal of International Law, 529, 534.
[148] Daphne Eviatar, 'The Show Trial: A Larger Justice?' *The New York Times* (New York, 20 July 2002) <http://www.nytimes.com/2002/07/20/books/the-show-trial-a-larger-justice.html> accessed 6 April 2019.
[149] ibid.
[150] ibid.
[151] ibid.
[152] ibid.
[153] Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction 1997) 3.
[154] ibid 69.
[155] Eviatar (n 148).
[156] William G. Acree Jr, 'The Trial of Theatre: Fiat Iustitia et Pereat Mundus' (2006) 40 Latin America Theatre Review 39, 42.

a helpful medium through which supply justice in Latin American societies, where experiences of past tortures and present public concealment can be coped with by way of theatrical performance.[157] Plays such as *La muerte y la doncella* and *Información para extranjeros* both perform and narrate straightforwardly those heinous memories, thus delving into the truth and highlighting the stage as a place where crimes committed by torture regimes can be factually tried.[158] The author, quoting Arendt, remarks that the discovery of truth is a paramount step in order to grant pardon,[159] since 'men are unable to forgive what they cannot punish'.[160] However, Acree Jr ultimately recognises how this quest for justice is intrinsically limited, since it cannot replace the role of legal proceedings.[161] Felman furthers this point, highlighting the eventual irreplaceability of 'trial and trial reports' as sole means employable in order to render justice and to put human sufferings (viz., those caused by the war and the Holocaust) to an end.[162] According with this view, she ultimately remarks how only the law, through its limits and procedures, may circumscribe atrocities in a determined time, etch the borders of its magnitude, and legitimately 'close the case and enclose it in the past.'[163]

Therefore, these contrasting opinions do not truly resolve the conundrum; however, this is not within the scope of this essay. For the purpose of the current inquiry, it is relevant the fact that the ends sought by trials and plays may have more common points than conceded by Simonett, although not to the point to impair his distinction.[164] Thus, as highlighted by the aforementioned scholars, the function of the lawsuit might diverge from the sheer pursuit of justice and the application of the legal rule in actual cases, especially when broader concerns about memory, history or upbringing become part of the scheme, and the production of the process should be modelled accordingly.[165]

This overview of different perspectives on the objectives of judicial context, through the example of show trials, proves useful for the scope of the present inquiry, inasmuch as it

[157] ibid.
[158] ibid 45-50.
[159] ibid 51.
[160] Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 241.
[161] Acree Jr (n 156) 55-56.
[162] Felman (n 46) 202.
[163] ibid.
[164] Simonett (n 1) 1146-1147.
[165] See nn 150, 153, 154, 155.

permits to establish a comparison in terms of genres between the forensic and the theatrical realms.

In fact, Ball evaluates different kinds of theatre in order to see which one better conforms to the judicial representation; [166] he points out the theatre of fact as the most pertinent form.[167] He excludes the appropriateness of other kinds, namely theatre of absurd and morality play, because of the presence of disruption in the former, and for the predetermined routine and upshot in the latter.[168]

However, the presence of these characteristics in a show trial does not appear preposterous. In fact, the disruptive element is likely to be found in such a context, as Peterson affirms when listing the curtailment of the defendant's right to tell his side of the story as one defining mark of a show trial.[169] He accordingly notices the presence of defence walkouts, the ousting of the accused, outbursts and refusal of court-appointed lawyers as featured elements during the trial of Saddam Hussein before the Iraqi Special Tribunal (IST) in 2005-2006,[170] which he eventually labels as a show trial.[171] Moreover, the utilisation of rupture as a rhetorical device further stresses the applicability of the category of theatre of the absurd in such a context.[172]

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[166] Ball (n 18) 97-100.

[167] ibid. The Theatre of fact represents a form of documentary drama that recounts real stories drawing on existing documents (e.g. court records, newspapers, journals, etc.), often without altering the transcript in performance. See Derek Paget, 'documentary drama and theatre', The Companion to Theatre and Performance (Oxford UniversityPress2010) <www-oxfordreference-com.ezproxy.unibo.it/view/10.1093/acref/9780199574193.001.0001/acref-9780199574193-e-1101?rskey=Onwxna&result=2> accessed 23 August 2020.

[168] ibid. Regarding the former, see Ian Buchanan, 'Theatre of the Absurd', A Dictionary of Critical Theory (Oxford University 2010)<www.oxfordreferencecom.ezproxy.unibo.it/view/10.1093/acref/9780199532919.001.0001/acref-9780199532919-e-704?rskey=U1OKyk&result=1> accessed 20 August 2020. According to Buchanan, the Theatre of the Absurd is '[a]n anti-political form of theatre […]' that '[i]t is typified by clever language play, which pushes language to the point of non-meaning and nonsense, thereby exposing language's capacity to betray its users […].'

Concerning the morality play, see John Wesley Harris, 'morality play', The Companion to Theatre and Performance (Oxford University Press 2010) <www-oxfordreference-com.ezproxy.unibo.it/view/10.1093/acref/9780199574193.001.0001/acref-9780199574193-e2713?rskey=fy8b6X&result=7> accessed 20 August 2020. The author reminds that'the distinguishing mark of most morality plays was the use of allegorical characters to represent the interplay of various positive and negative forces in human life. Characters representing the soul, sins, and virtues came to be treated as forces acting within the human mind, thus making possible a simple form of psychological analysis. […].'

[169] Peterson (n 2) 270-271.

[170] ibid 278-281.

[171] ibid 286-288.

[172] See nn 118, 120.

Subsequently, Ball rejects the morality play's appropriateness for judicial theatre by discarding its pre-programmed result as '*immorality* plays'[173] and by warning that 'Insofar as it is made a platform for moralizing or a forum for educating, a trial is not a trial.'[174]

In contrast, these are widely accepted features of show trials, as confirmed by Peterson[175] and Christenson, with the second author talking of expediency as a fundamental point in partisan trials.[176] In the same vein, even if she does not discuss sheer drama, Felman identifies the considered show trial (namely, the Eichmann case) as the 'text of a modern folktale of justice', inasmuch as it involves the unique intermingling of memoirs and allegory in the legal account, expressed through a forensic narration of both public and intimate sorrow.[177]

Therefore, these evaluations explain how, unlike an ordinary lawsuit, its show counterpart allows a comparison with a wider spectrum of theatrical genres.[178] The parallelism between play and lawsuit is conceivably reinforced by these findings, since the production of show trial seems to exceed Simonett's boundaries, for it seeks to gain control even of the case's outcome and embedded significance.[179]

6. Final clarification

In the light of the above, the connection between theatre and law appears everything but accidental. However, one last issue must be addressed before setting forth some conclusions: it is the distinction between 'real' and 'show' trials on the ground of theatricality.

In Paragraph 1 I touched the topic, briefly claiming that 'show' trials seem particularly adapt for the comparison with the theatrical structure, insofar as the formers rely on predetermined (or very likely) outcomes - combined with a focus on the trials' appearance to an external public audience, outwith the trial parties, and resorts to dramatic techniques. However, artificiality in these features seems not exclusively limited to the area of 'show trials'.

[173] Ball (n 18) 98.
[174] ibid 99.
[175] Peterson (n 2) 265-269.
[176] Christenson (n 5) 11.
[177] Felman (n 46) 238.
[178] See nn 169, 175, 176.
[179] ibid.

As I tried to recount in the previous paragraphs, a certain amount of fiction appears intrinsic in legal proceedings per se, up to the point that 'regular' trials cannot be truly insulated from artificial elements. In the legal scenery every 'character', consciously or not, plays a part, striving to build up his own pathway through the case, which must be at the same time 'credible and probable', in order to achieve his competing goal - be it (i.e. in criminal justice) acquittal, conviction or a fair decision.[180] At the same time, the parties may purposefully employ the procedural norms, such as rules of evidence, defendant's rights or *ex officio* powers, in order to counter the opponents' play, to exploit their errors, and to sustain a different interpretation of facts and law. If some degree of theatricality appears physiological, it operates as a twofold mean in regular trials, since the judicial process may be exposed to undue external influences, which may reveal a pathological aspect of artificiality. In a non-exhaustive account, it is worth noticing that even in the most forward legal systems society and politics appeal the administration of justice, especially in the criminal branch, with their exigencies and anxieties.[181] Fuelled either by political authorities or by the public opinion, the demand of rapid sentencing and severe penalties risks hampering the very foundations of the rule of law (for example, the presumption of innocence).[182] The result of such an approach is brilliantly expressed in the words of the late Professor Filippo Sgubbi, when he warned against the 'legal monstrosities' created by populism, demagogy and vindictive justice.[183]

For the purpose of the present paper, it follows that even a regular trial, like its 'show' counterpart, somehow 'smacks of manipulation'.[184] Nevertheless, my stance here is that the distinction between 'show' and 'regular' trials' theatricality needs to be maintained. In fact, whereas both deal with fictional elements in their structure and devices, only the former appears to be controlled by them, whereas the rule of law, in the latter, safeguards its procedure and scope, which is to deliver justice.[185] This line of reasoning approximately echoes what an observer of the relationship between theatre and law, Nicole Rogers, argued citing Huizinga –

[180] Christian Biet, 'Law, Literature, Theatre: the Fiction of Common Judgement' (2011) 5 Law & Humanities 281, 287.
[181] Filippo Sgubbi, 'Monsters and Criminal Law' in Daniela Carpi (ed.), *Monsters and Monstrosity: From the Canon to the Anti-Canon: Literary and Juridical Subversions* (De Gruyter 2019) 289-292.
[182] ibid.
[183] ibid.
[184] Simonett (n 1) 1145.
[185] See nn 178, 179.

in particular, when she stated that '[l]aw, as a form of play, is a highly serious form of play which is subject to 'the rules of the game''.[186] The law, in fact, strives to order, predict, and bind by rule, regulates what is an otherwise extravagant 'form of play'[187] driven by other means to other ends. In accordance, the same distinction can be drawn between trials and plays as such.

7. Conclusion

In conclusion, theatre and legal proceedings share strong resemblances in the vein of reliance on a qualified format, utilisation of a pre-prepared space and attention given to their respective audiences.[188] Moreover, they both marshal dramatic devices drawn from a common pool of techniques and theatrical expertise.[189]

However, the utilisation of these common features in both might also blur the distinctions between trials and plays. In fact, the former ultimately aim to render justice by means of procedural fairness, whereas the latter recount a story, without being constrained by the legal rule.[190] Thus, the common elements are not inherent characteristics, but means to an end, which must be accurately selected and employed in order to achieve an objective – that is to say, to produce it.

Therefore, the assessed statement of Simonett proves valid, and even more so in the context of show trials, since they share the same traits of ordinary lawsuits but border on – often encroaching – the limits of the rule of law.

[186] Nicole Rogers, 'The Play of Law: Comparing Performances in Law and Theatre' (2008) 8 Queensland University of Technology Law and Justice Journal 429, 430.
[187] ibid, 430.
[188] See nn 48, 66, 86.
[189] See nn 107, 130.
[190] See nn 164, 165.

Grotius' Contribution to Natural Law- A Reappraisal

George Dick[*]

Introduction

While he is considered the "father of international law",[1] Hugo Grotius is also known for his contribution to the jurisprudential field of natural law, most notably in his work '*De Jure Belli ac Pacis'*,[2] which was first published in 1625. There has, however, been fierce debate as to the nature of his contribution, primarily regarding whether Grotius' jurisprudence was original or whether his views were a continuation of the Scholastics before him. For instance, Chroust asserts that Grotius' jurisprudence was "a direct continuation of the great Natural Law tradition which stretches from St Augustine to Suárez, and which culminated in St. Thomas".[3] In contrast, Schneewind claims that Grotius "removed natural law from the jurisdiction of the moral theologian, to whom Suárez had assigned it, and made its theory the responsibility of lawyers and philosophers".[4] Schneewind elaborates by noting that later thinkers wrote of natural law without utilising the doctrine or language of any particular religious denomination.

However, while later philosophers' works on natural law were much less theological in nature,[5] debate continues on the nature of Grotius' contribution to natural law, particularly on two fronts. First, was Grotius' account of natural law actually original? It has been particularly argued that Grotius' conception of natural law, even his famous '*etiamsi daremus*'[6] (which, in brief terms, refers to the notion that natural law still possesses validity even if God does not exist or has no interest in humanity's affairs), borrows much from the

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[1] Edward Dumbauld, *The Life and Legal Writings of Hugo Grotius* (University of Oklahoma Press, 1969), 58. This is a title Grotius often shares with Francisco de Vitoria and Alberico Gentili- see, *inter alia*, Thomas Holland, *Studies in International Law* (Clarendon Press, 1898), 1-2; Anthony Pagden and Jeremy Lawrence (eds.), *Vitoria: Political Writings* (Cambridge University Press, 1998), xvi.

[2] Citations for *De Jure Belli ac Pacis* shall come from: Hugo Grotius (Francis Kelsey (tr.)), *On the Law of War and Peace* (Originally published 1625, Oxford University Press, 1925) ('*DJBP*').

[3] Anton-Herman Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition' (1943) 17(2) New Scholasticism 101, 125.

[4] Jerome Schneewind, *The Invention of Autonomy* (Cambridge University Press, 1998), 82.

[5] See, Alessandro d'Entrèves, *Natural Law- An Introduction to Legal Philosophy* (Hutchinson's University Library, 1951), 52-53.

[6] 'Etiamsi daremus' is Latin for 'even if we should concede'. The term shall be analysed in more detail below.

Scholastics before him. Second, did Grotius' account itself lead to the secularisation of natural law? It has been argued, particularly by Crowe,[7] that, because Grotius was himself religious, it is questionable whether Grotius would have truly desired to separate natural law from religion.

However, I shall argue that Grotius' contribution to natural law was ground-breaking and truly original in regard to both points above. Grotius' arguments, while having similarities with previous Scholastic thought, break considerably from the Scholastic tradition by asserting that obligations exist under natural law irrespective of the existence of God. In contrast, Scholastic philosophers had merely argued that the content of natural law is not dependent on God's existence, while neglecting the element of obligation. Moreover, while Grotius did not seek to secularise natural law, he did seek to provide an account which was non-sectarian and thus removed from theological controversy. This approach would prove influential and would pave the way for Grotius' successors to gradually secularise natural law.

This article shall be split into four parts. First, it is useful to establish the pre-Grotian dominance of theology in discussions of natural law before analysing Grotius' impact. The legal writings of Francisco Suárez, writing in 1612 (13 years before Grotius' *De Jure Belli ac Pacis*) provide a perfect medium to explore theology's firm grip on natural law (and on law in general). Second, Grotius' thoughts on natural law will be established. Third, the originality of Grotius' natural law account will be examined, notably by focusing on his *etiamsi daremus*. Fourth, Grotius' non-sectarian approach to natural law will be analysed with reference to his legal and theological treatises.

1. Suárez on the Theologian's Jurisdiction over Natural Law

In the West, following the fall of the Roman Empire, Christianity was the most dominant force spurring on the study of law, and natural law in particular.[8] Consequently, the majority of treatises were authored by theologians, such as Thomas Aquinas, with later theologians following in their footsteps into the 16th and early 17th centuries. Francisco Suárez was one such later theologian, whose work on natural law was tremendously influential, a trait shared

[7] Michael Crowe, *The Changing Profile of Natural Law* (Martinus Nijhoff, 1977), particularly 224.
[8] See, John Kelly, *A Short History of Western Legal Theory* (Clarendon Press, 1992), 102.

with much of Suárez's work.[9] Suárez's central treatise on law was *De Legibus ac Deo Legislatore*[10] ('*A Treatise on Laws and God the Lawgiver*') (hereafter, '*De Legibus*'). This part will focus primarily on his assignation of natural law to the jurisdiction of the theologian, with reference to core components of Suárez's jurisprudence as required.[11]

Suárez opens *De Legibus* by declaring that it "need not surprise anyone that it should occur to a professional theologian to take up discussions of law".[12] Suárez asserts that for all rational beings, the "last end" is God, a being in whom "their sole felicity consists".[13] Theology has "this last end in view and…sets forth the way to attain that end", implicitly intending for rational beings to achieve eternal salvation.[14] The path to salvation is based on "free actions and moral rectitude", with such rectitude being based largely upon "law as the rule of human actions".[15] It follows that the study of law is within the jurisdiction of the study of theology, to which God is treated as the ultimate lawgiver.[16]

However, Suárez notes that one may argue that while theology has domain over the consideration of divine law, it may be highly unusual for a theologian to consider laws derived from nature or enacted by humans. After all, all three types of law originate from different law-making authorities (God for divine law; nature for natural law and human lawmakers for human law). Furthermore, Suárez notes that it could be argued that theology, as a "supernatural science", should not deign to consider natural and human affairs, especially as this may invite scholars of those other forms of law to turn to divine law itself.[17]

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[9] Christopher Shields and Daniel Schwartz, 'Francisco Suárez' (*The Stanford Encyclopedia of Philosophy*, revised 25 September 2019) <https://plato.stanford.edu/entries/suarez/> accessed 29 November 2019. ("it is noteworthy that figures as distinct from one another in place, time, and philosophical orientation as Leibniz, Grotius, Pufendorf, Schopenhauer, and Heidegger, all found reason to cite him as a source of inspiration and influence".)

[10] Reference to Suárez's *De Legibus* shall come from- Francisco Suárez (Gwladys Williams *et al* (trs.), Thomas Pink (ed.)), *Selections from Three Works: A Treatise on Laws and God the Lawgiver; A Defence of the Catholic and Apostolic Faith; A work on the Three Theological Virtues: Faith, Hope and Charity* (*De Legibus* originally published 1612, Liberty Fund, 2015) ('*De Legibus*'). Page numbers will be used when section numbers are unavailable.

[11] A full discussion of Suárez's extensive and fascinating writings on jurisprudence is beyond the scope of this article. However, for overviews of Suárez's jurisprudence, see James Gordley, 'Suárez and Natural Law' in Benjamin Hill and Henrik Lagerlund (eds.), *The Philosophy of Francisco Suárez* (Oxford University Press, 2012), 209-229; Schneewind (n.4), 58-66.

[12] Suárez, *De Legibus* (n.10), 11.

[13] ibid, 11.

[14] ibid, 11.

[15] ibid, 11-12.

[16] ibid, 12.

[17] ibid, 12.

Ultimately, the "harmonious division of the sciences" would risk being compromised if theology considered other forms of law beside the divine.[18]

Suárez is unimpressed by these concerns and contests them with three counter-propositions. First, he asserts that the authority that all lawmakers possess to create legitimate binding laws can ultimately be ascribed to God. Divine law can clearly be ascribed to God as it "flows directly from Him".[19] Suárez argues that human law can also be ascribed to God, whereby he cites Romans 13:1, which states that all legitimate governing authorities are to be followed as they have been "instituted by God" himself.[20] Consequently, valid human law has "surely been ordained by man, acting as God's minister and vicar", meaning that human law can also be attributed to God.[21] At this point in his argument, for reasons unknown, Suárez omits mention of natural law and how it can be ascribed to God. However, Suárez thankfully sets out his account of natural law later in the text, and analyses this particular point of ascription. In contrast to the intellectualists and voluntarists before him,[22] Suárez asserts that natural law not only indicates what is good or evil, but also contains its own "precepts and prohibitions regarding what is good and evil".[23] However, God also adds his own commands, obliging humans to follow natural law. This is fitting because God is "the Author and Governor" of nature.[24] Thus, natural law, in some respects at least, is also attributable to God. Consequently, all law falls within the purview of theological study, given that God is the ultimate lawgiver, either through his own commands or through "a deputy" who has been rightfully assigned lawgiving powers.[25]

Second, Suárez notes that it is a function of theology to "take thought for the consciences of men in this life".[26] A core part of the conscience, in Suárez's view, "rests upon the observance of laws, just as perversion of conscience rests upon their violation".[27] Thus, the

[18] ibid, 12.
[19] ibid, 12.
[20] *The New English Bible* (Oxford University Press, 1970), Romans 13:1. ("Let every person be subject to the governing authorities, for there is no authority except from God, and those authorities that exist have been instituted by God").
[21] Suárez, *De Legibus* (n.10), 12.
[22] See Schneewind (n.4). 60-61. For a detailed discussion of the voluntarist-intellectualist debate, and its relationship with natural law, see Anna Taitslin, Intellectualism versus Voluntarism, and the Development of Natural Law from Zeno to Grotius (DPhil Thesis, University of Tasmania, 2004) <https://eprints.utas.edu.au/8499/7/Taitslin_whole_thesis.pdf>.
[23] Suárez, *De Legibus* (n.10), II.VI.5.
[24] See, ibid II.VI.8; Also see, ibid, I.III.9 and II.V.15.
[25] ibid, 12-13.
[26] ibid, 13.
[27] ibid, 13.

obedience of valid laws, binding upon one's conscience, puts one on the path to salvation; disobedience of the same valid rules diverts one from that path. Consequently, given that obeying valid laws is crucial to achieving salvation, the study of law is also within "the province of the theologian".[28]

Third, Suárez notes that Catholicism not only teaches to what extent we must obey God's commands, but also the fact that God highlights what nature "forbids, commands or permits".[29] Subsequently, humans can, *inter alia*, determine to what extent we must observe "both ecclesiastical and secular laws".[30] Given its theological foundations, Suárez submits that theologians are best placed to discuss and provide answers to such legal questions.

Suárez notes that, historically, many philosophers ranging from Plato to Plutarch had discussed questions of jurisprudence and natural law. However, he felt that their treatment only laid out the basic "principles of jurisprudence".[31] These philosophers' focus was largely on human and natural law, in which natural law was conceptualised in so far as it was "known by human reason".[32] Canon law goes a little further, relating more to the supernatural order. However, Suárez notes that canon law was primarily concerned with the establishment of an ecclesiastical state and the ordering of religious practices, rather than the study of law at great depth.[33]

Suárez believes that the wider field of theology is able to go much further. Theology conceives of natural law as being "subordinated to the supernatural order", whereby natural law derives its form and order from this supernatural order.[34] In terms of civil law, theology only determines the moral worth of these rules from the perspective of "higher order" rules.[35] Theology further recognises that both "the sacred canons and pontifical degrees" are binding on the human conscience as they point out the path to eternal salvation.[36] Thus, as a field, theology is able to conduct a full inquiry into the "primary origins and the final ends" of all laws, whether they be divine, natural or human.[37] Moreover, theology is able to explore how

[28] ibid, 13.
[29] ibid, 13.
[30] ibid, 13.
[31] ibid, 13-14.
[32] ibid, 14.
[33] ibid, 14-15.
[34] ibid, 15.
[35] ibid, 15.
[36] ibid, 15.
[37] ibid, 15.

all laws are ultimately "standards of human action relatively to the conscience", showing how laws contribute to the determination of merit, or demerit, for salvation and eternal life.[38]

Furthermore, Suárez notes that he is not the only theologian to consider the study of law in these terms. Theologians "of the gravest authority, in every age", such as Aquinas and Domingo de Soto, have considered the nature of law.[39] Consequently, based upon all of his previous considerations, Suárez declares that the nature of law, whether it be divine, natural or human, is well within the purview of theological study.[40]

Schneewind is correct when he says that Suárez, amongst others, assigned natural law firmly within the jurisdiction of theological study.[41] However, within the same century as the publication of Suárez's *De Legibus*, this jurisdictional claim of theology over natural law would be challenged by Grotius and subsequent thinkers.

2. Grotius on Natural Law

Hugo Grotius was a Dutch lawyer, diplomat and philosopher, [42] who wrote numerous treatises on a wide variety of topics throughout his life, most notably on law and religious affairs. While he wrote many notable legal treatises, his most famous was *De Jure Belli ac Pacis* ('*On the Law of War and Peace*') (hereafter '*DJBP*') which sets out, *inter alia*, his later views on natural law. This part will be split into two subsections: the first briefly addresses Grotius' definitions of law contained in *DJBP'*s Book 1; the second shall examine *DJBP'*s controversial preface- the prolegomena.

2.1- Grotius' Definitions of Law

*DJBP'*s Book 1 contains many definitions of law which require brief analysis. First, Grotius notes that his general aim is to determine whether any war can be considered just, and if so, which actions are just in war. Consequently, one definition of the term law is that it "means nothing else than what is just".[43]

[38] ibid, 15.
[39] ibid, 15-16.
[40] ibid, 16.
[41] Schneewind (n.4), 59.
[42] For a brief overview of Grotius' eventful life, see Dumbauld (n.1), 3-19. For a longer biography, see Henk Nellen (J.C Grayson (tr.)), *Hugo Grotius: A Lifelong Struggle for Peace in Churchand State, 1583-1645* (Brill, 2015).
[43] Grotius, *DJBP* (n.2), I.I.III.

Second, law can be "viewed as a body of rights"- rights which are held by people as something akin to a "moral quality" of the person.[44] These rights enable people "to have or to do something lawfully".[45] Grotius divides these rights on the basis of their perfect and imperfect moral qualities. When the moral quality is considered perfect, it is referred to as a 'faculty'; when it is not perfect, it is known as an 'aptitude'.[46] Faculties (also known by Grotius as "legal rights strictly so called") are the rights "to one's own".[47] This includes, *inter alia*, the "power over oneself" (freedom) alongside the legal power of ownership and contractual rights.[48]

Third, Grotius notes that law can also be defined as a rule, whereby the law imposes an obligation on individuals to do "what is right".[49] To Grotius, law imposes an obligation not only to do what is required by law, but also what is generally virtuous and good.[50] These laws are divided by Grotius into volitional and natural law.[51] For the purposes of this article, Grotius' views on natural law will be focused upon in particular.

Grotius submits that the law of nature "is a dictate of right reason" which highlights that an action has a quality of "moral baseness or moral necessity" on the basis of the action's "conformity with rational nature".[52] These actions are either "obligatory or not permissible" and Grotius understands these actions as being necessarily "enjoined or forbidden by God", the "author" of nature.[53] In this respect, natural law differs not only from human law, but also volitional divine law, as under volitional divine law, actions are permissible or prohibited on the basis of God's commands rather than the action's inherent character.[54] Moreover, the law of nature is unchangeable, even by God himself. Two plus two will always equal four, and God cannot make an "intrinsically evil" action good by commanding it be so.[55] Under Grotius' account, the law of nature not only concerns entities outside of the human domain, but also entities constructed by humankind. For example, while the concept of ownership was

[44] ibid, I.I.IV.
[45] ibid, I.I.IV.
[46] ibid, I.I.IV.
[47] ibid, I.I.V.
[48] ibid, I.I.V.
[49] ibid, I.I.IX.1.
[50] ibid, I.I.IX.1.
[51] ibid, I.I.IX.2.
[52] ibid, I.I.X.1.
[53] ibid, I.I.X.1.
[54] ibid, I.I.X.2.
[55] ibid, I.I.X.5.

created by humanity, upon its introduction it became unnatural for one to take another's property against their will.[56]

Grotius' treatment of natural law at this stage does not depart tremendously from his intellectual predecessors.[57] However, this context is helpful to understand the radical aspects of Grotius's views on natural law which are found in *DJBP's* prolegomena.[58] Now that Grotius' core definitions have been established, this article shall now turn to the prolegomena.

2.2- *DJBP*'s Prolegomena

In the prolegomena, Grotius sets out the foundations underpinning *DJBP*. Grotius notes that humans are certainly animals, but animals of "a superior kind"[59] with heightened faculties and skills unique to humanity, such as the ability to learn knowledge and to vocally communicate through speech.[60] However, the central difference between humans and other animals is the former's desire for a peaceful society and a social life with other humans.[61] The maintenance of social order is the motivation for, and source of, "law properly so called".[62] This includes the laws of obligations (contracts, promises etc.), rules of delict and penal laws.[63] Moreover, given our advanced faculties, humans also discriminate between right and wrong. Thus, we have the ability to follow our "well-tempered judgement" rather than be led astray by impulse.[64] Furthermore, with our discrimination, we are also able to allot to each social group what is "properly theirs".[65] Thus, we can prioritise the wise over the unwise, as well as give more to the poor than the rich, and so on.

This builds up to one of Grotius' most well-known statements, which is worth quoting in full:

> "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."[66]

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[56] ibid, I.I.X.4.
[57] d'Entreves (n.5), 51; Crowe (n.7), 224.
[58] Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge University Press, 1996), 29.
[59] Grotius, *DJBP* (n.2), prol.6.
[60] ibid, prol.7.
[61] ibid, prol.6.
[62] ibid, prol.8.
[63] ibid, prol.8.
[64] ibid, prol.9.
[65] ibid. prol.10.
[66] ibid, prol.11.

This statement has been given many shorthand names, including the 'impious hypothesis'[67] and the '*etiamsi daremus*' (Latin for 'even if we should concede').[68] This essay will hereafter use the latter term '*etiamsi daremus*'. Grotius notes, immediately after the *etiamsi daremus,* that "the very opposite view" has been shown to us by reason, by centuries of "unbroken tradition" and proven by both the proofs of God's existence[69] and the miracles observed over the ages.[70] Thus, he personally does not doubt the existence of God. Moreover, he then asserts that another source of law is the free will of God, to which we must, irrespective of our "cavil", "render obedience".[71] Further, he notes that the law of nature, including humanity's sociability, can be "rightly attributed to God" as He has surely willed these attributes within our psyche.[72] However, the core claim of the *etiamsi daremus* remains- humanity's sociability and the rules required for the maintenance of social life, the natural law, would exist irrespective of whether God himself existed.

Prima facie, Grotius' philosophy of natural law, particularly with the *etiamsi daremus* challenging the requirement of God for natural law's existence, seems to contest the theological tradition of natural law expounded by Suárez *et al*. Regarding Grotius' theory of natural law, Dugald Stewart noted that Grotius provided "a new direction to the studies of the learned".[73] More brazenly, Christian Thomasius declared that Grotius had "revived and began to purge this extremely useful discipline, which had been tainted and corrupted by dry scholasticism".[74] Most ambitiously, Otto von Gierke asserted that it "was a definite epoch in the history of thought when Grotius proceeded to elaborate a purely secular philosophy of law".[75]

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[67] This term originated from Pufendorf and was adopted by later thinkers- see Leonard Besselink, 'The Impious Hypothesis Revisited' (1988) 9(1) Grotiana 3, 3.
[68] Schneewind (n.4), 68; Javier Hervada, 'The Old and the New in the Hypothesis "*Etiamsi daremus"* of Grotius' (1983) 4(1) Grotiana 3, 5.
[69] However, it should be observed that no particular proofs are listed by Grotius here- see Grotius, *DJBP* (n.2), prol.11.
[70] ibid, prol.11.
[71] ibid, prol.12.
[72] ibid, prol.12.
[73] See, Dugald Stewart, 'Dissertation: Exhibiting the Progress of Metaphysical, Ethical and Political Philosophy, Since the Revival of Letters in Europe' in William Hamilton (ed), *The Collected Works of Dugald Stewart*, 170-171.
[74] Christian Thomasius (Thomas Ahnert (tr.)), *Institutes of Divine Jurisprudence. With Selections from Foundations of the Law of Nature and Nations* ('Foundations' originally published 1705, Liberty Fund 2011), *Foundations, Introductory Chapter*, §1 (p.571).
[75] Otto von Gierke (Ernest Barker (tr)), *Natural Law and the Theory of Society: 1500 to 1800* (Originally published in 1934, Cambridge University Press, 1950), 36.

However, as shall be seen in Parts 3 and 4, other scholars have questioned both the originality of Grotius' theory of natural law and whether it truly marked the secularisation of natural law. Challengers of Grotius' originality argue that Grotius' claims regarding natural law, even the *etiamsi daremus*, originate from prior Scholastic thought. Critics of Grotius' alleged secularisation of natural law argue that Grotius was profoundly religious and never intended to separate natural law from religious foundations.

I shall submit that these arguments above are unconvincing in many respects. It will be argued in Part 3 that Grotius' account of natural law is profoundly original as he was the first scholar to coherently propose a theory of natural law wherein natural law would be obligatory irrespective of God's existence. Part 4 will show how Grotius espoused a minimal version of Christianity in many of his religious works which was non-sectarian and broadly free of Christian doctrine. This approach carried over to his legal treatises, especially in *DJPB*, wherein Grotius established a minimally-Christian theory of natural law which attempted to be religiously uncontroversial, laying the path for natural law to be increasingly secularised by later jurists.

3. Grotius' *Etiamsi Daremus*- Scholastic-Inspired or Original?

This part shall be split into two subsections. The first will consider the argument that Grotius' thoughts on natural law, in particular his *etiamsi daremus*, were unoriginal, and were likely inspired by previous Scholastic jurisprudence. The second will consider and endorse the rebuttal to this view, whereby Grotius' *etiamsi daremus* is actually profoundly original as, through it, Grotius argues that natural law can be obligatory irrespective of God's existence- a position which no Scholastic adopted.

3.1- Grotius' Alleged Lack of Originality

It has been argued by many scholars, as shall be seen below, that Grotius' thoughts on natural law were not profoundly original in nature. These scholars submit that Grotius' core claim in the *etiamsi daremus* was that natural law would *exist* irrespective of God's existence. In the history of natural law, such a claim would be fairly unoriginal. As Besselink neatly summarises, "counterfactual assertions concerning the existence of God are commonplace in antiquity, the middle ages and later".[76] Finnis submits that Grotius would have likely been

[76] Besselink (n.67), 62.

aware of such counterfactual assertions through his reading of other thinkers.[77] However, the exact source of inspiration for Grotius' *etiamsi daremus* is unclear as he does not cite any particular philosopher who had expressed a similar view. This lack of a direct citation has not stopped commentators from speculating on the potential sources or inspiration for the *etiamsi daremus*. Scholars have suggested a variety of potential sources, ranging from the Second Scholastics (including Gabriel Vásquez and Suárez), theologians from the Middle Ages, such as Aquinas, Duns Scotus and Gregory of Rimini,[78] and even Romans like Emperor Marcus Aurelius.[79] The list of potential sources is gargantuan, and consequently Besselink admits that it may be impossible to attribute the *etiamsi daremus* to any thinker in particular.[80]

Regardless, while we may be unable to attribute the *etiamsi daremus* to any particular philosopher, it would be useful to compare Grotius' position with those of theologians who have utilised similar arguments. Gregory of Rimini is often cited as making arguments comparable to Grotius' *etiamsi daremus*.[81] Gregory splits 'law' into two key distinctions- *lex imperativa* and *lex indicativa*. *Lex imperativa*, or 'imperative law', consists of the commands of superior authorities; *lex indicativa,* or indicative law, only "indicates that something is good or bad".[82] Natural law, as a dictate of right reason, is a form of *lex indicativa* under Gregory's framework.[83] However, Gregory claims that sin is not only a violation of divine reason, but also a violation of right reason. In order to make that claim, he states that sins would still be classified as such per right reason even if God and divine reason did not exist.[84] Other theologians, such as Gabriel Biel, fully endorsed Gregory's viewpoint, with Biel even quoting Gregory's assertion that sin would exist irrespective of God's existence.[85] However, as Suárez rightly notes, natural law under Gregory's scheme is *not* prescriptive. Thus,

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[77] John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press, 2011), 43. Finnis, like other scholars, theorise that Grotius was familiar with Suárez's work and may well have derived his inspiration from Suárez. This has been, however, disputed by other scholars- see, Besselink (n.67), 58-62 and citations within.
[78] See, Crowe (n.7), 226-227 and the sources cited within.
[79] See, Hervada (n.68), 10; Schneewind (n.4), 68 (fn.17). Hervada rightly rejects Marcus Aurelius as being the source as the content of the *etiamsi daremus* is not present in Aurelius' work- see Hervada (n.68), 10-11.
[80] Besselink (n.67), 62.
[81] ibid, 8.
[82] James St Leger, *The "Etiamsi Daremus" of Hugo Grotius- A Study in the Origins of International Law* (Herder, 1962), 124.
[83] ibid, 124-125.
[84] ibid, 125.
[85] See, ibid, 125-127. However, c.f., Michael Crowe, 'The "Impious Hypothesis": A Paradox in Hugo Grotius?' (1976) 38(3) Tijdschrift voor Filosofie 379, 403-405.

Gregory's natural law lacks the attribute of actually being binding on humans, and thus lacks the essential component of obligation.[86]

As St Leger notes, another comparison must be made to Gabriel Vásquez.[87] In his discussions of sin, Vásquez seemingly goes one step further than his predecessors by declaring that "sin is evil of itself prior to any prohibition, whether that prohibition be imperative or indicative, created or divine".[88] Vásquez, contrary to Gregory and Biel, argues that the "formal nature of sin does not lie in the fact that an act is contrary to the judgement of reason, but rather in the fact that it is inconsistent with rational nature".[89] St Leger highlights that Vásquez believes that right reason is able to identify consistently whether an action is contrary to rational nature. Even if right reason was inconsistent, Vásquez believes it only strengthens his argument as sin is clearly not based on reason, whether human or divine, but instead rational nature.[90] Consequently, Vásquez concludes that "if we should concede, which is indeed impossible, that God did not judge as He does now, and if there remained in us the use of reason, sin would remain".[91] Actions and beliefs are not sinful because God says so- instead, God understands these entities as sinful because they *are* sinful.[92]

At this point, one could reasonably say that there *appears* to be an affinity between Grotius' *etiamsi daremus* and previous theological arguments. However, many scholars have gone further than noting a mere affinity. Hervada submits that Grotius' *etiamsi daremus* did not present anything not seen before in Scholastic thought.[93] Furthermore, St Leger believes that Grotius' *etiamsi daremus* is a direct endorsement of Vásquez's jurisprudence, given their similarities.[94] Chroust, as noted earlier, believed that Grotius' jurisprudence was "a direct continuation of the great Natural Law tradition", which had been Scholastic in nature.[95]

Presuming these arguments above are correct, and Grotius' account is indeed merely a direct continuation of the Scholastic tradition, a new question emerges- did Grotius have a

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[86] See, Suárez, *De Legibus* (n.10), II.VI.3 and II.VI.6; See also Schneewind (n.4), 60.
[87] St Leger (n.82), 130.
[88] ibid, 131, citing Gabriel Vásquez, *Commentariorum ac Disputationum in Priman Secundae Sancti Thomae* (Published between 1598 and 1615) (*'Commentariorum'*), disp.97,1,2. Translations used for Vásquez's *Commentariorum* are St Leger's.
[89] ibid, 131, citing Vásquez, *Commentariorum* (n.88), disp.97,1,3.
[90] See, ibid 132.
[91] ibid, 132, citing Vásquez, *Commentariorum* (n.88), disp.97,1,3.
[92] ibid, 132.
[93] Hervada (n.68), 18. Instead, Hervada argues that "the novelty resides in that Grotius does not establish any relation of causal exemplarity - analogy and participation - between divine nature and human nature, between God's reason and man's."- see, ibid, 18-20
[94] See, ibid, 132-134.
[95] Chroust (n.3), 125.

particular purpose in mind when posing the *etiamsi daremus* or was it mere "rhetorical flourish"?[96] Some scholars argue that the purpose of the *etiamsi daremus* was for Grotius to distance himself from a voluntarist position he had committed to in one of his earlier works, *De Jure Praedae* ('Commentary on the Law of Prize').[97] In *De Jure Praedae*, Grotius declares that, as an axiom, "what God has shown to be His Will, that is law".[98] A few lines later, he goes further stating that "a given thing is just because God wills it, rather than that God wills the thing because it is just".[99] As Tuck notes, the jurisprudential account offered by Grotius in *De Jure Praedae* would be classified as a voluntarist one.[100] While the reasons for Grotius' change of heart on voluntarism has attracted speculation,[101] it is evident that he had abandoned his extreme voluntarism by the time he wrote *DJBP*.[102] Devices like the *etiamsi daremus*, whereby God's existence is not necessary for the existence of natural law, evidence this change of opinion.[103] Moreover, Oakley adds that the *etiamsi daremus* also highlights the "unchanging nature of natural law and the inability of God to alter or transcend it". Thus, the *etiamsi daremus* was designed to highlight Grotius' distinction between natural law and volitional divine law in *DJBP*.[104]

The sum of this argument is that Grotius' *etiamsi daremus* was not actually a novel concept. Scholars have argued that statements in the same vein had already been made by a number of theologians before Grotius. Given its harmony with prior theological thought, if anything Grotius could be viewed as the continuation of Scholastic jurisprudence. Moreover, the *etiamsi daremus*, seemingly, provided the opportunity to depart from the voluntarist stance of his earlier works.[105]

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[96] Crowe (n.7), 225.
[97] See, Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (Continuum, 2005), 66.
[98] Hugo Grotius (Gwladys William (tr.), Martine van Ittersum (ed.)), *Commentary on the Law of Prize and Booty* (Originally published 1604 Liberty Fund, 2006), 19
[99] ibid, 20.
[100] Richard Tuck, 'The "modern" theory of natural law' in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge University Press, 1987), 112.
[101] See Crowe (n.7), 225.
[102] Tuck (n.100), 112; Oakley (n.97), 66; Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian Tradition' (2019) 30(1) European Journal of International Law 17, 33
[103] For an argument that Grotius' approach in *DJBP* was a "subtle compromise" between intellectualism and voluntarism, see Peter Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture 1' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations* (Oxford University Press, 1992), 171 (fn.129).
[104] Oakley (n.97), 66-67.
[105] On the point of Grotius' move from voluntarism to intellectualism, Besselink contests the notion that Grotius intended to advocate a voluntarist argument in *De Jure Praedae*- see Besselink (n.67), 47-54.

However, while there are similarities between Grotius' arguments and the theologians before him, there is clearly more to the *etiamsi daremus* than meets the eye. Other scholars have argued, rightly, that Grotius undoubtedly goes further than the Scholastics before him. I shall now consider and endorse this alternative argument in favour of Grotius' originality.

3.2- Rebuttal- Grotius' Argument's Originality

In this section, I shall argue that Grotius' account of natural law goes further than the Scholastics before him. This is because Grotius' assertion that humans are *obliged* to follow natural law irrespective of God's existence was, at the time, unique to his jurisprudence. Previous theological arguments never went as far as to say that natural law had this obligatory component irrespective of God's existence.

Gregory of Rimini and Biel both noted that sinful acts would remain sinful irrespective of God's existence. However, as Suárez correctly identifies, natural law under Gregory's and Biel's accounts are classified as *lex indicativa*, only signifying to humans which actions are good and evil- these rules of natural law are not prescriptive.[106] Thus, natural law's *content* may not rely on God's existence, but natural law fails to become a binding obligation. Consequently, Suárez, alongside Luis de Molina and Domingo de Soto, argued that natural law requires an authoritative command from a superior, often God, in order to be fully obligatory on humanity.[107]

However, St Leger seemingly suggests that Vásquez's theory of natural law does include the obligation to follow natural law.[108] However, in my view, this perspective is unconvincing. St Leger correctly states that Vásquez identifies rational nature as the "primary criterion of good and evil".[109] However, Vásquez does not explicitly touch upon the notion of obligation- his theory only asserts that the *content* of natural law is grounded in rational nature.[110] Subsequently, it is difficult to say that Vásquez goes tremendously further than previous theologians, as he too does not assert that *obligations* under natural law exist irrespective of God's existence.

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[106] Suárez, *De Legibus* (n.10), II.VI.6
[107] See, St Leger (n.82), 127-130 and citations within.
[108] ibid, 131-132.
[109] ibid, 131
[110] See, Hervada (n.68), 17. For further differences between Vásquez's and Grotius' accounts of natural law on this point see Besselink (n.67), 57-58.

In contrast, Grotius assertively argues that obligations can exist in nature irrespective of the existence of God.[111] In the prolegomena, Grotius notes that humans are social animals, seeking a peaceful existence in the company of others. In order to maintain social order, humans create a variety of laws to regulate that order. For example, Haakonssen notes that in such an order, people can certainly form perfect rights of a contractual and quasi-contractual nature, "unaided by religion", whereby they can perform certain actions legally.[112] Moreover, Grotius notes that societies also create penal laws which inflict "penalties upon men according to their deserts" and laws of delict which oblige us to make "good of a loss incurred through our fault".[113] The beauty of Grotius' scheme is that these laws are obligatory on citizens irrespective of God's existence.[114] While these laws originate from societal structures, Grotius still claims that these laws are from the "source in nature", making these natural laws explicitly separate from God's will.[115] Thus, Grotius' argument goes further than the Scholastics before him, and is consequently original.

The consequence of Grotius' position is clear. Schneewind highlights the comments from Jean Barbeyrac in the latter's translation of *DJBP*. Barbeyrac comments at Grotius' *etiamsi daremus*-

> "No…to speak exactly the duty and obligation, or the indispensable necessity of conforming to these ideas and maxims [about social life] necessarily supposes a superior power, a supreme master of mankind".[116]

After all, if natural law can impose obligations irrespective of God's will, then it is fundamentally unclear why, and how, God would be involved at all. As he states- "The will and authority of God would…be an accessory which, at most, would only make the obligation stronger".[117]

Grotius' argument is a clear divergence from the views of the theologians who preceded him. This is because Grotius claimed that people are obliged to follow the precepts of natural law

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[111] Moreover, the notion of obligation would come to dominate later debates within natural law- see, Stephen Buckle, *Natural Law and the Theory of Property: From Grotius to Hume* (Clarendon Press, 1991), 24.
[112] Haakonssen (n.58), 29.
[113] Grotius, *DJBP* (n.2), prol.8.
[114] See Jerome Schneewind, 'Hugo Grotius' in Jerome Schneewind (ed), *Moral Philosophy from Montaigne to Kant* (Cambridge University Press, 2010), 88-89; Haakonssen (n.58), 29.
[115] Grotius, *DJBP* (n.2), prol.12.
[116] Schneewind (n.4), 73, citing Hugo Grotius (Jean Barbeyrac (tr.), *De Jure Belli ac Pacis* (Originally published 1625, Barbeyrac's 1738 Translation) ('Barbeyrac'), note to prol.xi.
[117] ibid, 75, citing Barbeyrac (n.116), note to I.I.x.2.

irrespective of God's existence or whether he cares about human affairs- an argument which was unique at the time it was made. Such an argument, as Barbeyrac noted, strongly questions whether God is a necessary component for natural law's operation at all. This problem for theologically-based natural law is possibly why, at the time, Suárez asserted that while natural law contains its own "precepts and prohibitions regarding what is good and evil", natural law still requires the command of God to make it obligatory.[118] Nonetheless, Grotius' jurisprudence of natural law is ultimately original on the basis that he confidently goes beyond this position, by grounding natural law's obligatory nature in the societal structures which humanity creates to regulate its societies, notably without the requirement of God.

However, despite the *etiamsi daremus'* implications, whether Grotius' approach secularised natural law is still keenly debated by scholars. Gierke, for example, argued that Grotius' contribution was the turning point in natural law becoming a secular, rather than a theological, pursuit. In contrast, Crowe has argued that Grotius' jurisprudence neither secularised natural law, nor would he ever have intended it to. In Part 4, this article will take an alternative approach, arguing that Grotius set out to present a non-sectarian and religiously uncontroversial version of natural law, a consistent theme in his other non-legal works. This non-sectarian approach prove influential to later thinkers, and laid the intellectual foundations for later jurists to secularise natural law..

4. Grotius' Religiously Uncontroversial Approach to Natural Law

This part shall be split into three subsections. The first shall consider the two traditional sides of the debate regarding whether Grotius' jurisprudence secularised natural law. The second will consider Grotius' non-sectarian views regarding Christianity and its doctrines. The third shall analyse how Grotius' non-sectarian and minimal approach to Christianity impacted his approach to natural law. The end result of Grotius' jurisprudence was a religiously uncontroversial version of natural law, which paved the way for natural law to be secularised by later jurists.

[118] See, Suárez, *De Legibus* (n.10), II.VI.5 and II.VI.8

4.1- The Traditional Debate

As we have seen, the *etiamsi daremus* proposes that natural law imposes obligations on individuals irrespective of God's existence or whether he cares about humanity's affairs. Consequently, it has been commonly claimed that Grotius was the first scholar to propose a truly secular theory of natural law.[119] This was most strongly argued, as seen above, by Gierke who proclaimed that it "was a definite epoch in the history of thought when Grotius proceeded to elaborate a purely secular philosophy of law".[120]

However, Crowe asks whether Grotian devices such as the *etiamsi daremus* were designed to "take natural law out of the theological controversies of the age?".[121] He is unconvinced. Crowe rightly notes that Grotius "suffered greatly from the religious intolerance of the time".[122] Grotius, both during and after his lifetime, was accused of "deviating from Protestant orthodoxy".[123] Furthermore, he was sentenced to death, though his sentence was later commuted, and was imprisoned for favouring the Arminians[124] (also known as the Remonstrants) in their religious and political disputes with the Calvinists in Holland.[125] However, despite all of this, Crowe claims that Grotius remained a theologian, and, further, that Grotius' account of natural law was still heavily influenced by religion. Crowe notes that immediately after setting out the *etiamsi daremus*, Grotius states that God's will is still a source of law which all humans are obliged to follow.[126] Furthermore, Grotius' definition of natural law is set out using "entirely traditional terms".[127] Lastly, "Grotius' other writings leave little doubt" that he was still a religious man.[128] Grotius did indeed write a variety of treatises on Christianity. For example, in *De veritate religionis Christianae* ('On the Truth of the Christian Religion'), he asserted that, *inter alia*, there was only truly one God,[129] who is

[119] See, *inter alia*, Brian Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 67; Finnis (n.77), 43.
[120] Gierke (n.75), 36.
[121] Crowe (n.7), 224.
[122] ibid, 224.
[123] See Scheewind (n.3), 68.
[124] Such views can be found in Hugo Grotius (Edwin Rabbie (ed.)), *Ordinum Hollandiae ac Westfrisiae pietas-Critical Edition with English Translation and Commentary* (Originally published in 1613, Brill, 1995).
[125] For an overview of this complex part of religious history in Holland, see Richard Tuck, *Philosophy of Government 1572-1651* (Cambridge University Press, 1993), 179-184.
[126] Crowe (n.7), 224. However, c.f., Hervada (n.68), 18-19.
[127] ibid, 224.
[128] ibid, 224.
[129] Hugo Grotius (Simon Patrick (tr.)), *The Truth of the Christian Religion in Six Books* (Originally published 1627, St Paul's Churchyard, 1689), Bk.I Sects.I-II

omnipotent, infinite, the creator of all things and "absolutely good".[130] In other sections of the text, Grotius also attempts to prove that Christianity, rather than Judaism or Islam, is the 'true' religion. Given Grotius' Christian commitments, Crowe opines that it is unlikely that Grotius would have sought to separate natural law and theology in *DJBP*.

In my view, this debate regarding whether Grotius secularised natural law misses a key dimension of Grotius' views on both religion and jurisprudence. While it is true that Grotius was religious, a central theme of Grotius' religious treatises was their non-sectarian nature and his desire to present arguments agreeable to all Christians- a controversial stance at the time he wrote. Moreover, Grotius' tendency to pose arguments appealing to all would imprint itself in an even stronger sense onto *DJBP*, where Christian doctrine was almost non-existent. Such a stance, while not secularising natural law, laid the groundwork for natural law's secularisation by later thinkers. To begin exploring this argument, Part 4.2 shall explore Grotius' approach to theological matters.

4.2- Grotius' Non-Sectarian Approach to Theology

Grotius' writings on religion are truly fascinating, as he often sought to provide religious arguments which would be uncontroversial to all Christian factions, or even universal in nature, despite the intense religious turmoil which engulfed Europe during the 16th and 17th centuries following the Protestant Reformation. Schneewind correctly identifies that *De veritate religionis Christianae* presents "a minimal version of Christianity", with many doctrines like 'Christ as the Savour' and 'sin' being surprisingly absent.[131] Given the prevalent doctrinal divides between Protestants and Catholics at this point in history, and controversies about religious toleration (particularly in Grotius' native Holland),[132] such an approach would have been unusual in Christian literature. However, Tuck highlights that Grotius was always "unhappy about the split between Catholic and Protestant".[133] Grotius' unhappiness with this division is most clearly seen in *Meletius, or Letter on The Points of Agreement Between Christians.*[134] *Meletius* takes the form of a letter to an unnamed

[130] ibid, Bk.I. Sects.III-VI
[131] Schneewind (n.4), 69. See also, Tuck (n.125), 195.
[132] See, Tuck (n.125), 179-184.
[133] ibid, 185.
[134] References to *Meletius* will come from Hugo Grotius (Guillaume Posthumus Meyjes (tr.)), *Meletius sive de iis quae inter Christianos conveniunt epistola* (Brill, 1988) ('Grotius (Posthumus Meyjes (tr.)), *Meletius*'). Reference to the text shall utilise Grotius' section numbers, while Posthumus Meyjes' commentary shall be referred to using the page number his commentary appears.

correspondent, who is widely suspected to be Grotius' friend Johannes Boreel.[135] Grotius opens *Meletius* by reflecting on the deep, and unnecessary in Grotius' view, divisions among the communities of Europe despite their similarities to each other.[136] Grotius proceeds to note that similar divisions have appeared within Christendom, where different Christian factions had completely alienated their fellow Christians on the basis of differences in doctrinal opinion and degrees of conviction. As a result, "implacable anger" divided these Christian sects to such an extent that even war had broken out between them.[137] Given God's emphasis on harmony, Grotius writes that he often mulls over the religious views that all Christians have in common, and how it could unite them once more..[138] In particular, Grotius finds the example of Meletius, who served as Patriarch of Alexandria, to be especially inspiring. Grotius recalls from his conversations with the well-travelled Boreel how Meletius advocated for harmony among all Christians by stressing the "points of consensus" they all shared.[139] Following in Meletius' stead, Grotius' purpose in *Meletius* is to highlight the points of consensus among Christians, so as to resolve the divides between different Christian sects for, ultimately, a united Christendom.

To accomplish this goal, Grotius highlights the aspects which most religions,[140] regardless of their apparent 'truth', share with each other, namely the belief in God and the notion that God is a remunerator who rewards genuine belief.[141] The other sections of *Meletius* assert that Christianity is the true and perfect account of religion,[142] and that other faiths[143] and philosophies[144] have deviated from the truth in their incorrect doctrines and interpretations. This climaxes in *Meletius'* epilogue where Grotius returns to Meletius' teachings once more. Meletius believed that the root of the divisions between Christians was the over-emphasis on disputable dogmas and the disregarding of widely agreed ethical precepts.[145] Grotius agrees with this sentiment, noting that religious doctrinal disputes rarely concern ethical principles but instead broadly relate to discretionary matters which do not impact on the lives of other

[135] See, ibid, 20-22
[136] ibid, §.1
[137] ibid, §.2
[138] ibid, §.3
[139] ibid, §.5
[140] It should be noted that Grotius claims that "all religions" share these traits- ibid, §.12. However, religions, such as Buddhism, which neither place Gods at the centre of their doctrine, let alone view God as a remunerator, are left unmentioned.
[141] ibid, §6-12.
[142] See, Posthumus Meyjes' excellent summary of Grotius' core argument- ibid, 32-33.
[143] Namely Judaism (see, e.g., ibid, §.50 and §.64) and Islam (see, e.g., ibid, §.79).
[144] Grotius primarily criticises Stoicism (see, e.g., ibid, §.7) and Epicureanism (see, e.g., ibid, §.8 and §.29).
[145] ibid, §.89

Christians.[146] In contrast, Grotius asserts that ethical principles are "definite and unequivocal rules" which all Christians would find agreeable.[147] Thus, to remedy the divides between Christian factions, Grotius proposes that Christians limit "the number of necessary articles of faith to those few that are most self-evident", while inquiring "into other doctrinal points which lead to the perfection of pious wisdom, without prejudice, preserving clarity and under the guidance of the Holy Scriptures".[148] Furthermore, to avoid sowing further division, Christians should not be hostile to each other over disagreements about their faith, and instead forgive each other's perceived ignorance. After all, they err out of their love of God, rather than hatred of Him.[149]

In *Meletius,* Grotius advocated for a unified Christendom on the basis of its core commonly-agreed ethical principles, rather than on divisive doctrinal concepts. Moreover though, as Posthumus Meyjes highlights in his translation of *Meletius*, Grotius was also appealing to members of other religions, primarily paganism and Judaism, given their similarities to Christianity.[150] This is further evidenced in one of Grotius' letters to the Calvinist minister Antonius Waleus, when he wrote:

> "It was my intention both to stimulate Christians to love one another for what they have in common, and to induce the others to embrace the common Christian confession as well".[151]

Thus, as Tuck neatly comments, Grotius was attempting to present a version of Christianity "which would be agreed on by all societies"- a version which was noticeably removed from theological controversy and sectarian doctrine. [152]

Some of Grotius' contemporaries were concerned with *Meletius*' non-sectarian tone. The most prominent critic was the aforementioned Antonius Walaeus. Grotius and Walaeus were well acquainted and certainly respected each other. However, it is clear that both of them had very different theological viewpoints, which would eventually result in the pair being

[146] ibid, §.90- see the example of the duration of fasting in the cited letter between Irenaeus and Victor.
[147] ibid, §.90.
[148] ibid, §.91.
[149] ibid, §.91. See also §.90 ("Indeed it is impossible that everybody should agree about everything").
[150] ibid, 25. See also, ibid, §.12.
[151] Letter from Hugo Grotius to Antonius Walaeus, 11th January 1612, cited ibid, 25 (Posthumus Meyjes' translation).
[152] Tuck (n.125), 185.

political opponents during the Calvinist-Remonstrant dispute.[153] It is perhaps this difference of opinion that led Grotius to send a draft of *Meletius* to Walaeus for comments and advice. In response, Walaeus was wary, advising Grotius that elements of *Meletius* risked attracting tremendous controversy, especially given the religious intolerance pervading Holland at the time. In particular, Walaeus advised Grotius to revise his sections discussing tolerance towards Catholics and other heretics, as well as to emphasise Christian doctrines, namely the Holy Trinity, and to amend his discussion of man's free will and its relationship to the concept of grace.[154] Grotius' response regarding Walaeus' comment on Catholicism is perhaps the most revealing aspect of Grotius' complete rejection of sectarianism. He stated that "it follows that if Religion is reduced to what all Christian churches at all times believed in, then Papism collapses, for it is made up of isolated opinions".[155] As Tuck rightly notes, Grotius hardly needed to point out that Protestant movements, such as Calvinism, fail on the same ground.[156]

However, in the end, *Meletius* was never published. This was seemingly because Grotius was unwilling to amend his sections regarding the relationship between human will and grace. Walaeus warned Grotius that he risked, *inter alia*, being accused of modernism by conservative theologians (given his argument's novelty), and urged Grotius to express greater clarity in his argument to avoid criticism.[157] Posthumus Meyjes speculates that Grotius would be unwilling to amend this particular section as Walaeus was effectively recommending Grotius to "toe the line of the churchmen".[158] Such a position would have detracted from Grotius' overall message of encouraging consensus among Christians.[159] Given the potential for harsh criticism from his theological peers, coupled with the religious intolerance of the age (to which a treatise calling for consensus would likely only court controversy), Grotius chose to withhold publication.[160]

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[153] For a brief biography of Walaeus and his relationship with Grotius, see, Grotius (Posthumus Meyjes (tr.)), *Meletius* (n.134), 46-49.
[154] See, ibid, 49-50. See also, Tuck (n.125), 186-187.
[155] Letter from Hugo Grotius to Antonius Walaeus, 11th November 1611, cited in Tuck (n.125), 186-187 and Grotius (Posthumus Meyjes (tr.)), *Meletius* (n.134), 52. (Tuck's translation used by the author).
[156] Tuck (n.125), 187.
[157] For both sides of this complex discussion, see Posthumus Meyjes' commentary in Grotius (Posthumus Meyjes (tr.)), *Meletius* (n.134), 55-57.
[158] ibid, 57.
[159] ibid, 57.
[160] For Waleus' reaction to Grotius withdrawing *Meletius* from publication, see ibid, 57-58. It is noteworthy that not all of Grotius' contemporaries shared Waleus' theological concerns- see, ibid, 58-59 and the citations within (in particular, the Letter from Petrus Cunaeus to Apollonius Schotte, 4th April 1612).

Regardless, it is clear that *Meletius* provides a clear and honest insight into Grotius' approach to Christian theology. Grotius sought to present a version of Christianity which would be agreeable to all Christians regardless of their denomination. He accomplished this by advocating for a minimal approach to Christian doctrine, with indisputable ethical precepts as its foundation. Such a minimal and non-sectarian approach can also be seen in in his later theological works, such as *De veritate religionis Christianae* which was published over 10 years later (as seen above).[161] More importantly, for this article's purposes, it shall be submitted that Grotius' non-sectarian approach also carried over to his legal works. This resulted in an account of natural law which, despite being Christian-influenced, was largely free of divisive denominational Christian doctrine. While this approach in itself was still religiously-orientated, it laid the groundwork for later thinkers to secularise natural law completely, as Part 4.3 shall now explore.

4.3- Grotius' Non-Sectarian Natural Law, and Its Legacy

From the above, it is clear that Grotius was committed to presenting a version of Christianity which was agreeable to all. This desire to pose uncontroversial, universal arguments carried over to his later legal treatises. As Schneewind notes, *DJBP* is nearly devoid of Christian doctrine altogether.[162] In *DJBP*, Grotius notes that all valid religions share four fundamental principles: first, a single God exists; second, God is not a visible entity- he is beyond the comprehension of humanity; third, God is providential and, accordingly, regulates human existence; fourth, God is the "creator of all things except himself".[163] Grotius notes that all 'true' religions hinge on these core propositions.[164] He adds that failure to respect the Sabbath is punishable on the basis that non-observance of this sacred rite was akin to denying God himself.[165] Beyond these points, which are attributable to any Christian faction, sectarian doctrine is completely absent from *DJBP*.

This non-sectarian approach can also be found in Grotius' discussion of natural law. As seen above, Grotius asserts that due to the moral necessity of natural law's precepts, the natural

[161] See also, Tuck (n.125), 195.
[162] Schneewind (n.4), 69-70.
[163] Grotius, *DJBP* (n.2), II.XX.XLV-XLVI.
[164] It is worth noting that Grotius' tolerance of Christian denominations does not necessarily extent to other religions. Many religions, such as Buddhism and Hinduism, fail to meet his criterion for 'true' religions, though in *DJBP* Grotius only glazes over them- Grotius, *DJBP* (n.2), XX.XLVI.1. Moreover, Grotius flatly rejects, and is even hostile towards, other faiths, namely Judaism and Islam- for his views on the latter two, see, Grotius, *The Truth of the Christian Religion* (n.129), Bks.5-6.
[165] Grotius, *DJBP* (n.2), II.XX.XLV.2.

law is necessarily "enjoined or forbidden by the author of nature, God".[166] From this passage, it is clear that God still has a role under Grotius' jurisprudence- however, it is quite a minimal one. Moreover, despite the *etiamsi daremus*' primarily implication being that God's existence is not necessary for obligations to exist under natural law, Grotius does personally reject the hypothesis.[167] Given Grotius' Christian conviction, it seems that this rejection of *etiamsi daremus* is genuine. The key point of the *etiamsi daremus* was to claim that obligations would exist under natural law irrespective of God's existence- Grotius himself did not seek to personally endorse that position. Consequently, it would be difficult to claim that Grotius had a secular view of natural law. However, the religious aspects of Grotius' account of natural law are minimal and would not be controversial to any Christian faction. Thus, Grotius' account of natural law can be reasonably classified as non-sectarian in nature.

This non-sectarian approach is important for understanding the profoundness of Grotius' contribution to natural law's development. As was seen with Suárez, previous natural law thought before Grotius was dominated by Christian theology. Suárez was even particularly bold by claiming that the theologian had philosophical province over all forms of law, including natural law. As Schneewind highlights, Grotius' approach undermined calls into question this theological dominance over natural law. First, under Grotius' jurisprudence, lawyers and philosophers are well placed to identify the obligations required under natural law without the need for theological guidance. Second, all individuals can, given Grotius' deliberate exclusion of sectarian doctrines, both understand and comply with their (minimal) religious obligations under natural law.[168] d'Entrèves adds that even if the content of Grotius' natural law was unoriginal, his methodology was certainly original. He argues that Grotius presented a theory of natural law, implicitly based in humanity's social nature, which was "independent of theological presuppositions".[169] Consequently, Grotius' objective was to construct a theory of natural law which "would carry conviction in an age in which theological controversy was gradually losing the power to do so".[170]

To sum up, Grotius was indeed a committed Christian, as Crowe suggests above. However, Grotius, unusually for the time, held non-sectarian Christian views, and tended towards

[166] ibid, I.I.X.1.
[167] ibid, prol.11 ("What we have been saying would have a degree of validity even if we should *concede that which cannot be conceded without the utmost wickedness*, that there is no God...") [emphasis added].
[168] Schneewind (n.4), 70.
[169] d'Entreves (n.5), 51.
[170] ibid, 52.

making theological arguments which were agreeable to Christians of all denominations. The account of natural law in *DJBP* is even further free from sectarian doctrine and religious controversy, with devices such as the *etiamsi daremus* calling into question whether God is even necessary for natural law to be obligatory. This is a profound account of natural law, given not only the theological background of natural law prior to Grotius' writings, but also the religious intolerance of the age, which had nearly cost Grotius his life.

In contrast, however, Gierke is mistaken when he claims that Grotius' account of natural law was a secular one, as religious elements still do remain within it, but in a very minimal form. Instead, as d'Entreves correctly argued, Grotius' successors "completed the task" of secularising natural law.[171] For example, Pufendorf, writing 30 years after Grotius' death, formulated his theory of natural law in such a way as to avoid religious controversy.[172] In particular, Pufendorf suggested that the fields of divine law and natural law were quite distinct from each other, questioning the place of the theologian in the field of natural law.[173] Furthermore, scholars of the 18th Century, such as Vattel,[174] advocated natural law positions which were broadly secular in nature, far removed from theological controversy.[175] Bix adds that over the 17th and 18th centuries, the role of God in theories of natural law was tremendously reduced. Consequently, the vast majority of contemporary accounts on natural law are now formulated without attempting to ascertain the existence of God.[176] This secularisation of natural law was put into motion by Grotius' detachment of natural law from a particular religious denomination. This non-sectarian approach would be adopted by later writers on natural law, which in turn gradually secularised the concept.[177]

It is clear that Grotius' account of natural law has a complex legacy in the history of natural law. To be sure, Grotius was indeed a committed Christian, though he was a non-sectarian one. This non-sectarian approach influenced his legal treatises, notably *DJBP*, where Grotius

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[171] ibid, 52.
[172] Nigel Simmonds, *The Decline of Juridical Reason: Doctrine and theory in the legal order* (Manchester University Press, 1984), 53.
[173] Samuel Pufendorf (Andrew Tooke (tr.)), Ian Hunter and David Saunders (eds.)) *The Whole Duty of Man, According to the Law of Nature* (Originally published 1673, Liberty Fund, 2003), 17-26 (Author's Preface); Schneewind (n.3), 131-132.
[174] Emer de Vattel (Béla Kapossy and Richard Whitmore (eds.)), *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Originally published.1797, Liberty Fund, 2008), in particular 67-79. See also, Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press, 2015), 117-118.
[175] See, d'Entreves (n.5), 52-53.
[176] Bix (n.119), 67; See also, for an example, Finnis, (n.77), 48-49.
[177] See, Schneewind (n.4), 82.

presented an account of natural law which was designed to be religiously uncontroversial. It is true that Grotius' account of natural law was not secular, nor did he seemingly intend it to be so. However, its legacy was to encourage later scholars to theorise on natural law in non-sectarian, and later secular, terms. In turn, this downplayed the importance of God and religion in these later accounts, leading over time to the secularisation of natural law- a process in which Grotius' jurisprudence was undoubtedly influential.

Conclusion

This article has sought to reappraise Grotius' contribution to the history of natural law. In Part 1, the example of Suárez's *De Legibus* highlighted the dominance of theology over the philosophy of natural law, and the study of law in general. However, this dominance would come to be challenged by Grotius' account of natural law in *DJBP*, which was established in Part 2. However, it was highlighted that the legacy of Grotius' contribution to natural law has been widely debated on many aspects. Many scholars asserted that Grotius' account of natural law was unoriginal on the grounds of its similarities to prior Scholastic jurisprudence. Others debated the topic of whether Grotius sought to secularise natural law or whether it remained religiously-orientated.

In this article, I have aimed to contribute to both of these key debates. In Part 3, it was submitted that Grotius' approach to natural law, namely through his *etiamsi daremus*, was profoundly original, despite an affinity with Scholastic thought. Grotius went further than the Scholastics by clearly asserting that obligations exist under natural law irrespective of the existence of God. In Part 4, it was argued that Grotius' account of natural law was non-sectarian in nature and was designed to be religiously uncontroversial. This is in keeping with the broader themes of Grotius' theological works, as seen in his pivotal treatises such as *Meletius.* Consequently, it appears that Grotius did not seek to secularise natural law himself. However, it is clear that his approach to natural law inspired many later jurists to theorise on natural law in non-sectarian, and later secular, terms. Thus, his account, whether intended or inadvertent, laid the foundations for the secularisation of natural law by later jurists. In closing, it is clear from this reappraisal that Grotius' account of natural law was a truly profound contribution to the development of natural law.

The Benefits of the Bolar Exemption in the UK

Kathleen Sargent[*]

Introduction

The Bolar Exemption was originally derived from the U.S. case *Roche Products Inc v Bolar Pharmaceutical Co.*[1] Roche Products Inc. took action against Bolar Pharmaceutical Co. to prevent them from taking the statutory and regulatory steps necessary to market a generic pharmaceutical equivalent to their patented pharmaceutical after the expiration of their patent within Roche Products Inc.'s lifetime.[2] This led to the creation of the Bolar Exemption, which allowed clinical trials to take place that test the safety and efficacy of a patented pharmaceutical without infringing upon a creator's patent. The Bolar Exemption was then implemented in the United States by the Drug Price Competition Patent Term Restoration Act of 1984, more commonly known as the Hatch-Waxman Amendments. The European Union then brought in a version of the Bolar Exemption by way of the Directive 2001/83/EC which has been amended by the Directive 2004/27/EC on the Community Code relating to medicinal products for human use. The Bolar Exemption was then introduced into the United Kingdom's legislation in The Legislative Reform (Patents) Order 2014 on section 60 of the Patents Act 1977.

The Exemption has great importance both in the patent and medical field for all stakeholders; the public, creators, competitors, and regulators. These changes have been significant, and each time have resulted in the Bolar Exemption becoming more effective. Each change has redistributed the power complex between the four stakeholder groups. Another change may potentially take place with the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) Act 2019, 'Brexit'. The Patents Amendment (EU Exit) Regulations 2019 leaves room to grow the United Kingdom's Bolar Exemption based on the Exemption in other European Countries. The United Kingdom should continue to develop the Bolar Exemption by exempting all clinical trials from patent infringement, as currently there is a distinction between "medicinal product assessment",

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[1] *Roche Products Inc v Bolar Pharmaceutical Co., Inc.* [1984] 733 F.2d 858.

[2] Roche (n 1).

"medicinal product", and "medicinal product for human use" within the Patents Act 1977. The Bolar Exemption should be expanded so far as to exempt medical innovation, procedures and research procedures from patent infringement. This would allow for the Bolar Exemption to be used to its full capability.

The importance of the Bolar Exemption

There are a lot of different reasons why the Bolar Exemption is important, as it has many benefits for the general population. Medicines are necessary for public health and they need to be something that the general public can afford. It tips the balance in the public's favour as it creates a more affordable route for both the pharmaceutical companies to produce products and for the general population to access them. It also provides the public with more choice when picking which pharmaceuticals to go with, as the Bolar Exemption allows for more generic and patented options. This choice holds the producers of these pharmaceuticals accountable as competitors can test in a clinical trial the safety and efficacy of a medicinal product. It is argued that there is no need for a generic pharmaceutical to exist simply because bringing the pharmaceuticals to market is enough public benefit gained and therefore no additional benefit is required.[3] This, however, is not the case. Medicines are required for the general public, but if the public cannot afford them then they are not for the public benefit. The money required for both the public to be able to afford those pharmaceuticals and the research and development needed to produce them in the first place is disproportionate. As research and development can be quite expensive, if a company can maintain its revenue stream they are able to provide medicines at an affordable price to the public.[4] The Bolar Exemption allows for generic products to enter the market after clinical trials have been properly conducted following the provisions of Regulation (EU) No 536/2014 (repealing Directive 2001/20/EC) on clinical trials on medicinal products for human use. This allows for generic products that are just as safe and it keeps the costs low for the public.

Companies need to be able to produce these medicines, or even medical inventions that aid with procedures, without fear of facing extensive financial detriment. Medical inventions are included within the Bolar Exemption; however, most companies tend to focus on the medicinal products,

[3] Kevin Iles, 'A Comparative Analysis of the Impact of Experimental Use Exemptions in Patent Law on Incentives to Innovate' [2005] 4 Nw J Tech & Intell Prop 61, 65.
[4] Iles (n 3) 66.

as they are cheaper to produce and test. Medical inventions also tend to not be included within the scope that most countries allow, however France and Germany are the exception to this.[5] The financial detriment that they may incur can potentially be from legal fees due to patent infringement, the costs for research and development, and price regulation.[6] The Bolar Exemption lowers costs for pharmaceutical companies. It allows for and encourages generic competition. While a patent is active, generic companies are unable to apply for regulatory approval and third parties are unable to supply them with active pharmaceutical ingredients; the Bolar Exemption removes these barriers. To improve on the legal costs when it comes to making sure that a company will not accidentally commit patent infringement it is recommended that the United Kingdom widens the scope to include all medicinal products to be tested within clinical trials. This will have a beneficial impact on companies as it will free up revenue to continue manufacturing generic products. The Exemption already aids in making the United Kingdom a more favourable location[7] for innovative medical research and development. With a wider scope, it is a real possibility that it will continue to become more favourable for all clinical trials, which will help advance the pharmaceutical industry within the United Kingdom.[8] The United Kingdom should follow in the footsteps of the United States, Germany, and France to broaden the scope of the Bolar Exemption.

Creation of the Bolar Exemption – The US and the move into Europe

The Bolar Exemption was created to allow clinical trials that assess the safety and efficacy of a patented pharmaceuticals to be exempt from patent infringement.[9] This is the current interpretation that the common law courts in United Kingdom use, which is a narrow interpretation compared to other jurisdictions, such as European Member States and the United States.[10] In some European Member States this has been broadened to include all clinical trials, research procedures, laboratory equipment, third country rights, and medical innovations, both for patented and generic pharmaceutical ingredients. The Exemption was originally derived from a United States case in

[5] Nigel Stoate, 'EU enlargement, the Bolar exemption and parallel imports: The consequences for market exclusivity' (2003) Vol 3, 3 International Journal of Medical Marketing 239, 240.
[6] Iles (n 3), 66.
[7] C L Cohen and L Peirson, 'The UK Research and "Bolar" Exemptions: Broadening the Scope for Innovation?' (2013) 8 Journal of Intellectual Property Law & Practice 837, 837.
[8] Cohen (n 7) 837.
[9] JA KEMP, 'Amendments to the UK Patents Act to Extend the Bolar Exemption for Clinical Trials' (JA KEMP 2015) Briefing, 1.
[10] Cohen (n 7) 837.

Roche v Bolar.[11] Roche took action against Bolar from taking the statutory and regulatory steps necessary to market a generic pharmaceutical equivalent to their patent pharmaceutical within Roche's lifetime, even after the expiration of their patent.[12] The court held that the experimental use in this case had definite, cognizable and not insubstantial commercial purposes. In this instance it was a case of patent infringement.[13] Originally this idea of experimental uses being protected from patent infringement was under a very narrow scope.[14] It then was implemented in the Drug Price Competition Patent Term Restoration Act of 1984, more commonly known as the Hatch-Waxman Amendments, as the 'Bolar' provision[15] which was to be interpreted narrowly, meaning that only two activities were covered under the Exemption. The two activities covered were; one, for clinical trials that tested the safety and efficacy of an active pharmaceutical ingredient and two, for activities carried out to obtain regulatory approval for generic pharmaceuticals.[16] Since the original implementation of the Bolar Exemption within the United States there have been a significant amount of cases that have gone to the United States Supreme Court and have since widened the statutory definition created in *Roche v Bolar*.[17] While the European Directive was put in place to match the Drug Price Competition Patent Term Restoration Act of 1984 in terms of broadness, the United States have since widened the scope of the Exemption and the European Directive no longer matches it.[18] The Unites States also uses the "Orange Book" which is a comparative system for approved drug products with therapeutic equivalence evaluations that the US Food and Drug Administration have approved as both safe and effective.[19] The most recent development in the United States was when the FDA removed from the Orange Book the listings for biological products, as these products are no longer listed drugs under Section 7002(e)(4) of the Biologics Price Competition and Innovation Act of 2009.[20]

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[11] Roche (n 1).
[12] Roche (n 1).
[13] Roche (n 1).
[14] Iles (n 3) 67.
[15] Cohen (n 7) 837.
[16] Roche (n 1).
[17] Cohen (n 7) 837.
[18] Cohen (n 7) 837.
[19] Small Business and Industry Assistance FDA/CDER SBIA Chronicles, Patents and Exclusivity (19th May 2015) <https://www.fda.gov/media/92548/download > accessed 5 November 2020.

[20] FDA US Food and Drug Administration, Orange Book: Approved Drug Products with Therapeutic Equivalent Evaluations

The European Union developed an equivalent to the initial narrow scope known as the Bolar Exemption in 2001[21] and is governed by Article 10(6) of Directive 2001/83/EC as amended in Directive 2004/27/EC. The intention of this equivalent was to develop a minimum scope across European jurisdictions, since there was no unitary patent law within Europe when the Bolar Exemption was created. The Bolar Exemption in the Directive 2001/83/EC was purely regarding activities carried out to obtain regulatory approval for generic pharmaceuticals.[22] Since then, a Unified Patent Court was made in Brussels on 19 February 2013,[23] and there is also a European Patent office operating outside the confines of the European Union and is governed by the European Patent Convention.[24] The United Kingdom has since introduced this Directive into domestic legislation using a narrow implementation, however from amendments[25] this has widened slightly. The European States were able to choose to implement this directive narrowly, as in sticking to the minimum scope, or broadly, where they would expand the definition of what the Bolar Exemption would entail. This will be explored further on and it is recommended that the United Kingdom should continue to widen the interpretation.

The Exemption within the United Kingdom

The Bolar Exemption was first introduced to the United Kingdom by the European Union in 2001 with a required minimum scope laid out in Article 10(6) of the Directive 2001/83/EC as amended.[26] This was a provision which required all European Union Member States to exempt from patent infringement all studies and trials that were necessary to secure an authorisation for a generic medical product; specifically, those that are required to demonstrate bioequivalence to an existing authorised medicinal product.[27] The Directive does not explicitly require that clinical trials designed to secure authorisation for an innovative medicinal product be exempt from patent infringement.[28] This allowed Member States to determine the scope that they wished to implement,

<https://www.accessdata.fda.gov/scripts/cder/ob/?source=govdelivery&utm_medium=email&utm_source=govdelivery > accessed 5 November 2020.

[21] Kemp (n 9) 1.
[22] Cohen (n 7) 837.
[23] The Patents (Amendments) (EU Exit) Regulations 2019 Article 1 A in the Patents Act 1977.
[24] European Patent Convention Article 142.
[25] The Legislative Reform (Patents) Order 2014.
[26] Cohen (n 7) 840.
[27] Kemp (n 9) 1.
[28] Kemp (n 9) 1.

as there was at this stage no unified patent court throughout the European Union. As such this provision was not carried out in a uniform manner by all Member States. The United Kingdom decided to take the narrow approach and they kept to the minimum scope initially.[29]

The United Kingdom then took this directive and transposed it into domestic law in the Patents Act 1977 by following the minimum scope and adding Section 60(5)(i) which was introduced on 30 October 2005.[30] This Bolar Exemption that they added to domestic law only allowed Exemptions for general medicinal products designed to secure marketing authorisation for a generic product.[31] This provision was based on the model of the Drug Price Competition and Patent Term Restoration Act 1984 that also allowed for a narrow scope, meaning that the Exemption is only to be used to test the safety and efficacy of current patented drugs, a broad scope extends all the way to testing medical inventions.

The last change that the United Kingdom has made to the Bolar Exemption happened on 1 October 2014 when the Patents Act 1977 was amended. The amendment was to provide clarification on the extent to which conducting clinical trials to assess the safety and efficacy of a patented pharmaceuticals can constitute patent infringement.[32] This was included over two additional sections, 60(6D) and 60(6G), to go along with the previously added one from the 2005 amendment. It extended the scope to medicinal products as well as generic products so that both types of clinical trials will be covered.[33] The amendment is still limited to experimental purposes relating to the subject matter of the invention. It provided clarification on medical product assessments,[34] stating that anything done in or for the purposes of a medicinal product assessment which would otherwise constitute infringement of a patent for an invention is to be regarded as being done for experimental purposes relating to the subject matter of the invention.[35] The intention of this new amendment is that it should cover all activities necessary to secure authorisation for a medicinal product or for any health technology assessment carried out after a medicinal product is authorised.[36] This current

[29] Cohen (n 7) 840.
[30] The Medicines (Marketing Authorisations Etc.) Amendment Regulations 2005 (SI 2005/2759).
[31] Kemp (n 9) 1.
[32] Kemp (n 9) 1.
[33] Kemp (n 9) 2.
[34] Legislative Reform (Patents) Order 2014.
[35] Justyna Ostrowska and Dorthe Minde, 'Latest Trends in Bolar Exemption Rules in Europe' (2014) 241 Managing Intell Prop 44, 44.
[36] Cohen (n 7) 839.

state of the Bolar Exemption within the United Kingdom has definitely expanded since its first introduction into domestic law. However, there is still room to expand the Exemption to allow for medical innovation to take place in the United Kingdom.

The Effectiveness of the Changes in the UK

Currently the Bolar Exemption balances the rights quite fairly between the different stakeholders. The threshold for meeting the Exemption is quite high for creators and competitors and is very effective in protecting the rights of all the parties. The Exemption in general does have some drawbacks, for example, it can restrict the rights of the creator. This is because the current protection for a patent is a twenty-year period.[37] However, the Bolar Exemption protects from patent infringement regardless of how much time has passed in the twenty years.[38] This means that the patent does not protect them from competitors using a generic form of their product for clinical research purposes.[39] There are advantages for the creator as well, as it promotes clinical trials using their product. This in turns proves the safety and efficacy of their product, creating good publicity and generating more commercial opportunities.

The advantages for the State are that it makes the United Kingdom favourable for companies to come and create their pharmaceuticals. It creates more employment as more regulators and employees can be employed due to the uptick in revenue that companies can maintain, therefore boosting the economy of the state. This is because companies who are participating in clinical trials to create a generic pharmaceutical do not have to worry about the possible repercussions of patent infringement. It also lowers their research and development costs. It increases the clinical trial market in that Member State, as well as increasing the production of generic and innovative medicinal products.

[37] Patents Act 1977 s 25(1).
[38] Iles (n 3) 63.
[39] Wested, Jakob and Minssen, Timo, 'An Update on Research - & Bolar Exemptions in the U.S. and Europe: Unsolved Questions and New Developments in an Increasingly Important Are of Law' (2019) Vol 2 Nordiskt Immateriellt Rättsskydd 168, 169.

The Exemption allows for a competitive advantage since they can use the active ingredients that the creator has made for regulatory approvals. It can also disadvantage the competitor since it can place a financial burden on the pharmaceutical and biotechnology companies. Specifically, when it comes to analysing the scope of the Exemptions and challenging the validity of existing patents in order to clear the way for a safe pharmaceutical launch. This financial burden comes in the form of research and development expenses as well as legal costs.[40] The public does benefit the most from this Exemption as it does favour the interests of the general population. It allows for more generic medicines to be available to the public, giving them more options to find what works for them and it keeps the pharmaceuticals at a more cost-effective price point.

There has been some ineffectiveness with the changes as well. There is a long-standing debate around the question of whether the Bolar Exemption also allows third-party active pharmaceutical ingredients suppliers to produce, advertise and sell to generic companies such protected active pharmaceutical ingredients for the carrying out of clinical trials.[41] In certain jurisdictions this is normal, however it is something that the United Kingdom legislation has failed to address. The European Directive 2004/27/EC on this is also unclear and there is no legislation in Member States regarding this area of the Exemption. The domestic legislation also is ineffective compared to other jurisdictions when it comes to allowing for the trials of innovative medical and laboratory equipment and is an area where there is room for further change and clarification within the law.[42] There is some direction from other European Member States that the United Kingdom could choose to follow.

Brexit

Following Brexit, the UK will no longer have to comply with the EU legislation, and it will affect both IP law and the Bolar Exemption. On 'Exit Day' which is currently scheduled as January the 31st 2020, The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 and Patents (Amendments) (EU Exit) Regulations 2019, which has not mentioned Section 60 of the Patents Act 1977 that deals directly with the Bolar Exemption, will come into effect. This is in addition to the European Union (Withdrawal) Act 2018 and the

[40] Cohen (n 7) 843.
[41] Ostrowska (n 35) 44.
[42] Stoate (n 5) 240.

European Union (Withdrawal) Act 2019. Currently the Bolar Exemption is unlikely to go through any change with this new statutory instrument. The explanatory note also does not provide any clarity on this Exemption and whether it will be changed. This is because the Bolar Exemption is currently enacted into domestic law through the changes mentioned previously to the Patents Act 1977 amendments in 2005 and 2014. It is also currently higher and more defined[43] than the European Union minimum requirement that was set out in the directive 2001/83 EC. This would mean that there are unlikely to be potential impacts with the incoming Brexit legislation for the current Exemption provision. There are, however, potential impacts on the United Kingdom developing the Exemption further as both France and Germany have done, since they currently give third country rights[44] which will be explored below. This may not be a possibility for the United Kingdom in the future due to Brexit implications on trade and current European unitary patent requirements.

Other Member States

Many jurisdictions, including the European Union, provide for some type of experimental Exemption which protects those from patent infringement.[45] Most often the type of experimental Exemption is in relation to clinical trials of active pharmaceutical ingredients. As previously discussed, the European Union requires a minimum scope regarding the Bolar Exemption as per the directive 2001/83 EC as amended.

Two implementations are generally taken throughout the European Union. The first is the Narrow Implementation and the second is the Broad Implementation. The United Kingdom, Belgium, Ireland, Netherlands, Sweden, Luxembourg, Greece, and Cyprus[46] have all taken the Narrow Implementation. This means that they have stuck to the minimum scope that the European Union directive requires. The United Kingdom has, since implementation, widened the scope slightly and provided further clarification for the Exemption. In Sweden, the Exemption is aimed at avoiding delay to the entry of generics and therefore exempts only activities relating to a reference medicinal

[43] Ostrowska (n 35) 44.
[44] Ostrowska (n 35) 45.
[45] Anthony Tridico, Jeffrey Jacobstein and Leythem Wall, 'Facilitating Generic Drug Manufacturing: Bolar Exemptions Worldwide' (June) 3 *WIPO Magazine* <https://www.wipo.int/wipo_magazine/en/2014/03/article_0004.html> accessed 23 October 2019.
[46] Ostrowska (n 35) 45.

product.[47] This is also a common theme in the Netherlands, where Dutch law is very similar and only extends to generic applications.[48] The one thing that typically defines the narrow definition is that it defines which clinical trials will have an Exemption from patent infringement.

Germany, Spain, Italy, France, Austria, Romania, Czech Republic, Poland, Slovakia, Finland, Lithuania, Bulgaria, Denmark, Latvia, Malta, Portugal and Slovenia[49] have chosen the broad implementation. Germany has sought to exempt from patent infringement all clinical trials, whether for a generic medicinal product or for an innovative medicinal product.[50] Germany and France have also extended the Bolar Exemption to third party countries,[51] making them safe harbour against any patent, including patents for laboratory equipment and even research tools.[52] This is a broader implementation than most other European Member States have taken. However, there are some limits as are seen in the Polish and German courts. They have followed a strict approach when it comes to the scope of the Bolar Exemption for third-party suppliers of active pharmaceutical ingredients. They take the view that as long as the supplier is not engaged in the clinical trials, it could not benefit from the Exemption.[53] This is a defining limit, one which is a perfect threshold for this Exemption, as it balances the rights between all the stakeholders adequately.

There are two outliers when it comes to implementation and these are Estonia and Hungary, where there was no implementation due to existing domestic law.[54] Both currently allow for clinical trials that are for regulatory approval for generic pharmaceuticals to be exempt from patent infringement.[55] This is potentially the category the United Kingdom will fall into once the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) Act 2019 also known as 'Exit Day' comes to pass. At present the Patents Act 1977 is intact with elements of the Directives referred to above included. Change is coming however, as the first major amendment to the Patents Act 1977 that is already in effect as a result of the Withdrawal Acts in the UK is the

[47] Ostrowska (n 35) 45.
[48] Ostrowska (n 35) 46.
[49] Ostrowska (n 35) 45.
[50] Stoate (n 5) 240.
[51] Stoate (n 5) 240.
[52] Stoate (n 5) 240.
[53] Ostrowska (n 35) 44.
[54] Ostrowska (n 35) 45.
[55] Ostrowska (n 35) 45.

Patents (Amendments) (EU Exit) Regulations 2019. Another amendment that will be implemented is on the Prohibition of Importation outlined in Regulation (EC) No 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. The amendment is in Article 13 which will be substituting Community for United Kingdom in paragraph 1. These Regulations also amend the law in relation to Supplementary Protection Certificates.

How the United Kingdom should further develop the Bolar Exemption

The United Kingdom should broaden the scope of the Bolar Exemption. The Exemption allows for more medicinal products to enter the market that have been properly tested for safety and efficacy, which is beneficial to the public. It alleviates the financial burden on both creators and competitors as research and development can be expensive. There is the potential for the United Kingdom to expand the scope of the Bolar to include medical inventions which can make the country more attractive for companies to conduct their research and clinical trials here. This will then create more employment within the United Kingdom and have positive effects on the economy. Like in Germany and France, the United Kingdom should extend the Exemption to third party countries to further promote themselves as a favourable location for medical innovation. This could be for pharmaceuticals both innovative and generic, equipment, procedures, and research tools. The view should also be taken that third-party rights who do not participate in the clinical trials do not benefit from the Exemption. If the United Kingdom does leave The European Union on ‘Exit Day’ with the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) At 2019 they should continue to make changes and expansions to the Bolar Exemption, as it is important to the medical innovation world.

Scots Criminal Procedure, the Investigation of Crime and the Origins of Police Interviews

*Robert Shiels**

Introduction

In the modern era, an investigation by the police of a complaint of crime may involve an interview with a suspect. Statutory authority for interviews did not exist until recently.[1] Such a legal development has received little academic attention despite a notable interest in the wider history of the police in Scotland.[2] There exist few attempts to explore how the new police forces and their constables came to deal with legal problems in the context of the existing conceptual framework of criminal law, evidence and procedure, or how individual aspects of the practices developed.[3] In contrast, in other jurisdictions the historical aspects of police practices have been studied closely.[4] How then did the police in Scotland find a place in the existing Victorian legal system? How and when did interviews by the police begin?

Asking the Accused Questions

In 1947, a review of the practice of the courts of admitting as evidence what an accused had said to police officers produced a summary of the position: "With us [in Scotland] the matter has been one of gradual development, chiefly over the last twenty years".[5] The issue of police investigation has an older history than comparatively modern developments in the inter-war years. When police constables as a force first appeared and became involved in investigations,

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[1]The Criminal Justice (Scotland) Act 2016 (asp 1), s.31 ('interview'), s.34 ('put questions') and s.37 ('questioning'). These may amount to the same sort of event, or events with similar characteristics.

[2] E.g. David G. Barrie, *Police in the Age of Improvement: Police development and the civic tradition in Scotland, 1775-1865* (Cullompton, Willan Publishing, 2008).

[3] Sir Gerald Gordon QC has considered aspects of the history of police practices: "The Admissibility of Answers to Police Questioning in Scotland" in P.R. Glazebrook *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (London: Stevens & Sons, 1978) 317-343, esp. 318-322.

[4] E.g. Tracey Maclin, "A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at *Miranda v Arizona*" (Book Review) (2015) 95(4) Boston University Law Review 1387, esp. 1397-1401 [available freely online].

[5] Wm Jardine Dobie, "Statements to the Police as Evidence" (1947) 59 Juridical Review 122-130, 122.

the resulting cases were inconclusive and inconsistent with an outstanding feature of the exercise by the courts of a very wide discretion to admit or reject evidence.[6]

Yet, the cases of the mid-nineteenth century established what may be seen as the origins of the emphasis of the courts at common law to protect individuals from any excess of police powers.[7] With the increase of police involvement in the fact-finding process there was a concomitant decrease in the demands on the existing means of investigation or fact-finding.

The development of the investigation of crime might reasonably be seen as both a necessity in itself and a change in legal policy. It was a necessity in that the traditional mode of judicial investigation of crime was inexpedient in the modern and industrialised Scotland of the mid-Victorian era. It was a change in executive policy in that there had been a change to the means of proof. There was no appointed day for the change: the workings of the system began to evolve as the police constables appeared, and doubtless old attitudes lingered.[8]

The coincidence of the decline of the judicial examination and the resulting declaration by an accused, at a time of the rise of the police force may be just that, a coincidence. Yet it is to be recalled that the received wisdom is that the study of history is a study of causes.[9] Might it be then that the judicial investigation of crime declined at the same time as the introduction of the police? Moreover, in a wider context, the decline of *judicial* investigation of crime and the emergence of the police involvement does not sit easily, or at all, with the concept of 'state monopolisation' and the idea elsewhere that the governance of crime transferred from the people to the police in the nineteenth century.[10]

The various duties associated with the office of Sheriff included those of investigating serious crime and the rules to be observed in carrying that dated from 1765 which rules have been revised judicially. The judicial investigation included, in rule 5, this requirement:

> "That when a murder is committed, as soon as it comes to the knowledge of the judge-ordinary, he and the clerk should repair immediately to the place where it is said to have been committed, and take a precognition [a collection of

[6] Gordon (n 3), 321.
[7] *Gilroy v HM Advocate* [2013] HCJAC 18; 2013 J.C. 163, per the Lord Justice Clerk (Lord Carloway), [56].
[8] See Mirjan R. Damaska, "The Uncertain Fate of Evidentiary transplants: Anglo-American and Continental Experiments" (1997) 45 American Journal of Comparative Law 839-852, 845.
[9] E.H. Carr, *What is History*? (Basingstoke, Palgrave Macmillan, rep. 2001), 81.
[10] David C. Churchill, "Rethinking the state monopolisation thesis: the historiography of policing and criminal justice in nineteenth-century England" Crime, History & Societies 2014, 18(1), 131-152,132.

> witness statements] of what appears at that place, as of the marks or impressions of feet upon the ground, or other particulars which may appear there, and of the whole other circumstances which may ascertain the crime, and point out the guilty person".[11]

With this sort of practical background, the developing police forces in Scotland had to find a place consistent with the fairly comprehensive legal structure already occupied by investigators of sorts. Yet, the increasing presence of the police individually and as a power structure could not have been easy for those there already.

The Duties of a Constable

The relationship between the law and police must be traced through specific historical context.[12] That raises the question as to what constitutes a valid specific historical context. In the nineteenth-century, the state assumed increasing control of the criminal justice system, as it did of the police who were put in the vanguard of the attempts to control society then. There were critics but the process: "generated its own momentum, nonetheless, as 'experts' accumulated evidence that more and yet more bureaucratic control was needed to solve 'problems'".[13] In Scotland, the presence of the police constable meant an enhanced representation of the state and that was of a different nature and intensity from England.

Sir Archibald Alison had advised in 1833, which may be considered as a convenient starting point for a consideration of the modern era, that having arrested an accused, it was the duty of the officer of law to take the arrested person "with all convenient speed" to appear before a magistrate to be dealt with by him according to law.[14] The duty of the magistrate was to take the judicial declaration of the accused, and commence a precognition in order to determine whether there are sufficient grounds for committing for further examination, or for trial.[15]

The process before a magistrate was an intricate interview, and Alison asserted that "the first duty" of the magistrate, before whom an accused is brought, is to take a declaration from him.[16]

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[11] Robert Clark, *A View of the Office of Sheriff in Scotland* (Edinburgh: Bell & Bradfute, 1824), 24.
[12] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016), 46.
[13] V.A.C. Gatrell, "Crime, Authority and the Policeman-state" in F.M.L. Thompson *The Cambridge Social History of Scotland 1750-1950, Volume 3, Social agencies and institutions* (Cambridge: Cambridge University Press, 1990), 244.
[14] Archibald Alison, *Practice of the Criminal Law of Scotland* (Edinburgh: Wm. Blackwood, 1833), 129.
[15] ibid, 130.
[16] ibid, 130.

The judicial nature of the examination was supplemented by the rules that required a fast speed of proceeding. That was under explanation that the taking of a declaration had:

> "the double purpose of giving him [the accused] an opportunity of clearing himself in so far as he can by his own allegations, and explaining any circumstances which may appear suspicious in his conduct, and of affording evidence on which the magistrate can with safety proceed in making up his mind whether or not to commit for trial. And experience has abundantly proved the wisdom of this provision; for a declaration hardly ever fails to be as great an assistance to an innocent man in clearing him from an unjust imputation, as it is a disadvantage to a guilty one in endeavouring to screen himself from punishment. The Roman maxim *magna est veritas et praevalebit* [the truth is great and shall prevail], is nowhere more strictly applicable than in this case: the truth in the end is generally triumphant, and from nothing more than its own candid statement; while guilt is caught in its toils, and very frequently brought to light from the efforts made by false statements to escape the merited punishment".[17]

Few legal textbooks or other written guidance was available to early constables, and what seems to have been the only relevant and dedicated legal text of the era, George Tait's small publication, was first published in 1815, and the seventh and final one in 1832.[18] The introduction to the first edition, reproduced in the seventh, stated that due to the want of information about to the powers and duties, Constables and other officers of law are less effective than they might otherwise have been.[19] Still, the duties of Constables included procuring evidence. A Constable ought:

> "[…] on apprehending a person suspected of an offence, to endeavour to discover all the evidence which he can, both against the prisoner *and in his favour*. And he ought to observe, and endeavour to remember, what passed at apprehending and searching the prisoner, and, in particular what the prisoner said in reference to the charge made against him, and the articles found in his possession, which are supposed to be connected with the offence".[20]

[17] ibid, 131.
[18] George Tait, *A summary of the powers and duties of a constable in Scotland in public and in private cases: and those of a private person in criminal cases* (Edinburgh: John Anderson: 7th edn. 1832).
[19] Ibid, 3.
[20] Ibid, 13-14: emphasis added.

It is arguable on that summary then that the initial responsibilities of Constables were not merely to pursue evidence for a conviction but to recover evidence for a forensic inquiry. Given that these wide police duties also included apprehending lunatics "wandering about" and taking them before a Justice of the Peace "to be disposed of", it was only to be expected that Constables would have spoken to and assessed prisoners.[21] Practical consequences suggest that then with such a wider approach and even now, in the present era, discerning the distinctions between solicited and unsolicited remarks can be difficult.[22]

Mere remarks made in passing are different to interviews. Police interviews have their own dynamics.[23] The continuing importance of the interview makes it worth recalling that it started without an enabling Act or other source of origin. As late as 1864, it was asserted that:

> "We are not aware of any statute which regulates the proceedings in criminal matters, up to the period of the prisoner's being fully committed for custody in order to trial [*sic*], at which step of procedure the provisions of the [Criminal Procedure (Scotland) Act 1701 (c.6)] come into play. There have been, at different times, statutory enactments imposing the duty of investigating crimes upon various parties, and giving regulations for their procedure (see Hume, vol. i., pp.23-26); but the functions of these officials successively became obsolete, and the duty of investigating crimes and securing the offenders for trial, came gradually to be performed almost entirely by the Sheriff, to whose office these duties have always pertained at common law. The procedure of the Sheriff in these matters is therefore entirely customary; and his powers have never been authoritatively defined, either by the Legislature or by the order of a Superior Court".[24]

The theory of the procedure then was that the whole examination, until the prisoner was committed in custody for trial, was conducted "under the authority of the Sheriff or other

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[21] ibid, 24.

[22] Peter Duff "Adversarial Ideology and Police Questioning After Charge" 2013 Juridical Review 1-25, 1, fn.1.

[23] See e.g. Hannah Quirk, *The Rise and Fall of the Right of Silence* (London: Routledge,2017) and Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process*, (London: Routledge,2017), for the modern English position, and the different tensions there.

[24] R.C. "On the Investigation of Crime in Scotland" (1864) 8 Journal of Jurisprudence 473-484,475. The reference to Hume in the quote is to: D. Hume, *Commentaries on the Law of Scotland Respecting Crimes* (Edinburgh: Bell and Bradfute, 4th ed., 1844), two volumes with notes by B.R. Bell, advocate. The author with initials "R.C." is probably Richard Vary Campbell, (1840-1901) admitted advocate 1864 and described as "Author (Legal)" in Stephen P. Walker, *The Faculty of Advocates 1800-1986*, (private printing, 1987) p.25.

magistrate, according to principles regulated entirely by usage and not by any statute".[25] The importance of the declaration as a confession, it was said, rested in that the declaration was received in a trial as an article of evidence against the accused, "but it behoves to be acknowledged by him as genuine in presence of a jury, or verified by the testimony of two witnesses, on oath".[26]

That has to be assessed in the context of the general theory of a descending hierarchy of judicial authority in its various manifestations:

> "By the theory of Scotch [*sic*] law, the importance of which the Judges take every opportunity of inculcating upon Circuit, the Sheriff is responsible for the proper administration of justice within his district; and […] it is obviously inexpedient that he should be anything but a committing [*sic*] Magistrate in regard to matters of direct accusation initiated by the Lord Advocate […]".[27]

Recalling that constables were to take their instructions if necessary from the local Sheriff, it has to be asserted that Sheriffs were required as part of their duties of office to attend the Judges of Justiciary when the latter were on their Circuit.[28] The Senior Bench did indeed 'inculcate' and the remarks of Judges to the Sheriffs in attendance were sometimes recorded.[29] At any rate, the mention of 'a committing magistrate', rather than, for example, a *committed* magistrate, is significant as it is probably a reference to the judicial authority of the Sheriff to commit an accused to custody until liberated in due course of law. That was regarded by contemporaries as "a step of the utmost moment to all concerned".[30] It implies, arguably, that a desirable quality in the local Sheriff was that of not challenging any decision of the Crown in regard to the preliminary assessment of the existence of a *prima facie* case against any accused. That was not the same as asserting that there was a presumption in favour of the Crown, but that legal frame of mind may have come later.

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[25] Ibid, 476.
[26] Clark (n 11), 42.
[27] Anonymous, "The True Method of Criminal Inquiry" *The Scotsman*, 9 November 1881, 9; 3 December 1881, 11 and 22 December 1881, 3. The quote cited is from the last of these articles.
[28] Clark (n 11), 4-5.
[29] E.g. Lord Deas on the purpose of Sheriffs being in attendance: (1859) 3 Irvine 406, 406-7. The mere fact that such a note was published suggests a possible decline of attendance by Sheriffs. These attendances of course were to hear what amounted to statements of current judicial policy.
[30] Alison (n 14), xi.

The law had always permitted spontaneous and voluntary extra-judicial statements which had been made by prisoners but without questioning.[31] That concept of spontaneity was established early and remained for many generations as a compelling factor in the admissibility of admissions by an accused. In a summary appeal in 1913 the judges of the High Court of Justiciary reiterated following established principles that a:

> "criminal officer [was] not entitled to examine a person suspected of crime in order to obtain confessions of admissions from the criminal, and so in fact to obtain from him what is to serve the purpose of a declaration without giving him the protection of the magistrate, before whom *alone* declarations have to be taken".[32]

The general legal policy was to preserve the position of the vertical ordering of authority and hierarchical review of the prosecution process: "Officials are organised into several echelons: power comes from the top, trickling down the levels of authority".[33] The decision of 1913 has been described as a "rearguard action", but it may be more apposite to assert that it was a continuation of the policy of the High Court of Justiciary to maintain some degree of judicial supervision of the investigation of crime.[34] Notwithstanding that, the police as a service had been established in statute and, in fact, that policy objective, along with attendance at Circuits, amounted to an antipathy towards adversarialism or accusatorial process.

The judicial acceptance of a monopolistic role for police constables in the investigation of crime, had not occurred by about 1914 or so. For the judiciary to concede an investigatory role to the police was to accept a diminution in the judicial control of the fact-finding role. The reduction in the courts' fact-finding activity more than hinted at the concomitant growth of 'adversary' polarities.[35] At any rate, even as late as 1928, it could be asserted, albeit with more than a hint of equivocation, that:

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[31] David Hume, *Commentaries on the Law of Scotland Respecting Crimes* (Edinburgh: Bell and Bradfute, 4th edn, 1844) vol. II, 333.
[32] *Hodgson v Macpherson*, 1913 S.C. (J) 68 per Lord Kinnear at p.74: emphasis added. Lord Kinnear who gave the Opinion of the Court had qualified as an advocate in 1856 and would have known of the earlier practices.
[33] Mirjan R. Damaska, *The Faces of Justice and State Authority* (New Haven: Yale University Press, pb. 1986), 19.
[34] David B. Griffiths, *Confessions* (Edinburgh: Butterworths, 1994) p.5.
[35] That is adapted from an observation about civil procedure of Damaska (n 8), 843.

> "Nothing short of a judicial admission of guilt by his pleading guilty in open Court will serve of itself to convict a person of a crime; but to a certain extent his extra-judicial statements are admissible in evidence".[36]

The duties associated with the judicial taking of a declaration were those of the magistrate.[37] Not least of these duties was that requiring that the accused "ought to be warned, that his declaration may, and probably will be made use of against him, on his trial".[38] Yet, some duties resonate with modern practices: the magistrate had:

> "to inform the prisoner that he is at liberty to confess or not as he pleases; that no punishment will attend his declining to speak, but the fact of his having done so be merely set down in the declaration; and that in all probability the declaration, whatever it may be, that he may emit, will be used in evidence against him".[39]

No threats or inducements of any sort to confess should be made to the accused to overcome any reluctance to make a judicial confession.[40]

There was, however, criticism of the whole procedure with reference to "expert questioners" wringing admissions from "an ignorant and unaided person".[41] Certainly, the criticism of the procedure continued and was particularly explicit in the mid-Victorian era.[42] The criticism proves insight as to how the system worked then:

> "[…] frequently the questions are put in a leading manner, showing the accused that the whole matter is known to the authorities, and thus it is needless to deny the matter. The declaration is of necessity taken down more in the language assented to than by any actual statement by the prisoner. It is easy to perceive

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[36] Robert W. Renton and Henry H. Brown, *Criminal Procedure According to the Law of Scotland* (Edinburgh: W. Green & Son, 2nd edn., 1928) p.271. The sub-category there of "Statements on Apprehension and to Prison Officials" contains the then modern cases from about the Great War which might be said to have started the modern era in this regard.

[37] Alison (n 14), 131-4.

[38] R.C. (n 24), 477.

[39] Alison (n 14), 131, duty (2).

[40] Alison (n 14), 131-2, duty (3).

[41] Anonymous, *Book Review*, (1845-1846) 4 The North British Review 313-346:at 342. The review is really an excuse for an extended comment on the contemporary Scottish criminal justice system. The anonymous reviewer has been said to be Lord Ardmillan: Timothy H. Jones and Ian Taggart, *Criminal Law* (Edinburgh: W. Green, 6th edn. 2015), 380.

[42] Hugh Barclay, "Observations on the Administration of Criminal Law in Scotland" (1862) The Scottish Law Magazine and Sheriff Court Reporter, vol. 1, New Series, 18-20 and 21-24.

> how a timid person may thus be completely led into statements which he really did not mean, and which are not consistent with fact".[43]

Moreover, the commentator developed the argument to the point of asserting that the "contrast of the English practice with ours is more favourable to humanity and fairness of our southern neighbours".[44] The judicial investigation of crime in Scotland was still in the mid-nineteenth century driven by swift intervention by the Sheriff's Procurator Fiscal and then the Sheriff himself. The former would attend the locus and obtain precognitions, in the form of written statements obtained from witnesses, and anyone identified as the culprit would be examined by the Procurator Fiscal in the presence of the latter, the Sheriff.[45] The whole process around this point was criticised by some.

> "[…] the Procurator Fiscal takes what is called a 'precognition' – that is, he secretly in his own chamber takes the evidence, or rather (for the parties examined are not upon oath) the depositions of those who may afterwards be called on as witnesses against the accused".[46]

Before a declaration was taken an accused had to be warned by the Sheriff that he or she need not answer any of the questions that may be put, unless the prisoner wanted to answer them. Yet, the view from experience was that;

> "it is needless to say how eager a party accused of any crime, unless he is hardened by iniquity, wishes to tell some sort of story, either to justify or excuse or explain his conduct; and how very seldom is it that the judge's alternative injunction of saying nothing is followed".[47]

In short, the evolution of the roles of the police as a force, and individual officers as investigators, had to take place in the context of a lawyer-dominated process, described contemporaneously as "practiced legal talent".[48]

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[43] ibid, 22.
[44] ibid, 22.
[45] ibid, 22.
[46] Anonymous, "Criminal Procedure" (1862) The Scottish Law Magazine and Sheriff Court Reporter, vol. 1 New Series, 37-38.
[47] Anonymous, "Criminal Procedure" (n 50), 38.
[48] ibid, 38.

Questions and Confessions

A 'history of the police' may encompass developments on several fronts. In 1894, a local authority and the Chief Constable sought to have a declaration from the Court that the Procurator Fiscal was 'bound to follow' instructions from the local authority and Chief Constable and deal with cases as directed.[49] In particular, the local authority and the Chief Constable sought to instruct the Procurator Fiscal as to the particular level of court that a case ought to be prosecuted in. The case was dismissed on the basis that it was extravagant. The "undisguised object of the action" was in effect to enhance the discretion of the Chief Constable to direct where cases were to be prosecuted.[50] The Court noted that s.12 of the Police (Scotland) Act 1857 was the basis of the authority of the Chief Constable and it

> "simply required and empowered the constables at once bring before a magistrate, the Sheriff, or a justice of the peace, persons found in the commission of crime, so that there might be no delay in securing the investigation of the crime, and the committal and trial, or liberation of accused persons by a competent tribunal".[51]

That authority did not justify the outcome sought by the Chief Constable. Indeed, by s.6 of the 1857 Act the Chief Constable was bound to obey all lawful orders of the Sheriff, or Justice of the Peace, and on that basis the case failed.[52] An appeal failed, and the primacy of the Lord Advocate was reasserted.[53] The police, as they developed in Scotland from the mid-Victorian era, did not command *any* directing role, and they were not prosecutors. These are first principles of delineated authority and are constitutional matters.

As to the role in investigation, nothing is said by Alison on the lawful authority of an officer of law to ask questions or to take a statement from the accused. That absence of clarity of function did not mean that anything said by the accused could never be used. It was well-established, by reference to Baron Hume, that there was no rule that excluded confessions made by a prisoner spontaneously to the Procurator Fiscal, or officers of the police, either on

[49] Although not stated in the reported case, the analogy with an employed solicitor being given and following instructions on an agency basis is clear.
[50] *County Council and Chief Constable of Dumfries v The Sheriff and Procurator Fiscal of Dumfries* (1894) 2 S.L.T. 173.
[51] ibid, 174.
[52] ibid, 175.
[53] *County Council and Chief Constable of Dumfries v The Sheriff and Procurator Fiscal of Dumfries*, (1895) 22 Rettie 538; 23 S.L.R. 438, (1895) 2 S.L.T. 580.

apprehension or after having been lodged in the police cells, if the accused had been "duly warned".[54]

No explanation was made of what precise words were required to constitute such a warning, and on that basis alone it is difficult to fault any inquiry by a police officer about events when faced with an individual who was relevant to inquiries. Further, following the little guidance provided, any spontaneity required of an accused meant that relevant words had to have been made, by definition, by the accused on his or her own initiative. That was a wholly different matter from questioning by the police. In any event, it was recognised that an extrajudicial confession was not full proof of guilt but required to be corroborated in regard to the crime and the accused's responsibility for it.[55] Equally, a declaration before a magistrate, although important, was in no case conclusive evidence against the accused who gave it.[56]

Attempts were made by the Crown to rely on admissions made by an accused other than before a judicial authority. Admissions against interest, in a highly sensitive case in 1853, were held inadmissible when made to a person in authority and there had been undue influence.[57] Similarly, in the same year evidence was not allowed of something said by a sailor in the Royal Navy to an officer after the sailor had been told to tell the truth. Such a requirement by the officer did not necessarily make the words said a voluntary statement.[58] The judicial suspicion of the police is patent in the prosecution of a young man where a superintendent of police asked the prisoner why he had not tried to run away when arrested. An attempt to lead evidence of what the prisoner had then said was refused. Lord Neaves said, in his brief decision that ought to be regarded as a matter of mid-Victorian legal policy:

> "The duties of an officer are very clear. He goes to apprehend the accused and to state the charge against him, and then the panel [accused] is *put on his guard not to commit himself.* The officer's duty then is to take him before a magistrate. I think it was very ill-advised and wrong on the part of the superintendent of police to commence the conversation by asking the panel why he did not run away. Drawing the lad on in that way was most unjust. It would entirely subvert

[54] Wm. G. Dickson, (Edition by P.J Hamilton Grierson), *A Treatise on the Law of Evidence in Scotland,* (Edinburgh: T & T Clark, 1887) vol.1., para. 348 at p. 243: see fn. (a) and (b) there for authorities.
[55] Ibid, para.352 at 245.
[56] ibid, para.339 at 238.
[57] *HM Advocate v Robertson*, (1853) 1 Irvine 291.
[58] *HM Advocate v Turner and Rennie*, (1853) 1 Irvine 284 per Lord Cowan at 287.

> the course of justice if police officers were allowed, by nicely-contrived questions, to entrap prisoners into a confession".[59]

An admission made by an accused to the keeper of a prison who noted the statement when made was not allowed in evidence. That was held to be an irregular practice. The duty was to return the prisoner to the Sheriff or other magistrate in order, if they thought it proper to do so, to take another declaration.[60]

Admissions made to a police officer after an assurance that the matter would not be brought to trial were held inadmissible. The Crown had sought to rely on the admissions on the basis that the Crown had not been responsible for the assurances. The Court held that if the Crown was going to make use of evidence obtained by means of these assurances, and which would not have been obtained without them, it plainly makes the Crown responsible for them.[61]

Similarly, where Crown Counsel sought to ask a 'criminal officer' to relate a conversation which he had held with an accused, and which he admitted consisted entirely of answers by the accused to questions which had been put by him, there was a defence objection. The basis of the defence objection is instructive: the conversation of questions and answers was substantially a declaration taken from the accused, without any warning having been given of the right of the accused to decline answering, and without the protection afforded by the presence of a magistrate.[62]

The Crown answered that confessions of admissions made at the time of the arrest of an accused, or *de recenti*, to a police officer who held out no improper inducements, had repeatedly been admitted in evidence.[63] That practice may well have been true but the actions of the police officer seemed then to have been different in nature being a number of questions and answers. The Court held that evidence inadmissible.[64]

That matter of inadmissibility was dealt with when the Court addressed the police witness in the following terms:

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[59] *HM Advocate v Millar*, (1859) 3 Irvine 406, 406-8: emphasis added.
[60] *HM Advocate v Beaton or Bethune*, (1856) 2 Irvine 457 per Lord Cowan at 458.
[61] *HM Advocate v Mahler and Burrenhard*, (1857) 2 Irvine 634 per the Lord Justice Clerk (Lord Hope) with whom Lord Cowan and Lord Handyside concurred.
[62] *HM Advocate v Hay*, (1858) 3 Irvine 181, 183-4.
[63] No authorities seem to have been cited then but the trial was held on Circuit when legal arguments supported with such authorities seem to have been rare.
[64] *HM Advocate v Hay* (n 66), 185.

> "The Court think it right to tell you, that what passed between you and the prisoner on that occasion is not a regular proceeding. Without attaching any blame to you on this particular occasion, the Court think it right to tell you, that when a person is under suspicion of crime, it is not proper to put questions, and receive answers, except before a magistrate".[65]

These words suggest merely a tepid and politely instructive rebuke. Admittedly, the declaration in this case was of little assistance to the prosecution. While the accused did admit having recently given birth to a male child, when asked if she had thrown it into a pond where a male child had been found drowned, she declined to answer. When asked judicially if her child was alive, or where it was, she again declined to answer.[66] The charge against the accused was found not proven.

The common law has developed by cases with judicial statements of policy in the past but by the mid-Victorian era it was increasingly regular for the legislature to specify and provide for new powers for office-holders in the context of other relevant legislation.[67] However, such powers for the police were often to establish offices without statements of how the office-holders were to carry out their duties. The police would seem to have been required to have found their powers by practice, which ran the risk of judicial disapproval.

The judicial policy of inadmissibility of what might be seen now as inquiry by interview was not an isolated event. There was real concern judicially to guard against a prisoner being entrapped into making a confession.[68] Such an approach judicially was not antipathetical towards the police, who with statutory authority for their professional existence were clearly the future. Yet, it is to be recalled that the view from the bench was of a powerful state prosecutor, or trusted representative, combined with the statutory powers of punishment available to the judiciary, brought together with an accused in the dock facing the bench.

It has been argued that the growth of police forces began to change the balance between the judicial investigation of crime and evidence from the police of confessions. This was because, "unsurprisingly", witnesses sometimes said incriminating things to the police and the latter

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[65] ibid, per the Lord Justice Clerk at 184.
[66] National Records of Scotland: JC26/1858/100.
[67] E.g. Burgh Police (Scotland) Act 1833 (c.46); General Police (Scotland) Act 1847 (c.39); Police of Towns (Scotland) Act 1850 (c.33); Police (Scotland) Act 1857 (c.72).
[68] *HM Advocate v Grant,* (1862) 4 Irvine 183.

were "naturally tempted" to question a potential suspect before taking him to a magistrate.[69] Perhaps, the suggestion of natural temptation is correct but in an age of deference to authority and working in an hierarchical organisation of sorts subject to judicial control it does seem inherently improbable that the police had real opportunity to influence the direction of a case.

In 1864 "R.C." noted a practice that more than merely suggested a material change in established practice had begun to occur about them. After arrest, an accused in practice in Edinburgh was:

> '"*sometimes'* taken not directly to the Sheriff, but to the '*lieutenant of police* when a ***court of inquiry*** was held, modelled after the procedure of the Sheriff's office, consisting of the *lieutenant*, the *constable*, and in cases where his assistance has been called in, the *police surgeon*'".[70]

That delayed procedural event may be contrasted with *de recenti* statements following immediately on the discovery of a crime.[71] At any rate, the writer "R.C." was describing such an intermediate procedural event in the case of Alexander Milne, where such a police station procedure seems to have been brought to prominence.[72] The police may well have had doubts about the state of Milne's mind (in the context of his involvement in the death of another person) and Dr Henry Littlejohn was present.[73] The subsequent high reputation of Dr Littlejohn makes his presence worth noting when- and where-ever it occurred.[74]

The evidence adduced was to the benefit of the accused and the issue of the admissibility of the results of the inquiry did not arise seriously.[75] However, the commentator on the subject wrote that:

> "[…] if a similar case should occur in which an objection is insisted in on the evidence of such a proceeding being offered, the admission of the evidence would certainly require most serious reconsideration. Such a proceeding, allowed in every case where there is reason to suppose that there may be insanity, would simply lead to a systematic worrying, by men in small authority,

[69] Duff (n 22), 5.
[70] R.C. (n 24), 479: bold emphasis added, with all other emphases in the original.
[71] *HM Advocate v Wylie*, (1858) 3 Irvine 218.
[72] *HM Advocate v Milne*, (1865) 4 Irvine 301.
[73] ibid, see evidence of Lieut. Wm. Cowan and Dr Littlejohn, 311-4.
[74] Paul Laxton and Richard Rodger, *Insanitary City: Henry Littlejohn and the Condition of Edinburgh* (Lancaster: Carnegie Publishing, 2013).
[75] R.C. (n 24), 479.

> of a class of prisoners who, above all others require the protection of a Magistrate's presence".[76]

In Milne's case it had been said that:

> "the duty of police-officers, when they apprehend a person upon a criminal charge, is to carry him as soon as possible before a Magistrate, in order that he may there have an opportunity of making a declaration, and of giving answers to any questions that may be put to him; and it is certainly not a proper course for police-officers to anticipate that examination before a Magistrate and enter upon an examination of the prisoner themselves. About this the Court never have entertained any doubt".[77]

Milne's case was thus regarded by the court as an exceptional one and it was accepted that the police officer and the doctor, who knew their duties, did not "transgress the bounds of their duties at any time".[78] There were, however, changes in practice in the 1860's with a major evolution of police practices, in the absence of statutory authority, that did not sit easily with the view of the court in Milne's case:

> "The practice, however, of holding this ***small court of investigation*** is not uncommon; and to such an extent is the mimicry of the proceedings in the Sheriff's office carried, that we have heard a lieutenant of police gravely state, that on such an occasion he had *warned* the prisoner – meaning, we suppose, that he had given the caution customarily administered by the magistrate".[79]

That sentence is a recognition of the notice of lawyers outside of the system that a change was taking place. The fact that the Bench should have adverted to 'a court of inquiry' and a commentator should also mention the same event as 'a small court of inquiry' is no coincidence: the lawyers could see a force for change at work and that their professional responsibilities were being moulded to some other shape.

Yet, there may well have been a practical point in the development of this pragmatic arrangement. Prior to the judicial examination of a suspect, the magistrate had:

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[76] R.C. (n 24), 479-80.
[77] *HM Advocate v Milne* (n 74) *per* the Lord Justice Clerk (Glencorse) at 341-2.
[78] ibid, 342: bold emphasis added, with other emphasis in original.
[79] R.C. (n 24), 473, 480.

> "to see that the prisoner is in a sane and sober state of mind. This had to be proved or admitted [at trial] before the declaration is read to the Jury; and if there is any doubt on this head, the Court will direct it to be laid aside".[80]

In Milne's trial, the Lieutenant of Police in his evidence made it abundantly clear that he was assessing the demeanour of the suspect, and within an hour he had made notes of what the suspect had said. The officer, who had frequently seen other prisoners under *delirium tremens,* said that the only "peculiarity" he noted was that the suspect was "sour and sullen".[81]

Dr Littlejohn had the responsibility as Police Surgeon that "included examining and treating sick policemen, prisoners and children in reformatories".[82] Doubtless the doctor would be aware of the concern that there had been as to the official oversight of mental health institutions leading to the Lunacy (Scotland) Act 1857 (c.71) and the restructuring of medical assistance. His appointment allowed him to examine the suspect in the presence of the Lieutenant of Police and both thought that the suspect was about to enter into the state of *delirium tremens*. But when the doctor saw him the next day the condition had not been that.[83] The doctor spoke to the suspect about his health and the latter was about to speak of the incident leading to the death of another person: the doctor "warned him to reserve his examination for the magistrate, but he insisted upon going on to say [something of the event]".[84] Although the sanity of the suspect was put in issue at trial and medical evidence led by the defence, the verdict was guilty of murder.[85]

Similarly, in the prosecution of George Bryce the issue was the sanity of the accused.[86] On arrest the accused had said something of relevance to proof of his guilt. The constable had said that he thought the victim was not then dead, although she was, because the constable wanted the accused to come quietly on arrest. The initial admission against interest was allowed as the constable had not acted unfairly, or beyond the limits of his duty.[87] What was thereafter said by the accused was not allowed on the basis of the false statement made by the constable to the

[80] Alison (n 14), 131, duty (1).
[81] *HM Advocate v Milne* (n 72), 312.
[82] Tara Womersley and Dorothy H. Crawford, *Bodysnatchers to Lifesavers: Three Centuries of Medicine in Edinburgh* (Edinburgh: Luath Press, 2010) p.73.
[83] *HM Advocate v Milne* (n 72), 313-4.
[84] *HM Advocate v Milne* (n 72), 314.
[85] Sentence of death was later commuted to penal servitude for life: (1865) 4 Irvine 301, 346.
[86] *HM Advocate v Bryce*, (1864) 4 Irvine 506, 508.
[87] ibid, per Lord Neaves at 510.

accused.[88] At any rate, it is interesting that at trial Dr Littlejohn noted that the accused was sober and rational. Further, when asked why he examined George Bryce and asked some simple questions, he said: "My object in putting those questions was to satisfy the Sheriff as to the state of the prisoner's mind before he was examined. I was satisfied that he was in his sound and sober senses".[89]

Around the 1860's there was concern that there seemed be a decreasing deference to judicial investigation as previously required prior to the essential decisions required in committal proceedings. The argument was that the place of the magistrate in committal proceedings had become "mere form", and this was said to be unsatisfactory.[90] This procedural shift suggested a change of professional duties: there seemed to have been no change in authority of long habitual practice or common law or in statute to justify the 'small court of investigation'. It was clearly, however, an attempt by the police and, separately, by a doctor of medicine to assess the degree to which an arrested person was in fact incapacitated.

The officially controlled fact-finding method of Continental procedure was being altered by force of circumstance. Perhaps that was necessary as the existence of facts (principally medical ones) were now becoming more obvious than they had been in the past: new types of investigators were looking for new facts.[91] The contemporary view of a lawyer was that "the theory of *judicial* investigation required to be fully restored to its place in practice".[92] The advent of a modern police force by the Police (Scotland) Act 1857 meant that there was little chance of a return to the previous prominence of lawyers in the investigation of crime.

Coincidentally in the mid-Victorian era, the more immediate presence of local police forces with constables in attendance suggests a contribution by the preliminary assessment of the arrested person and their mental conditions. The awareness of ill-understood mental conditions occurred in this era but the history is not often considered in the context of the availability of the police to bring the matter to the attention of the authorities and thereby the courts.[93] Indeed, the development of what came to be called the doctrine of diminished responsibility may not

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[88] ibid, 510-1.
[89] Hugh Cowan, "Report of Trial of George Bryce for Murder" Edinburgh Medical Journal (1864) 10 (1) (July), 76, 81.
[90] R.C. (n 24), 473, 481.
[91] Mirjan R. Damaska, "Presentation of Evidence and Fact-finding Precision" 123 University of Pennsylvania Law Review 1083-1106 (1974-1975), 1084-5.
[92] R.C. (n 24), 473, 482: emphasis in the original.
[93] Richard Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh: Edinburgh University Press, 1981).

be wholly a matter of the development on the basis of significant aspects of Scots criminal law.[94] The reality might have been more of the judicial attempts to rationalise the newer cases with accused displaying these ill-understood mental conditions.[95]

Changing Circumstances

The 'small court of investigation' complained of by a lawyer ought to be seen then as a focus for the development of professional police duties. The Police (Scotland) Act 1857 (c.72) provided, by s.15, that a constable acting under that Act shall, "in addition to their ordinary duties", perform all such duties connected with the police in their respective counties as the Sheriff or the Justices of the Peace of the County may from time to time direct and require. No statutory definition of the 'ordinary duties of a constable' in that era was provided by that Act. Police constables may indeed have gained legitimacy from their association with local civil administrations.[96] It seems likely, though, that their legitimacy was based principally on their practical ability to investigate and catch those responsible for crimes.

Increased police activity in the investigation of crime began to show in the reported decisions. In Laing's case it was held competent for the prosecutor to ask a police officer who had apprehended an accused two days after the commission of an offence: "What did the panel [accused] say on being apprehended and told the charge against him?"[97] Objection had been taken to the Crown leading evidence of something that an accused had said on arrest two days after an incident, when the accused was in police custody and "a question" was asked by a detective. More specifically, if a statement was volunteered after apprehension, it could be used as evidence, but not if it was in answer to questions put by the officer apprehending.[98]

The judicial decision recorded was merely, and without explanation, that the question was "perfectly competent".[99] The answer given in answer to the prosecutor's question was that the accused had said that he knew nothing about the matter as he had been drunk for three days. In

[94] Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2010) pp.227-8.
[95] Robert S. Shiels, "The uncertain medical origins of diminished responsibility" J. Crim L. 2014, 78(6), 467-476.
[96] Neil Davidson, Louise A. Jackson and David M. Smale, "Police Amalgamation and Reform in Scotland: The Long Twentieth Century" The Scottish Historical Review 95(1), 88-111,93.
[97] *HM Advocate v Laing and others* (1871) 2 Couper 23.
[98] ibid, 25.
[99] ibid, per Lord Justice General (Glencorse), 25.

these circumstances it seems strange that the prosecutor should have asked the question and counsel should have bothered about the point.

Gracie's case concerned the reset of a watch.[100] Counsel objected to evidence of what the accused had said in answer to questions put by a police officer as that constituted "an irregular declaration". The Sheriff repelled the objection and the detective said that the accused had made two inconsistent statements as to where he got the watch.[101]

Answering the point on appeal, the Lord Justice Clerk (Moncreiff) said:

> "I have always discouraged such questions [by police officers to accused after apprehension], but I do not think that they are incompetent evidence. In some cases, the questions may arise naturally, and without any intention to entrap or obtain information unfairly".[102]

Lord Young was more forthcoming:

> "I am of the same opinion, and I wish to observe that there is no incompetency in such questions as to those which your Lordship has last referred. The rule is that a statement made by a person on the occasion of his being apprehended, without threat or pressure, is competent, but if it shall appeal that the matter was carried too far the Court will stop the examination on the ground of fairness to the prisoner. It is not a question of competency at all".[103]

Smith's case, only a short time after Gracie's, suggests an increasing tendency for the police to question an accused, or at least take a note of anything the accused said.[104] The charge was an assault and counsel objected to evidence of a constable as to what the accused had said freely, apparently spontaneously, to the constable after being liberated on bail. The point argued was that the words spoken voluntarily were incompetent because the constable had not warned the accused that anything that he said might be used against him. Further, the fact that the words spoken were done so voluntarily did not make them competent as evidence.[105]

Lord Young thought the matter too clear to need argument:

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[100] *Gracie v Scott* (1884) 11 Rettie (J) 22.
[101] ibid, 23-4.
[102] ibid, 25.
[103] ibid, 25-6. Lord Craighill concurred, 26.
[104] *Smith v Lamb* (1888) 1 White 600.
[105] ibid,602.

> "I am of opinion that there is no rule of our law requiring a constable in ordinary circumstances, to give such a warning [that anything said the constable would be used against the accused]; and in such a case as the present it is ridiculous to say that a constable, by not doing so failed in his duty. But I desire to say, further, with regard to the authorities cited [by counsel], that I know of no such rule as has been assumed in the argument. It is a matter of daily practice to ask a policeman, who has apprehended a prisoner, 'What did the prisoner say when you charged him?' It never crossed my mind, nor, I should think, the mind of any other judge, to object to the question on the ground that the constable had not warned the prisoner. A Glasgow Circuit never passes but such statements are made by constables, as, 'He said he wasn't there,' 'He admitted the theft and gave me the purse,' and so on. The idea that a statement of this kind should not be accepted because no warning was given, is absurd."[106]

The question seemed to be whether any advantage was being taken of a prisoner, and if so then the evidence of what was said would not be admitted.[107]

Lord McLaren concurred.

> "On general principles it is evident that the rules as to admissibility of evidence of voluntary statements by accused persons, applies to the evidence of police officers as well as of members of the public. There are cases where the relation between the witness and the accused constitutes an objection, as where the witness is in a position of authority, and has the opportunity of using pressure from which the accused requires protection. No such case is presented here. The appellant went up to the constable and spoke about his case. It is no part of the duty of a constable to warn every person who casually addresses him not to say anything in case it may be used in evidence against him".[108]

By 1887 the new edition of the leading textbook on the law of evidence repeated the law on declarations with a degree of realism as to purpose:

> "It is the practice in Scotland, whenever a person is charged with a criminal offence (except in petty cases), to take him before a magistrate, in order to

[106] ibid,602-3. Lord Young then contrasted the position of prison staff who were to be considered differently, and much more strictly, if reliance was made on a confession to them: ibid, 603.
[107] *Smith v Lamb* (n 104),603.
[108] ibid,603-4. Lord Rutherford Clark concurred, 604.

> obtain his account of the matter. By this means innocent persons sometimes succeed in explaining circumstances which seem to throw suspicion upon them; but far more frequently declarations support the case of the Crown, by containing express or implied admissions of guilt, or at least of circumstances prejudicial to the prisoner".[109]

The same textbook, after that description of practice, then specifies at length the law of declarations which by any test might be regarded as complex. Perhaps not often noted is the discussion of the *policy* of taking a declaration, at the conclusion of the chapter.

> "Considerable difference of opinion exists as to whether the proceedings detailed in the foregoing sections is fair to the prisoner. It is certainly most oppressive to subject accused persons to the inquisitorial and harassing examinations practised in some foreign courts. But so long as the procedure is conducted according to the law of this country, with perfect liberty to the prisoner to decline answering, and with the protection of a magistrate against importunity or cross-examination, there seems to be no good reason why it should be discontinued; for it is more likely to assist than to prejudice the innocent, while it often completes a defective proof for the Crown and so prevents the guilty from escaping. No doubt, it admits of being abused in the hands of an over-zealous prosecutor and a weak or biased magistrate, with the connivance of witnesses equally unscrupulous. But the times when such improper practices could be successfully resorted to have gone by, and the risk of them in modern procedure, although it may alarm the theorist, will not have any weight with persons acquainted practically with the administration of criminal law in this country".[110]

The policy statement concludes with the following reference: "Cp. [compare] J.F. Stephen, *A General View of the Criminal Law of England*, 1863, p.189 sqq".[111] The specific page references are to a section headed: "The Practice of Not Interrogating the Prisoner". The comparison invited is probably to note that the comparative criticisms directed by Stephen at

[109] Dickson (n 54), para.314 at 224.
[110] ibid, para.342 at 239.
[111] i.e. J.F. Stephen, *A General View of the Criminal Law of England*, (London and Cambridge: Macmillan and Son; 1863) 189-203.

the system in England and its preference to that in France took no account of the system in Scotland which seemed to follow generally that in France.[112]

A system of public prosecution has to be seen as one with stages in continuous activity:

> "One stage can be devoted to the gathering and organisation of relevant material, another to the initial decision, still another to hierarchical review, and so on, depending on the number of levels in the pyramid of authority".[113]

Control over the fact-finding process, in Scotland at any rate, was generally in the hands of judicial officials (Sheriffs or magistrates), or state officials (Procurators Fiscal).[114] The presence of both at the judicial examination when a declaration was to be taken could represent a formidable force in the determination of the future of the inquiry. That could not be said to be indicative of the adversarial system as envisaged by at least one theorist: "[…] a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive".[115]

The changed practices as suggested in the case of Alexander Milne indicate that judicial officers were developing a less active role as investigators, and concurrently a more active role judicially: judicial investigation was being elided by judicial management. There was precedent in a manner of speaking for the desirability of such an approach in the high administrative standards that had been recognised elsewhere in the legal system.[116] The ambition of the fact-finding activity was being extended to others, because of the development of new sciences and understandings. The issue under consideration is locating the developing role of the police especially in regard to interviews with accused.

It would seem then that the practical role of the 'small court of investigation' noted by the commentator in 1864 was a preliminary inquiry into the mind of the accused who was suspected of a major crime. Yet, the value of Milne's case, it was asserted, was that it did not "hand over the question [of mental capacity] to the doctors".[117] The police were established in law and understandably took an active role in the investigation of crime, rather than merely

[112] There was no requirement that Stephen should have considered Scotland but England was not Britain.
[113] Damaska (n 33), 48.
[114] Damaska, (n.33), 161-3. Scottish officials such as Procurators Fiscal may not have liked to be thought of as 'state officials', even if they were that in practice.
[115] Damaska, *Evidence Law Adrift* (New Have: Yale University Press, pb. 1997), 74.
[116] P.T. Riggs, "Prosecutors, Juries, Judges and Punishment in Early-Nineteenth Century Scotland" (2012) 32(2) *Journal of Scottish Historical Studies* 166, 168.
[117] Anonymous, "Responsibility in Delirium Tremens" (1878) 22 Journal of Jurisprudence 518-522, 519.

passed the time as night watchmen as in the distant past. Their assessment of those suspected of crimes included looking for evidence as to the mind of the arrested person. The subsequent case law may also be seen as not handing over the question of the mental capacity of the accused to the police.

Control of the criminal process remained with the lawyers, but it is certain that the enhanced role of the police and the contributions from the medical profession meant reconsidering the responsibility for certain aspects of the system. Such change of participation in different parts of the process of proof illustrates the differing competencies to influence reactions to evidence.[118] The police were being allowed their place, and the medical interventions came to be accepted, but not without a test for admissibility.

Discussion of principles

The established procedure of the judicial investigation of crime was in a state of far more than subliminal change around the late 1850s and into the 1860s. That change was not driven directly by statute or overt policy initiative but rather by other developing professions, notably the police, edging their way into what had been the sole province of lawyers. The pressures worked both ways: it has been argued that there was a crucial role played by economic and social change in shaping the development of the police.[119] If there was then any judicial antipathy to the police forces and what they did at work, it must also be seen as another factor in the tensions or dynamics of mid-Victorian trials.

Indeed, the nature of the subtle alteration of the balance of interests, with a developing hint of the rights of accused persons in the Scottish system, may be taken to have been described in abstract terms elsewhere:

> "That the purpose of criminal prosecution is to apply state policy towards crime independent of the defendant's attitude towards the charges was a deeply ingrained intellectual habit. What seemed attractive to liberal reformers, however, was to structure criminal proceedings, whenever feasible, *as if* there were a clash of opinions between the state prosecutor and the defendant. Contest forms, or *simulation* of a dispute, seemed to indicate at least some recognition

[118] Damaska (n 33), 76.
[119] Barrie (n 2), 262.

> that the interest of an individual can legitimately be opposed to the interest of the state: no small achievement in the liberal view".[120]

Arguably, the appropriate overview of the change in Scotland is one of an established *system* evolving into another with new participants and new knowledge from their respective professions, tempered with some acceptance that the accused may have some sort of rights. Indeed, by the end of the nineteenth-century there came to be clear reference to preserving the rights of the accused.[121]

Far from the accused being merely arrested and taken before a magistrate and committed for trial on simplistic legal grounds of *dole* or *dolus*, there was emerging from the developments of psychiatry and psychology an understanding of the possibility of newer compelling mental processes at work behind the criminal activity. The presence of police opened up the possibilities of extra-judicial confessions and the modern medical views produced a markedly more subjective assessment of the physical condition and the mind of the accused, especially when investigation was directed at the crime of murder.

Cases later in the nineteenth-century showed how the legal approach to extra-judicial confessions had changed and had led to their acceptance, with a consequential decline in the judicial investigation of crime. The need for a warning had been required where an admission was to be relied on.[122] The fact that a confession had been made to someone in authority did not in itself result in its being admitted in evidence.[123] In 1909 the summary of police duties on the arrest of an accused following past practice could be stated succinctly:

> "[The officer] ought not to put questions to the prisoner, but any voluntary statement with reference to the charge should be noted in writing. The officer then brings his prisoner as speedily as possible before a magistrate. He may detain him in a police station house, or other suitable place, if necessary, on account of the lateness of the hour, the distance to travel, or other sufficient cause".[124]

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[120] Damaska (n.33), 190, with all emphases in the original.
[121] H.H. Brown, "The Evidence of the Accused in Criminal Procedure" (1898) 5 S.L.T. 182 at 185.
[122] *HM Advocate v Proudfoot*, (1882) 4 Couper 590 per Lord Craighill at 593 and 595.
[123] *HM Advocate v Simpson*, (1889) 2 White 298.
[124] Robert W. Renton and Henry H. Brown *Criminal Procedure According to the Law of Scotland* (Edinburgh: Wm. Green, 1st edn. 1909) 32-3.

In the round, it can be said then that the Scottish courts established and retained a supervisory role over the admissibility of the evidence of police officers but no authority seems to have existed in law, even by 1900 for formal interview as such by the police, or to regulate much what was happening in fact. With a public prosecutor pre-eminent, the Scottish legal system was not developing an adversarial or accusatorial character in the sense of an engagement between two adversaries before a relatively passive decision-maker whose principal duty is to reach a verdict. There was no real authority in law to conduct an interview with an accused, and judicial attitudes seemed quite antagonistic to such a development. There was, however, a dissonance arising from the development of expertise in several fields of relevant knowledge at the point at which an investigation was necessary.

Yet, the responsibility for the immediate investigation of crime was slowly shifting from the judicial approach. The Lord Advocate, as the national public prosecutor for the Crown, had not relinquished the traditional control of the whole prosecution process. The results of Crown investigations were "very highly confidential".[125] The court was slow to interfere with the discretion of the Lord Advocate in these matters.[126] The view of the Lord Advocate carried very great weight with the court.[127] The central authority in what may be regarded as the state was assured.

However, the 'small court of investigation' was developing pragmatically and to that extent, there was an ebbing of what had been the complete domination of the whole system by lawyers. The intervention of the police and medical men, however tangential, meant that the traditional hierarchy of authority risked becoming distorted. That was doubtless affected also by the development of summary procedure and the minimal or non-existent investigation by the public prosecutor and the absolute reliance on police reports and statements. However, the prosecution system in Victorian Scotland retained its non-adversarial character with the hierarchical arrangements structured as an official inquiry.[128]

It has been said of the general acceptance amongst the 'governing class' that the British constitution of the same era was appropriate to its purpose. "But agreement on the merits of a piece of machinery does not obviate quarrels about how it should be operated, and by

[125] Robert W. Renton and Henry H. Brown *Criminal Procedure According to the Law of Scotland* (Edinburgh: W. Green & Son: 5th edn, 1983) 70 at para.5-93.
[126] *Donald v Hart* (1844) 6 Dunlop 1255.
[127] *Arthur v Lindsay* (1894)1 Adam 582.
[128] Damaska (n.33), 3.

whom".[129] Possibly unlike the British constitution, the Scottish criminal procedure in the mid-Victorian procedure was not appropriate to its rapidly developing and therefore changing purposes, and it required to meet with coherently new principles the criminal circumstances of traditional *mala in se* crimes, which were being supplemented rapidly and in bulk by *mala prohibita* offences.

There seemed to have been little or no formal of policy discussion as to how the police, or 'criminal officers', were to go about their professional business within the context of Scots criminal law: the nature and the extent of their investigatory powers may well have been, and probably were, a real issue in practice and law. The role of police officers brought about by statute seems not to have been specified or fully integrated into the existing scheme.

Discussion

Lord Pearson wrote in 1896 that the "maintenance of the public peace and detection of crime are in the hands of the police force subject to such instructions as they may receive from superior authority".[130] In the 40 years from the police legislation in 1857 an accommodation of respective rights and duties, as well as responsibilities had been settled: the practical aspects of investigation was by then for the police, subject to objective instruction from lawyers. The development was informed, by practice honed in the successes or failures at court. Yet, there was, an astonishing lack of law books or other publicly available texts. The Chief Constable at Greenock produced for publication at the start of the twentieth-century his own textbook as there was "no Treatise on the Powers and Duties of Police in Scotland known to exist of a more recent date than Mr Tait's *Summary* published in 1832 […]". [131]

The reason for judicial suspicion of the place of the police force in the legal system and the role of constables in legal practice is not difficult to understand. The judicial investigation of crime, from the 1860's, has to be seen now in the context of the growth of the range and number of statutory offences liable to be and actually prosecuted in the context of the development of

[129] G.H.L. Le May, *The Victorian Constitution: Conventions, Usages and Contingencies* (London: Duckworth, pb.1979), 22.
[130] Charles Pearson, "The Administration of Criminal Law in Scotland" (1896) *The American Law Register and Review* 44 (1), 619-632, 622.
[131] John W. Angus, *A Treatise on the Powers and Duties of Police Constables in Scotland* (Edinburgh: Wm. Green, 1904), Preface. The reference is to Tait (n.19).

summary procedure.[132] The primacy of the judicial investigation of crime was no longer tenable in the unsettled or developing society with a floating population. The ultimate authority in the form of instruction may have indicated where the power of decision-making lay but that in itself did not have the same characteristics as investigation. The concern about the evolution of 'a small court of investigation' suggests that there was rising within the legal system an alternate way of doing things that had not been sanctioned by judicial decision at common law or by statute.

A further notable development was that the presence of the police brought to the notice of criminal courts people with mental disorders whom the public would not otherwise have engaged with directly. The consequential development of the interaction with mentally disordered accused may be one of the best examples of the dual nature of the police role that distinguished the police in Scotland from England.[133] The presence of police surgeons, such as Henry Littlejohn, may also have assisted in separating or sifting at an early point the various categories of arrested people, dividing those manifestly suffering from mental disorder, superficially assessed it must be suggested, from those who had acted in a truly criminal manner. The Courts seemed to have had an increasing number of such complex people with mental disorders to deal with.[134]

By the start of the twentieth-century, depriving citizens of their liberty, albeit temporarily, on account of real risks to their health and safety because of their alcohol-dependency was seen then as benevolent pragmatism and a demonstration of common sense.[135] Yet, the dispute about investigating after every arrest was not merely a desire to return to things as they had been but rather an assertion around the application of first principles. The range of summary offences included substantive matters that were regulatory and not thought by modernists as being crimes in the traditional sense that required engagement with the courts. Traditionalists would

[132] W.W.J. Knox and A. McKinlay, "Crime, Protest and Policing in Nineteenth-century Scotland" in Trevor Griffiths and Graeme Morton (eds.) *A History of Everyday Life in Scotland, 1800 to1900* (Edinburgh: Edinburgh University Press, 2010), at pp.204-5 gives some of the notable figures for summary prosecutions in the mid-Victorian era.
[133] Ibid, 216.
[134] For background to the developing judicial involvement see Chloe Kennedy, "'Ungovernable feelings and Passions': Common Sense Philosophy and Mental State Defences in Nineteenth Century Scotland" (2016) Edinburgh Law Review 20(3) 285-311.
[135] David Smith, "Drinking and Imprisonment in Late Victorian and Edwardian Scotland", Social History, 19(37) (1986), 161-176, 163-4.

have been anxious that the police were dealing with offensive behaviour pragmatically and those responsible as offenders were not being brought before court.[136]

The central position of the judicial investigation of crime was beginning to be displaced around the 1860s, and the change was not necessarily seen by contemporaries as being for the better but there were still clear ideas at work. Perhaps in marked contra-distinction to contemporary views in England that anyone might prosecute their own case, it was held in the mid-Victorian era that: "the Procurator Fiscal is assumed to have no connection with the cause, but to be in court merely in the discharge of his official duty".[137] As if to emphasis the objective nature of the role of public prosecutor in Scotland, Lord Deas asserted that if a Procurator Fiscal had: "personal knowledge of the facts vital to [a] case" such that he might have to give evidence, there was then a duty "to decline from the outset all interference, either official or judicial" which duty was to be observed carefully.[138] In the Edwardian era a misunderstanding of duties led to a strict assertion that: "no matter what the circumstances may be, the prosecutor in a criminal case cannot give evidence as a witness".[139]

These judicial statements are principles of the first order in delimiting the nature of the Scottish system of criminal prosecution. There is a risk that the history of the police in Scotland is distorted by a misunderstanding of the source of authority. The police were to find their own role and its limits in the system but Procurators Fiscal had a duty to investigate crime, rather than a liability to be "instructed" to do so.[140] By the mid-century the established role of the Procurator Fiscal was the hand of the investigating magistrate with instructions still to be received competently from the Sheriff or the Lord Advocate depending on the procedural stage.[141]

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[136] ibid, 164.
[137] *Ferguson v Webster* (1869) 1 Couper 370 *per* the Lord Justice General (Lord Glencorse), 374.
[138] ibid.
[139] *Graham v McLennan* (1910) 6 Adam 315 per the Lord Justice Clerk (Lord Kingsburgh), 320.
[140] Barrie (n 2), 154, fn.58 where the source for such 'instruction' is unclear.
[141] See Robert S. Shiels "Legal Process and the decision to prosecute Madeleine Smith" 2016 S.L.T. (News) 175 for the manner in which the local public prosecutor in the mid-Victorian era investigated a serious crime. The results of investigation were reviewed by independent judicial scrutiny and the cumulative professional view was then placed before the Lord Advocate for an executive decision in the public interest was taken, on this occasion to prosecute. In summary, the Procurator Fiscal with the assistance of the police discovered the facts and the judicial supervision gave a legal assessment for a decision on prosecution to be taken.

On high legal authority and by very long-established practice a broad statement of a general principle could be written with confidence in the mid- to late-Victorian era:

> "By the law of Scotland, the testimony of one witness, however credible, is not full proof of any ground of action or defence, either in a civil or criminal cause. Accordingly, if the only evidence in support of a case is the uncorroborated testimony of one witness, it is the duty of the Court to direct the jury that the proof is not sufficient in point of law".[142]

It would take little exercise of the imagination to see that admissions by an accused, if not a full confession then at least as something that assisted the police, at the earliest point in criminal procedure were not being recorded judicially and not recorded in a form consistent with established procedures that produced admissible documents for production in court later.[143] There was then no obvious reason in politics or developing legal philosophy for an ancient *judicial* function with explicit safeguards for the 'prisoner' to be delegated in effect to 'inferior officials' as members of a new statutory force.[144]

In mid-Victorian Scotland, and thereafter for several generations, the quasi-inquisitorial nature of the investigation still required the active participation of the local public prosecutor (the Procurator Fiscal on a quasi-judicial commission) under immediate local supervision (by the Sheriff as a qualified judicial office-holder). No prosecution on *indictment* could commence without certain, that is to say explicit, authority of the national prosecutor (the Lord Advocate, personally or in his place by his Deputes). These are to be seen as constitutional principles carrying with them inherent checks and balances against unilateral action. Even prosecution on indictment in the Sheriff Court required such authority.

The well-established hierarchical, bureaucratic and centralised system, (none of these terms is used pejoratively), as operated in mid-Victorian Scotland reflected an historical process that may yet be traced back to European origins. Mid-Victorian developments from an Imperial Parliament, in the context of a transformed economy, required the Scottish system to adapt to the presence of the police who had been introduced on a statutory basis. Separately, but with

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[142] Dickson (n 54), vol. 2, 986-7, para. 1807 and footnotes.
[143] ibid, vol. 1, title 2, chapter 4 sets out the complex procedure for judicial declarations.
[144] ibid, vol. 1, p.227, para. 318.

an admitted degree of interdependence, the growth of summary criminal procedure was bringing within the confines of courts a new sort of attack on unacceptable social behaviour; *mala prohibita* rather than *mala in se*. New practitioners of the new trades and professions required to inquire into, and provide evidence of, the new offences were needed to carry out the related forensic business.

The growth of the police in forces and individually required constables at their work to find a precisely defined role in law, and the lawyers and courts had to accommodate them. The distinctive nature of the customs, traits and practices of the police in Scotland, even now, reflect a balancing of the tensions that already existed in the legal system before the arrival of the new means of law enforcement, and that ought to be seen as a significant factor in the development of the police.[145] The presence of the Procurator Fiscal as, in effect, an investigating magistrate operating in the public interest, represented an important feature to be considered in the firmament of the legal system when contemplating the development of the police.

Concluding remarks

In Scotland, the introduction of the police has to be seen as being within, and therefore constrained by, the existing and idiosyncratic legal regime. In short, the mid-Victorian legislation providing for the establishing of the police in Scotland required implementation within an existing hierarchical system with Continental influences.[146] The judicial investigation of crime had grown up to deal with serious but parochial crime and the Procurators Fiscal and their Sheriffs, working together, would know the detailed social dynamics of their geographical jurisdictions. However, in an age of rapidly increasing travel opportunities, principally the railways, allowing for travelling criminals, and the spread of detailed knowledge of criminal events by mass-circulation newspapers, the effectiveness of the traditional judicial investigation of serious crime must have come to be doubted.

In the absence of a statement of major policy imperatives embedded in statute, the police had to find their own way to develop and expand their duties within a legal system that had never

[145] David G. Barrie, "Anglicization and Autonomy: Scottish Policing, Governance and the State, 1855 to 1885" (2010) Law and History Review 30(2), 449-494.
[146] For 'hierarchical officialdom' see Damaska (n.33), 182-186.

been intended or otherwise adjusted in anticipation to accommodate their presence. That idea extended beyond the role of constable and extended to a police force as well.[147] Locating precisely the commencement of the modern police interview in Scotland would seem to suggest that it was much later than the 1860's but the case law then and the initial inquiries into the medical state of an accused identified by a lawyer's complaint suggests serious change to various professional dynamics was in motion around then.

The scope for a comparative study of criminal procedure (as a source of authority and the means of proving facts while attaining fairness) in the Victorian era remains remarkable, but which systems are to be compared? The traditional features of Scottish and French procedures are as notable as are the contrasts between these Scottish procedures and the English ones.[148] Further, the law was being shaped by the vision of criminality that doctors of medicine were bringing into court, as was happening in France.[149] It is an indication of the difficulty of locating sources of authority that the place of the police in the investigation of crime, as late as the 1950's, could be held judicially to be subject to the responsibility of the Procurator Fiscal to investigate crime. Realistically, the preliminary investigation was by then undertaken by the police under the general supervision of the Procurator Fiscal.[150] That may be said to have been the formal or theoretical view of the division of professional responsibility, but with a hint of sentimental reminiscence.

[147] David Swinfen, *Moncreiff*, (Broughty Ferry: Shakenoak, pb. 2015) pp.135-7 narrates an example of the tensions in 1861 between a Sheriff and a Chief Constable around the authority to instruct the latter. The example may not have been unique.

[148] See e.g. Ruth Harris, *Murders and Madness: Medicine, Law and Society in the* Fin de Siècle (Oxford: Clarendon Press, 1989), Chapter 4 (esp.pp.125-7), where the French criminal procedures prior to charge are described, and to an experienced Scots lawyer may seem remarkably familiar.

[149] ibid, 138.

[150] *HM Advocate v Smith* J.C. 66 and quoted without demur by Lord Mackay of Clashfern in: "The Relationship Between the Police and the Prosecution" 1984 Scottish Law Gazette 11,15.