

## **GUILTY AS SIN: A SCOTS NATIONAL HERITAGE?**

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In my current research I am evaluating whether (and if so, how) the development of Scots criminal law has been influenced by changes in Scottish religious culture and theological orthodoxy. The connections between law and religion and between religion and penology have previously been explored at a general level, but the connection between religion and the criminal law as a composite system has so far remained unexplored. Scots criminal law is particularly appropriate for a study of this nature because Calvinism, with its key aims of maintaining social cohesion and enforcing moral discipline, has been a prominent feature of Scottish society ever since the Reformation of 1560. Given the overlap in the objectives of Calvinist doctrine and the objectives of the criminal law – namely, promoting social harmony and punishing ‘wrongful’ acts – it is highly likely that the religious climate in Scotland has had some bearing on the way that the criminal law has been shaped and applied.

The more precise aim of my thesis is to uncover how any theological influences have contributed to the presence of legal moralism within Scots law. In addressing this issue I have examined various aspects of the criminal law at different points in time and tried to identify evidence of theological ideology, as well as any connections with especially moralistic features of the law. For example, in the area of criminalization the religious underpinnings of the law might be suggested by the justification given for the law’s content or by the fact that the range of criminal offences coincides with Biblical sins. Similarly, if the authority or source of the criminal law is suggested as being of divine providence, then this suggests that religious influences have infiltrated the criminal law. Another key area of the criminal law on which I have focused is the attribution of criminal responsibility, both from the point of view of general theories of responsibility and from the point of view of the structure of mens rea (the mental state which must accompany a proscribed act for it to be a crime).

In respect of general theories of criminal responsibility, I hold traditional character-based theories to be the most moralistic, particularly in contrast with choice and capacity theories which have attracted most support in recent criminal law scholarship. This is because traditional character theories base criminal responsibility

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on a moralistic assessment of the accused's reputation and past conduct unlike contemporary cognitive and volitional based theories of responsibility. I seek to track the shift in Scots law away from character-based theories and towards contemporary psychologised theories in order to establish whether the role of Calvinist Presbyterianism, and its decreasing dominance in public life, has been significant in this regard.

Given that Calvinist Presbyterianism is associated with a collectivist model of societal relations it is my contention that the authoritative status of Calvinist Presbyterianism from the Reformation onwards has fostered a character-based approach to criminal responsibility in Scots criminal law that assigns great importance to the accused esteem in the eyes of the community. I argue that as Scottish society became increasingly individualized over time, this encouraged a more subjectivist form of criminal responsibility in which an impartial assessment of the accused and his or her intentions and motivations is paradigmatic. Many reasons can be offered for this move towards individualism, but in my account I concentrate on the changes that were introduced by Scottish Enlightenment thinkers to popular thought on the nature of morality, which contradicted the older Calvinist beliefs on the matter. Once it had been suggested that man's ability to make morally 'right' decisions and take morally 'right' actions was based upon certain inclinations within him rather than the observance of rules external to him, it became pertinent to examine man's desires and sentiments for they became the key to discerning the moral worth of those decisions and actions. This change in theories of responsibility also has associated implications for the way that mens rea was structured. As responsibility became increasingly subjectivist, a new concern to libel specific mental states that did not previously exist in the criminal law appeared and, again, it is my contention that this can be linked with the changing role of religion in Scottish society.

At present my research has predominantly covered the immediate post-Reformation era up until the mid-eighteenth century and has tried to incorporate a wide range of primary and secondary legal, socio-historical, philosophical and religious texts. It is my hope to continue my research up to the present day and in doing so to offer an original interpretation of Scots criminal law that will make two key contributions to existing knowledge. First, I hope to further our understanding of historic Scots criminal law by considering its sources and institutions from a hitherto unexplored theological perspective. Second, I hope to enhance our understanding of certain aspects of contemporary Scots criminal law that remain ostensibly moralistic, such

as the now defunct power of the High Court of Justiciary to declare immoral conduct criminal and the use of normative language and conceptions of responsibility and guilt, as evidenced by the continued reference to *dole* and the *mentes reae* of 'evil intent', 'wicked intention' and 'wicked recklessness'.

Due to the interdisciplinary nature of my work and the fact that, at least aspirationally, it is pertinent to the interest of other members of SOLON, I am particularly pleased to have joined the network and I would welcome any discussion with any other members on my own research or any other matter.