

‘According to Justice’: Women’s interactions with the Inverness Sheriff Court, 1777-95

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Abstract

This thesis examines the Inverness sheriff court criminal processes and assesses their documentary value for historians of gender, Scots law, and social history. The sheriff court represented a locus for Inverness civic life but was not solely an urban institution. Over the period under study, the court made significant efforts towards improving and cementing access to law throughout Inverness-shire, appointing various court personnel throughout rural parishes. This was primarily an attempt to counteract entrenched pockets of resistance to state authority in various areas, particularly Lochaber. It is clear that lower-order Inverness-shire residents were aware of their rights and ability to access the law, and frequently utilised the sheriff court system to adjudicate disputes and to obtain justice in response to experienced harm. This thesis will first examine the institution of the Inverness sheriff court, its place in civic society, and the men who wielded the state power instilled in the inferior court system. It will then analyse a range of crimes for what relevant cases reveal about women's interactions with this court system, including lawburrows, resistance to judicial authority, and sexual violence. It concludes that while the surviving criminal processes of the Inverness sheriff court are vital sources of information regarding women's lives in the late eighteenth century Highlands, analysing women in isolation does not reveal the full picture of lower-order legal interactions at this time. Women very frequently collaborated with or were supported in their attempts to gain justice by men in their communities and kinship groups. Therefore, by considering what these documents reveal about community actions and familial support in relation to the law, we gain a fuller understanding of both how the law was administered in the Highlands at this time, and how women's lives were lived within their communities.

Ethics Approval



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Dear Lucy

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The ethical approaches of this project have been approved and you can now proceed with your project.

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Declarations

I can confirm that at no point during the preparation of this thesis was any generative artificial intelligence software accessed or used for any purpose, including, but not limited to, the generation of data and/or the writing of text, and declare this thesis to be entirely my own work.

I also confirm that I consent to the use of plagiarism detection software in the examination of this thesis.

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1. Introduction

This thesis argues that sheriff court criminal processes offer a detailed and varied view of lower-order women's lives within their wider communities. The criminal processes of the Inverness sheriff court are an under-researched resource which offer valuable insight into women's interactions with the law in the late-eighteenth century Highlands. The wide variety of cases investigated and adjudicated by the court, along with the large number of surviving witness precognitions in the criminal processes, allows the opportunity to examine, on a micro-level, how Inverness-shire inhabitants interacted with the court, and the wider role played by the sheriff court within community and civic life in the county. This thesis will consider in detail the institution of the Inverness sheriff court and its place within the wider Scottish legal and civil administrative systems. It will then consider, through analyses of a range of crimes, how Inverness-shire residents interacted both willingly and unwillingly with the sheriff court system, with a particular focus on how women accessed the law. This topic situates this thesis within several, at times overlapping, historiographical fields. Firstly, as a legal institution, Scots legal history provides the necessary groundwork for a study of the primary institution responsible for administering the law at the county level during this period. Additionally, as a fundamentally patriarchal institution, the field of gender history is also crucial to any study of the Inverness sheriff court, with this field in particular providing the basis for much of the methodology of this thesis. The geographical context of Inverness county is also central to the analysis, as the political and social background of the Highlands in this period, incorporating the tensions of post '45 Scotland, with the growing impact of enlightenment ideals of improvement on the environment throughout the Highlands, affecting its inhabitants from the urban centre of Inverness to the rural parishes that characterise the Highlands in popular thought. It is therefore hoped that this thesis represents a significant addition to these various fields, as the chosen direction of analysis of these documents is to produce a work of social history, using case documents to illuminate the lives and communities of the lower orders in Inverness-shire at a

micro-level, specifically at their point of interaction with the sheriff court system.

This mode of analysis has developed along several key themes, which comprise the following chapters of this thesis. The first chapter is an-depth examination of the institution of the sheriff court, its place within the wider judicial system, and the men who administered the law within its jurisdiction. Although not directly related to the study of women's interactions with the law, this chapter represents a crucial first step in the thesis overall. It would not be possible to accurately examine these points of interaction between the legal system and the lower orders, if the institution itself has not first been mapped out and analysed in detail. This allows a rich contextual base for the following analytical chapters, which consider three different types of crime based on relevant cases within the surviving Inverness sheriff court documents. The first of these chapters is centred on lawburrows, which, rather than being a crime in and of itself, could more accurately be termed as a use of the law as a harm prevention measure. Exploring this allows not just an examination of access to the court, but a consideration of court mediation of inter-personal conflict, which allows significant insight into eighteenth-century communities and relationships. The second of these chapters looks at resistance to the legal authority of the sheriff court, primarily through cases of deforcement – or the obstruction of court personnel during the course of their legal duties. The surviving documentation of these deforcements suggests that resistance to the court was concentrated within relatively small geographical areas, dominated by specific families routinely engaged in livestock theft. Women within these families can be seen attempting to physically prevent the arrests of (usually male) relatives, at times violently. In addition to these cases, the full range of resistance is considered, through examples of women harbouring outlaws, and other less violent forms of resistance, such as 'rough music'. The last chapter looks at rape, and other cases involving violence against women. It is here that the question of women's autonomy before the law can be most clearly examined, and one of the most prominent themes of this chapter will be the

importance of family support when accessing the law. Importantly, although the rape cases in this chapter would have been investigated by the sheriff court, they would have been tried by the High Court of Justiciary, likely on their twice-yearly circuit. This necessarily restricts the scope of analysis within this chapter. It is not intended as a consideration of rape conviction rates or even of judicial reactions to rape, but rather as an examination of how women, and their families, attempted to inflict judicial consequences against rapists. The material examined within these four chapters will provide a much clearer understanding of how the sheriff courts existed within people's lives, as both a source of punishment, and an institution that could be used to seek protection against and restitution for experienced violence.

Methodology: development of project aims

The discursive framework of the thesis having now been briefly outlined, it is necessary to consider in more detail the documents of the Inverness sheriff court criminal processes, the research work of the wider PhD project, and how the boundaries of the project were developed. The records of the Inverness sheriff court held by the National Records of Scotland (NRS) are a rich, engaging resource that reveal a great deal about criminal activity and legal practice in the Highlands. These documents are currently box-listed, but not catalogued, hindering their research accessibility for those who do not have the time, or the funding, to speculatively comb through the many bundles of documents in the hope of finding material relevant to an existing research project.¹ This project has been a Collaborative Doctoral Award, which differs from a more traditional PhD in that it is carried out with the support of an industry partner, in this case the National Records of Scotland, with a representative from this organisation serving on the supervisory team. CDAs have a vocational focus, with high importance placed on gaining industry experience within the given field. The primary aim of this Collaborative Doctoral Award project was therefore to

¹ The bundles are currently described on the NRS online catalogue simply as criminal processes within given date ranges, with no case information available.

complete a cataloguing project for NRS, listing the criminal processes of the Inverness sheriff court from 1748-1800, meaning that wherever possible, the NRS online catalogue will have a reference and corresponding entry for each individual case, containing the crime, perpetrator, victim, date of trial and the outcome of that trial in terms of punishment. The choice of time period and geographical location were driven by a combination of personal experience and practical concerns. This project was planned as a continuation of previous Masters and undergraduate dissertations examining women's agency in eighteenth-century Scottish court records. The Inverness sheriff court records were identified by NRS as a collection which would benefit from more in-depth cataloguing, and the time period chosen was the second half of the eighteenth century. The reorganisation of the sheriff court system in the late 1740s, a process which will be examined in more detail in the next chapter, necessitated a project start date of no earlier than 1748, with the end of the eighteenth century chosen as the end point for the project.

The aim in the archival part of the project was to reorganise the collection so that the documents for each case were contained together, greatly improving the ease of access and searchability of these documents for the public. Due to time constraints and the various realities of pandemic-era research, the year-range of listed cases now covers 1777-1795, and the thesis research and analysis are based entirely on the documents within this period. This cataloguing project for the NRS has had obvious advantages for the thesis research: the increased level of familiarity with the documents has arguably resulted in a greater level of insight than could be achieved through standard archival visits. It has also provided valuable experience in archival work such as appraisal and cataloguing systems, a key component of the planned benefits of the project as a whole. In the early 1990s, the documents were organised into chronological bundles, and they are held in boxes usually containing approximately ten bundles each. Their condition is generally good; however, some documents have suffered significant insect, mould or dirt damage, occasionally affecting legibility. The documents are tightly folded, with the title of the document written on the outer fold.

Careful handling is therefore vital, but this folding has frequently protected the bulk of the writing from the dirt and dust found on the outer cover of each document. It should also be noted from a research standpoint that due to these conditions, handling and assessing these documents takes significantly more time than, for example, examining bound court minute books.

The analytical aim of the thesis is therefore threefold; to better understand the administration of the law in Inverness-shire during this period, to assess the records of the Inverness sheriff court for their documentary value in illuminating the lives of women otherwise missing from the historical record, and to see what conclusions can be drawn about how gender influenced the court system in terms of women's agency before the law. This project is not an attempt to quantify crime in Inverness as a whole, and although reference will be made to other court systems such as the High Court of Justiciary and the kirk session, any attempt to cross-reference the information found in the sheriff court processes with other record series would have rapidly ballooned the scope of this project beyond anything remotely achievable within a funded PhD timeframe. It likely would be possible to attempt to trace specific cases or individuals across other kinds of legal records, and this remains a possible avenue for future research. Returning to the cases heard in the Inverness sheriff court, particular attention will be paid to women's differing legal statuses in these cases, depending on whether they were defendants, witnesses, or complainants, and how this affected their experiences in court, as well as any possible comparative male legal interactions. The completed archival work has revealed a treasure trove of cases involving women and, crucially, shows that there was no one universal experience for women in this period. The records amply demonstrate that any conception of a monolithic Highland womanhood is false and ultimately depersonalising. The records show women in all of their varied humanity; some were driven to crime by circumstance while some aimed to profit, some actively sought the involvement of the judicial system as a method of settling disputes while others physically prevented sheriff officers from performing their duties. In the 368 cases listed within the 1777-95 date range, there is a wide range of legal

involvement by women. This work will therefore reject the methodological shortcoming seen in some social histories where the aim is to discover how lower-order women lived in a general sense. This approach can be seen within Tom Devine's 2000 book *The Scottish Nation: 1700-2000*. He seeks to establish only overarching trends; for example, he argues that women in the interwar period of the twentieth century did not resist gender inequality. He states that 'women at the time did not see their lives in such negative terms. For young girls in work, this was a period of rising incomes and more opportunity to spend on such pastimes as the cinema and dancing.'² The superficiality of such an assessment is obvious, and when court cases involving historically marginalised people are examined, it reveals how reductive such analyses can be.

Moreover, any attempt to quantify a universal experience, even within a distinct region such as the Highlands, risks flattening our perception of the past into generalised conclusions that obscure lived realities. This more limited methodological approach can arise from a belief that records containing information about the lower orders simply do not survive. This project will, however, demonstrate the value of criminal records as a crucial source of information about individual women, as well as the wider communities that they inhabited. The methodology of the thesis will therefore be qualitative – rather than attempting to count how many women appear in the records, the thesis will seek to assess the available evidence in terms of what it reveals about women's lives and experiences in the Highlands judicial system. It will attempt to build on previous work in this field such as Rosalind Mitchison and Leah Leneman's work on the kirk session records,³ Anne-Marie Kilday's research on female violent crime⁴ – particularly infanticide – and Lynn Abrams' assessment

² T. M. Devine, *The Scottish Nation: 1700-2000* (Harmondsworth, 2000), p. 537.

³ See L. Leneman and R. Mitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland, 1660-1780* (Edinburgh, 1998), and R. Mitchison and L. Leneman, *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780* (Edinburgh, 1998).

⁴ See A. M. Kilday, *Women and Violent Crime in Enlightenment Scotland* (Suffolk, 2007).

of Highland masculinity as identified through the Inverness sheriff court records.⁵

The first chapter will serve as an introduction to the Inverness sheriff court in its wider legal context, and how the court was accessed. As will be discussed in detail within this chapter, in 1748, the sheriff court became the primary inferior court in the Scottish legal system. However, there is evidence that in Inverness-shire, the personnel of the sheriff court operated in tandem with other legal officers of various kinds, such as justices of the peace and even baron baillies. It is reasonably common within the surviving records for the initial precognitions to be collected by whatever local figure represented the judicial system in a given area. In Inverness or Fort William, and their surrounding areas, this figure was the sheriff substitute, the direct subordinate to the sheriff depute. In more rural areas, this could also be a justice of the peace, usually an army officer of some kind, or a member of the local gentry. The requirements for the vast jurisdiction of Inverness-shire clearly involved cooperation between multiple judicial systems. Another aspect of this chapter is how people accessed this legal framework; there are several cases in which documents note that people have sought out a justice of the peace or gone to the office of the procurator fiscal in Inverness to settle disputes or obtain warrants against others. This question of access, and how the law was administered in the Highlands in this eighteen-year period, is an under-researched topic. Further to this, another crucially important aspect to consider is the use of language within the court environment. There is a significant quantity of evidence within precognitions and declarations surrounding Gaelic being spoken in the court; these documents regularly mention towards the end of a statement if the deponent or declarant spoke in Gaelic. For instance, in 1782, Katherine McChandy was alleged to have stolen meal and hay from her employer, James McIntosh, tacksman at Aberarder. Her

⁵ See L. Abrams, 'The Taming of Highland Masculinity: Inter-personal Violence and Shifting Codes of Manhood, c.1760–1840', *The Scottish Historical Review*, Volume XCII, No. 233 (April 2013), pp. 100–22.

declaration, submitted before the sheriff depute on 5 July 1782, ends with the following passage:

This Declaration consisting of this & the four preceding pages is freely and voluntary [sic] emitted by the Declarent and being again read over to her in the Galeik [sic] Language she adhered to the same & all this in presence of Robert Campbell Sheriff Clerk Depute of Inverness Robert Cuming his Clerk Writer hereof Alexr. McKenzie also his Clerk and James Simson one of the Burrow officers of Inverness and is signed by the said Sheriff because the Declarent says she cannot write.⁶

Accommodating Gaelic speakers was clearly a necessity frequently navigated in the court. One of the most important aspects of this avenue of inquiry is to consider how far statements made by Gaelic speakers can be considered to be their own words, when the distorting lens of standardised legal language is further clouded by in-court translations. This is an important aspect of popular access to the legal system, particularly in terms of the potential marginalisation of Gaelic-speaking defendants, witnesses and victims of crime within the court environment.

Leading on from this, the third chapter will consider one of the particular varieties of court documents that are contained within the surviving records of the Inverness sheriff court - petitions for lawburrows. These petitions offer a vital glimpse into eighteenth-century interpersonal disputes. Lawburrows was the eighteenth-century Scots law equivalent of a restraining order; it allowed people to state in court that they feared physical violence or damage to their possessions as a result of another's conduct. The documents surrounding these cases are usually limited to a single petition wherein protection under lawburrows is sought and then granted, but even these brief descriptions offer a great deal of information about human interactions in this period – for example,

⁶ National Records of Scotland (hereafter NRS), SC29/53/13 [SC29/53/1782/12], Inverness Sheriff Court Criminal Processes 1782, 'Declaration of Katherine McChandy', 5 July 1782. For every NRS reference cited in this thesis, I have included the current bundle reference, i.e. SC29/53/13, and the case reference, i.e. SC29/53/1782/12. These case references currently exist only in the NRS database of listed cases for this collection, however, they will be added to the NRS online catalogue in due course. This method will allow researchers to locate relevant case documents after this collection has been reorganised.

how people negotiated animosity between neighbours, and how they utilised the law when threatened. Case studies involve women seeking protection from men and from other women, and also men seeking protection from women, providing an opportunity to examine in some detail whether it is possible to determine if gender played a significant role in how these cases were interpreted by the court.

One case study involving a lawburrows petition which then proceeded to an assault conviction is particularly rare, but also demonstrates the limitations of the documents under study. On 18 January 1782, Andrew McPherson, a vintner in Castle Street of Inverness, was sentenced to fifteen days imprisonment in the tolbooth of Inverness, and fined five pounds, fifteen shillings sterling for entering the home of Katherine Fraser, widow of the deceased Evan McPherson, late Sergeant in the 82nd Regiment of Foot, and beating her.⁷ Within the documents held in NRS, this is classified as an assault case, but there is also a separate lawburrows petition, not held in NRS, but in the Highland Council Archive (HCA).⁸ This changes the interpretation of how Katherine Fraser accessed the law, as she initially sought protection under lawburrows, rather than prosecution for an assault. The discovery of the numerous Inverness sheriff court records from this time period held by the Highland Council Archive, not all of which have a copied counterpart in the NRS collection, was made after obtaining access to a scanned typescript index of documents not otherwise listed on the HCA online catalogue. Both collections, at HCA and NRS, are therefore demonstrably incomplete, but it is not possible to assess how incomplete they are, or what proportion of case documents have survived. As a way of mitigating the difficulties in accessing the full range of surviving Inverness sheriff court criminal processes across two archives, all relevant HCA records have been added into a separate, 'Related Material' column of the NRS listed cases spreadsheet. This information will be added to the NRS online catalogue in

⁷ NRS, SC29/53/7 [SC29/53/1781/13], Inverness Sheriff Court Criminal Processes 1781, 'Defender's Proof and the Sheriff Substitute's Interloqr. Thereon', 18 January 1782.

⁸ The reference for the lawburrows petition is: Highland Council Archive (hereafter HCA), L/INV/HC 42/3/4, 1781, Agst. Andrew McPherson, vintner, Inverness: charge – lawburrows (2 items).

due course, thereby, for the first time, linking the two collections, and allowing researchers to seek out all of the currently known surviving records for cases during this time period. There are some few cases which do not appear in the NRS collections at all. Where possible, these have been added to the database's 'Related Material' field for relevant, similar cases, hopefully opening them up to potential further study, and better linking them with the NRS collections. Therefore, although there are limitations in the analyses carried out in this thesis – for instance, it is impossible to assess with certainty any overarching quantitative crime figures when the overall survival rate of court documents is unknown – the documentary value of the surviving records cannot be overstated. They provide the opportunity to investigate the lived experiences of Highland inhabitants, in a way that is frequently impossible in other records. While sources such as kirk session records offer a glimpse into the moral concerns of eighteenth-century Scottish communities, the Inverness sheriff court criminal processes provide another source through which lower-order lives and communities can be examined in detail, and specifically illuminate how individuals responded to crises such as interpersonal violence. These documents also show how lives were transformed in the cases under study, for example through injuries from assault, or by sentences of banishment forcing those convicted to leave their communities.

Another important aspect of the enforcement of law in the Highlands is how people resisted it. Within the records at NRS, there are several cases of deforcement involving women attempting to stop the arrest of their male relatives via the physical harassment or assault of sheriff officers. This resistance against the enforcement of the law is an area requiring further consideration, with gender playing an important role. Women in deforcement cases were defying the state in solidarity with their kinship groups, and there was often a long history within these families, traceable within the sheriff court records, of criminal activity and opposition to the law. This opposition seems to have been focused in particular areas, for example in the parish of Kilmonivaig, and there are references within late nineteenth-century literature to the efforts of the

sheriff depute from 1781 onwards, Simon Fraser of Farraline, against these pockets of resistance.⁹ A consideration of the geography of Inverness-shire will also be an ongoing theme. The county of Inverness was a sprawling jurisdiction. Roughly defined, its boundaries spread from Ardersier, north-east of Inverness, south to Loch Ericht, then westward to the sea loch of Loch Moidart on the West Coast. Its northern border was above Glen Strathfarrar, and the county also covered the Isle of Skye and surrounding islands, and the entirety of the Outer Hebrides except for Lewis and Harris, which was part of the county of Ross and Cromarty. Therefore, the criminal processes contained within the records of the Inverness sheriff court cover a considerable proportion of the Highlands, with a great deal of geographical variety. This provides an opportunity to assess the peculiarities of these distinct areas – for example, a consideration of attitudes towards the judicial system within rural communities, a topic which will be analysed in more detail in the chapter on resistance to judicial authority. This chapter will argue that the surviving documentation indicates a trend towards fewer justice-seeking behaviours in rural, more geographically isolated communities. This was likely less due to a more restricted access to justice, and instead was more indicative of opposition to state intervention in these areas. This chapter will therefore seek to establish how the sheriff court deployed officers and cooperated with other judicial agencies to assert the law across the expanse of Inverness-shire. The crucial question that can be asked of this material in relation to this study is what a consideration of gender can bring to the analysis, and the evidence contained in these cases makes it possible to assess comparatively how women and men sought out justice and responded to state intervention in their communities.

The final chapter will consider cases of rape and violence against women, a topic which raises its own methodological difficulties, with the extreme gendered violence described within the cases under study in this chapter presenting challenges for both the researcher and the reader. The themes that

⁹ See, for instance: C. Fraser-Mackintosh, *Letters of two centuries chiefly connected with Inverness and the Highlands from 1616 to 1815* (Inverness, 1890), p. 337.

arise from these cases incorporate many of the threads that run through the preceding chapters, with the added consideration of the patriarchal violence inflicted upon the victims. Primarily, and in line with the chapter considering lawburrows, this final chapter will analyse some of the few rape cases within the Inverness sheriff court criminal processes, and assess them for how these complaints were made, and how the law was accessed. Unsurprisingly, family support for victims would seem to be one of the most common predicated factors behind whether a woman was able to seek judicial restitution against a rapist, but this was not always the case. Women were also subjected to sexual violence in the course of their employment, and the vulnerability of lower-order women working away from their kinship groups will be considered. Almost invariably, women can be found in the witness precognitions for cases involving sexual violence, and these cases therefore also offer the opportunity to examine women's relationships with one another, be they familial, neighbourly, or associated with employment. The analysis will therefore not focus on interpreting the acts of violence themselves, or what these cases suggest about rape more widely in eighteenth-century Inverness-shire. It is likely that the cases that were investigated by the sheriff court represent a mere fraction of the overall total, and they are therefore not particularly useful in assessing the actual risk of sexual violence faced by lower-order women in Inverness-shire at this time. It will instead examine the legal consequences of violence, not strictly for the rapists themselves, but rather for the women who were victims of violence, as they, or their families in their stead, negotiated the Inverness sheriff court system in an attempt to obtain justice for the harm perpetrated against them.

Methodology: foundation of methods used

At this point, it is necessary to consider in more detail the methodological basis for this research. The aim of this thesis is to produce a qualitative study of women in the Inverness sheriff court, studying how they came into contact with the court environment, what the documents reveal about their lives, and how –

and indeed, whether – gender played a role in that environment. As outlined above, the Inverness sheriff court criminal processes are a rich resource for considering the nuances and variety of women's lives, and they make clear the fact that lower-order women are far from invisible in the historical record. Within the secondary literature, the field of Scottish gender history has a long lineage of qualitative studies, notably in the works of Lynn Abrams, Katie Barclay and Anne-Marie Kilday. Lynn Abrams provides a particularly important example of this type of study in her 2013 article, 'The Taming of Highland Masculinity: Inter-personal Violence and Shifting Codes of Manhood, c.1760-1840', which examines cases of violent assault seen in the Inverness burgh court, sheriff court, and in the High Court of Justiciary. Abrams' article is the only secondary source discovered during the research process that focuses on the Inverness sheriff court records during this period, and therefore her use of these records is worth examining closely. Abrams seems to have concentrated her research in the Highland Council Archive and examined only 'a sample of cases heard in the Inverness sheriff court before a jury (NRS, SC 29)'.¹⁰ Interestingly, she also comments that:

Precognitions are not commonly extant for Scottish sheriff courts (with the exception of Shetland). Moreover, sheriff court papers for most counties have been weeded, and those held in NRS are in unsorted bundles.¹¹

Abrams does not provide details of which bundles were sampled, but in the sixty-two bundles covering the period 1777-1795 that have been examined and listed in the spreadsheet database, most bundles contain numerous precognitions, titled as such on the outside cover of the folded document. It should also be noted that, as discussed above, these bundles are not unsorted, but have been organised chronologically by year by NRS archivists. It is additionally the case that, other than sheriff court summary cases after 1860, no criminal material is weeded (i.e. appraised as not of historical importance and

¹⁰ L. Abrams, 'The Taming of Highland Masculinity', p. 104.

¹¹ *Ibid.*, p. 104.

discarded from an archive),¹² and Abrams does not cite a source for the idea that large amounts of sheriff court criminal papers have been deliberately discarded or destroyed, or indeed specify when this may have taken place (i.e., while the documents were still held by the courts, or after they had been transmitted to archival repositories). Having examined in detail the collection of Inverness-shire criminal processes held by the Highland Council Archive, it does indeed seem that very few, if any, precognitions survive within their collections. Their collection is divided by document type, and predominantly consists of sentencing documents,¹³ petitions and various kinds of warrants,¹⁴ and certificates of caution and liberation.¹⁵ Precognitions most commonly feature as a document type in their own right, produced within the pre-trial investigation of a crime, or as witness statements produced as evidence within a trial, and therefore appear within the trial documentation itself.

Despite these questions surrounding the sources used for the study, the process of defining what records Abrams may have used was extremely useful for the early stages of this PhD project, as it provided a comparative, if problematic, example of scholarly engagement with the exact collection under study. It also brought attention to the Highland Council Archive collection of records, theretofore unknown to this project. Researching this collection greatly improved the depth of knowledge of the sources overall, and the inclusion of these documents in the final spreadsheet of listed cases will undoubtedly improve researcher access to these important records. Additionally, Abrams' article is particularly useful in terms of considering how gender and crime were linked within Inverness-shire during the late-eighteenth and early-nineteenth centuries. She also makes a vital point about sheriff court documents and the unviability of quantitative studies using these sources:

The inconsistent and incomplete character of Scottish legal records from this period means it is impossible to conduct a quantitative analysis of the geographical or chronological distribution of legal cases or to say

¹² I am grateful to colleagues at NRS for providing me with this information.

¹³ Held under HCA series references L/INV/SC35 and L/INV/SC36.

¹⁴ Held under HCA series references L/INV/SC32, L/INV/SC33, L/INV/SC37, and L/INV/SC42.

¹⁵ Held under HCA series reference L/INV/SC38.

anything meaningful about the frequency of violent incidents per capita; the cases pursued in the legal system and which have left written traces are a fraction of those that occurred, though it is impossible to be certain what that fraction is.¹⁶

This point is crucial. Although the research carried out on these records could potentially be used to create statistics about the Inverness sheriff court, they represent a small sample, and due to the poor storage of these records prior to their transferral to the then Scottish Record Office in the 1970s, there is significant dirt, dust and insect damage which is likely to have irreparably damaged an unknown volume of now lost material. Even if caveats are included, there are significant methodological difficulties surrounding the production of statistics from an incomplete sample, particularly when these records have not been commonly considered in previous research. This thesis will likely become an important source for researchers looking to utilise Inverness sheriff court documents, who may quote statistics from it in their own work, removed from the context established for these figures in this study. The main aim of this project is therefore not to parcel up these documents quantitatively but to open them up to further research, with the hope that they will eventually be studied using a range of methods. When these listed cases become publicly available on the NRS online catalogue, researchers will then be able to assess the surviving documents quantitatively online, if such a study would add value to their research. However, with these caveats in mind, it is necessary to provide some broad, descriptive statistics, to give a general idea of the scope of the surviving records. Between 1777 and 1795, around 368 cases have been recorded overall. Of these, 271 represent a crime with a male defendant, and 48 a crime with a female defendant, with 21 cases where the defendant was unknown. 28 cases involve men and women as defendants for the same crime. When considering victims, the picture is similar. 39 cases involve a female victim, while 207 victims were male. 113 cases had either an unknown victim, a victim of unrecorded gender (such as many child murder cases) or did not have a clearly delineated victim at all, for example in poaching cases, which were essentially victimless.

¹⁶ L. Abrams, 'The Taming of Highland Masculinity', p. 104.

Only 9 cases involved male and female victims. Men therefore appear far more commonly within the surviving documentation as both perpetrators and victims of crime. Given the paucity of the extant record, the unknown factors behind why some case documents survived and some were destroyed, the likely significant quantity of records which did not survive the centuries, and the unknown number of crimes which never came to the attention of the sheriff court system, these figures are analytically useless for calculating contemporary crime figures. They do, however, give a broad picture of the dataset under consideration in this thesis. While the first chapter takes a wider view of the types of cases that feature within this collection, the chapters on lawburrows, resistance to judicial authority, and the final chapter on rape and violence against women all focus primarily, but not exclusively, on the smaller set of cases involving women as defendants, victims, and witnesses of crime, with the aim of assessing what these documents reveal about eighteenth-century Highland women and their communities.

To return to Lynn Abrams' article, its value also lies in how it amply demonstrates what can be gleaned from the criminal processes of the Inverness sheriff court about how gender operated within the Highlands at this time. Although it does not focus on women, the study's focus on middling and lower-order men reveals a great deal about how masculinity was performed in Highland society. Abrams argues that these records indicate the use of violence by men to reinforce their masculinity and defend their kinship group.¹⁷ In the late-eighteenth and early-nineteenth centuries, these values came into conflict with evolving ideas of civility and restraint in the face of provocation, and this conflict carried over into the courts. During this period of 'everyday Scottish manhood in transition',¹⁸ recreational violence spurred on by long-lasting rivalries between families or by alcohol was gradually discouraged by the courts through prosecutions.¹⁹ However, Abrams maintains that the Highlands were

¹⁷ *Ibid.*, p. 108.

¹⁸ *Ibid.*, p. 105.

¹⁹ *Ibid.*, p. 113.

not comparatively more violent than other regions in Scotland,²⁰ and rejects the idea that male inter-personal violence was a ‘hallmark of Highland masculinity’.²¹

In addition to Abrams, there are several other studies which have been influential in the development of the methodological framework of this study. The question of how gendered norms impacted early modern women’s lives has been considered by Katie Barclay in her 2012 book *Love, Intimacy and Power: Marriage and Patriarchy in Scotland, 1650–1850*. This work considers the patriarchal dynamics of courtship and marriage for the Scottish elites, consulting letters written between gentry wives and husbands – a fascinating resource which illuminates the realities of women’s lives in their own words.²² It utilises gender history methodologies as well as sociological concepts to examine how women negotiated power within and against patriarchy, and what a qualitative approach can reveal about how patriarchal ideals evolved over time. Barclay particularly analyses the notion of power in relation to patriarchy, and stresses that in intimate relationships, ‘negotiation allows patriarchy to repair and survive’.²³ She argues that women saw themselves as members of kinship groups, rather than as members of a wider class of women that could act together in their own shared interest,²⁴ an idea that will be returned to and affirmed by the cases consulted within the chapter on resistance to judicial authority. The patriarchal system resisted change by stressing the prime importance of the marital unit, ensuring continued engagement of women in the domestic, rather than in a wider relational engagement with other women as an oppressed group.²⁵ Barclay uses her literature review as an extended qualification of her use of terms – such as patriarchy – that may be viewed as anachronistic within an eighteenth-century setting. She successfully argues that

²⁰ *Ibid.*, p. 122.

²¹ *Ibid.*, p. 122.

²² K. Barclay, *Love, Intimacy and Power Marriage and Patriarchy in Scotland, 1650–1850* (Manchester, 2012), pp. 4-5.

²³ *Ibid.*, p. 8.

²⁴ *Ibid.*, p. 9.

²⁵ *Ibid.*, p. 9.

women in the past spent their lives constrained by conceptions of gendered difference which we have only recently begun to name and understand.²⁶ While the theories and terms now used to describe such systems are newly developed, these terms articulate in language societal structures that had an enormous impact on those who lived in the past. Therefore, although restricted to the social elites, and analysing a different type of document than this PhD project, Barclay's work provides a crucial example of how to fruitfully use qualitative research methods to produce gender history.

Anne-Marie Kilday's work on violent female criminality assesses the impact of patriarchal norms on women's experiences in the Scottish legal system and is thus a particularly important study in the context of this PhD project. Her 2007 book *Women and Violent Crime in Enlightenment Scotland* examines Lowland High Court of Justiciary records between 1750 and 1815, and argues that when women committed physical violence, they were transgressing the accepted bounds of human behaviour more seriously than men, and could correspondingly expect more severe punishment.²⁷ Described by Louise A. Jackson in the *Journal of British Studies* as 'an invaluable contribution to the almost nonexistent field of Scottish criminal justice studies',²⁸ Kilday's work is therefore particularly useful for what it illuminates about how to research crime in eighteenth-century Scotland. She makes an important point about the limitations inherent in any overarching conclusions drawn from court records, noting that an overall increase in violence committed by women over the period under study cannot be taken at face value. Factors such as an increase in court business, the growth of the Lowland population as well as a rise in crime reporting complicate any statistics on crime frequency that may be drawn from criminal court records.²⁹ While Kilday does utilise some statistics to broadly illuminate points, she also states that 'the numerous difficulties and

²⁶ *Ibid.*, pp. 6-8.

²⁷ A. M. Kilday, *Women and Violent Crime*, p. 54.

²⁸ L. A. Jackson, 'Anne-Marie Kilday. *Women and Violent Crime in Enlightenment Scotland* Royal Historical Society Studies in History. Woodbridge: Boydell & Brewer, 2007. Pp. 183. \$85.00 (cloth)', *Journal of British Studies*, Vol. 47, No. 2 (July 2008), p. 683.

²⁹ A. M. Kilday, *Women and Violent Crime*, p. 2.

complexities associated with the evidence related to actual overall crime rates means that they cannot form a substantive part of the analysis'.³⁰ Although the collections of the justiciary court are comparatively more complete, there are still important caveats to consider regarding any conclusions drawn solely from statistical evidence.

Leah Leneman and Rosalind Mitchison have also contributed significantly to this field of literature, theorising women's transgressions of social norms as seen through court records, albeit in a non-secular source. Their work looks at kirk session records, assessing how women's sexuality was controlled and punished through the system of the church courts. In their 1998 book *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780*, they analysed the kirk session records for 78 rural parishes, looking at expressions of sexuality that transgressed the moral standards of the kirk, such as illegitimacy and irregular marriage.³¹ While the book is primarily a work of gender history, Mitchison and Leneman consulted works of social, economic, gender, religious and legal history during their research, firmly grounding their work and defining the kirk session as a social as well as a legal instrument.³² This approach also strengthens their analysis of patriarchal motivations behind the church's punishment of moral deviance, as they comment, 'illegitimacy in Scotland reflected a confluence of economic, social and biological forces, but it was the girls who were in trouble'.³³ Similarly to this thesis, Kilday, Leneman and Mitchison all frame their research in a primarily qualitative way, and use statistical data when it is methodologically useful.

One of the most important aspects of the Inverness sheriff court criminal processes from a research standpoint are the hundreds of pages of precognitions and declarations. While these documents are undoubtedly a rich source of information about eighteenth-century Highland life, the question of authorship must be carefully considered. Tim Stretton has termed this issue 'the

³⁰ *Ibid.*, p. 2.

³¹ R. Mitchison and L. Leneman, *Girls in Trouble*, p. 3.

³² *Ibid.*, pp. 17-19.

³³ *Ibid.*, p. 2.

problem of the lawyer's hand';³⁴ it is vital not to see these documents as uncontaminated voices from the past, but rather as narratives shaped by their environment and changed to an unknown degree by the clerks recording them. Alexandra Shepard has also highlighted the difficulties in assessing the evidence contained within women's witness statements, in her study of 13,500 witnesses' self-appraisal of their financial worth in English church courts.³⁵ She stresses the problem of clarifying biographical information about women in the courts;³⁶ while the Inverness sheriff court criminal processes reliably contain the name, place of habitation, kinship affiliation and sometimes age of those testifying in court, cross-referencing this information is difficult without a considerable amount of time spent examining the somewhat unreliable and incomplete Old Parish Registers for the relevant parishes, while finding sources outwith kirk records for lower-order declarants would be unlikely at best. She also advises caution when considering 'the extent to which acting as a witness merely involved serving as a mouthpiece for others' interests',³⁷ an important aspect of the constructed nature of court testimony which is often relevant in Inverness criminal case records. Stretton has suggested some strategies to mitigate against over-estimating the evidentiary value of documents containing a facsimile of women's voices. He proposes considering the limitations of a collection as a main feature of the analysis and interrogating the absences themselves as sources of information – for instance, considering whether certain crimes or certain categories of defendants are missing from the record.³⁸ Overall, he advocates for a nuanced approach, taking into account the collaborative nature of legal documents, particularly witness statements. He states; 'instead of trying to look around or behind lawyers and scribes, we should bring them into the frame',³⁹ and view women's court testimony as both highly constructed legal

³⁴ T. Stretton, 'Women, Legal Records, and the Problem of the Lawyer's Hand', *Journal of British Studies*, Vol. 58, Issue 4 (October 2019), p. 684.

³⁵ A. Shepard, 'Worthless Witnesses? Marginal Voices and Women's Legal Agency in Early Modern England', *Journal of British Studies*, Vol. 58, Issue 4 (2019), p. 722.

³⁶ *Ibid.*, p. 719.

³⁷ *Ibid.*, p. 720.

³⁸ T. Stretton, 'Women, Legal Records', p. 688.

³⁹ *Ibid.*, p. 698.

narratives, and statements that reveal information which, when carefully evaluated, contain vital glimpses into lower-order lives that do not survive in other records.

Tim Stretton also notes the views of various writers who advise caution for gender historians overwhelmed by the 'seductive quality of the material',⁴⁰ and identifies several related methodological issues facing those researching women in legal records, including the inaccessibility of historical truth in testimony, and the risk of witnesses having been influenced by lawyers and other court personnel.⁴¹ However, it feels worth noting that any attempt to establish unambiguous historical 'truth' is a process filtered through the historian's own experiences and biases, or, to quote Keith Jenkins, 'the past and history are different things'.⁴² Alongside the fact that the amount of surviving material from the past represents a fraction of what was originally produced, every surviving document was produced within a given context which irreparably colours its interpretation. Given that these tenets are central to even the most basic training any historian might undertake, it seems peculiar to subject gender historians to particular suspicion for their methodological approaches, when such approaches should be common across all historical fields. Further, rather than interpreting the context of their creation as a shortcoming of legal records, it can instead be seen as one of their great evidentiary strengths. It would be short-sighted to seek to interpret these records in the same way one would interpret, for example, a diary or letter written by a woman belonging to the gentry. Those studies exist elsewhere and have added much of value to our understanding of gender and patriarchy in early modern Scotland.⁴³ What legal records provide is the unique opportunity to study the point of *interaction* between the court system and the lower orders, and how the administration of the legal system affected the lives of eighteenth-century women. When viewed in this light, the act of mediation becomes the most important and illuminating

⁴⁰ *Ibid.*, p. 687.

⁴¹ *Ibid.*, p. 693.

⁴² K. Jenkins, *Re-thinking History*, (London, 2004), p. 6.

⁴³ For a particularly useful example of such a study, see K. Barclay, *Love, Intimacy and Power*.

part of these records. This applies particularly in the case of inferior court records. Judicial interventions into petty crimes, and the process of investigation carried out by sheriff courts prior to high court trials, provide an abundance of detail into events where the law was broken, where the law as an institution can broadly be considered as defining social norms and the bounds of acceptability. It should further be noted that as most of these records are being created in the context of establishing the course of events surrounding an instance of lawbreaking or wrongdoing, there is perhaps a more pronounced tendency than in other sources to bend the facts being set out within testimony to make one's actions appear in the best light possible. Rather than reducing the evidentiary value of witness testimony, in many cases the accuracy of such testimony can be assessed through comparisons between declarations made by those accused of crimes, and witness statements made by those who separately witnessed the same events. As Stretton astutely notes, 'the primary goal of courts was not the identification of historical truths but the resolution of conflicts'.⁴⁴ It follows, therefore, that if a stated research aim is to study women's experiences of interpersonal conflict and the role played by the sheriff court in the mediation and resolution of those conflicts, the value of sheriff court criminal processes is unsurpassed. The core tenet of the methodology of this thesis is to consider the documents produced by the Inverness sheriff court first and foremost as records of the interactions between the lower orders and the legal system. By highlighting this feature of the documents, their limitations instead become features crucial to the analysis overall. They provide evidence of legal practice, and the power wielded by sheriff court personnel over Inverness-shire communities, as well as providing the opportunity to study microhistories of the lower orders, at their point of contact with the court, within the context of their kinship groups and wider communities.

⁴⁴ T. Stretton, 'Women, Legal Records', p. 688.

Literature Review

The nature of this project necessitates a historiographical examination of several, somewhat disparate fields, namely legal history, gender history, and the history of the Highlands. An understanding of the current work in each of these fields, and, crucially, where this thesis sits in relation to that work, is vital preparatory work for the documentary analysis in later chapters. Firstly, as the Inverness sheriff court was inescapably a legal institution, a consideration of the Scottish legal system is required. The eighteenth-century Scottish legal system defined, in a practical sense, the parameters of Scotland as the geographical area ruled by Scots law.⁴⁵ The field of Scottish legal history is understandably primarily composed of technical studies considering the development of specific aspects of Scots law, for example, of institutions such as the Faculty of Advocates, or the use of institutional texts. These studies overwhelmingly focus on the men who worked in the legal system, in both supreme court settings and in local law practice. John Finlay has, in his 2015 book *Legal Practice in Eighteenth-Century Scotland*, established three primary distinctions that were of importance to contemporary law practitioners; the difference between central court practitioners and those in provincial, inferior courts; those who were admitted to argue before a judge, and those who were not; and between those who were qualified as notaries, and could therefore perform specialist administrative functions, and those who were not.⁴⁶ There were several different terms used for men who practised law in eighteenth-century Scotland. The most commonly used outside of court settings was 'writer', but 'doer', 'law agent', 'man of business', and 'solicitor' could also be a recognisable term for 'anyone who held himself out as sufficiently expert to manage the legal affairs of others'.⁴⁷ In other words, there was no necessary formal accreditation for local writers, and no requirement even for a university degree. Within court settings, the term 'procurator' was used for those who had provided proof of legal ability

⁴⁵ H. L. Macqueen, 'Regiam Majestatem, Scots Law, and National Identity', *Scottish Historical Review*, Vol. LXXIV, No. 197 (April 1995), p. 1.

⁴⁶ J. Finlay, *Legal Practice in Eighteenth Century Scotland* (Leiden, 2015), p. 1.

⁴⁷ *Ibid.*, p. 2.

to an inferior court judge and consequently been given permission to plead before the court.⁴⁸ The alternative to being admitted as a procurator was a 'purely chamber practice',⁴⁹ where a writer would provide legal advice, draft deeds, and assist in buying and selling property, but would not be able to argue in a court trial. At the most elite level of the legal profession was the Faculty of Advocates, an organisation that has its roots in the sixteenth century.⁵⁰ Only members of the Faculty of Advocates could plead in the supreme courts, and it was therefore a necessary career requirement for lawyers who wanted to climb the judicial ranks. The process of admittance to the Faculty underwent significant development during the late-seventeenth century, particular in terms of the social background of advocates. J. W. Cairns argues that in the period immediately following the Restoration in 1660, landed gentry and peers became the most highly represented group in the Faculty, a trend that continued throughout the eighteenth century.⁵¹ During this period there was a related move towards the discouragement of applicants who had undertaken a legal apprenticeship in the office of an advocate, in favour of members 'of proper education and background'.⁵² Overall, the literature considering the development of the Faculty of Advocates in the eighteenth century reveals a certain anxiety surrounding the social propriety of a legal career path for the sons of elite families. Cairns describes how this can be traced to a change in attitudes post-1660, after which advocates were eager to 'stress that the law that they practised was a liberal science rather than a mechanical art'.⁵³ The developments in Faculty admission requirements in the eighteenth century can therefore be seen as part of a longer process, through which the Faculty carved out a role in the legal landscape that gave them the exclusive right not only to plead in front of the superior courts, but to confer elite status upon its

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ J. W. Cairns, 'Importing Our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century', in J. W. Cairns (ed), *Law, lawyers, and humanism: Selected essays on the history of Scots law, Volume 1* (Edinburgh, 2015), p. 229.

⁵¹ *Ibid.*, p. 230.

⁵² *Ibid.*

⁵³ *Ibid.*

members. This space was jealously guarded, and the admission requirements were designed to restrict membership to a more or less homogenous group of elite landed men. Bruce Lenman cites the figure that throughout the eighteenth century, ninety percent of entrants to the Faculty of Advocates were from landed gentry families.⁵⁴ This level of power and administrative control was part of a rigid hierarchical structure in which the vast majority of men and practically all women were significantly marginalised politically, with Lenman asserting that 'deference and obedience were what was expected of the lower orders',⁵⁵ an ideology reinforced through the kirk and in schools.⁵⁶

This focus in the literature on the elite members of the legal profession can side-line the consideration of how ordinary people accessed the law. John Finlay has usefully described the process an average litigator would follow during a civil case and its possible appeals, along with the personnel that would be involved at each stage. The first stage for a client would be hiring a local writer, and if that writer was not admitted as an inferior court procurator, then one would be hired separately to plead the case in court. If the case was then appealed to the central Edinburgh courts, an Edinburgh writer would be hired to advise on legal procedure and oversee the process of the action. This Edinburgh writer would most likely also hire one or more advocates, to give advice on the specific points of law involved in the case, and then plead the case in the Court of Session.⁵⁷ If the appeal then went to the House of Lords, a London-based solicitor would be hired, and in some cases this would be a Scottish advocate who practised in London specifically to plead these cases.⁵⁸ Finlay stresses that only the wealthy could afford to take their litigation this far, but also that 'the Scots were a litigious people',⁵⁹ and many ordinary people took advantage of arrangements providing free legal access to those of limited financial means.⁶⁰ The

⁵⁴ B. Lenman, *Integration, Enlightenment, and Industrialization: Scotland 1746–1832* (Toronto, 1981), p. 9.

⁵⁵ *Ibid.*, p. 10.

⁵⁶ *Ibid.*, p. 11.

⁵⁷ J. Finlay, *Legal Practice*, p. 8.

⁵⁸ *Ibid.*, pp. 7–8.

⁵⁹ *Ibid.*, p. 5.

⁶⁰ *Ibid.*, p. 9.

appointment of advocates for the poor was undertaken in the eighteenth century by the Dean of the Faculty of Advocates. From the 1780s, this provision of legal aid was customarily provided by newer members of the Faculty for a period of four years, demonstrating the importance placed by eighteenth-century Scottish society on mitigating, in some way, the financial barriers to justice many would face if paying their own way.⁶¹

Cairns' research has examined in considerable detail the procedural aspects of criminal cases in the High Court of Justiciary, the superior criminal court in the Scottish legal system. Once again this demonstrates the tendency within the literature towards overly focusing on the better documented business of the High Court, but as the process was broadly similar to that of the sheriff court, it is useful to include a summary of his findings. It also provides a helpful introduction to the legal terms commonly used within court documents. The prosecution of an individual for any given crime was documented through a libel, which could be in the form of criminal letters or an indictment – indictments could only be issued by the Lord Advocate, whereas criminal letters could be issued by private individuals.⁶² The formatting of this libel was standardised, and featured a 'major premiss' citing the criminal charge and a 'minor premiss' featuring a description of the actions allegedly committed by the defendant. The defendant would be described in these documents as the 'pannel', which was simply another term for a person brought to trial. Added to this document were lists of witnesses to the alleged crime, and a list of assizers – or members of the jury – prepared to appear in court. This would then be served on the defendant, who would be required to appear at the High Court on a specific day and time; they could also be asked to appear at one of the three circuit courts. At the commencement of a criminal trial, following the pannel's not guilty plea, 'there normally was a debate on the relevancy of the libel'.⁶³

⁶¹ *Ibid.*, pp. 198-9. See *Ibid.*, pp. 191-202 for a full account of the development of this system in Scotland.

⁶² J. W. Cairns, 'Hamesucken and the Major Premiss in the Libel, 1672-1770: Criminal Law in the Age of Enlightenment', in J. W. Cairns, E. Reid (ed.), *Enlightenment, legal education, and critique: Selected essays on the history of Scots law, Volume 2* (Edinburgh, 2014), p. 314.

⁶³ *Ibid.*, p. 315.

Cairns describes how an Act of 1695 required these debates to be *viva voce*, before the judge. Here procurators for the pannel and the prosecuting advocate would debate points of law, drawing on legal principles from Roman law traditions as well as Scottish institutional texts, resorting to codifications of the laws of other countries if there was not sufficient precedent within Scots law – or indeed, if the precedent was not beneficial to either the pannel’s or the crown’s aims. This act was superseded by the Heritable Jurisdictions Act of 1748, which preserved the tradition of *viva voce* debates on relevancy.⁶⁴ Following this, the judge made a pronouncement defining which crimes needed to be proven, and which defences offered during the debate would be considered during the trial proceedings. At this point the assize – or jury – would examine all the evidence, including any exculpatory witness statements, and thereafter offer their verdict.⁶⁵

Sentencing was the preserve of the judge, and Roger Ekirch has considered the practice of sentencing convicted criminals to transportation as an alternative to execution. He argues that the Union of 1707 offered unfettered Scottish access to British colonies in North America, making specific sentences of banishment across the Atlantic possible, rather than the previous restriction to banishment beyond the Scottish border.⁶⁶ This option for sentencing grew in popularity throughout the eighteenth century; Ekirch comments, ‘by the mid-1700s, banishment had achieved a central place in Scotland’s penal armory’,⁶⁷ although Emma Macleod has noted that an important factor behind this practice was that the low number of Scottish prison facilities made long-term imprisonment impracticable.⁶⁸ He argues that very few inferior courts employed transportation as an option when sentencing, as to do so ‘invoked the wrath of

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ A. R. Ekirch, ‘The Transportation of Scottish Criminals to America during the Eighteenth Century’, *Journal of British Studies*, Vol. 24, No. 3 (1985), p. 367.

⁶⁷ *Ibid.*, p. 367.

⁶⁸ E. Macleod, ‘The English and Scottish State Trials of the 1790s Compared’, in M. T. Davis, E. Macleod and G. Pentland (eds), *Political Trials in an Age of Revolutions: Britain and the North Atlantic, 1793-1848* (Basingstoke, 2019), p. 82.

higher tribunals'.⁶⁹ The right of the central courts in Edinburgh to appropriate many inferior court cases and rulings to themselves in their function as appellate courts may have discouraged inferior courts from attempting this sort of ruling, and when they did sentence someone to transportation, they usually restricted themselves to banishment from the boundaries of their own jurisdictions.⁷⁰ Ekirch cites figures stating that between the years 1718 and 1775, out of the 395 convictions for which sentences survive in the High Court of Justiciary, 181 of these were a sentence of transportation to America.⁷¹ These sentences were frequently assigned in capital cases where the alternative sentence was execution, and defendants who had been ordered to appear at their High Court of Justiciary trial – including those accused of capital crimes – could pre-emptively apply for banishment through a petition to the judge. Ekirch found that a high proportion of the 181 people sentenced to banishment had petitioned for this ahead of their trial. Some of the most common reasoning behind these requests were that they feared ostracization in their communities, even if they were to secure an acquittal, as well as the desire to avoid taking the risk of a trial that might end with a death sentence.⁷² The system for transporting criminals was less formalised than in England, where those sentenced to banishment were conveyed across the Atlantic by specific contractors. In Scotland, convicted prisoners had to make their own arrangements, from within the tolbooth they had been confined to after their trial.⁷³ While at first this may seem more benevolent, it had the result that when lower-order convicts were unable to pay for transport, they had to indenture themselves as servants to the captain of the ship on which they had secured passage.⁷⁴ Ekirch records that it could sometimes be extremely difficult for convicts to procure even arrangements for indentures, particularly for women, who were undervalued as a labour source in plantation work.⁷⁵ In 1766, the

⁶⁹ A. R. Ekirch, 'The Transportation of Scottish Criminals', p. 367.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 368.

⁷² *Ibid.*, p. 369.

⁷³ *Ibid.*, p. 371.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p. 372.

Transportation Act of 1718 which had originally only applied to England, was extended by the British Parliament to Scotland. This formalised the transportation of criminals in a similar system to England, where contractors undertook the transportation of criminals to American plantations, where they were usually sold as servants, with indenture periods of a minimum of seven years.⁷⁶ Ekirch stresses the preliminary nature of his study, but it illuminates a great deal about the experiences of those convicted of crimes in the High Court of Justiciary and the often difficult choices offered to them, where transportation was viewed as a harsh, often brutal but invariably preferred alternative to death.⁷⁷

Another branch of the Scottish legal system was that of the church, as represented by the kirk session. It was equally as important as the inferior courts, and it is likely that the kirk sessions were a comparatively more everyday part of life within local communities; the practice of making those found guilty of crimes such as fornication or sabbath-breaking appear before their neighbours for their sins brought the actions of this court far closer to home.⁷⁸ Alastair Mutch has examined the administrative practices of the Scottish Presbyterian church as a method of illuminating its impact, and his 2016 book *Religion and national identity: governing Scottish Presbyterianism in the eighteenth century* contains a comprehensive analysis of the kirk session. Like the secular courts in Scotland, the kirk session was a system exclusively occupied by men, but the unusual elements at play within the church system were the authority the minister had over his parishioners, and the use of male elders who were recruited from the community ranks. This resulted in a normalised participation in patriarchy that had far-reaching consequences for communities. Mutch analyses the structure of the kirk session by considering the men who

⁷⁶ *Ibid.*, p. 374.

⁷⁷ *Ibid.*

⁷⁸ A. Mutch, *Religion and national identity: governing Scottish Presbyterianism in the eighteenth century* (Edinburgh, 2015), p. 95. Interestingly, Mutch also notes here that it was commonplace for wealthier parishioners to avoid public appearances before the congregation through the payment of fines, making this act of humiliation before one's community almost exclusively a lower-order experience.

were given authority through its practices. He comments that the idea of the kirk session in the popular imagination is dominated by its prosecution of sexual crimes and its pious focus on sin, in some ways obscuring the daily practices of the court in the eighteenth century.⁷⁹ Mutch's work acts as an attempt to remedy this shortfall in knowledge, and his examination of the minutiae of court practice and personnel appointments illustrates how parishes functioned at an everyday level. Given the importance of the kirk in people's lives, this analysis is vital for an understanding of social life in eighteenth-century Scotland. The primary authority figure in the kirk session was the parish minister, without whom the session could not meet. Ministers were expected to obtain a university education, although a formal degree was not always necessary.⁸⁰ The minister was aided in the administration and management of the kirk session by a session clerk. This post was frequently filled by a divinity graduate who was usually working as a parish schoolmaster while waiting for their own appointment as a minister. These waits could be lengthy, and Mutch cites a case study of one minister who had to teach for twenty years before eventually being ordained.⁸¹ This was partly due to a trend towards extremely long periods of service by ministers, and Mutch's quantitative research finds that the average length of service in eighteenth-century Ayrshire was 26.5 years.⁸² Many remained in their roles until death, and this occasionally resulted in parishes suffering a reduced quality of administration due to the illness or infirmity of their elderly minister.⁸³ The appointment of parish elders to assist in the work of the kirk session was a process that could be fraught with difficulties. A session typically had the services of six to eight elders, but as Mutch comments, 'that recruitment was a common problem can be gleaned from session minutes'.⁸⁴ Efforts by ministers to secure more elders in the event of a previous elder's death or retirement were sometimes thwarted by a lack of local men who were

⁷⁹ *Ibid.*, p. 78.

⁸⁰ *Ibid.*, p. 82.

⁸¹ *Ibid.*, p. 84.

⁸² *Ibid.*, p. 80.

⁸³ *Ibid.*, p. 79.

⁸⁴ *Ibid.*, p. 87.

willing to undertake the responsibility.⁸⁵ The criteria for a suitable candidate were fairly restrictive; in addition to standard requests for a suitably pious moral code, and a decent intellectual ability,⁸⁶ Mutch stresses the deeply patriarchal nature of the role. He comments, 'men were to be the masters in their own houses, and only those who were could be fit to manage the affairs of the parish'.⁸⁷ This is fascinating, as it demonstrates the conscious and subconscious decision-making that men (and women) participated in, that resulted in the daily reinforcement of patriarchy as a system of societal governance. In this regard, the structure of the kirk session serves as an illuminating microcosm of society at large; men were deemed solely responsible for the administration of parish life, and, more importantly, for the judgement and enforcement of church discipline against the women and men of the minister's 'flock'.

When considering women's interactions with the law, the limitations of traditional legal scholarship become apparent. The methodologies of gender historians are necessary to understand how women accessed the law, but the studies of the structure of the court system found within legal scholarship are similarly vital to any comprehensive analysis. Although the research and work of the above-mentioned historians are immensely valuable, they are primarily studies of the men who shaped and dominated the legal profession. When studying the apparatus and institutions of Scots law in a historical context, there seems to be little scope for considering women's role in a sphere that they did not have access to at a professional level. However, there also seems to be little scholarly impetus by these historians to study why women were denied access to this sphere. The fact that women could not obtain a university education or become a local writer – let alone an advocate – was not simply the natural state of things, but a consequence of patriarchy. While it would be impossible to explore every avenue of research in a given field, there is a distinct lack of curiosity from some Scottish legal historians on how women's subordination in society led to a complete denial of access to holding any level of legal or

⁸⁵ *Ibid.*, pp. 89-90.

⁸⁶ *Ibid.*, p. 89.

⁸⁷ *Ibid.*, p. 86.

jurisdictional authority. As a consequence of this, it becomes somewhat difficult to integrate women's experiences with the law into the analyses contained above, resulting in a further, structural segregation of women's histories that poses a significant methodological challenge. Therefore, while the exclusion of women's voices from traditional legal history scholarship reveals an intellectual blind spot when constructing an overview of the Scottish legal system in the eighteenth century, it becomes a self-perpetuating pitfall that can only be remedied by examining in detail the works of gender historians that consider the topic of women and the law.

Tim Stretton and Alexandra Shepard have considered the gender history approach to legal access and justice in their introduction to a special issue of the *Journal of British History*, titled 'Women Negotiating the Boundaries of Justice in Britain, 1300–1700'. The overall aim of the special issue is to investigate the ways in which women accessed the law in Britain, and how this access was influenced by a range of factors, including geographical location, social background and status, and financial resources. Shepard and Stretton argue against forming generalised theories of women's participation in justice, as to do so obscures the specific circumstances of court and legal access experienced by women in the past.⁸⁸ They also argue that one of the unifying aims of the articles contained in the special issue is to:

challenge the male-dominated paradigms of legal history as an institution-led field of study that has traditionally assumed a male universal subject, by prioritizing the experiences of female court users and highlighting the patriarchal character of the law.⁸⁹

An example of this male-dominated methodology can be seen in Cairns' work, specifically in his essay on the crime of hamesucken (premeditated assault within the victim's home), published in a collection of his work in 2015. In one part of the essay, he considers the history and development of the marital rape

⁸⁸ A. Shepard and T. Stretton, 'Women Negotiating the Boundaries of Justice in Britain, 1300–1700: An Introduction', *Journal of British Studies*, Vol. 58, Issue 4 (2019), p. 678.

⁸⁹ *Ibid.*

exception, a feature of Scots law which actively restricted women's rights to bodily autonomy.⁹⁰ However, in this discussion Cairns examines only the opinions of prominent male jurists and confines his analysis solely to the law itself. In the notes for the essay, the only secondary literature he engages with are works by other legal historians, and he bypasses any feminist analyses of rape. Cairns' scholarly discussion of marital rape is both useful and thorough, but while his scholarship is admirable, his analysis would be greatly enhanced by looking beyond the confines of his own field. Works such as this, which can only conceive of the past through a male lens, give an impression of Scottish legal history as a cloistered field, driven by technical discussions that can seem divorced from the society that was ruled by these laws. Male-dominated legal history scholarship therefore compounds the male-dominated courts of the eighteenth century Scottish legal system, doubly marginalising women in the past.

Despite the difficulties involved in engaging with legal scholarship of this type, Shepard and Stretton have stressed the importance of these works for gender historians interested in women and the law. They argue that:

The pioneers of the subject of women and the law immersed themselves in the scholarship of traditional legal historians to understand the technicalities of courts, procedures, and legal instruments. Current scholars, by contrast, are more likely to rely on the burgeoning array of works by non-legal specialists, raising the danger of a gradual lessening of expertise over time.⁹¹

Therefore, it is vital for those considering women's histories in legal contexts to examine the legal scholarship. While much legal history is lacking the perspective of the laypeople who utilised the legal system, researchers examining women's legal interactions cannot successfully separate those interactions from the structure of the court system and the law itself. These structures framed the legal environments that women and men found

⁹⁰ J. W. Cairns, 'Hamesucken and the Major Premiss in the Libel', pp. 336-40.

⁹¹ A. Shepard and T. Stretton, 'Women Negotiating', p. 680. See also T. Stretton, 'Women, Legal Records', p. 685.

themselves in as litigants, witnesses or defendants, and a proper understanding of this framework can only benefit an analysis. An example of a work which employs this approach fruitfully is Mitchison and Leneman's 1998 book *Girls in Trouble*, a study of illegitimacy in rural parishes as viewed through the records of the kirk session. Mitchison and Leneman highlight the importance of the structural context for their study, noting that their book 'begins by outlining the theology which sustained church discipline, and the court structure which administered it'.⁹² In their first chapter, 'The Scottish Church', they set out in detail the development of the system of church discipline, its success in comparison to other parts of the British Isles, and the doctrinal background to the attitudes enforced by church personnel through the kirk session.⁹³ This therefore demonstrates that engagement with institutional scholarship is necessary in order to facilitate a structural analysis of the legal and court environments women encountered in their interactions with the law. This practice is particularly vital for gender historians tasked with investigating women's histories in fields where, according to the dominant prevailing scholarship, women were permanently absent.

It is useful at this point to consider the field of Scottish gender history more generally, as well as to consider how the methodologies of its various published works have contributed to the methods employed in this thesis. Women's and gender history in Scotland as a field developed considerably later than in other countries, such as the United States or England. While this meant that Scottish historians were less involved in the development of methodologies that came to define the subject, it also meant that when, in the early 1990s, historians wishing to study Scottish women were beginning to assess the scope of the work available to them, they were able to absorb this earlier work seamlessly into their research aims.⁹⁴ This has resulted in the brisk development of the field; in the early 1990s, new publications were sparse and review articles relied heavily

⁹² R. Mitchison and L. Leneman, *Girls in Trouble*, p. 1.

⁹³ *Ibid.*, pp. 5-17.

⁹⁴ E. Ewan, 'Women's history in Scotland: towards an agenda', *The Innes Review*, Vol. 46, No. 2, (Autumn 1995), p. 156.

on works published on English history, or on the wider European context, to suggest potential research routes for historians to take. By the late 2010s, the Scottish historiography had grown into an innovative field, which utilised the methodologies developed elsewhere to reimagine how women existed in the past. The development of the field includes an expanded focus beyond simply recovering Scottish women and resituating them into the existing historical narrative. Many of the works currently being produced are sophisticated analyses considering how gender operated in the past, and how this impacted the lives and opportunities of men and women of different classes and from different geographical areas within Scotland. Much of this work has an explicit feminist focus, for example Katie Barclay's work on the history of emotions, and particularly her 2012 book *Love, Intimacy and Power*, which considers what – if any – opportunities for a reclamation of agency existed for women in the marriage market.⁹⁵

It is important to note that the majority of Scottish history works produced over the last few decades are overwhelmingly male in subject matter and outlook. It is uncommon for a work of political or economic history to spend any time considering the very real impact gender has had on their period of study; for example, why only men had access to university education, or careers in law, or politics, or business, or why only men were designing urban spaces, or participating in associational culture. In this type of analysis, patriarchy is the unexamined glue that holds the topic together, placing it into a liminal category of research which is gender history, without quite being aware of it. This 'elephant in the room' can also be seen in works which do consider other axes of power, most commonly class, without reference to other axes which would greatly benefit the analysis, such as gender, and race. This ignorance of the centrality of gender to society both now and in the past creates a landscape within Scottish historiography which sidelines the study of gender as a separate topic, usually aligned with women's history as a marginal addition at best. As Ian

⁹⁵ K. Barclay; *Love, Intimacy and Power*, p. 57.

Donnachie and Christopher Whatley commented in the introduction to their 1992 edited work *The Manufacture of Scottish History*,

... the assumption of most Scottish historians has been that the realities of women's lives are of lesser national importance, and there was until very recently almost no awareness that women's values and priorities might have deeper significance in themselves.⁹⁶

In popular textbooks written for undergraduate audiences, the best that can be hoped for is a 'family/women/home life' chapter segregated from the main text, establishing women in the past as less important than the men focused on for the majority of the page count. Michael Lynch's *Scotland: A New History* (1992) does not include any chapters on women, and T. M. Devine's *The Scottish Nation: A Modern History* (2012), has one chapter at the end of Part Three, called 'Scottish Women: Family, Work and Politics'.⁹⁷ This uncritically reproduces the marginalisation of women within the text, and firmly establishes the study of women's lives as separate from the supposedly 'important' historical events that should primarily be focused on. Much of the work done during the 1970s by American women's historians was formulated as a challenge to this male-dominated mode of historiographical thought, and as a demand for respect, funding and space for the historical study of women's lives. Although these historians were building on a small number of earlier English works by the likes of Ivy Pinchbeck and Alice Clark, there was a school of thought developing in the 1970s and 1980s, pioneered by American historians, which can be considered foundational in terms of how it shaped the narrative and research aims of women's and gender history in the following decades. Three historians in particular produced work during this time which has greatly contributed to the development of women's history, and whose theories and methodologies can be seen in the historiography of Scottish gender history as it developed from the 1990s onwards – Gerda Lerner, Joan Wallach Scott, and Joan Kelly.

⁹⁶ I. Donnachie, C. Whatley (eds.) *The Manufacture of Scottish History* (Edinburgh, 1992), p. 14.

⁹⁷ T. M. Devine, *The Scottish Nation: A Modern History* (London, 2012), pp. 634-58.

Lerner's seminal 1979 book, *The Majority Finds Its Past: Placing Women in History*, is a collection of essays first written between the early 1960s and the late 1970s, against the backdrop of the growth of the feminist political movement in the U.S. Through them, Lerner explores the potential of the emerging field of women's history and describes the various stages in the development of the historiography. Firstly, she notes the tendency during the early years of the field to focus on so-called 'women worthies',⁹⁸ women who are visible within the histories written by men because their successes are comparable to those of men, or rather women who are perceived as having risen to political, literary, or economic prominence *despite* their gender. The next phase of historiographical development Lerner identifies is 'contribution history',⁹⁹ or research works which attempt to add women into 'male-defined history'.¹⁰⁰ Monographs and articles will analyse the contributions women made to movements and eras pre-defined by male historians and examined through a male lens, such as abolitionism. This approach is limited in its conclusions; essentially the aim of this research is to prove that women were also present in movements built by men.¹⁰¹ Despite this, there is some value in demonstrating women's agency in the achievement of aims previously only credited to men. The field then grew to absorb and implement feminist philosophy and began to question the nature of women's oppression under patriarchy in the past. At this point, Lerner highlights the limitations of viewing women only as victims of oppression. For Lerner, this approach obscures the way women in the past lived for themselves, not simply in opposition to or compliance with patriarchy. She writes, 'the true history of women is the history of their ongoing functioning in that male-defined world *on their own terms*'¹⁰² (emphasis Lerner's). She describes the lens of oppression as one of 'limited usefulness to the historian',¹⁰³ as it restricts our understanding of women to how well they conformed to

⁹⁸ G. Lerner, *The Majority Finds Its Past: Placing Women in History* (London, 2005), p. 115.

⁹⁹ *Ibid.*, p. 116.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, p. 117.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

standards set by men. Lerner argues that it is more fruitful to consider patriarchal oppression as 'one aspect of women's history, but never ... the *central* aspect of women's history'¹⁰⁴ (emphasis Lerner's).

However, it can be argued that there is a difference between simply viewing women as victims of standards set by men and acknowledging that those patriarchal standards defined how women were able to exist in their societies. The root of attitudes of propriety, fashion, property ownership and economic involvement was patriarchy. Contemporary formulations of the gender binary prescribed exactly what 'men' and 'women' were, with variations dependent on factors such as social order and race, with the result that women in the past, similarly to women now, did not have access to an understanding of themselves as 'women' that had not been formulated, shaped and constrained by patriarchal ideologies. In order to obtain an understanding of women's lives in the past, historians must have a critical awareness of how these identities are formulated according to the dominant attitudes of the period. Although these gendered categories regulated women's interactions with society and further fortified male dominance, individual women's experiences of their own gender varied. Women in the past often had autonomy over their actions, but those actions at every stage, from birth, to employment, marriage, childrearing or caregiving, were influenced and restricted by patriarchy. Patriarchal oppression is therefore not the 'central aspect of women's history',¹⁰⁵ but the backdrop to women's lives. It must be noted that patriarchy was also the backdrop to men's lives, and historians of male-dominated fields such as economic, military or political history would benefit greatly from a critical evaluation of their subjects' actions from the viewpoint of gender history. Rather than viewing patriarchy as a limitation, it must rather be understood as one of several factors which shaped human interaction in the past, alongside, for example, white supremacy, capitalism and entrenched class systems.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

One of the most widely read essays in gender history is Joan Wallach Scott's 'Gender: A Useful Category of Historical Analysis', first published in 1986. In the essay, Scott explores the critical potential of gender history, and the various ways this term had been deployed. She notes that, during the growth of women's history as a field, 'the response of most nonfeminist historians has been acknowledgment and then separation and dismissal',¹⁰⁶ therefore marginalising women's lives as a discrete field of thought, that did not need to disrupt or disturb male-dominated historiographical fields, such as economic or political history. She stresses that the concept of 'gender' widens the avenues available to historians, by accepting that 'women and men were defined in terms of one another, and no understanding of either could be achieved by entirely separate study'.¹⁰⁷ Therefore, studies of women's history as well as dominant, male-focused historical narratives are liable to distort understandings of the past, by viewing men and women as distinct groups operating separately in public or private spheres, rather than as an intertwined society. Scott goes on to consider the importance of analyses which question how gender was enacted in various historical contexts, and how gendered norms were constructed and performed. She writes:

The point of new historical investigation is to disrupt the notion of fixity, to discover the nature of the debate or repression that leads to the appearance of timeless permanence in binary gender representation.¹⁰⁸

This is vital, as core to gender history is the notion that despite the socially constructed nature of gender, binary sex categories have persisted throughout human history, albeit in a multitude of different ways. Categories accepted contemporarily as natural and unchanging must be regarded critically, and as far as possible be interpreted as part of a lineage of gendered norms through which these apparently natural categories of biological sexual difference did, in fact, exist in a constant state of flux. When considering how these ideas have

¹⁰⁶ J. W. Scott, *Gender and the Politics of History* (New York, 1999), p. 30.

¹⁰⁷ *Ibid.*, p. 29.

¹⁰⁸ *Ibid.*, p. 43.

influenced the field of Scottish gender history, it is important to return to the work of Katie Barclay. In 2013, Barclay published a review article of Scottish gender history, written with Tanya Cheadle and Eleanor Gordon and published in the *Scottish Historical Review*. This article in particular cites the earlier work of Joan Wallach Scott as the source of a grounding methodology which has proved fruitful for Scottish historians of gender.¹⁰⁹ They argue that while significant strides have been made in understanding the history of gender in Scotland, gender as a category of analysis does not enjoy the same near universality as, for example, class.¹¹⁰ Consequently, although there are gender historians working diligently to illuminate the gaps in knowledge that particularly affect women in the past, there is less scholarly interest in engaging with the literature and methodologies of gender history from historians working in other fields. This restricts the impact of Scottish gender history, as it is still seen as an optional extra, with little attention given to the fundamentally destabilising character of gender, and the opportunities this provides.¹¹¹

In 1992, writer and editor Joy Hendry wrote the first comprehensive assessment of the progress of women's history in Scotland. She notes, importantly, that studies of the field should not begin with the first works of women's history, but should also focus on the preceding works which neglected to feature women.¹¹² This approach is useful in recognising that while not including the history of women has been seen as the standard, it was also a methodological choice – albeit usually a subconscious one – which devalued women's lives and contributions. This allows a more complete assessment of the timeline of Scottish gender historiography. Hendry makes it clear that she is not a trained historian, rather a book editor, and that this allows her to approach her assessment of the field from a different viewpoint.¹¹³ She is particularly scathing

¹⁰⁹ K. Barclay, T. Cheadle, E. Gordon, 'The State of Scottish History: Gender', *The Scottish Historical Review*, Vol. XCII, Supplement: No. 234 (2013), pp. 85-6.

¹¹⁰ *Ibid.*, p. 107.

¹¹¹ *Ibid.*, pp. 106-7.

¹¹² J. Hendry, 'Snug in the asylum of taciturnity: women's history in Scotland', in I. Donnachie, C. Whatley (eds.) *The Manufacture of Scottish History* (Edinburgh, 1992), p. 125.

¹¹³ *Ibid.*

in her review of some 'general' Scottish history books. In particular, she criticises Bruce Lenman's 1977 book *An Economic History of Modern Scotland 1660-1976*, which features women so rarely that 'women' as a term does not appear in the index.¹¹⁴ Hendry makes it clear that scholarship this narrow has an impact:

Reading history as in a sense past and done with and therefore given, unarguable and inevitable, a fact, something unchangeable, has a powerful effect on women's perceptions of what is open to them in the present and the future.¹¹⁵

Hendry's review is therefore intended as a call to arms for Scottish history researchers, and acts as a robust defence of the importance of uncovering the realities of Scottish women's lives in the past. In 1995, Elizabeth Ewan published a review article in *The Innes Review*, considering the status of women's history in Scotland, particularly focusing on what was then known about Scottish women pre-1800. She concurs with Joy Hendry's assessment of the late development of the field, stating that 'women's history, a flourishing field elsewhere in the world, is at a very early stage in Scotland',¹¹⁶ and highlighting a dearth of any research on Scottish women from the 1930s to the 1980s.¹¹⁷ However, she also states that one of the advantages of this is that the methodologies developed in works on other countries can be applied by Scottish historians of women, thus allowing an examination of how Scottish women's experiences differed.¹¹⁸ Ewan briefly outlines the work that had been done in the field in the preceding years, noting that while Michael Lynch's then-new textbook *Scotland: A New History* does not prioritise or integrate the study of Scottish women, other studies – such as Rab Houston's 1989 article 'Women in the economy and society of Scotland 1500-1800' – had begun the re-evaluation of how women had existed

¹¹⁴ *Ibid.*, p. 130.

¹¹⁵ *Ibid.*, p. 128.

¹¹⁶ E. Ewan, 'Women's history in Scotland', p. 155. For a more general assessment of the development of Scottish history since the early 1990s, see: A. Mackillop, 'Preface: The State of Early Modern and Modern Scottish Histories', *The Scottish Historical Review*, (April 2013), Vol. 92, No. 234, pp. 1-4.

¹¹⁷ E. Ewan, 'Women's history in Scotland', pp. 155-6.

¹¹⁸ *Ibid.*, p. 156.

alongside men throughout economic and social life.¹¹⁹ It is worth examining how the research questions identified by Ewan in 1995 have consequently been answered. Ewan points out the vital role of religion in Scottish society, and uses an example from the English historiography to draw out possible research questions for future scholars – Patricia Crawford’s *Women and Religion in England 1500-1720*. Although the questions Ewan is raising around women’s role in religious life are more focused around the early modern period, particularly around the Reformation, she does suggest that far more needs to be known about women and religion more widely, noting that:

Women expressed their religious devotion within the family. The area of family history is still relatively undeveloped in Scotland: further work on the family would reveal much about both women’s and men’s lives and indeed about Scottish society itself.¹²⁰

Some of these questions have been examined by Elizabeth Ritchie, in her 2021 article, ‘Faith and the Family: Family Life and the Spread of Evangelical Culture in the Scottish Gàidhealtachd, c. 1790-c.1860’. Despite Ewan’s view that ‘the religious influence of women on their husbands or offspring should not be underestimated’,¹²¹ Ritchie reveals a much more complicated picture, where the practice of worship within family units both subverted and strengthened patriarchy.¹²² It should be noted that Ewan attempted to fill this gap herself, with the 2008 book *Finding the Family in Medieval and Early Modern Scotland*, co-edited with Janay Nugent. However, although the stated date range for the material within the book is c. 1300-1750, there is only a marginal focus on the eighteenth century. Ritchie’s study therefore gives valuable insight into the role of family religious life in the late-eighteenth-century Gàidhealtachd, a geographical and cultural area under threat from the steady advance of

¹¹⁹ *Ibid.*, p. 156. See also, R. A. Houston, ‘Women in the economy and society of Scotland 1500-1800’, in R. A. Houston and I. D. Whyte (eds.), *Scottish Society 1500-1800* (Cambridge, 1989), pp. 118-47.

¹²⁰ E. Ewan, ‘Women’s history in Scotland’, p. 162.

¹²¹ *Ibid.*

¹²² E. Ritchie, ‘Faith and the Family: Family Life and the Spread of Evangelical Culture in the Scottish Gàidhealtachd, c. 1790-c.1860’, *Scottish Historical Review*, Vol. 100, Issue 1 (April 2021), p. 57.

agricultural improvement. The conclusions of this article will be discussed in more depth later in this thesis. It will therefore suffice to note here that this complex, nuanced study of how gendered hierarchies were enacted within lower-order family units in the Scottish Highlands represents an important addition to the historiography, especially when considered in context with Ewan's criticisms of how as late as the mid-1990s studies of gender within family life were marginalised.

Another possible focus for future research identified by Ewan is women's interactions with the law. She comments, 'A clearer understanding of women's legal status would help historians assess the ways in which they might react to changes in society'.¹²³ One aspect of this which has been fruitful for Scottish gender historians is the intertwined history of women, credit, and debt, and how this was influenced by marriage status. However, the literature in this area is overwhelmingly focused on the pre-eighteenth century early modern era.¹²⁴ One of these works is Rebecca Mason's article on women litigants in seventeenth-century Glasgow, which has added significantly to knowledge of early modern women's changing legal status throughout their life cycles. She identifies a 'marital spectrum',¹²⁵ which more fully conceptualises the ways in which women's interactions with the law were codified and influenced by their marriage status. Rather than a simplistic single/married/widowed model, Mason highlights the interim stages in a woman's marital career, for example 'marrying daughter', or 'remarried widow'.¹²⁶ Within the Glasgow Burgh and Commissary courts, women were frequently characterised by multiple labels, which established their property rights in terms of inheritances and other financial claims.¹²⁷ Mason's aim is to establish in more detail how women accessed the law for their own interests, as opposed to relying on the descriptions of

¹²³ E. Ewan, 'Women's history in Scotland', p. 164.

¹²⁴ See, for example, C. Spence, *Women, Credit and Debt in Early Modern Scotland* (Manchester, 2016).

¹²⁵ R. Mason, 'Women, Marital Status, and Law: The Marital Spectrum in Seventeenth-Century Glasgow', *Journal of British Studies*, Vol. 58, Issue 4 (October 2019), p. 790.

¹²⁶ *Ibid.*, p. 791.

¹²⁷ *Ibid.*

women's legal status as set down by jurists in institutional texts.¹²⁸ Studies like this cross the boundaries between gender, economic, legal and social history, allowing a wider interpretation of women's lives, particularly in terms of how they perceived their rights, and how they were willing to seek legal recompense when those rights were breached. Despite the importance of this work, there is more to be done on women, credit and property in the eighteenth-century Scottish context, and it would be useful to see whether the trends identified in the early modern period are applicable to the later eighteenth century and Enlightenment period.

A further crucial aspect of this project in relation to the historiography is the court's location in the Highlands, a region that was undergoing rapid change during this period. Politically, the failure of the 1745 Jacobite Rebellion and the ensuing legal and military backlash shaped the Highlands for several decades, with ramifications for land ownership and the cultural expression of clan-based kinship structures. Additionally, population distribution was undergoing a radical shift during this period due to the changing economic practices of the landowning elite. The spread of ideologies of improvement combined with the encroaching roots of capitalistic endeavour resulted in the wholesale adoption of agricultural methods which transformed the Highland landscape.¹²⁹ The effects of these changes were exaggerated by the predominantly agrarian nature of the region's economy, and the fact that land ownership was consolidated in the hands of a tiny proportion of the overall population made up of the aristocracy and landed gentry.¹³⁰ The historiography of the Highlands is in some aspects well-developed, and in others, there is still considerable work to be done. As Stana Nenadic comments, 'the history of the Highlands has been written as if almost no women ever lived there'.¹³¹ Much of the scholarly focus

¹²⁸ *Ibid.*, p. 792.

¹²⁹ T. M. Devine, 'Social responses to agrarian 'improvement': The Highland and Lowland clearances in Scotland', in R. A. Houston and I. D. Whyte (eds.), *Scottish Society, 1500-1800* (Cambridge, 1989), p. 148.

¹³⁰ B. Lenman, *Integration, Enlightenment*, p. 8.

¹³¹ S. Nenadic, *Lairds and Luxury: The Highland gentry in Eighteenth-century Scotland* (Edinburgh, 2007) p. 14. I am grateful to Dr David Brown for bringing my attention to this quote.

on the Highlands in the eighteenth century has been devoted to the history of the Jacobites, a growing field of study which shows no sign of deceleration. While the wider fields of Highlands economic and social history have been paid comparatively less attention, work in these fields has been extensive since the 1980s, and we now know a great deal about how Highland society functioned.

Historians such as Robert Houston and Bruce Lenman have dedicated books and monographs to interpreting the social and economic structure of Scotland during this period. One point to stress is Lenman's assertion that in 1750, the population of Scotland was split evenly between the Highlands and Lowlands.¹³² Far from peripheral, the Highlands were an integral part of Scotland as a whole, particularly in terms of trade; the production of surplus animal products for sale, mostly with the Lowlands, provided a crucial source of supplementary grain for the region.¹³³ Women's participation in the Highland economy was widespread, and has been examined in detail by Houston. His chapter on 'Women in the economy and society of Scotland 1500-1800', found within his and Ian D. Whyte's book on Scottish society in the early modern period, is a useful resource for examining women's economic practices during this period. Written in 1989, it is situated within a period of expansion for gender history as a field, and is explicit about what it has drawn theoretically from earlier works by the likes of Gerda Lerner and Olwen Hufton.¹³⁴ Houston argues that resituating women in history requires more than simply adding their stories to existing interpretations, and stresses the need for careful interrogation of surviving texts written by men, which can often 'trivialise, marginalise or even ignore women's concerns'.¹³⁵ Women were employed in almost all roles in agriculture, only spared from the most physically difficult work. The types of remuneration women received for their labour was similarly varied, with a combination of day wages, yearly contracts and a system whereby married women's wages were paid directly to their husband as a supplement to his own.¹³⁶ Houston stresses the impact of the

¹³² B. Lenman, *Integration, Enlightenment*, p. 3.

¹³³ *Ibid.*, p. 5.

¹³⁴ R. A. Houston, 'Women in the economy', p. 118.

¹³⁵ *Ibid.*, p. 119.

¹³⁶ *Ibid.*, p. 120.

adoption of new agricultural technologies from the closing decades of the century, giving the example of how the use of the more physically demanding scythe instead of the sickle during harvests barred many women from doing that work, although it is unclear whether this was due to a lack of physical ability by most female agricultural labourers, or cultural attitudes.¹³⁷ This trend continued into the nineteenth century; the specialisation of agricultural work became more pronounced, and women's work became more menial and chronically low-waged. During the 1790s, rural wages for women in the Highlands and Islands were the lowest in the country, and the average wage across Scotland for female agricultural workers was around 50% of a man's.¹³⁸ The trend for women in the Highlands seeking seasonal work in the Lowlands also became more pronounced during this decade, but overall Houston stresses the lack of options for single women in the world of agricultural work, as women's wages were purposefully designed not to support them in independence, but to supplement a married household.¹³⁹ This was also demonstrated in the growing cloth trade. A section in Sir John Sinclair's *Statistical Accounts of Scotland* written by William Grieg mentions the example of a cloth manufacture at Nether-Kinmundy in Aberdeenshire, where the production of 'narrow cloths'¹⁴⁰ provided work for forty families. Grieg writes that 'men, thus employed, earn from 4s. to 10s. a week; and women from 1s. 6d. to 3d.'¹⁴¹ The difference in men and women's work responsibilities within the factory is not mentioned, but Houston cites an example from Newmills cloth works in East Lothian, where women completed menial work making sure wool was free of foreign bodies, whereas the higher-waged weavers' positions were reserved for men.¹⁴² Lenman has commented that the textile trade was differentiated into gendered tasks; spinning was

¹³⁷ *Ibid.*, p. 121. For more analysis of the adoption of the scythe in the English and Scottish contexts, see B. Hill, *Women, Work and Sexual Politics in Eighteenth-Century England* (London, 1993), pp. 55-8.

¹³⁸ R. A. Houston, 'Women in the economy', p. 123-4.

¹³⁹ *Ibid.*

¹⁴⁰ W. Greig, 'Longside, Aberdeen', in J. Sinclair (ed.), *The Statistical Account of Scotland*, Volume 15 (Edinburgh, 1795), p. 287.

¹⁴¹ *Ibid.*

¹⁴² R. A. Houston, 'Women in the economy', p. 123.

'highly dispersed'¹⁴³ and frequently performed informally by women, whereas weaving was specialised, concentrated in manufacturing settings, and usually reserved for men.¹⁴⁴ Therefore, by the end of the eighteenth century, the growth in specialisation in waged agricultural and manufacturing work had reinforced patriarchal ideas around acceptable work for women, denying women opportunities for financial independence and making economic survival outside marriage a daunting task, a task made even more difficult in the Highlands due to lower than average female wages.

For a more detailed analysis of elite women's involvement in the Highland agricultural economy and how this changed over the period, Stana Nenadic's work on the impact of evolving gender roles on Highland gentlewomen is particularly useful. Her article 'Experience and Expectations in the Transformation of the Highland Gentlewoman, 1680 to 1820' aims to illuminate the impact of changing ideas around acceptable femininity on the life cycles of Highland elite women, utilising the family archives of the Campbells of Barcaldine, a prominent gentry family based in Argyll.¹⁴⁵ She highlights the dramatic transformation in elite women's involvement in the local economy between the late-seventeenth and early-nineteenth centuries. In 1680, many gentlewomen would have primarily conversed in Gaelic and been heavily involved in the daily management of their households through practical experience with animal husbandry and growing and preparing food. They also contributed economically to their households through the sale and trade of animal products within their local communities, and had frequent contact with their lower-order neighbours.¹⁴⁶ High levels of female illiteracy in the Highlands make sources written by them extremely rare, and Nenadic marks the mid-eighteenth century as a turning point after which sources written by and featuring elite Highland women become more common due to gradually

¹⁴³ B. Lenman, *Integration, Enlightenment*, p. 6.

¹⁴⁴ *Ibid.*

¹⁴⁵ S. Nenadic, 'Experience and Expectations in the Transformation of the Highland Gentlewoman, 1680 to 1820', *Scottish Historical Review*, Vol. 80 (October 2001), p. 202.

¹⁴⁶ *Ibid.*

increasing literacy levels.¹⁴⁷ By the late eighteenth century, elite women were normally resident in the Lowlands, usually had little to no involvement in the management of family finances, and visited the Highlands perhaps once a year as a holiday; Nenadic stresses how elite women became culturally detached from the Highlands, viewing it remotely through an idealised, romanticised lens.¹⁴⁸ This only became possible due to the loss of the direct knowledge of daily life in the Highlands, which would have been obtained by their recent ancestors through the practical management of estates.¹⁴⁹ Nenadic uses the case study of Janet Mackay, wife of Colin Campbell of Glenure, to show the life of a Highland gentry woman between these two chronological extremes. When Mackay was widowed in 1752, at the age of 20, she provided a description of the daily management of the estate to lawyers, demonstrating her close involvement in all stages of food production, cloth production, and in the management of household servants.¹⁵⁰ This demonstrates that there was considerable continuity in the experiences of elite women from the seventeenth to the mid-eighteenth centuries, and stresses the need for nuance when understanding the gradual process of change that led to the alteration of the social role of elite Highland women, and the evolution of gendered norms during this period.

Having now summarised the current historiography for the fields of Scottish legal and gender history, as well as providing a brief overview of literature examining women's role in the society and economy of the Highlands during this period, the place of this thesis within these concentric and overlapping fields is clearer. The documents of the Inverness sheriff court offer the opportunity to study the place of the sheriff court within wider county society, and following on from this, how the lower orders accessed, interacted with, and opposed the legal system, particularly in relation to how women were treated by, and were able to make use of, the sheriff court. The following chapters will seek to

¹⁴⁷ *Ibid.*, p. 203.

¹⁴⁸ *Ibid.*, p. 202.

¹⁴⁹ *Ibid.*, pp. 218-19.

¹⁵⁰ *Ibid.*, p. 207.

illuminate these interactions in relation to the topics of lawburrows, organised resistance to the court, and violence against women with, wherever possible, a particular focus on cases involving women, and a consideration of how the overarching patriarchal system influenced the daily operations of the sheriff court.

2. The Inverness Sheriff Court

The surviving criminal processes of the Inverness sheriff court offer unparalleled insight into the lives of those living in Inverness-shire in the late eighteenth century. In order to fully understand the thematic studies of later chapters, it is first necessary to describe the institution of the Inverness sheriff court itself, its place in the Scottish legal system, and more generally how defendants and victims of crime interacted with the court. This chapter will therefore examine how the sheriff court system evolved through the second half of the eighteenth century, demonstrating the importance of the sheriff courts in terms of civil and criminal law-keeping and administration. The roles and duties of the primary personnel of the court will be examined through contemporary literature and newspaper coverage, giving insight into the men controlling this site of state power. The criminal processes themselves give greater insight into the inhabitants of Inverness-shire who interacted with the court system. The court was used as a tool by those experiencing crises of varying kinds, as the legal authority invested in the institution of the court could be levered to resolve situations incapable of being settled within families or communities. It is clear that, in some cases, invoking the authority of the court was a last resort, while in others, it was the first place people sought advice. This spectrum of how people viewed and interacted with the court system will be analysed in detail throughout the thesis but will be considered within this chapter in a more practical sense.

The documents themselves represent a wide variety of legal papers,¹⁵¹ with petitions to the court – either on behalf of the procurator fiscal, or by a victim of a crime – being by far the most numerous. These petitions most commonly formally notified the sheriff depute of a potential crime and usually described the alleged events and requested some intervention on the sheriff depute's behalf, for example by apprehending the accused, or gathering evidence

¹⁵¹ For clarity, the NRS documents under discussion here are currently held under catalogue references SC29/53/1 – SC29/53/62.

through precognitions – a pre-trial witness statement gathered in a formal court environment by legal personnel. Importantly, large numbers of these precognitions survive. There are many instances, even where cases either did not proceed to trial or the trial documents have not survived, of extensive precognitions remaining, with each witness's name, marital status, place of residence and age diligently recorded. These documents are therefore an enormously valuable resource for researchers and may feature descriptions of events from those who do not otherwise survive in the historical record. It is rare to get a complete case record from petition to sentencing, and it is important to note once again that this is an incomplete source. It is not yet – and most likely will never be – possible to establish how many of the cases dealt with by the sheriff courts are contained somewhere within the collection. It is therefore difficult to draw definitive, empirical conclusions about the prevalence of different types of crimes, but amongst the surviving documents, there are clear themes. Theft was, unsurprisingly, commonly dealt with by the sheriff court, with livestock theft seemingly a particular concern. There were several families, for example the McDonells of Aberarder, and the Kennedys of Shian, that were prolific cattle and sheep thieves, and various men and women from these families regularly feature in the court documents during the 1780s. There are also cases involving the four pleas of the crown – murder, rape, fire-raising and robbery – which inferior courts were barred from prosecuting. It is likely in these cases that the sheriff courts were apprehending the accused and gathering precognitions in preparation for the twice annual circuit court of the High Court of Justiciary, rather than attempting to try the cases themselves. The broad scope of recurring themes and fields of potential analysis amply demonstrate the value of these documents.

Overview of sheriff courts in the Scottish legal system

In order to establish the role performed by the Inverness sheriff court within Inverness-shire society, it is first necessary to consider the function of sheriff courts within the wider Scottish legal system at this time. Sheriff courts had

existed in some form or another since the twelfth century,¹⁵² although their administrative powers and competency fluctuated over the centuries. In a geographical sense, the country was divided into sheriffdoms, which governed over local areas administratively and legally. The sheriff courts were latterly presided over by a sheriff depute, who frequently appointed substitutes to manage the majority of court business. The legal jurisdiction enjoyed by sheriffdoms was extensive; in terms of criminal law, they were only restricted from trying the four pleas of the crown, but they did have the ability to try other capital crimes, such as hamesucken or theft. For civil law, the court could try a wide variety of cases, and in 1672, the Scottish Parliament established the right of the sheriff courts to try all civil cases with claims under 200 merks.¹⁵³ One of the quirks of the early sheriff court system was heritable jurisdictions, whereby the office of sheriff was passed down through the male line of families – 21 of 33 sheriffdoms were held by hereditary right in 1700.¹⁵⁴ There was also a considerable element of nepotism present, with no regulatory system for the appointment of sheriff deputies. This left the system vulnerable to corruption and bias in the application of legal justice, although the Courts of Session and Justiciary were the appellate courts for all inferior courts, and their ability to advocate cases from the sheriff courts to their own may potentially have mitigated the most egregious miscarriages of justice. Despite this, David M. Walker takes a dim view of sheriffs operating in the late-seventeenth century, stating that 'the sheriffs were slack in the performance of their duties and there is little ground for confidence in the quality of their justice'.¹⁵⁵ Ann Whetstone agrees, stating that franchise courts and hereditary sheriff courts were both 'run with greater regard for profit than for quality of justice'.¹⁵⁶ The quality of legal practice carried out in these jurisdictions was therefore clearly questionable, and

¹⁵² D. M. Walker, 'Background of the Institutions', in D. M. Walker (ed), *Stair Tercentenary Studies* (Edinburgh, 1981), p. 73.

¹⁵³ *Ibid.*, p. 74.

¹⁵⁴ A. E. Whetstone, 'The reform of the Scottish Sheriffdoms in the Eighteenth and Early Nineteenth Centuries', *Albion: A Quarterly Journal Concerned with British Studies*, Vol. 9, No. 1 (Spring, 1977), p. 62.

¹⁵⁵ D. M. Walker, 'Background of the Institutions', p. 74.

¹⁵⁶ A. E. Whetstone, 'The reform of the Scottish Sheriffdoms', p. 63.

following the 1745 Jacobite rebellion, the state took the opportunity to reform the sheriffdoms. Ostensibly, this was to root out potential dissidents and put in place men loyal to the crown, but the process overall went much further and transformed the system of the sheriff courts into a professionalised institution. Whetstone has remarked that while the '45 acted as the impetus for this reform, 'there was no real reason to suppose that the system was related to Jacobitism'.¹⁵⁷ Scotland at this time became a focus of reform by the British government more generally, and anachronisms in the legal system were no longer seen as acceptable. Therefore, the Heritable Jurisdictions Act was passed by the British Parliament in 1747, and implemented on 25 March 1748, abolishing all heritable rights to sheriffdoms and, as these had been established as property by the 1707 union, the holders were financially compensated for their loss.¹⁵⁸ Additionally, all jurisdictional rights held by Lordships of Regality, baileries and stewartries reverted to the crown.¹⁵⁹

Ann Whetstone has examined the development of the sheriff courts during this transitional period in detail, and her scholarship illuminates a great deal about this process of professionalisation. The sheriffdoms were reorganised and officiated by twenty-seven sheriffs depute – men who were appointed for life and were required to be advocates with at least three years' experience of legal practice. A condition of the Heritable Jurisdictions Act was that these *ad Vitam aut Culpam* (for life or until fault) appointments were to be delayed for twenty-one years after 1748, perhaps so that anyone found to be unsuitable for the role could be more easily removed. However, Whetstone notes that the government did not remove any men from their posts after the first 7 years – whatever caution provoked this measure was therefore apparently unwarranted.¹⁶⁰ They also employed sheriff substitutes, with at least one resident in each sheriffdom. This proved important as it was expected that advocates employed as sheriff deputies would continue their legal practice in Edinburgh alongside their work in

¹⁵⁷ *Ibid.*

¹⁵⁸ *Heritable Jurisdictions (Scotland) Act 1746.*

¹⁵⁹ A. E. Whetstone, 'The reform of the Scottish Sheriffdoms', p. 63.

¹⁶⁰ *Ibid.*, p. 64.

the sheriff courts, and were consequently only required to spend four months out of every year in their sherifffdom.¹⁶¹ However, there were no requirements for sheriff substitutes to have any legal training, and they were essentially a 'personal assistant chosen by the sheriff depute at his own recognizance'.¹⁶² Clearly, the reforms only went so far. There were major concerns surrounding conflicts of interest, as substitutes were almost always hired locally, and in 1783 the Court of Session ruled that sheriff substitutes could not be personally interested in cases that appeared in their own courts.¹⁶³ Low wages also made attracting qualified personnel difficult, and in 1787 a recommendation by the Lord Justice Clerk, Robert MacQueen, and the Lord Advocate, Ilay Campbell, ensured that the government took responsibility for sheriff substitute salaries.¹⁶⁴ This resulted in salaries doubling, although they were still not particularly high, and concerns remained around the low level of training that sheriff substitutes frequently had outside of larger towns. Whetstone comments that 'in most cases the training and status of even the best was not especially high'.¹⁶⁵ This was a particular issue in the Highlands, and Whetstone notes that the first Inverness sheriff depute appointed post-1746 – David Scrimgiour of Birkhill – resorted to employing a 'barrackmaster' and landholders from outwith Inverness.¹⁶⁶ The duties of a sheriff substitute were extensive, and their frequent lack of legal training does not seem to have restricted them from acting in a judicial capacity when the sheriff depute was unavailable. For example, in a document detailing the pre-trial actions in a 1782 case heard in the Inverness sheriff court, the sheriff depute, Simon Fraser of Farraline, called for a list of witnesses 'all to compear before me or my substitute in a sheriff court to be holden by one or either of us upon the [space left blank] day of December next within the Tolbooth of Inverness'.¹⁶⁷ This implies that sheriff substitutes were

¹⁶¹ *Ibid.*, p. 64.

¹⁶² *Ibid.*, p. 65.

¹⁶³ *Ibid.*, p. 69.

¹⁶⁴ *Ibid.*, p. 70.

¹⁶⁵ *Ibid.*, p. 69.

¹⁶⁶ A. E. Whetstone, *Scottish county government: in the eighteenth and nineteenth centuries* (Edinburgh, 1981), p. 9.

¹⁶⁷ NRS, SC29/53/11 [SC29/53/1782/7], Inverness Sheriff Court Criminal Processes 1782, 'Diligence the Pror Fiscall Agt. Witnesses', 25 November 1782. The sheriff substitute was named

able to hear cases and make judgements upon them. Indeed, Whetstone claims that:

Most of the ordinary work of the sherifffdom was handled by the sheriff substitute acting in the sheriff's name. The sheriffs depute judged only the difficult cases sent them by their substitutes and those cases where the protagonists requested the sheriff depute's personal attention.¹⁶⁸

The proportion of cases heard by sheriffs depute rather than their substitutes likely varied widely between sherifffdoms, depending on the inclination and priorities of differing sheriffs. Within Inverness-shire, an exact estimate is not possible due to the high number of court documents, but it is possible to say with some degree of certainty that Simon Fraser of Farraline, sheriff depute from 1781-1810, was considerably more involved in daily court business than his predecessor, Alexander Campbell of Delnie; from 1777-1781 there are only 28 surviving case records of any kind, whereas from May 1781 (the month of Farraline's appointment)¹⁶⁹ to December of the same year, there are 39 cases. This evidence is not conclusive, as the survival of case documents is dependent on more factors than the sheriff depute's work ethic – however, it is a point worth considering. The role of sheriff substitute was not subject to the same professionalisation as the sheriff deputies until the early nineteenth century. Increases in salaries and other reforms in the recruitment process were implemented in 1811,¹⁷⁰ and the standards of training for sheriff substitutes improved after 1825, as the government prioritised the appointment of men with high-level legal qualifications, such as advocates or Writers to the Signet.¹⁷¹

Colin Campbell Esq., and although his level of legal training, if any, is not clear from this document, he later became the sheriff substitute for the Fort William district in Inverness-shire, and additionally the sheriff substitute for the northern district of Argyllshire – see: NRS, SC29/53/49 [SC29/53/1789/4], Inverness Sheriff Court Criminal Processes 1789, 'Copy Precognition against John Dow Kennedy relative to the Tenth House', 21 September 1789, f. 1.

¹⁶⁸ A. E. Whetstone, *Scottish County Government*, p. 9.

¹⁶⁹ A. Mackenzie, *History of the Frasers of Lovat, with genealogies of the principal families of the name, to which is added those of Dunballoch and Phopachy* (Inverness, 1896), p. 546.

¹⁷⁰ A. E. Whetstone, 'The reform of the Scottish Sherifffdoms', p. 70.

¹⁷¹ A. E. Whetstone, *Scottish County Government*, p. 13.

Whetstone stresses the fact that sheriff deutes were drawn from the social elite of Scotland, and the initial appointments in 1748 were carefully considered by the government. Political considerations were highly influential in this process; Whetstone cites protracted correspondence between British government officials and the then Lord Justice Clerk – Andrew Fletcher, Lord Milton – concerning lists of suggestions for the appointments.¹⁷² At this stage loyalty was a more important qualification than a distinguished legal career, but Whetstone notes that those chosen for their loyalty were usually also highly experienced lawyers, resulting in a coalescence of nepotism and professionalism amongst the first crop of sheriff deutes.¹⁷³ The requirement for appointees to be an advocate, combined with a regulatory act from 1540 which required sheriff court procedures to copy those of the Court of Session, likely lessened the impact of the more egregious lapses in quality of justice mentioned by Walker and Whetstone,¹⁷⁴ by attempting to enforce uniformity in the recording of court business. Another element of the 1747 act was the stipulation that all court fees and sheriffs' fines were to be collected by the government. This necessitated the paying of a salary to sheriff deutes, which were initially low, at £150-250 annually, including expenses.¹⁷⁵ It was the original intention of the government that sheriff deutes should have local ties to their sherifffdom, but in some more staunchly Jacobite counties it was considered politically necessary to appoint strangers.¹⁷⁶ Whetstone describes the development of this more regulated system throughout the second half of the eighteenth century, noting that while the second crop of sheriff deutes were less skilled than the first, by the early-nineteenth century standards of training were higher and incompetent sheriffs were forced to stand down.¹⁷⁷ Another later eighteenth-century

¹⁷² A. E. Whetstone, 'The reform of the Scottish Sherifffdoms', p. 65. Whetstone claims the correspondence took place between the Home Secretary and the Lord Justice Clerk, however, the office of Home Secretary did not exist at this time. The letter cited is from 'Newcastle to the Lord Justice Clerk', that is Thomas Pelham-Holles, 1st Duke of Newcastle.

¹⁷³ *Ibid.*, pp. 65-6.

¹⁷⁴ D. M. Walker, 'Background of the Institutions', p. 74; A. E. Whetstone, 'The reform of the Scottish Sherifffdoms', p. 66.

¹⁷⁵ A. E. Whetstone, 'The reform of the Scottish Sherifffdoms', p. 65.

¹⁷⁶ *Ibid.*, p. 66.

¹⁷⁷ *Ibid.*

development was that increasingly, competent and highly-trained lawyers desired appointments as sheriff deutes, as the majority of judges of the Courts of Session and Justiciary were recruited from among their ranks.¹⁷⁸ Therefore, by the half way point of the eighteenth century, sheriff courts enjoyed original jurisdiction – i.e. the ability to hear cases in the first instance – in a majority of civil or criminal cases, and were by far the most prominent inferior court jurisdiction in the Scottish legal system. The 1748 reforms were extensive, but enduring issues with nepotism and the valuing of political connections over skill meant a prolonged, gradual process of change throughout the rest of the eighteenth century and on into the nineteenth. Long-term, the reforms also seem to have secured their intended aim of establishing a more reliable, professional system of local court administration which provided an increasingly standardised, higher quality of justice for the general population.

Duties of the sheriff depute and brief overview of court personnel

The Inverness sheriff court clearly played a vital role in Highland law-keeping, but its importance in Inverness-shire and wider Highland civic life should not be underestimated. The court existed as a point of contact to be accessed in times of crisis, predominantly by victims of crime. The surviving material produced by the court spans a range of legal documentation, encompassing the entire legal process from initial petitions to convictions and eventual sentencing. Petitions to the sheriff depute are by far the most numerous of the various types of surviving court documents, and although the language can be formulaic, much can be established about the process of how crimes came to the attention of the courts, and the protocols followed in the prosecution of alleged crimes. Initial petitions can be broadly split into two categories. Firstly, petitions written by the procurator fiscal, informing the sheriff depute or his substitute that a crime had been committed, and requesting that relevant persons be examined within the court, and sometimes also that the accused be found and imprisoned in the

¹⁷⁸ *Ibid.*, p. 67.

tolbooth. While informative and often useful, it is the second kind of petition which is often more revealing. These are addressed to the sheriff depute or his substitute from members of the public, informing the court of a crime committed against them, or, occasionally, from prisoners in the tolbooth requesting some form of clemency or aid from the sheriff. While written and occasionally signed by the petitioner, these were likely formulated and submitted with the assistance of a local writer, or lawyer, who could provide guidance on legal terminology and would have had recourse to a formulary to aid in drafting valid legal documents. Executions of warrants are also numerous and provide useful detail about the timeline of court procedures, as well as the court personnel involved. Although outside the scope of this thesis, it would be possible to use surviving executions to map a much fuller picture of the sheriff officers working in Inverness-shire during this period. As proto-police officers, sheriff officers, along with messengers-at-arms, occupied an interesting position in their communities, as those responsible for front-line enforcement of the law. How this worked day-to-day is not particularly clear from the surviving documentation, although the later chapter on resistance's focus on deforcement cases allows a fuller picture of the challenges faced by sheriff officers in the performance of their duties. It should also be noted that although our window into the actions of sheriff officers in this capacity derives almost solely from executions of warrants, a warrant was not necessary for a justice of the peace to carry out an arrest. George Tait's *A Summary of the Powers and Duties of a Justice of the Peace in Scotland* provides crucial insight into the operational practices of the inferior courts. Even more usefully, it provides an overview of the kinds of processes managed by front-line court personnel, and the consequent documentation produced and handled by them. As Tait explains,

any justice of peace, or other magistrate, who has knowledge of a felony, or even of a riot or breach of the peace, by seeing it committed in his presence, may straightaway himself arrest the offenders. He may require private persons to assist him.¹⁷⁹

¹⁷⁹ G. Tait, *A Summary of the Powers and Duties of a Justice of the Peace in Scotland* (Edinburgh, 1821), p. 6.

The powers of local law enforcement officials were therefore extensive. In situations where court officials lived within the communities that they were responsible for policing as the de facto first point of contact for the judicial system, this had the potential to be an obvious source of tension. However, Tait goes on to note that while there were no particular laws in place to restrict or quantify the proper procedures for the content of warrants:

it is a different and far more exceptional warrant which is general as to the person charged, and commands the bearer to apprehend all persons suspected of the matters there set forth, or to make search everywhere for stolen goods, or the like; for, under a writ of this shape, every thing is committed to the temper, judgment, and discretion of the officer; which is very dangerous, and may prove the occasion of great abuses.¹⁸⁰

Protection against these abuses seemed to rely on the professionalism and good practice of sheriff court officials, although it should be noted that while the surviving warrants and executions have not been examined exhaustively, specifically naming the accused and requesting their arrest or questioning seems to have been common practice within Inverness-shire.

How this worked in practice can be viewed in a case of sheep theft investigated by the Inverness sheriff court in 1783. At the beginning of January 1783, during a period of food dearth, Janet Fraser travelled with her two children to Torrangorm Farm, where her mother Christian Grant lived with her sister Hannah Fraser.¹⁸¹ In Christian Grant's judicial declaration, she states that Janet moved to the farm specifically because there was a 'prospect of scarcity'¹⁸² in the area. On the evening of Thursday, 9 January, Janet and Hannah Fraser, both unmarried and aged about thirty, resolved to steal sheep as they had no other food.¹⁸³ In Hannah Fraser's declaration, she added that her 'Sister proposed to her to go & steal some Sheep from Thomas Fraser in Fassock

¹⁸⁰ *Ibid.*, p. 7.

¹⁸¹ Torrangorm is in the Aird, in the parish of Kiltarlity, and is close to Belladrum.

¹⁸² NRS, SC29/53/17 [SC29/53/1783/15], Inverness Sheriff Court Criminal Processes 1783, 'Declarations of Christian Grant, Janet and Hannah Frasers', 14 January 1783, f.1.

¹⁸³ *Ibid.*, f.3.

assuring her that it would never be discovered nor would they be suspected for the same'.¹⁸⁴ These assurances were proven false just two days later, when the house at Torrangorm was searched by a party of men which included Thomas Fraser, the owner of the stolen sheep.¹⁸⁵ In a justice of the peace court held at Dalnamine, near Belladrum, on Monday the 13th of January, Thomas Fraser deponed that during the search, they discovered evidence of the theft, then stating that Janet Fraser had acknowledged the theft, and offered Thomas a cow if he would neglect to report it to the authorities.¹⁸⁶ This most likely was Hannah Fraser's cow that was being offered as a bribe, or perhaps more charitably as a kind of retroactive payment in kind, and Thomas specifies that this conversation took place in the presence of Hannah Fraser and Christian Grant, and that neither one objected.¹⁸⁷ Although Hannah and Janet's actions were clearly an attempt to support themselves through the dearth their area was facing, Thomas Fraser's actions can also be viewed as a response to crisis. In his case, he utilised the local branch of the judicial system, as represented by the justices of the peace, to seek redress for theft. He first submitted a petition and complaint along with two other men who were victims of sheep theft to Major James Fraser of Belladrum, who granted a search warrant, which was carried out by Thomas Fraser and a local constable, who was also named James Fraser, along with four other men.¹⁸⁸ This demonstrates exactly how people accessed the sheriff court system on a local level, and the recourses available to them to redress harm done to them. However, in the case of the Frasers, we also see how people attempted to mitigate judicial involvement and settle disputes without the involvement of the sheriff court. This kind of informal redress for crime seems to have been normalised in the eighteenth-century Highlands, and methods such as bloodwitt, or remuneration as redress for assault,¹⁸⁹ were

¹⁸⁴ *Ibid.*, f.4.

¹⁸⁵ *Ibid.*, f.5.

¹⁸⁶ NRS, SC29/53/17 [SC29/53/1783/15], Inverness Sheriff Court Criminal Processes 1783, 'Precognitions Taken against Christian Grant & her Daughters', 13 January 1783, f.4.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ "Bludewite *n.*". *Dictionary of the Scots Language* (2004). Accessed 23 Jul 2025 [<http://www.dsl.ac.uk/entry/dost/bludewite>].

common within the judicial sphere as well, with sentences mentioning fines specifically as bloodwitt regularly seen in assault cases in the Inverness sheriff court. It is clear that community settlement of disagreements, separate from the sheriff court system, was seen as a threat by the judicial authorities. This theme will be explored more fully in the chapters of this thesis considering lawburrows and resistance to judicial authority, but the Fraser case serves as a useful example of this idea of informal bargaining as dispute resolution.

Although the case against Hannah and Janet Fraser was clearly justifiable, as they freely admitted their guilt, they were not the only ones implicated within this case. John Fraser and Ann McDonald were a married couple who lived at Foxhall, or Foxhole Farm, which was located almost directly between Fassock, where Thomas Fraser lived, and Torrangorm. They were also investigated during the search for the missing sheep, as, according to constable John Fraser, ‘they had Cause to suspect ... John Fraser Tenant in Foxhal [sic] & Ann McDonald his wife were concerned art & part in stealing the said sheep’,¹⁹⁰ and when Fraser and McDonald’s home was searched after the search at Torrangorm, ‘they also found parrboiled [sic] mutton which he made a very indistinct account of’.¹⁹¹ The following section of constable John Fraser’s precognition represents a complete and concise summary of the investigative process followed by court personnel at this time, and is therefore worth quoting in full:

In consequence of [the mutton discovered at Foxhall] The Constable had seized the above Persons complained off [sic] and brought them Prisoners to attend this meeting. The Justices having considered the above Resolved to examine judicially into the matter and They ordered the said John Fraser and Ann McDonald to be called and They compearing Declared una Voce, That The Parrboiled [sic] Mutton found in their House was the Flesh of a diseased two year old sheep of their own Flock which They had killed for their own use two Days before it was found in their house¹⁹² ... The Justices having considered The above Find

¹⁹⁰ NRS, SC29/53/17 [SC29/53/1783/15], Inverness Sheriff Court Criminal Processes 1783, ‘Precognitions Taken against Christian Grant & her Daughters’, 13 January 1783, f. 1.

¹⁹¹ *Ibid.*, f. 2.

¹⁹² *Ibid.*

no Cause of Complaint against John Fraser or his Wife and ... hereby do dismiss the said Complaint and absolve them simplicitor.¹⁹³

It seems clear that the judicial verve that had sustained the group of local men through their successful search at Torrangorm continued on to Foxhall, to the considerable detriment of John Fraser and Ann McDonald. A twenty-year old man named Donald Fraser who was one of the members of the search party notes that 'neither John Fraser or his Wife seemed in the least alarmed upon their house being searched',¹⁹⁴ and made no attempt to conceal the mutton within their home, which would have been obvious to anyone visiting the house.¹⁹⁵ Despite this, John Fraser and Ann McDonald were removed from their home by their neighbours and carried as prisoners to the justice of the peace court at Belladrum. Clearly, eating diseased meat, even within a period of profound scarcity, carried enough potential for negative social consequences that Fraser and McDonald were not willing to disclose the true source of the mutton found in their home to their closest neighbours. What this investigative process shows most clearly is that the powers temporarily vested in local men by the sheriff court system were open to rampant abuse. While Fraser and McDonald were fully absolved of any legal wrongdoing and released from custody, their forced transfer from their home to the sheriff court represented more than a passing inconvenience, and it does not seem that the men within the search party faced any consequences for their overzealous approach to crime investigation. The power imbalances this could potentially cause within communities, and the opportunities for flimsily justified, potentially vindictive actions undertaken with the full backing and support of the sheriff court obviously represents a considerable risk to individual liberty, and when considering the cases under study in this thesis, it should be remembered that the sheriff court system was infinitely fallible in the exercise of its duties.

¹⁹³ *Ibid.*, f. 3.

¹⁹⁴ *Ibid.*, f. 2.

¹⁹⁵ *Ibid.*, f. 3.

Returning to a consideration of the types of documentary evidence available within the criminal processes, declarations and precognitions are, fortunately, common in the surviving documentation for the Inverness sheriff court. Precognitions were essentially witness statements, gathered initially before a justice of the peace court or in the sheriff court itself, depending on the location of the alleged crime. Declarations and precognitions form the overwhelming bulk of sources consulted within this thesis, as they offer by far the greatest insight into the circumstances surrounding a given case, as well as the lives and opinions of those who witnessed crime. As Anne Crowther has commented in her discussion of the great value of this type of document to historians, 'precognitions are one of the most seductive historical sources imaginable'.¹⁹⁶ The administrative process for precognitions was consistent with the other court documentation discussed thus far, i.e., an execution to appear before a justice of the peace court or the sheriff court would be served upon a witness, who would then be required to travel and be precognosed on the facts of the case as they knew them. This was no small commitment, and considering the size of Inverness-shire's administrative area, the travel requirements for witnesses could be considerable. In the final chapter, a case involving witnesses travelling from Dumfries to Fort William to testify in the case against their daughter's murderer will be examined in close detail – interestingly it also features extracted copies of the various letters and certificates that had been provided to them by local administrators in Dumfries, such as their parish minister and the local sheriff depute, designed to aid them in their journey north.¹⁹⁷ It is not necessary to delve too deeply into the function and practice of precognitions at this point of the thesis, but it is worth noting that in terms of the practicalities of witnesses giving their statements in court, the perhaps obvious but most important aspect of this process was that witness precognitions were private, and the accused was not privy to the initial investigative intelligence-gathering

¹⁹⁶ M. A. Crowther, 'Criminal Precognitions and their Value for the Historian', *Scottish Archives*, Vol. 1 (1995), p. 75.

¹⁹⁷ NRS, SC29/53/55 [SC29/53/1791/5], Inverness Sheriff Court Criminal Processes 1791, 'Precognitions Agt. Michael Wilson alias Welsh', 1 August 1791, ff. 7-10.

carried out by the court. This specific aspect of court practice is very rarely visible within the surviving documentation, however there are some examples which shed more light on the matter. In a rape case dating from 1780, the accused, a man named Alexander McIntosh, submitted a petition to the sheriff court requesting access to the precognition process. His justification for this was explicitly a desire to punish those who had testified against him:

The Petitioner is at no loss to track the Author of this Injury so extremely [sic] prejudicial to his Character and the future peace of his family, And he hopes to be able to bring him to condign punishment ... And understanding that your Lop.¹⁹⁸ is ... precognosing witnesses upon the above Complaint even without the presence of the nominal Accuser, he has attended, and made many requests to obtain Access to your Lop. And the witnesses ... but by some means or other this Access has been refused both to him and his friends.¹⁹⁹

Given that this represents a bald attempt to circumvent the fair and full investigation of a crime, it is unsurprising that McIntosh's application was refused. The wording of this refusal is, however, particularly interesting for its justification of the existing precognition process, as understood by a contemporary sheriff substitute:

The Sherriff Substitute haveing [sic] heard this petition and that the present precognition is intended only for the Information and Government of His Majestys Councill & publick prosecutor so as they may be enabled to Judge if the Crime laid to the petitioners Charge is well founded and that they may have an opportunity if that is the Case of bringing him to Tryall & punishment for the same Refuses therefore the Desire of this petition as improper & Incompetent & unprecedented.²⁰⁰

This clearly demonstrates the process of how information was uncovered within witness precognitions during the court's investigative process, and the protocols established for its containment. The right of the accused to submit evidence to the court that might exculpate them did not extend to the ability to fully assess

¹⁹⁸ Shortened form of 'Lordship'.

¹⁹⁹ NRS, SC29/53/6 [SC29/53/1780/7], Inverness Sheriff Court Criminal Processes 1780, 'Petition for Alexr. McIntosh To The Sheriffs of Invs.', 30 December 1780, f. 1.

²⁰⁰ *Ibid.*, f. 2. All spellings are as written within the original document.

all the evidence gathered to prove wrongdoing. Although not mentioned, another obvious reason why someone accused of a crime would not be provided access to the statements made against them was the potential for witness intimidation, which can be seen occasionally within the criminal processes and which will be examined more fully in the later chapter on lawburrows.

Further documents within the collection, such as Criminal Summons, and Minutes in the Criminal Processes, represent a far smaller proportion of the surviving documentation and are somewhat self-explanatory in their form and function. Nevertheless, they also form a crucial component of the evidence consulted within the thesis. The criminal summons would set forth the case against the accused as investigated by the sheriff court, and this often reveals the judicial interpretation of the case by the procurator fiscal – a useful tool when establishing the precise legal terminology and technicalities at play in a given case. Given the level of detail in the surviving documentation, there is considerable scope for an in-depth study of the men who operated the Inverness sheriff court system, from writers, procurators fiscal, and sheriff officers, to clerks of court and the sheriff substitutes and deputed themselves. Although regrettably outwith the remit of this thesis, this record set provides an opportunity to study the eighteenth-century legal infrastructure in relation to town and burgh administration, as well as the obvious links to local gentry. The men in charge of legal administration and adjudication in Inverness at this time were a small group, and the power they wielded over the lives of Inverness-shire inhabitants represents an obvious source of interest for historians.

Although a full study of this group of men is not possible within this project, it is necessary to at least consider the figure of the sheriff depute for the bulk of the time period under consideration, Simon Fraser of Farraline. According to Alexander Mackenzie in his *History of the Frasers of Lovat* (1896), Farraline was appointed in May 1781,²⁰¹ which aligns with a huge increase in surviving court processes from this period onwards. As discussed briefly above, the 1777-80

²⁰¹ A. Mackenzie, *History of the Frasers of Lovat*, p. 546.

time period accounts for 28 of the surviving 368 cases from 1777-95, compared with 39 surviving cases for 1781 alone. However, it is impossible to tell whether this is due to an increase in court business, or perhaps simply a change in protocol surrounding record-keeping. Farraline remains a constant figure in the records until the end of the period under study, and indeed remained sheriff depute of Inverness until 1810, when he died prematurely, apparently drowning while bathing in the sea.²⁰² The early years of his appointment saw a revolving door of sheriff substitutes, until the appearance of Thomas Gilzean of Bunachton in 1785, who remained sheriff substitute in Inverness until his retirement in April 1828.²⁰³ Gilzean's obituary, published in the *Inverness Courier* on 5 April 1843, lists his considerable number of other appointments. He was, variously, and at times concurrently, Comptroller of Customs at the port of Inverness, Distributor of Stamps and Collector of Stamp Duties for Inverness-shire, Provost of Inverness, Chairman and Treasurer of the Royal Academy, and apparently one of the principal organising minds behind the subscription-funded Northern Infirmary,²⁰⁴ which was founded in 1803.²⁰⁵ A petition was submitted to the Inverness sheriff court by Thomas Gilzean on 18 March 1785, in his role as Comptroller of Customs, describing an incident of deforcement against revenue officers and requesting a precognition of the facts of the case, which was granted by the sheriff depute, with witnesses to be precognosced, unusually, at Fort George, on 21 and 22 March.²⁰⁶ Gilzean's obituary states that he was appointed sheriff substitute in April 1785, two years after moving to Inverness to begin his role as Comptroller of Customs of the town's port.²⁰⁷ Although the obituary that appeared in the *Inverness Courier* did not describe the process by which he was appointed sheriff substitute, and there does not appear to be any

²⁰² *Ibid.*, p. 548.

²⁰³ *Inverness Courier*, issue published 5 April 1843, p. 3. Gilzean's work as sheriff substitute will be discussed again later in this section as part of the section on the use of language in the sheriff court.

²⁰⁴ *Ibid.*

²⁰⁵ C. Fraser-Mackintosh, *Letters of Two Centuries Chiefly Connected with Inverness and the Highlands from 1616 to 1815* (Inverness, 1890), p. 313.

²⁰⁶ NRS, SC29/53/30 [SC29/53/1785/11], Inverness Sheriff Court Criminal Processes 1785, 'Petition of Thomas Gilzean', 18 March 1785, ff. 1-3.

²⁰⁷ *Inverness Courier*, 5 April 1843, p. 3.

surviving documentation concerning the appointment within the criminal processes of the Inverness sheriff court, it could reasonably be assumed that Gilzean's conduct during this deforcement case may have brought his legal credentials to the attention of the sheriff depute. One final introductory note on Thomas Gilzean is necessary here, namely his repeated mentions in his nephew, Alexander Gilzean's entry in University College London's *Legacies of British Slavery* database.²⁰⁸ The evidence cited in Alexander's entry, authored by Jim Brennan, makes clear that Thomas supported him financially throughout his life, including opening an account for his support in 1816. Alexander was recorded in 1817 as the owner of a property in Jamaica which included a resident population of dozens of enslaved people.²⁰⁹ This demonstrates that money supporting colonial projects, and reciprocally, profits made as a result of the enslavement of human beings, were moving to and from Inverness. Brennan's research shows that at least one of the men responsible for the administration of the law in Inverness at this time was directly supporting and profiting from slavery.

As sheriff-depute, Farraline similarly had extensive responsibilities in Inverness civic life. This can be seen most clearly in his involvement in the administrative response to famine, detailed in Charles Fraser-Mackintosh's *Letters of Two Centuries Chiefly Connected with Inverness and the Highlands*, published in 1890. In the early 1780s, the Highlands experienced recurrent poor harvests and adverse climatic conditions, leading to food dearth that approached outright famine. A poor harvest in 1782 was compounded the following year by the eruption of the Icelandic Laki volcano, which emitted a sulphurous volcanic haze which caused dramatic and immediate changes to the climate of Northern Europe. The advance of this aerosol veil has been examined in detail by Thorvaldur Thordarson and Stephen Self in their 2003 article, 'Atmospheric and environmental effects of the 1783-1784 Laki eruption: A review and reassessment'. They posit that the haze, and its resulting acid rain,

²⁰⁸ J. Brennan, 'Alexander Gilzean', *Legacies of British Slavery Database*, <https://www.ucl.ac.uk/lbs/person/view/19360> [accessed 3rd August 2025].

²⁰⁹ *Ibid.*

had reached Caithness by the 10th of June 1783.²¹⁰ In August, the *Caledonian Mercury* published a report from Copenhagen describing the adverse effects caused by this strange weather, which primarily manifested in a fog that persisted regardless of wind, and which seemingly damaged crops and trees.²¹¹ In the Highlands, this phenomenon and its ensuing dearth became known as ‘the year of the white peas’.²¹² The sheriff court was central to the institutional response to this crisis, as evidenced in a letter, published by Fraser-Mackintosh, describing Farraline’s efforts to distribute meal to stave off famine. The letter is dated 11 December 1783, therefore offering crucial insight into the crisis as it extended past its second successive poor harvest. It outlines how meal had been delivered to Inverness-shire as supplies for famine relief intended to be sold below market rate. It was then ‘distributed by the Barons of Exchequer’²¹³ among the parishes, with Farraline personally responsible for communicating with the parish ministers – or, where ministers were absent or unavailable, the parish heritors – to negotiate the necessary amounts of bolls to be assigned to each area.²¹⁴ This would have been a complex administrative task at any time, and the desperation and dearth being experienced in Inverness-shire undoubtedly worsened the situation. Fraser-Mackintosh published the letter in isolation, meaning that the context of the preceding and following correspondence is not included, although it seems that the ongoing conversation related to efforts by the letter’s intended recipient, Captain John Mackintosh of Kyllachy, to secure further supplies for his area of responsibility, after apparently learning that neighbouring areas had received more relief than his own. The remaining supplies had been promised to various other parishes, and until the following week, Farraline claimed that ‘I have it not in my power to give above a boll to any mortal’.²¹⁵ That single boll was entrusted to the bearer

²¹⁰ T. Thordarson and S. Self, ‘Atmospheric and environmental effects of the 1783-1784 Laki eruption: A review and reassessment’, *Journal of Geophysical Research*, Vol. 108, No. D1 (January, 2003), p. 8.

²¹¹ *Caledonian Mercury*, issue published Saturday 23 August 1783, p. 2.

²¹² C. Fraser-Mackintosh, *Letters of Two Centuries*, p. 303.

²¹³ *Ibid.*, p. 304.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, p. 305.

of the letter, with a promise that if the remaining supplies were not claimed, Kyllachy could then be supplied with more.²¹⁶ This administrative minutiae offers a fascinating glimpse into the efforts by Inverness-shire's wider network of men with civic power to ameliorate the misery being experienced throughout the county, although as seen above in the events at Torrangorm, Foxhall and Fassock farms, these efforts did not sufficiently cushion communities from starvation. It should also be noted that such efforts by the landowning class to aid communities during crises were not unusual nor restricted to the Inverness-shire area. The issue of the *Caledonian Mercury* published on Wednesday 22 January 1783 featured an anonymous letter from Aberdeen, discussing contemporary attitudes to charity and crisis response. It details efforts in Aberdeen to establish a subscription famine relief fund, managed by 'the Committee for effectually supplying the town with grain',²¹⁷ with the writer then commenting:

When, as at present, the country is under the influence of a bad season, it is reasonable that the general distress should be, as much as possible, alleviated by those ranks of the community best able to bear it.²¹⁸

Therefore, the efforts made by the landowning elites to mitigate starvation in the parishes under their administrative attention tied into wider enlightenment ideas surrounding class and gender. While this certainly could be interpreted as supporting the paternalistic – and certainly idealistic – view of landowners as a protector class for the lower orders, it is also simply a factually accurate statement; when severe crises such as the dearth of the early 1780s hit communities who habitually lived at subsistence levels, these communities did not have access to the resources necessary to buffer themselves from the risk of starvation. However, to follow this thread too far would risk infantilisation of these communities. Robert Dodgshon has written extensively on the relationship between the Highland landscape and those who have inhabited it, and in his

²¹⁶ *Ibid.*

²¹⁷ *Caledonian Mercury*, issue published Wednesday 22 January 1783, p. 2.

²¹⁸ *Ibid.*

2004 article 'Coping with Risk: Subsistence Crises in the Scottish Highlands and Islands, 1600-1800', he argues that:

major subsistence crises occurred in a knowing context, a context in which communities had evolved practices of husbandry, customary forms of social response, and strategies of food procurement that helped to combat recurrent scarcities and famine.²¹⁹

Food scarcity was a chronic rather than episodic issue for Highland and Hebridean agricultural communities, and this contextualises the particular severity of this crisis in the early 1780s. It can therefore be understood as a more extreme version of recurrent low-level subsistence crises that were being routinely navigated by Highland communities. The urgency of the response to this particular dearth by the well-established system of civil administration in Inverness demonstrates primarily that the standard mitigation strategies practiced in rural communities had failed, due to several bad harvests, and catastrophic consequences from volcanic pollution which would have been impossible for eighteenth-century society to predict or mitigate. Although it has not been possible to delve much further into the field of environmental history within this thesis, there is considerable scope to expand upon these themes in future research. At the risk of stating the obvious, the sheriff court was not only a legal entity – it was a physical place, which administered the law over a sprawling and geographically diverse area. The communities served by the Inverness sheriff court were predominantly rural and many were extremely remote. Criminal cases that occurred in these areas, while sometimes tried at court premises in Fort William, were usually tried in Inverness. This necessitated the physical transportation of victims, witnesses and those accused of crimes over large distances. The practical, logistical factors at play in many of these cases are crucial to their wider interpretation, and this aspect of the Inverness sheriff court criminal processes will be considered throughout the following chapters.

²¹⁹ R. A. Dodgshon, 'Coping with Risk: Subsistence Crises in the Scottish Highlands and Islands, 1600-1800', *Rural History*, Vol. 15, No. 1 (2004), p. 2.

Additionally, the level of time and involvement necessitated by this famine relief response does not suggest that Farraline's civic duties were minor or subordinate to his role as sheriff depute. It should therefore be remembered that the various other duties undertaken by the personnel of the sheriff court were happening concurrent to the cases under consideration, and these men's importance to Inverness civic life separate from their court practice cannot be overstated. As an advocate, Farraline also would have had an Edinburgh legal practice to manage, further adding to his stack of responsibilities and titles. Alexander Murdoch's foundational monograph *The People Above: Politics and Administration in Mid-Eighteenth Century Scotland*, published in 1980, defines the five separate institutions which formulated civic county governance in Scotland as 'the Sheriff-depute, the Commissioners of Supply, the Justices of the Peace, the county freeholders, and the parish'.²²⁰ This cements the idea that legal practice served a crucial role in wider civil administration. Murdoch also discusses the concurrent administrative duties bestowed upon sheriff deputies, noting that in addition to their judicial responsibilities, they also served as the primary point of contact between localities and central government.²²¹ This resulted in a sprawling list of assignments and obligations including, but not limited to, ascertaining grain prices (of crucial importance, and providing further context on Farraline's famine relief efforts in the early 1780s), various electoral duties during parliamentary elections, quelling riots and pockets of political unrest, and a myriad of other duties involving the maintenance and communication of various forms of legal records and documentation.²²² Murdoch argues that the sheriff depute was 'the most important official in Scottish local government by the end of the century',²²³ and given the scope of the powers available to Farraline and his peers, it would be difficult to disagree.

We see a glimpse of Farraline's home life within a case of forgery heard by the sheriff court in 1787. From the surviving case documents, it seems that

²²⁰ A. Murdoch, *The People Above: Politics and Administration in Mid-Eighteenth Century Scotland* (Edinburgh, 1980), p. 22.

²²¹ *Ibid.*, p. 23.

²²² *Ibid.*

²²³ *Ibid.*, p. 22.

Alexander Reid, aged eighteen, was attempting to travel to Urquhart to visit a relative. In his declaration (which is repeatedly contradictory), he alleged that his money for the journey was stolen in Aviemore, and he decided to forge a letter from Lord Dunsinnan (a Court of Session judge) to the sheriff depute, asking him to pay Reid six pounds.²²⁴ He brought this letter to the sheriff depute's home – although he does not appear to make a clear account within his declaration of how he found out this address – and presented it to the sheriff depute's wife, who remains notably unnamed within the court records but is identified within Mackenzie's *History of the Frasers of Lovat* as Margaret Fall, 'a lady from the South'.²²⁵ According to Reid's declaration, immediately after meeting Fall, Farraline arrived home, realised the letter was a forgery and apprehended him.²²⁶ It would seem, somewhat unsurprisingly, that attempting a crime within the sheriff depute's own home inspired swift justice; Reid specified that 'he brought the said Letter this Evening to the Sheriff's Wife',²²⁷ confirming beyond doubt that the court was convened to hear Reid's declaration almost immediately. Witness precognitions were collected by Farraline the next day, when four men testified as to their knowledge of Reid's actions.²²⁸ However, more interesting than the actual precognitions is the fact that arguably the most important witness, Margaret Fall, did not testify. This is made more odd by Reid's statement in his declaration that although he brought the forged letter to Farraline's home and spoke to his wife, 'he did not ask any money of her'.²²⁹ We can take this to mean that Reid claimed to make no verbal demands for money in addition to the forged letter which explicitly requested money from Farraline. However, this would seem to be a point of fact worth clarifying in the case, and the absence of testimony from Fall makes this more ambiguous than is

²²⁴ NRS, SC29/53/43 [SC29/53/1787/33], Inverness Sheriff Court Criminal Processes 1787, 'Letter addressed to Simon Fraser Esq. of Farralane.', 19 January 1787.

²²⁵ A. Mackenzie, *History of the Frasers of Lovat*, p. 548. According to Mackenzie Fall died on 5 June 1796.

²²⁶ NRS, SC29/53/43 [SC29/53/1787/33], Inverness Sheriff Court Criminal Processes 1787, 'Declaration of Alexander Reid', 24 January 1787, f. 2.

²²⁷ *Ibid.*, f. 2.

²²⁸ NRS, SC29/53/43 [SC29/53/1787/33], Inverness Sheriff Court Criminal Processes 1787, 'Precognition Agt. Alexr. Reid', 25 January 1787.

²²⁹ NRS, SC29/53/43 [SC29/53/1787/33], 'Declaration of Alexander Reid', f. 2.

necessary. This fits into a wider trend observed within the sheriff court criminal processes, which is the general paucity of testimony from the elites, and, more notably for the purposes of this thesis, the specific lack of elite women's testimony within the court records. As this is a phenomenon necessarily defined by absence, it is difficult to examine this lacuna directly. Despite this, it remains an important feature of women's experiences within the court, if the only women who experienced and interacted with the court system were those from a lower-order background. As the focus of this thesis is explicitly the experiences and lives of the lower orders, as examined within and through court records, this absence does not represent an evidentiary shortcoming of the documents under study. However, it remains a point of interest and would seem to suggest that the dominant gender and class narratives of the period made elite women somewhat exempt from the vagaries of the judicial process, at least within Inverness-shire. One last point to take from this case is the blatant conflict of interest in Farraline examining the accused and the witnesses himself. While nothing further can be concluded from this other than the fact that the highest personnel of the Inverness sheriff court were apparently more than willing to use the court to act in their own interests, it is worth bearing in mind this tendency towards a certain laxity of court practice when the other cases under study in this thesis are considered.

Although an in-depth examination of the role of the kirk session within the wider Inverness judicial system is not the analytical aim of this thesis,²³⁰ it is worth noting in brief that co-operation between the secular and church court systems appeared to be common. For example, in the initial petition submitted in a 1785 case of child murder, the procurator fiscal stated that the body of a newborn, 'with marks of violence upon it',²³¹ had been found near the garrison

²³⁰ In addition to Rosalind Mitchison and Leah Leneman's landmark studies on the kirk session, and Alastair Mutch's fascinating analysis of kirk administrative practices, both discussed above, see also: A. Glaze, 'Women and Kirk Discipline: Prosecution, Negotiation, and the Limits of Control', *Journal of Historical Studies*, Vol. 36, Issue 2 (2016), pp. 125-142, for a study of 17th century women's interactions with the Canongate kirk session.

²³¹ NRS, SC29/53/30 [SC29/53/1785/15], Inverness Sheriff Court Criminal Processes 1785, 'Petition To The Sheriff of Invs.', 16 April 1785.

of Fort George on 15 April 1785. In response, the sheriff depute Simon Fraser of Farraline requested that the ministers and kirk sessions of the parishes of Ardersier, Croy, and Petty, along with the assistance of local midwives 'and other skilfull [sic] persons',²³² should inspect and question women in their parishes in order to locate the mother of the deceased child.²³³ It is not possible to ascertain how usual, or indeed unusual, this level of co-operation and surveillance was. However, clearly the avenues of communication were open, and the investigation of crime could be a multi-institutional effort. Legal practice in Inverness, as evidenced most clearly in the business of the sheriff court, must therefore be seen as part of the wider civil and societal infrastructure of Inverness-shire. The men who wielded legal power in the sheriff court also wielded administrative power within Inverness-shire civic life, and had close connections throughout business, administration, and the church courts. Although the sheriff courts sat firmly below the superior courts of Session and Justiciary, it is more useful to think of the sheriff court as a locus of various overlapping institutions, all managed and controlled by the same small group of men, all of whom wielded enormous power over the inhabitants of Inverness-shire in the eighteenth-century.

Criminal misconduct by court personnel

There are also several cases within the surviving record where court personnel themselves were charged with crimes and even put on trial. One such case will be examined in thorough detail in the later chapter on resistance to judicial authority, in that it features court personnel killing a civilian and apparently facing no serious consequences. However, there were also cases featuring potential impropriety in the court which resulted in far less lethal outcomes. In 1792, a serving sheriff clerk depute in Inverness sheriff court, John Grant, was charged with the crime of forging a subscription on a bill.²³⁴ Grant

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ HCA, L/INV/SC42/5/10, 'Petition The Pror Fiscalls agt. John Grant 1792'.

was tried in the circuit court, found guilty by an assize, and then transported to Edinburgh to be sentenced to banishment. Grant published his own trial documents in 1793, as part of an effort to prove that the case had been maliciously brought against him by his 'enemies',²³⁵ and if not exculpate himself, then attempt to establish if impropriety had taken place during his trial. He hoped that 'legislature may be induced to prevent such in future, by adopting measures to purify the streams of justice'.²³⁶ Grant's case for his own innocence seemed to hinge on most of the witnesses appearing against him having committed perjury specifically in order to ruin him, although, perhaps tellingly, he does not detail how such an extreme enmity might have originated.²³⁷ Another recurring character within the Inverness sheriff-court documents, particularly in the early years of the period under study, is Alexander Macpherson. Although Macpherson was at one point a sheriff substitute in Inverness sheriff court, and afterwards a frequent procurator admitted to argue before the court,²³⁸ his interactions with the sheriff court system were often mired in controversy. This somewhat fractious relationship culminated in 1787 with a process brought against Macpherson for vitiation, or the unlawful alteration of court documents. A copy warrant of imprisonment against Macpherson in this case has survived in the collections of the Highland Council Archive, and details much of the relationship between Macpherson and the other sheriff court personnel. Dating from June 1788, it stems from a charge of improper court conduct levelled at Macpherson, apparently for directing personal insults towards the sheriff depute and other court personnel during the court proceedings for his vitiation case. It identifies Macpherson as 'a procurator regularly admitted before this Court',²³⁹ and states that he:

notwithstanding of the duty incumbent on him to maintain the Dignity of the Court, has been guilty of a series of improper Conduct, vilifying to the

²³⁵ *The trial of John Grant, sheriff-clerk depute of the shire of Inverness, before the circuit court of justiciary held there, on May 1 1793* (Edinburgh, 1793), p. 37.

²³⁶ *Ibid.*, p. 3.

²³⁷ *Ibid.*, p. 38.

²³⁸ HCA, L/INV/SC/32/27, 'Extract Warrant of Imprisonment pronounced by the Sheriff Depute of Inverness Agt. Alexander Macpherson Writer in Inverness 26 June 1788', f. 1.

²³⁹ *Ibid.*

Character of the Sheriff depute, the procurator for the prosecution, and many of the witnesses adduced.²⁴⁰

Macpherson's alleged impropriety was detailed over the course of the warrant and seems mostly to have been various veiled accusations of corruption and improper conduct, particularly by the sheriff depute, Simon Fraser of Farraline. For example, he is quoted in the document as stating to Farraline, 'I know my duty as a Pannel better than your [Lordship] does the Administration of Justice'.²⁴¹ This pronounced grudge did not seem to extend to all of the active court personnel within the court at that time, as he was later quoted as having no objection to the calling of the sheriff substitute, Thomas Gilzean, as a witness, stating 'I know him to be an honest [sic] Man than ever I knew your [Lordship] to be'.²⁴² The warrant explains that these and other 'horrid oaths'²⁴³ were the result of an 'ill grounded Resentment seemingly entertained by the said Alexander Macpherson against the sheriff depute',²⁴⁴ although there is no explanation as to what the cause of this resentment may have been. Without a comparative study with another sheriff court, it is difficult to say with any certainty how common such animosity may have been between procurators and sheriffs in the sheriff court system at this time, or, more widely, with what level of regularity court personnel were charged by the court with alleged wrongdoing. It is, however, enough to note that even amongst the incomplete surviving documents, the Inverness sheriff court seems to have been significantly affected by personal enmity and possible irregularity of conduct, with some court personnel, such as John Grant, tried for serious crimes, while others, as will be seen later in this thesis, faced no lasting legal consequences for obvious instances of impropriety. These cases represent two of the more dramatic examples of criminality relating to legal practice in Inverness for which documentation survives in the criminal processes for the period 1777-95. There

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, f. 3.

²⁴² *Ibid.*

²⁴³ *Ibid.*, f. 4.

²⁴⁴ *Ibid.*

is a further wealth of evidence within these documents relating to legal practice and this small bubble of men who exercised patriarchal power through the apparatus of the sheriff court, to the extent that it would have been entirely possible to make this a primary theme of the thesis. The analysis of these documents present within this thesis has developed along other, equally valid lines, but it is hoped that by highlighting here the richness of the available documentary evidence, that historians of local politics and administration may find this a useful source for future studies.

The Tolbooth

The Inverness tolbooth was the centre of the Inverness-shire judicial system. It was where the vast majority of court business was conducted, and where alleged criminals denied bail were held in advance of their trials. The clearest image of conditions in the tolbooth is obtained through petitions, sent by those imprisoned there to the sheriff depute, usually requesting bail or some form of relief from the difficulties they had encountered within the building. In 1790, a family of three, Jean Cuming, her husband Alexander Burgess, and their adult daughter Ann Burgess, were accused of theft of various articles from the home of Adam Stewart, a farmer in the parish of Cromdale.²⁴⁵ In Ann Burgess' petition, dated 2 February 1791, she alleged that during the search of her father's house that was carried out during the initial theft investigation, Adam Stewart stole a quantity of clothing from the house, outwith the authority granted by the justice of the peace warrant. She requested the return of these articles and stated that she had directly requested this of Stewart several times but had been denied. She specifically desired the clothes as:

these trivial articles would be of infinite use and service to the petitioner in her unfortunate situation and forlorn condition confined within the

²⁴⁵ NRS, SC29/53/54 [SC29/53/1790/13], Inverness Sheriff Court Criminal Processes 1790, 'Petition of William Cuming', 15 March 1790.

walls of misery and despair in helping to screen her from the piercing rays of a frigid season.²⁴⁶

It is likely that the language used in petitions submitted from the tolbooth, which were most commonly requests for bail, would be purposely emotive in order to best state the petitioner's case for release. However, given the familiarity the court personnel would have with the tolbooth, which was a vital piece of court infrastructure, it would not have been possible for petitioners to invent poor conditions or health risks that were not present in some form. Additionally, in this case, Burgess was not requesting release, as she had already been convicted and was awaiting transportation. Burgess' need for clothing could have been partially explained by preparations for her upcoming transportation, however, the urgency of the request and the mention of the 'frigid season' suggest that Burgess' priority in the tolbooth was her survival and comfort in the short term, while she was imprisoned within the 'walls of misery and despair' of the tolbooth. Her request may have therefore been motivated by a need to provide her own bedclothes when imprisoned, and an awareness that a lack of protection from the cold could prove dangerous. Both Ann and her father were convicted and scheduled to be transported for life, but Jean Cuming's fate is unclear. For women, a petition to the sheriff depute was their only method of obtaining release from the tolbooth, either through an approved request for bail, or a successful pre-trial request for banishment, which seems to have been common amongst those accused of crimes which had a sentence of execution as a potential outcome. However, men retained the dubious benefit of military enlistment as a quick route out of the tolbooth, and usually thus evaded standing trial at all. Military enlistment, particularly to far flung deployments in the 'East Indies', seems to have been regarded by the court hierarchy as another method of effecting banishment, with the added benefit of bolstering the British army. The gendered practice of forced military recruitment, as seen through the records of the Inverness sheriff court criminal

²⁴⁶ NRS, SC29/53/55 [SC29/53/1790/13], Inverness Sheriff Court Criminal Processes 1791, 'Petition of Ann Burgess', 2 February 1791.

processes, deserves more study than is possible within this thesis. However, it is a topic of relevance within one of the case studies under examination in the chapter on rape and sexual assault and will be discussed in more detail there.

There are some oddities in the use of the tolbooth which can only be glimpsed through the surviving administrative paperwork, rather than through case documents. One of these is through community and eventually judicial efforts to deal with the issue of a man suffering from severe mental illness, Angus Smith, and the impact his illness had on his family and neighbours. Despite apparently having committed violent crimes, Smith seems to have been drawn into the punitive measures of the court system only because there was little to no specific mental health care available at the time for the lower order population. This interaction, therefore, allows an in-depth examination of both the hierarchical structure of the Inverness judicial system, as well as contemporary attitudes to mental illness. The narrative of Smith's interactions with the sheriff court are described within a petition and warrant, requesting the transmission of Angus Smith, a farm labourer residing in Drumnadaroch, Arisaig, to Inverness jail. In the case documentation, Smith is described as 'dangerously insane', and the designation of his condition as posing a risk to himself and others was a crucial aspect of the case. Although this example is unusual, through it, the convergence between families and communities, and the wider state apparatus of the sheriff court can be clearly seen. In 1796, Smith's mental health worsened – the petition describes how in September, he began to show:

symptoms of Insanity, & these by several fits increased [sic] to such a degree of violence as threatened imminent danger to his own wife & Children, his neighbours & to society at large by making repeated attacks on several individuals, & attempts [sic] to destroy himself.²⁴⁷

The petition continues, describing the attempts by Smith's immediate community to resolve the issue:

²⁴⁷ HCA/L/INV/SC41/3, 'Petition and Warrant to Convey Angus Smith Prisoner to Inverness as Insane in Mind 1796', f.1.

That his neighbours was [sic] under the necessity, to bind him hands & feet to secure his person to prevent his destroying himself or others for several weeks of the months of September & October last, but being tired of that charge & no hopes of his recovery, They called a meeting of the Gentlemen of the Country to consult what should be done ... Mr John McDonald of Borradil, with much humanity took him to his own family appointing two of his servants to attend him night & day.²⁴⁸

Although one could argue the cruelty of binding the hands of feet of someone in an acute mental health crisis, it is clear that the violence Smith was capable of made these measures seem unavoidable to those attempting to aid him. It is also interesting to note the clear escalation in terms of who was needed to resolve this crisis. Smith's poor mental health and resulting violence began within his own household, with violence directed towards his wife and mother. This then became known more widely and was discussed by his neighbours and community. When Smith did not recover, his community appealed to the next level of authority, the gentlemen of the country. This demonstrates how gender and class underpinned the decision-making processes of the middling and lower orders in the Highlands during this period. The paternalistic role played by the landed gentry was a key element of the secular social hierarchy that sought to deal with crime, and which ultimately culminated in the High Court of Justiciary. The levels of this hierarchy between the gentry and the High Court are described in the rest of the petition. Despite John McDonald's efforts to care for Smith 'with every unity & calmness to recover a man in his unhappy state',²⁴⁹ after several weeks Smith's health had not improved, and it was judged 'that he endangered the lives of his family therefore he & his neighbours stated the unfortunate man's case to the justices of peace of the Shire of Inverness'.²⁵⁰ This marks the first point of contact between those attempting to protect Smith's family, as well as Smith himself, from the episodic violence caused by his mental illness, and the secular court system in Inverness-shire. The justices of the peace for Arisaig, at the request of those already acquainted with the case, requested

²⁴⁸ *Ibid.*, ff. 1-2.

²⁴⁹ *Ibid.*, f.2.

²⁵⁰ *Ibid.*

that Smith be transported to Fort William.²⁵¹ The petition ends with a request, from Archibald McLachlan, the procurator fiscal of the Fort William district of Inverness-shire, to the sheriff depute, to transport and hold Smith in surroundings more appropriate for his situation. As McLachlan states:

the Garrison of Fortwilliam being only a jail for State Criminals & not a proper prison for persons in the sd. Angus Smiths present unhappy state as insane in mind ... to convey the person of the said Angus Smith prisoner from Fortwilliam to the County Jail of Inverness or other madhouse there fit for person's in his unhappy state there to ly at the expence of the County untill he is found to recover of his insanity or otherwise liberated in due course of Law according to justice & humanity & the saftey of the Leiges.²⁵²

The petition was responded to by the Magistrates of Inverness, who stated that:

The Magistrates having considered the preceeding [sic] petition and warrant refuse receiving Angus Smith as a prisoner in terms of the warrant in the Jail having no Madhouse or place for persons in his unfortunate situation, but from motives of humanity and to give him the benefit of medical assistance and at the request of the Sheriff Depute of Inverness they agree to detain him in a Cell in the Prison for a space not exceeding one month under the care of the Jailers or other persons to be employed.²⁵³

Given the usual conditions of the tolbooth as described above, an imprisonment there for the purposes of medical rehabilitation seems unlikely to have been successful. However, it is worth noting the attempts made by each stage of this secular hierarchy to remedy the situation in a way that recognised Smith's illness as the cause of his crimes. It is also interesting to see that both the procurator fiscal and the sheriff substitute for the Fort William district clearly had no knowledge of whether a medical facility for those suffering mental illness existed in Inverness, such was the unusual nature of Smith's case.

²⁵¹ *Ibid.*

²⁵² *Ibid.*, ff. 2-3. All incorrect spellings are preserved from the phonetic cadence of the original document.

²⁵³ *Ibid.*, f.4.

Every level of this secular, legal hierarchy was male, and rooted in a patriarchal, deeply paternalist social order that positioned the male landed gentry as having a social responsibility to their social inferiors. This patriarchal structure can also be seen within Angus Smith's own family unit, and at several points in the petition and subsequent warrant it is noted that, besides the threat Smith posed to his own life, the primary victims of his violence were his wife, children, and his mother, all of whom he apparently attempted to physically harm or even kill. However, aside from these mentions of harm, and the overall attempt to protect Smith's family from his violence, they are largely sidelined in the record. It is unfortunate that the precognitions, mentioned in the petition, do not seem to survive, as it is very possible that Smith's family may have testified before the justices of the peace on the extent of Smith's mental illness and violent tendencies. However, the surviving record solely details the attempts to deal with this issue at the community level, and the wishes of Smith's family have not survived. Although Smith's wife, mother and children remain nameless within the extant documents from this case, it is clear that the primary motivation behind the community desire to remove Angus Smith from his home, was an attempt to stop, or at least mitigate, the violence against women being perpetrated by Smith as a result of his mental illness. The criminal processes offer a wealth of precognitions and depositions by women with which we can directly engage, with caveats surrounding the issue of authenticity of quotations from women. However, to focus only on these documents would obscure the full richness of evidence about women's lives contained within this collection. A large number of people in Smith's immediate community intervened in his home life because the violence perpetrated by Smith against his female family members was deemed unacceptable. Smith's removal from his home was a preventative, protective measure for Smith's family but also for Smith himself, motivated by compassion and a recognition that Smith's actions were caused by illness, rather than a deficit of character. To have evidence of this kind of community mobilisation, in this level of detail, with a description of exactly how the issue was escalated through the various levels of the court and county infrastructure, is fascinating. This is the only case of its kind found during

this period, and so wider conclusions about the treatment of mental illness, or the prevalence of attempts to prevent violence against women, are impossible to draw. However, the insight into the actions of one community is invaluable, not least because of their rarity, and that value is not lessened by its lack of general applicability.

Physical descriptions within court documentation

One aspect of those who came into contact with the sheriff court system which is notable in its almost complete absence from the written record is descriptive evidence about the physical appearances of accused, victims, or witnesses. One document which does consider this can be found in the records of an assault and hamesucken case heard by the court in 1782-3. The full case record involves a sprawling account of a dispute between rival families of tinkers – or itinerate craftspeople – wherein an assault was perpetrated by one family on another. Most relevant here is a short document relating to the transportation of two of the accused, Mary McDonald and her husband Alexander Chisholm, to the tolbooth in Inverness. The descriptions were taken down in the presence of Charles McKinnon, a justice of the peace in Inverness-shire, but appear from the idiosyncratic nature of the letter forms to have been written by someone less experienced with writing. There are considerable differences in how Chisholm and McDonald are described. The document, titled ‘Description of Alexer. Chisholm Tinker’, describes Chisholm thoroughly and solely in terms of his physical appearance - he was five foot nine, brown haired, blue eyed, and ‘rather stout’.²⁵⁴ Mary McDonald was described next, although instead of naming her, the relevant section of the document is labelled simply as ‘Description of [Chisholm’s] wife as acknowledged by himself’.²⁵⁵ McDonald was, apparently, ‘a lusty stout broad shouldered woman with a strong and loud voice. In appearance very impudent and bold. Her hair dark brown.’²⁵⁶ Although the

²⁵⁴ NRS, SC29/53/13 [SC29/53/1782/1], Inverness Sheriff Court Criminal Processes 1782, ‘Description of Alexer. Chisholm Tinker’, 19 November 1782, f.1.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

description was apparently approved as accurate by Chisholm, Charles McKinnon notes directly beneath McDonald's description that it had been recorded by Normand McDonald, perhaps a sheriff officer or another official, who is therefore the likely scribe of the document. The differences in description are obvious, and it is fascinating to note that Mary McDonald appears to have been described almost exclusively in either gendered terms such as 'lusty' – defined in the DSL in relation to the description of women's appearances as meaning 'fair, beautiful, lovely'²⁵⁷ – or in terms of how her behaviour, rather than her appearance, breaches acceptable standards of gendered presentation. In fact, other than usefully describing her hair as dark brown, it does not appear to be a description designed, as it was apparently intended to have been, as a method of quickly and accurately identifying a prisoner. Indeed, it is difficult to imagine what a 'very impudent and bold'²⁵⁸ appearance may look like. Given the sample size, it is impossible to positively conclude that McDonald's description, when compared with her husband's, was irreparably coloured by the misogyny of her time. However, given that she was not even named within the document, its utility as to its stated purpose can safely be assumed to be nil.

There is only one other document discovered within the criminal processes of the Inverness sheriff court which describes the physical appearance of one accused of a crime. It was produced in relation to a case of theft investigated by the Inverness sheriff court in 1788. The accused, William Leslie or Lesly, had allegedly stolen various items (mostly different quantities of cloth, alongside two looking glasses)²⁵⁹ from the home of a man named Duncan McKay. McKay submitted his petition to the 'Justices of Peace for the County of Inverness or any one of their Number'²⁶⁰ on 17 July 1788, after apparently identifying many of the articles stolen from him in Leslie's possession. Leslie was described as

²⁵⁷ "Lusty *adj.*". *Dictionary of the Scots Language* (2004). Accessed 3 Aug 2025 [<http://www.dsl.ac.uk/entry/dost/lusty>].

²⁵⁸ NRS, SC29/53/13 [SC29/53/1782/1], 'Description of Alexer. Chisholm Tinker', 19 November 1782, f.1.

²⁵⁹ NRS, SC29/53/44 [SC29/53/1788/2], 'Petition Duncan McKay Agt William Lesly', 17 July 1788, f.1.

²⁶⁰ *Ibid.*

'slender made about five feet 4 inches high. Wears a white Cloth Coat, black vest & breeches, long white hair & a Cutt mark in his left Cheek'.²⁶¹ The document also, interestingly, describes his employment history; he had lived in London for five years where he was trained as a hairdresser, after which in 1772 he went to America 'as a Soldier in the 84th Regiment'.²⁶² He apparently returned from America in 1786, and resided once again in London for a year before travelling to live in Dornoch with his father about a year before the court proceedings commenced. This level of granular detail may seem like an unnecessarily thorough record of the life of the accused, and clearly the rarity of this type of document implies that this kind of document was rarely required in a criminal court case. Despite this, it represents an extraordinary insight into the life of a lower-order man in the late eighteenth century. Notwithstanding his social status, Leslie was geographically mobile, apparently spending fourteen years in America and a cumulative six years spent in London. It also demonstrates the constant presence of military recruitment and service in the lives of lower-order men during this period, a theme which will be expanded upon in this thesis' later chapter on rape. The surviving documentation for this case also reveals a crucially important aspect of the wider sheriff court system, but one which can be rarely seen within the Inverness criminal processes. In a letter addressed to Simon Fraser of Farraline, dated 28 October 1788, the sheriff substitute of Sutherland, Hugh McCulloch, answers Farraline's request for information on Leslie, apparently being well-acquainted with both the man and his penchant for stealing cloth. McCulloch describes him as 'not Sound in Judgement, particularly since his return to the Country from being a Soldier, & when he got Drink, To which he was much adicted [sic]'.²⁶³ In addition to adding yet further detail to the unusually ample quantity of documentary evidence regarding William Leslie's life, this document also demonstrates cooperation between different sheriff courts, showing what must have been a crucially important aspect of the

²⁶¹ NRS, SC29/53/44 [SC29/53/1788/2], 'Copy Description of Hugh Leslie, sent Mr Trail subjoined to the Sherriffs [sic] Letter', 5 October 1788.

²⁶² *Ibid.*

²⁶³ NRS, SC29/53/44 [SC29/53/1788/2], 'Letter the Sheriff Substitute of Sutherland regarding Wm. Lesly', 28 October 1788, f.1.

wider administration of county government in Scotland at this time. Although rare, this type of document does arise occasionally within the surviving documents, as those accused of crimes moved across county lines, or, as in Leslie's case, the investigative process initiated by the Inverness sheriff court required additional information from the accused's county or parish of origin. This collaboration between counties will once again be considered later in this thesis, in a murder case that will be discussed in the chapter on rape and violence against women. Other than the two documents examined here, there have been no other documents identified within the criminal processes which exist solely to describe the physical appearances of those who appeared within the court. It is possible that sporadic physical descriptions may exist in witness precognitions, but it is safe to assume that this is perhaps the rarest form of surviving documentation from the court.

Therefore, in comparison to earlier discussions on the richness and variety of potential research opportunities presented by the Inverness sheriff court criminal processes, the dearth of evidence relating to physical appearances greatly limits some avenues of potential research, perhaps most importantly the study of race in the eighteenth century. The study of race bears many similarities to the study of gender, in that they both attempt to name, define and study societal divisions which were socially constructed, and yet seen contemporarily as entirely natural. Gerda Lerner has commented on the difficulties that arise from attempts to understand the full impact of these societal systems in the past:

women are part of the anonymous in history, but unlike them, they are also and always have been part of the ruling elite. They are oppressed, but not quite like either racial or ethnic groups, though some of them are. They are subordinate and exploited, but not quite like lower classes, though some of them are. We have not yet really solved the problems of definition.²⁶⁴

²⁶⁴ G. Lerner, *The Majority Finds Its Past*, p. 119.

Here Lerner is touching on a theoretical lacuna which was eventually filled by Kimberlé Williams Crenshaw's 1989 article 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'. In this article, Crenshaw lays out the framework for her theory of intersectionality, in an attempt to counteract a 'tendency to treat race and gender as mutually exclusive categories of experience and analysis.'²⁶⁵ She was writing specifically within the American legal context, and attempting to define the multiply marginalised experiences of Black women in court settings.²⁶⁶ Crenshaw argued that in order to accurately theorise the full range of discrimination and oppression experienced by women depending on their class, race, sexuality, educational access etc., it was necessary to conceptualise these multiple, interacting axes of oppression, an approach she named 'intersectionality'.²⁶⁷ She comments that:

because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.²⁶⁸

This is an important question to consider in relation to the historiographical setting of this thesis. There has been a distinct lack of work done on race and the experiences of women of colour in the Scottish past, and much of the work done on race in eighteenth-century Scotland has been in the context of legal history. In 2003, J. W. Cairns published an article in *Fundamina* titled 'The Face That Did Not Fit: Race, Appearance, and Exclusion from the Bar in Eighteenth-Century Scotland'. He describes the career of John Wright, a cottar's son who became a member of the Faculty of Advocates in 1783.²⁶⁹ Wright's race was ambiguous, and from contemporary descriptions and portraits Cairns establishes that it is highly likely that Wright was either Black or suspected of being so, although

²⁶⁵ K. W. Crenshaw, 'Demarginalizing the intersection of race and sex: A Black Feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum*, Vol. 14, (1989), p. 139.

²⁶⁶ *Ibid.*, p. 155.

²⁶⁷ *Ibid.*, p. 140.

²⁶⁸ *Ibid.*

²⁶⁹ J. W. Cairns, 'The Face that Did not Fit – Race, Appearance, and Exclusion from the Bar in Eighteenth-Century Scotland', *Fundamina*, Vol. 9 (2003), pp. 11-12.

Cairns acknowledges the difficulty in separating out racism and classism in the discrimination faced by Wright, itself an intersectional line of thought.²⁷⁰ He also briefly describes how 'black individuals were to be found in most areas of Scotland in the eighteenth century',²⁷¹ although their prevalence is far more difficult to determine. Importantly, he also believes that the majority of Black people in Scotland at this time were young men, meaning that there may have been very few Black women in Scotland during this period.²⁷²

In 2006, Iain Whyte published *Scotland and the Abolition of Black Slavery, 1756-1838*, and has continued since then to produce research considering the slave trade and efforts to abolish it from a Scottish perspective. In a chapter from his 2006 book entitled 'Black Slaves in Scotland and Baptism', Whyte notes that there were three legal cases in Scotland in the latter half of the eighteenth century in which the legal status of enslaved people had to be considered, all three of which involved Black men attempting to secure their freedom from enslavement.²⁷³ Whyte later notes that of the eight recorded sales of enslaved persons that survive for Scotland, only one of these was for a woman; a nineteen-year-old woman named Peggy was sold along with her one-year-old child in Edinburgh in 1766.²⁷⁴ The scarcity of information about Black women in the historical record makes research challenging, and the difficulties of establishing race, for example in court records which rarely specify the physical appearance of witnesses or defendants must also be noted. Despite this, Scottish gender history as a field seems not to have yet advanced to a point where these questions are considered to be a vital part of research aims and methodologies, and many works on Scottish women do not even specify that the women whose oppression they are studying were white, or that their race could not be identified.

²⁷⁰ *Ibid.*, p. 33.

²⁷¹ *Ibid.*, p. 34.

²⁷² *Ibid.*

²⁷³ I. Whyte, *Scotland and the Abolition of Black Slavery, 1756-1838* (Edinburgh, 2006), pp. 10-11.

²⁷⁴ *Ibid.*, p. 14.

In 2013, Katie Barclay and Rosalind Carr published a review article assessing the impact of gender history on the history of Scottish social classes. In the introduction to the article, they note that:

intersectionality, the interaction between different facets of identity including – but not limited to – gender, class and race, has been viewed as one of the most significant theoretical contributions of women’s studies.²⁷⁵

They then define the term, writing that ‘attempts to separate out different facets of identity or experience without acknowledging their relational nature are artificial’.²⁷⁶ After this, the article moves on to an analysis of how the intertwined usage of gender and class in analyses of Scottish history can have a transformative effect on the historiography;²⁷⁷ somewhat ironically, race is not mentioned further. They do not acknowledge Kimberlé Williams Crenshaw as the originator of the concept, simply saying that intersectionality is a significant contribution of ‘women’s studies’ more generally, and Crenshaw is not cited in their bibliography. Removing intersectionality from its originating context in this way fundamentally misunderstands the term. It is important to recognise that it was created by Crenshaw as she saw the need for a methodological tool which could illuminate the multiple disadvantages faced by Black women. To remove race entirely and simply use gender and class is a simplistic use of the methodology that sidesteps its core message – that it is impossible to pick and choose which forms of discrimination to analyse. It is clear from this and the examples above that race is a field of thought on which Scottish gender history particularly is considerably lacking. Unfortunately, this thesis is not able to remedy this deficiency. The rarity of the above document describing the physical appearance of those who came into contact with the court demonstrates the almost complete lack of such information within the surviving documents, and there have been no documents located during the research undertaken for this

²⁷⁵ K. Barclay and R. Carr, 'Rewriting the Scottish Canon: The Contribution of Women's and Gender History to a Redefinition of Social Classes', *Études écossaises*, Vol. 16 (2013), p. 11.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*, p. 12.

thesis which specify the race of any of the actors within case documents, be they witnesses, perpetrators or victims. We can therefore reasonably assume that it is unlikely that any of the subjects within these records were not white. However, rather than universal whiteness being an assumed and unexamined part of the analysis, this is an avenue of research which has been carefully considered and is not possible to pursue further.

Justice-seeking behaviours

The sheriff court system was used by Inverness-shire inhabitants as a legal resource, not solely as a method of acquiring justice for crimes already committed. In a more mundane sense, it acted as an institution that could provide interpersonal arbitration when disagreements could not be resolved either by those involved or their immediate communities. This topic will be considered throughout the thesis, particularly in the chapter on lawburrows. The discussion here will provide a brief overview of the various ways in which attitudes towards justice can be observed through the sheriff court documents, as well as a consideration of the authority granted to the sheriff court, and the variety of roles this authority served within Inverness-shire. In August 1783, Angus McBean, a farmer of the Petty Customs in Inverness, was imprisoned in the tolbooth due to an altercation he had with Jean Mackintosh, a resident of Leys – an area of agricultural land very close to Inverness which is now a residential area. The dispute originated in a disagreement between McBean and Mackintosh over the ownership of some potatoes. Mackintosh's husband, Simon Fraser at Milntown of Leys (not the sheriff depute or procurator fiscal of the same name), and Hugh Fraser, late customer,²⁷⁸ had between them planted a quantity of potatoes, at some point after which Hugh Fraser had sold his share in the crop to Simon Fraser. The papers proving this were produced in court and are referenced in the Criminal Summonds against Angus McBean.²⁷⁹ McBean

²⁷⁸ Although this is not expanded upon, it is likely that Hugh Fraser was a customs officer.

²⁷⁹ NRS, SC29/53/16 [SC29/53/1783/8], Inverness Sheriff Court Criminal Processes 1783, 'Criminal Sumonds James Cuming Agt. Angus McBean 1783', f.2.

and Mackintosh had had recurrent disagreements over the ownership of the potatoes. Mackintosh describes their first altercation in her precognition during McBean's criminal trial:

the Pannell Angus McBean was observed by the Deponent Weeding the said Potatoes ground, upon which she Challenged him and asked him what business he had to take a concern with her own potatoes, To which he answered by giving the Deponent very abusive language and threatening to put her to Prison.²⁸⁰

The environmental context is crucial in this case. As previously noted, the summer of 1783 was at the latter end of a profound, years long period of food scarcity throughout the Highlands, lending an added urgency to disagreements over food or livestock ownership.²⁸¹ As will become clear, Mackintosh's gender is indivisible from her experiences during this interpersonal disagreement with McBean, the eventual assault, and her embodied experience of injury following the attack. It seems clear that McBean felt able to dismiss Mackintosh's requests for him to stop stealing her family's property in a way that would have been more difficult if Simon Fraser, her husband, had been present.

On 19 August 1783, the situation finally came to a head. Following Mackintosh's observing the food theft and her dismissal by McBean, she sought legal advice from the procurator fiscal in Inverness. She describes how she:

came in to Inverness, to Consult with the Prosecutor as a man of business, who told her, that to put a stop to the Pannell's raising the Potatoes, in a judicial manner would require some money and the Deponent having Answered that she had no money the Prosecutor then told her, that she might then go and raise the Potatoes for her own behooff.²⁸²

Mackintosh followed this advice, and while in the process of harvesting the potatoes for her and her family's use, McBean arrived and stopped her. They

²⁸⁰ NRS, SC29/53/21 [SC29/53/1783/8], Inverness Sheriff Court Criminal Processes 1783, 'Minutes In the Criminal Process The Pror Fiscall Agt. Angus MacBean', 2 October 1783, f.3.

²⁸¹ R. A. Dodgshon, 'Coping with Risk'. p. 2.

²⁸² NRS, 'Minutes in the Criminal Process The Pror Fiscall Agt. Angus MacBean', ff. 3-4.

then began to walk together from the Leys into town, 'in order to lay their case before a Judge'.²⁸³ It was during this journey that the assault took place, described by Mackintosh in these terms:

the Pannell gave the Deponent a push, and threw her on the Ley ground, whereupon She Cried out Murder, & was calling to William Grant Hyrer in Inverness whom She saw at a little distance to come and help her. That thereupon the Pannell took hold of the Deponent's hands, and put them across her breast, and with his knee gave her a severe Stroke on the side, which hurted her the more, that She was upon the ground, & he immediately above her. That the Deponent felt herself very much hurt by this stroke, & when She raised from the ground, some blood issued from her mouth, and the Deponent is certain that there was a large quantity of blood, and the Deponent has since that period vomited blood in that manner.²⁸⁴

She also stresses that despite their ongoing disagreement, she did not believe her actions at the moment of the assault had provoked McBean, only noting that when he had been giving her 'abusive language'²⁸⁵ while she had been digging, 'the Deponent said to him, "You Beast nobody called me a Bitch before" or Words to that purpose'.²⁸⁶ Mackintosh's account stresses the fact that she was acting within her legal rights, directly on the advice of the procurator fiscal of Inverness. At each stage of the disagreement, she sought to resolve it through secular legal means, resorting to the sheriff court as an institution to offer advice and restitution. It should be noted that despite the illegality of McBean's actions, the procurator fiscal was unwilling or unable to assist Mackintosh in pursuing McBean through a civil process without payment of an unspecified amount. After the assault she was taken directly to the house of the procurator fiscal, and then moved to her brother's house in Inverness, to recover from her injuries. Her description of the consequences of these injuries was specific and gendered: she was unable to breastfeed the child she was caring for (it is difficult to tell whether it was her own child or one she was caring for as a wet

²⁸³ *Ibid.*, f.4.

²⁸⁴ *Ibid.*, f.5.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

nurse) and describes in detail the effect of the injury on her breast milk, and her consequent reliance on charity to feed and care for the child.²⁸⁷ On 8 October 1783 the sheriff depute found the libel proven, fined McBean in the sun of twenty pounds Scots, and also found him liable in expenses of process. McBean was to remain in prison for eight further days and then continue his confinement until the fines had been paid. He was also charged to keep the peace for twelve months under the penalty of two hundred merks Scots; a standardised measure in cases of disagreements which had ended up breaking the boundaries of the law, but also obviously an attempt to shield Mackintosh from further or retributive violence. Mackintosh's perseverance in pursuing judicial restitution through the sheriff court therefore did, eventually, receive the desired outcome – McBean was found guilty of assault and punished under the law. Despite this, the sheriff court and the legal system more widely was clearly far from a guaranteed risk mitigation strategy. Mackintosh's interactions with the court system did not protect her from physical harm, effectively demonstrating the vulnerability of women to violence during this time period.

Although Mackintosh's case usefully shows the steps undertaken by those who sought to resolve conflicts within the means supplied by the judicial system, it is also possible to occasionally observe through the court documents the inverse; i.e. victims of crime having their interpersonal disputes mediated by the courts against their will. The wider question of the ways in which people attempted to settle disputes outwith the court apparatus will be explored in the chapter on resistance to judicial authority, as the purposeful exclusion of the law from such disputes represents a form of passive resistance to the overarching legal authority invested in the sheriff courts. However, it is useful firstly to consider here a particularly interesting case, in which two brothers settled a dispute between themselves, but then made the apparent mistake of informing the procurator fiscal of the circumstances of their disagreement. In the Criminal Summons for the case, dated 17 September 1785, Donald Fraser alias Bain, junior butcher, was alleged to have approached his brother, James Fraser alias

²⁸⁷ *Ibid.*, ff. 6-7.

Bain, also a butcher, in the flesh market of Inverness. The document then claims that Donald punched his brother on his ear, his mouth, and his chest.²⁸⁸ There were several aspects of this assault which were considered by the procurator fiscal to have been significantly aggravating factors. James was 'standing, in a quiet and peaceable manner'²⁸⁹ directly before the assault was initiated, the punches drew blood and left James on the ground, and, perhaps most importantly, Donald was apparently 'habit and repute a Quarrelsome turbulent person'.²⁹⁰ Donald failed to appear for his first trial date, on 6 October, and the trial was therefore held on the 10th. The trial record begins, extremely unusually, with a request from the private complainer – in this case James – to make a statement to the court. James claimed that:

this process is groundless, and he therefore Disclaims this Action, and Declares that he never gave any Information to the pror. fiscall [sic] to raise any such process, But on the Contrary told him that there was no occasion for such a process, as they had settled matters betwixt them, and which did not deserve the notice of the Court even before such process was raised.²⁹¹

This statement was signed by both James Fraser and Thomas Gilzean. The trial record then proceeds to Donald Fraser's declaration, which presents a decidedly different view of the altercation. He describes a verbal altercation between the two brothers, after which Donald pushed James to the ground. He denied drawing blood. The procurator for the defender, George Bean, then made a spirited case for the dismissal of the case, which was ably countered by the procurator fiscal, James Cuming's assertion that immediately following the altercation, James had transmitted a message to Cuming, requesting that he investigate the assault.²⁹² The fact that James later disclaimed the process as unnecessary was seen by the procurator fiscal as unimportant, as:

²⁸⁸ NRS, SC29/53/31 [SC29/53/1785/16], Inverness Sheriff Court Criminal Processes 1785, 'Criminal Sumds. Fraser & Fiscal Agt. Donald Fraser alias Bain', 17 September 1785, f. 1.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*, f. 2.

²⁹¹ NRS, SC29/53/31 [SC29/53/1785/16], Inverness Sheriff Court Criminal Processes 1785, 'Proof In The Criml. Process The Pror. Fiscall Agt. Donald Fraser', 10 October 1785, f. 1.

²⁹² *Ibid.*, ff. 2-3.

it is the business and the duty of the pror. fiscall [sic] to prosecute all those who make any breach of the Peace for the publick [sic] Interest as the same is Committed by a person of a Turbulent & quarrelsome disposition.²⁹³

This argument was approved as competent by the sheriff substitute, and although the case as brought by the private complainer was dismissed, the case in the public interest was continued, and the trial proceeded.²⁹⁴ Interestingly, as two witnesses failed to compear for the trial, it was continued until a later date. At this point, James Fraser alias Bain stood as cautioner for his brother, stating before the court that he would ensure that Donald attended any future trial dates 'under the penalty of one Hundred Merks Scots'.²⁹⁵

The judicial peculiarity of a crime's victim acting as the accused's cautioner seems somewhat emblematic of this case as a whole, but fortunately its farcical nature illuminates several aspects of court practice which are not made obvious in other cases. It can be argued that the continuation of the trial despite Donald's insistence that it be abandoned demonstrates how seriously the sheriff court took its role as a peace-keeping institution. However, given the small sample size when considering this kind of case, it is difficult to parse out the motivations behind the continuation of the trial, and the ongoing specification of Donald as someone 'turbulent' and 'quarrelsome' makes it just as likely that the procurator fiscal saw this case as an opportunity to enforce legal consequences on someone who was habitually prone to breaching the peace, or more seriously, to using physical violence in disputes with others. For the purposes of this thesis, the most crucial aspect of this case is the overarching authority of the 'public interest' in the wider legal arsenal of the Inverness sheriff court. It was not necessary for the victim of a crime to desire a legal process to be undertaken, nor to be interested in obtaining legal justice for harm done against them, for a trial to take place. Legal historian John Finlay has written about this

²⁹³ *Ibid.*, f. 3. Interestingly, the witness testimonies recorded in the case documents give valuable biographical information on the various men working as butchers in the Inverness fleshmarket at this time.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*, f. 8.

issue of the public interest, and clarifies that it relates to the procurator fiscal's role as the king's procurator; 'the lord advocate in the court of justiciary and circuit courts and the fiscal in the inferior courts',²⁹⁶ who 'had an independent right to prosecute even if the victims of a crime refused to do so'.²⁹⁷ This adds further context to the consideration of Inverness-shire inhabitant's interactions with the law and with the court system, and particularly to this thesis' analyses of justice-seeking behaviours as pursued by victims of crime. In terms of the eventual legal outcome of the Frasers' fraternal spat, Thomas Gilzean found the libel against Donald proven, and found therefore that he was guilty of a breach of the peace, aggravated by the fact that the assault had been committed against his own brother, likely due to the fact that the various witnesses called in the case all concurred that the Donald had struck James unprovoked.²⁹⁸ However, here James' wishes were finally taken into account, and it was stated that as the victim had not desired the action to go ahead, Gilzean fined Donald Fraser alias Bain in the sum of five shillings sterling only, to be paid to the procurator fiscal for the public interest, and also found him liable for the expense of the process against him, which was modified to two pounds sterling. Donald Fraser was then to be committed to the tolbooth of Inverness until the sums had been paid.²⁹⁹ Overall, this case demonstrates the level of interference that the sheriff court was capable of inflicting on the lives of Inverness-shire inhabitants, and the legal oddities that can sometimes be found within the surviving court records.

Gaelic in the Inverness sheriff court

Inherent within the practices of the Inverness sheriff court was the tension between the use of English as the official language of court proceedings, and the

²⁹⁶ J. Finlay, *Legal Practice*, p. 344.

²⁹⁷ *Ibid.*

²⁹⁸ NRS, SC29/53/31 [SC29/53/1785/16], 'Proof In The Criml. Process The Pror. Fiscall Agt. Donald Fraser', 10 October 1785, ff. 4-7. The two witnesses that failed to compear for the trial were each fined ten pounds Scots.

²⁹⁹ *Ibid.*, f. 11.

fact that many lower-order men and women who found themselves in court spoke Gaelic as their first or their only language. It is therefore necessary to examine the use of Gaelic in the Inverness sheriff court; drawing on the wealth of precognitions contained in the criminal processes will demonstrate how Gaelic was spoken and interpreted in the court, and how this disrupts any interpretation of witness statements as undiluted voices from the past. Case studies containing Gaelic speaking women will be considered, and will be specifically analysed in terms of what can be discovered from these records concerning bilingualism and literacy. It appears from the court record that bilingualism was common amongst court personnel, perhaps lessening the marginalisation of Gaelic speaking deponents and defendants.³⁰⁰

It is first necessary to consider the research surrounding Gaelic language use and bilingualism in the Highlands in wider civic life, before examining in more detail how these issues manifested within the Inverness sheriff court. Much of the historiographical discussion surrounding Gaelic language use and literacy is connected to research on education and religion in the Highlands. In her 2021 article, 'Faith and the Family: Family Life and the Spread of Evangelical Culture in the Scottish Gàidhealtachd, c. 1790-c.1860', Elizabeth Ritchie gives valuable insight into the role of family religious life in the late eighteenth century Gàidhealtachd. Interestingly, Ritchie concludes that although there was scope for challenging patriarchal dominance within families through worship practices, that challenge did not often come from adult women. Increasing levels of literacy – in terms of reading, if not always writing – allowed children to lead family worship.³⁰¹ Utilising the annual reports of the Edinburgh Society for the Support of Gaelic Schools, she notes that an increase in the importance of family worship corresponds with a rise in popularity in evangelicalism throughout

³⁰⁰ It feels useful to disclose here that I have no Gaelic, and therefore my analysis in this section will necessarily be coloured by an Anglophone lens. Methodologically, no translation of text has been required, as all court documents are in English. Although there will clearly be limitations to my analysis based on these factors, one of the aims of this PhD project is to open these documents up to further study. This section therefore serves as an introduction to some of the material related to Gaelic language use available within the collection under study, with the hope that future researchers will subject them to a range of viewpoints.

³⁰¹ E. Ritchie, 'Faith and the Family', p. 61.

Gaelic-speaking communities.³⁰² She further comments that the position of women in family worship was somewhat complicated. Married women with husbands and children seem to have had reduced spiritual authority, despite sharing the responsibility of spiritual education for younger children with their husbands.³⁰³ Additionally, despite the potential subversion of patriarchal power that was represented by children leading family worship, in practice, this was often carried out by boys, and women and girls remained in a subservient role.³⁰⁴ However, it seems that in households without adult men, women were the spiritual authorities of their family units.³⁰⁵ This is a complex, nuanced study of how gendered hierarchies were enacted within lower-order family units in the Scottish Highlands, representing an important addition to the historiography.

When considering the centrality of the Gaelic language to contemporary Highlands culture, a closer examination of the Society in Scotland for Propagating Christian Knowledge (SSPCK) is essential. The historiography is somewhat sparse, but several studies exist which illuminate the actions of the organisation. Donald Withrington's 1962 article on the Society looks closely at the criteria the organisation utilised when selecting parishes in which to establish schools and uncovers a fallacy within their judgments which demonstrates a fundamental misunderstanding of the Highlands. The article examines a survey carried out by the SSPCK in 1755, in which letters were dispatched to the moderators of presbyteries where a schoolmaster employed by the Society was retained, to discover how many parishes did not have a parochial school. Over half of the replies have survived, and as Withrington shows, because the Society did not give the moderators a definition of what they considered to be a 'parochial school', their answers contain a wide variety of interpretations.³⁰⁶ One definition of a parochial or legal school was 'a single institution the master of which had a stipend of at least 100 merks Scots from

³⁰² *Ibid.*, pp. 61-2.

³⁰³ *Ibid.*, p. 69.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*, p. 70.

³⁰⁶ D. J. Withrington, 'The S.P.C.K. and Highland Schools in Mid-Eighteenth Century', *Scottish Historical Review*, Vol. 41, No. 132 (October 1962), pp. 90-1.

the local heritors and tenants'.³⁰⁷ 100 merks Scots was the legal minimum salary for a schoolmaster of a parochial school. Due to geographical constraints and other factors, there were seemingly many parishes that had a teacher in a school of some kind, whose salary was below this level.³⁰⁸ The conclusion drawn by the SSPCK upon receiving the replies to this survey, was that there were 175 parishes without parochial schools in the area covered by the Society – which was mostly in the Highlands but also covered presbyteries such as Langholm, Jedburgh, and in Angus.³⁰⁹ In reality, this does not equate to 175 parishes lacking any school at all, and the large geographical area frequently covered by a single Highland parish led some heritors to follow a different route to providing educational facilities for their local communities. Withrington cites the example of the parish of Inverchaolain in Argyll, where geographical difficulties arising from a community spread out over twenty miles and in some parts separated by mountains caused the local minister to report that instead of one, strictly legal school, the parish had five small ones, in order to provide as many children as possible with access to education.³¹⁰ A 1774 publication entitled *An account of the Society in Scotland for Propagating Christian Knowledge, from its commencement, in 1709* details a similar approach in the very early days of the SSPCK, as the organisation wrestled with the logistics of spreading the gospel in the Highlands. In 1713,

the Society, considering that two of their schools had had very bad success, and that others of them, in wide and ill-inhabited countries, could be of little service, unless their numbers were increased, impowered [sic] their committee to erect more schools, with smaller salaries, in the most proper places.³¹¹

Withrington notes that in extensive parishes, this decision to supply more schools unsurprisingly placed a greater financial burden on local heritors, and

³⁰⁷ *Ibid.*, p. 92.

³⁰⁸ *Ibid.*, p. 93.

³⁰⁹ *Ibid.*, p. 93, p. 89. Withrington notes that the list itself does not seem to be extant.

³¹⁰ *Ibid.*, p. 96.

³¹¹ *An account of the Society in Scotland for Propagating Christian Knowledge, from its commencement, in 1709, in which is included, the present state of the Highlands and Island of Scotland with regard to religion* (Edinburgh, 1774), p. 9.

additionally he comments on the dubious merits of the SSPCK policy whereby parishes containing no 'legal' parochial school would be excluded from having a charity school set up by the Society, 'it not being the purpose of the Society to relieve the heritors of their legal duty'.³¹² This seems short-sighted, particularly considering the SSPCK's own struggles with placing schools in locations of most use to their local communities, and must have resulted in a reduction of educational access for Highland children. Despite this, Withrington successfully argues that educational provision in the Highlands was generally much greater than was accepted by the SSPCK, and it seems that in remote parishes the educational needs of the community were usually considered.³¹³

Expanding on this theme of the role of the SSPCK in the Highlands' educational structure, Jamie Kelly's 2021 article on the language policy of the Society is a valuable addition to the historiography. Kelly argues that although the language policy of the SSPCK has been commonly interpreted as an attempt to eradicate Gaelic and assimilate the Scottish Gàidhealtachd into the anglophone world, a more nuanced interpretation reveals that there were several factors influencing rules around the use of Gaelic in SSPCK schools.³¹⁴ One complication which was highly influential in shaping education in the Highlands was the lack of an agreed literary standard for written Gaelic.³¹⁵ Kelly explores the historical use of Classical Common Gaelic, a 'high-register literary dialect'³¹⁶ originating in the twelfth century, which employed strict grammar and vocabulary in order to be intelligible despite differences in dialects throughout the Gàidhealtachd. However, Kelly argues that in the Highland context, Classical Common Gaelic was used alongside Latin and Scots, and had fallen out of use by the early eighteenth century.³¹⁷ The difficulties surrounding written Gaelic are exemplified through the rejection of the 'Irish bible', a Classical Gaelic

³¹² D. J. Withrington, 'The S.P.C.K. and Highland Schools', p. 98.

³¹³ *Ibid.*, p. 99.

³¹⁴ J. Kelly, 'Revisiting the Language Issue', pp. 2-3.

³¹⁵ *Ibid.*, p. 4.

³¹⁶ *Ibid.*, p. 5.

³¹⁷ *Ibid.*, pp. 5-9.

translation published in Ireland in 1685.³¹⁸ Despite hopes that this translation could provide a basis for Gaelic-speaking ministers and schoolteachers to improve literacy in their Highland parishes, the translation was rejected as almost unintelligible; Kelly comments that 'the majority of literate Gaels simply could not read the book'.³¹⁹ Therefore it is arguable that the use of the English bible in Gaelic-speaking areas had less to do with attempts to eradicate Gaelic, than it did with the lack of a serviceable Gaelic translation to replace it. Indeed, a Gaelic translation of the New Testament did not become available until 1767, and its Old Testament counterpart was not published until 1801.³²⁰ The lack of Gaelic literature was also mentioned in *An account of the Society in Scotland for Propagating Christian Knowledge*, as part of a discussion of the 'disadvantageous circumstances'³²¹ affecting the Highlands in the years prior to the foundation of the Society:

The nature of the Gaelic language, – the obstinate adherence of the inhabitants to it, and their rooted antipathy to the English, – the want of books in their native tongue, – their consequent inability to read, – and vast extent of country, at that time, necessarily under the charge of one minister, were very formidable obstacles to the propagation of the gospel in those parts.³²²

Although this language clearly seeks to disparage the Gaelic-speaking inhabitants of the Highlands, Kelly urges caution when considering the negative portrayals contained within SSPCK literature. He argues that due to the nature of the Society as a charity, dependent on financial contributions, some exaggeration of the state of educational and spiritual provision in the Highlands was beneficial to their cause,³²³ and that often the Society's 'rhetoric did not necessarily correspond with its policy'.³²⁴ Gaelic was most likely used in SSPCK classrooms as the primary language of communication, and was used in

³¹⁸ *Ibid.*, p. 10.

³¹⁹ *Ibid.*, p. 12.

³²⁰ E. Ritchie, 'Faith and the Family', p. 59.

³²¹ *An account of the Society in Scotland for Propagating Christian Knowledge*, p. 2.

³²² *Ibid.*

³²³ J. Kelly, 'Revisiting the Language Issue', p. 13.

³²⁴ *Ibid.*, p. 27.

translating English texts in order to acquire fluency.³²⁵ Even when the Society employed policies discouraging the use of Gaelic, it had no method of enforcing these policies other than 'entrusting local agents who could either moderate or impose them'.³²⁶ It therefore seems difficult to argue that there was any kind of homogenous approach to Gaelic use attempted by the SSPCK in the Scottish Highlands. Clearly significant nuance is required when considering the impact of this organisation in the eighteenth-century Scottish educational structure, and when the ambiguities of its practices are taken into account, it cannot be regarded simply as a missionary project to anglicise the Highlands. Kelly's research allows a more practical interpretation of the translation undertaken in the sheriff court documents in Inverness. Although it is likely that English translations of Gaelic precognitions were required due to legal conventions, it should also be noted that the lack of generally agreed conventions for recording Scottish Gaelic text likely precluded the notation of precognitions in their original Gaelic.

In terms of other historiographical discussions of the SSPCK, Bruce Lenman briefly mentions their success in the late eighteenth century in bringing 'literacy in English even to some Highlanders',³²⁷ whereas Rab Houston criticises their policy of mostly teaching boys, meaning that they had the advantage of becoming bilingual whereas most girls remained linguistically isolated.³²⁸ This casual erasure of girls from educational considerations is an important consideration, and can be clearly seen in the literature of the time. In a short book detailing a group's intention to found 'The Charitable Highland Society of Glasgow', published in Glasgow in 1788, the unnamed author discusses the high numbers of Highlanders who had moved to Glasgow requiring financial support, and the group's intention to create a fund for this purpose. After a lengthy discussion of how funds should be raised, it prescribes that 'the interest only of the said sums, so lent out, be disposed of by the Managers of the fund, for

³²⁵ *Ibid.*, pp. 28-30.

³²⁶ *Ibid.*, p. 35.

³²⁷ B. Lenman, *Integration, Enlightenment*, p. 13.

³²⁸ R. A. Houston, 'Women in the economy', p. 134. See also, E. Ritchie, 'Faith and the Family', p. 69.

educating boys at school, or putting them to trades'.³²⁹ It would seem therefore that girls' education was not prioritised in the eighteenth-century Scottish Highlands, nor in Scotland in general.

Attempting to define general literacy rates in Scotland during this period is a topic of some methodological debate within the wider historiography. In T. C. Smout's study of the connections between religion and literacy in Cambuslang, he notes the lack of connection between reading and writing as skills,³³⁰ which suggests that many women who were unable to write about their experiences with books and literacy were still able to read and may have ventured beyond the bible into a more varied reading practice. Smout then goes on to link this discovery of reading versus writing literacy to Houston's work, particularly his 1982 article on illiteracy in Scotland.³³¹ Houston aimed to produce statistical evidence either proving or disproving the notion that Scotland's literacy levels were significantly higher than those of its neighbours in the early modern period.³³² However, the criterion used to assess literacy within Houston's study is the ability to sign one's own name in a legal document, an 'admittedly imperfect',³³³ decidedly blunt tool. Using this methodological approach in the examination of witness depositions before the High Court of Justiciary, Houston estimates that in the mid-eighteenth century, overall illiteracy levels were around thirty-five percent, allowing for variations according to region and occupation. For women, this rises to eighty-five percent, lagging far behind the estimate of sixty-percent illiteracy for English women during this period.³³⁴ However, Houston tempers this dispiriting conclusion with the caveat that this focus on writing ability may severely underestimate women's reading ability: 'reading was taught before writing, and...girls were much less likely to pass

³²⁹ *The scheme of erection of the charitable Highland Society in Glasgow: to which is subjoined, additional regulations, made in 1787* (Glasgow, 1788), f. 4.

³³⁰ T. C. Smout, 'Born Again at Cambuslang: New Evidence on Popular Religion and Literacy in Eighteenth-Century Scotland', *Past & Present*, No. 97 (November 1982), p. 121.

³³¹ *Ibid.*, p. 122.

³³² R. A. Houston, 'The Literacy Myth?: Illiteracy in Scotland 1630–1760*', *Past & Present*, Vol. 95, Issue 1 (May 1982), p. 82.

³³³ *Ibid.*

³³⁴ *Ibid.*, pp. 98–9.

beyond the stage of learning to read and sew'.³³⁵ This research on Highland literacy allows a more nuanced contextualisation of literacy within the surviving criminal processes of the Inverness sheriff court. While it was common for court testimony to specify whether the person being precognosced was able to write, this was part of a standardised administrative procedure under which testimony was authenticated – those able to write would read over their testimony and sign their names to confirm that their words had been recorded accurately. For those unable to sign their names, as well as monolingual Gaelic speakers, court procedure was oral confirmation of testimony with those being precognosced, with the document then signed by court officials to prove the legitimacy of the evidence. Therefore, while court records provide ample evidence of the negotiation of language use and writing literacy in the Highlands, they are less reliable as a source of information on reading literacy rates.

Considering the somewhat thorny relationship between institutions of authority, such as the kirk and, relatedly, schools, and Gaelic language use, it would be reasonable to assume that Gaelic speakers may have been intentionally marginalised or penalised within the sheriff court. However, there is no overt evidence that this took place. It seems, from the available documentation, that any limitations posed by evidence given by monolingual Gaelic speakers were navigated as a matter of course, with a standard administrative process for translation managed by the court clerks. There are several pertinent case studies that demonstrate how language barriers were navigated within the court. For example, in a document containing witness statements for a 1781 assault, one witness, Duncan Davidson – a married man aged over thirty – described seeing a conversation between two men that caused them to come to blows:

he observed Dalcromby and the said James McIntosh on Horseback and speaking together as they came along the Road. But what they were

³³⁵ *Ibid.*, p. 82.

saying he does not know as they spoke in English which language the Declarant understands none of.³³⁶

The conversation took place after a funeral, while the procession was travelling to the interment ground, and although Dalcromby was being charged as the aggressor, the witness statements cast doubt onto McIntosh's apparent role as victim. Davidson continues to describe how, after the initial quarrel:

James Mackintosh disengaged [sic] himself from those that had hold of him and then ... the Declarant saw him get a Stick from a Man that mett [sic] him That as he came up to near the Place where the Corps & Dalcromby was the Declarant observed a number of people gather about him and prevent him from falling in with Dalcromby That Dalcromby looking behind him & observing this he immediately being still a Horseback stopt & rush'd into the Crowd and with the great end of the Stick which he had in his hand the Declarant saw him give a Blow with all his force to the said James McIntosh on the Head upon which the Blood gushed out largely.³³⁷

Regardless of the propriety of attacking a man in a crowd while on horseback, this testimony – given by a monolingual Gaelic speaker – helped convince the court that the incident was less an assault and more a public brawl. The sheriff substitute, Alexander Grant, noted that the exculpatory statements 'not only greatly alleviates but partly exculpates the Pannell of the Crime that is proven that he has been guilty of'.³³⁸ Dalcromby was found guilty of striking James McIntosh twice on the head with a wooden staff, to the effusion of his blood, and was ordered to pay twenty shillings sterling to the public prosecutor. However, he was not found liable for any other expenses, such as bloodwitt. Notably, there is no mention of translation happening during the precognition process in Dalcromby's case.

Court administrative practices surrounding Gaelic testimony are further illuminated by the arrival, as detailed above, of the new sheriff substitute

³³⁶ NRS, SC29/53/8 [SC29/53/1781/24], Inverness Sheriff Court Criminal Processes 1781, 14 May 1781, 'Precognitions agt. Dalcromby', f. 8.

³³⁷ *Ibid.*, f. 9.

³³⁸ *Ibid.*

Thomas Gilzean in 1785. The same year, Alexander Matheson, a tailor from Rigg in the Skye parish of Snizort, was accused of stealing two cows. After being apprehended in July, Matheson absconded from justice and enlisted in the army under the name Alexander Mackenzie. He continued to live under this alias until 20 September 1785, when he was apprehended by James Fraser, one of the sheriff officers of Inverness-shire. In his declaration, given before the court the same day he was apprehended, he was:

Judicially Examined by Mr Robert Campbell Sheriff Clerk of Inverness as Sworn Interpreter, as the sheriff substitute does not Understand the Irish Language, and the said Alexr. Matheson does not understand English.³³⁹

As discussed earlier in this section, Gilzean's appointment as sheriff substitute marked the beginning of a period of remarkable stability within the personnel of the Inverness sheriff court. Given that Gilzean remained a constant fixture within court practice for the remainder of the time period under consideration, his lack of familiarity with Gaelic had an outsized impact on how the law was administered in Inverness-shire. Matheson's case allows a clearer examination of how translation worked in practice. At the end of his declaration, the document states that:

This Declaration ... wrote by Alexr Mackenzie Writer in Inverness, Is freely and Voluntarily Emitted by the Declarent, and the same being read over, and Explained to him in the Gaelic Language, He adhered to the same, before and in presence of James McDonald Writer in Inverness, and the said Alexander Mackenzie Writer hereof.³⁴⁰

At a practical level, the processes that existed to mediate the statements of monolingual Gaelic speakers were likely put in place to retain the evidentiary value of those statements. However, they can also be interpreted as a form of legal empowerment for Gaelic speakers placed into a legal environment conducted in a language they did not speak. Gaelic speakers experienced unique

³³⁹ NRS, SC29/53/32 [SC29/53/1785/27], Inverness Sheriff Court Criminal Processes 1785, 'Declaration of Alexr. Matheson', 20 September 1785, f. 1.

³⁴⁰ *Ibid.*, f. 3.

disadvantages in their ability to navigate the legal system. That said, the meticulous recording of administrative personnel involved in the recording of declarations and precognitions gives the impression of a court environment that, although it could not reasonably be argued to be overly hospitable towards those accused of crimes, did at least attempt to mitigate the marginalisation faced by monolingual Gaelic speakers in a sheriff court that operated and was recorded in English. Indeed, given that explicit information regarding translation seems only to appear with the appointment of Thomas Gilzean, this lack of overt translation in other documents may suggest that many of the court personnel were bilingual. At the very least, the sheriff clerk depute Robert Campbell's ability to act as a linguistic mediator for Gaelic speakers suggests that there was a much lower risk of mistranslation or misunderstanding testimony from monolingual Gaelic speakers when these personnel were present, further mitigating their marginalisation.³⁴¹ Lynn Abrams has also drawn conclusions regarding the translation of Gaelic testimony, commenting that the events described within testimonies 'have already been mediated ... before the historian reads the text'.³⁴² However, as discussed in the introduction, all documents produced within the context of the legal system have to be considered as substantially mediated objects, in that their creation takes place within the strict standards and norms of the law and the court system.

Further context on the wider role of the sheriff clerk depute is once again available within Alexander Murdoch's *The People Above*. He points out that the sheriff clerk was not chosen by the sheriff depute, but rather appointed separately by the Keeper of the Signet.³⁴³ For the vast majority of the period under study within this thesis, the Keeper of the Signet was Henry Dundas, and from 1792 to 1800, the duties of the office were shared between Henry and

³⁴¹ For a study of the developing role of the interpreter in the Irish court system during this time period, see M. Phelan, *Irish Speakers, Interpreters and the Courts, 1754-1921* (Dublin, 2019). For a later nineteenth century examination of interactions between Gaelic speakers and the government, see S. M. Kidd, "'You seem a very intelligent man, and can speak English': Gaels and Government Inquiries in the Later Nineteenth Century", *Scottish Historical Review*, Vol. 104, No. 1 (2025), pp. 71-100.

³⁴² L. Abrams, 'The Taming of Highland Masculinity', p. 105.

³⁴³ A. Murdoch, *The People Above*, p. 23.

Robert Dundas.³⁴⁴ This separate sphere of influence on the personnel of the sheriff court has been examined by Whetstone, who reserves particular scorn for the office. The duties of the sheriff clerk were carried out independently of any influence or control from the sheriff depute, and the fact that sheriff clerks were paid via fees charged by the court, rather than by set salaries, often meant that the clerks earned more than sheriff substitutes.³⁴⁵ This lack of local regulation and the de facto hereditary nature of the role become particularly problematic when one considers that sheriff clerks were responsible for ensuring that proper standards of documentation were observed, as well as maintaining the record-keeping and correspondence of the court. Indeed, to historians and archivists, the sheriff clerk can be considered the most important of all sheriff court personnel. Whetstone argues that the post 'nakedly displayed all the worst features of early modern officeholding',³⁴⁶ remaining mostly unreformed until later in the nineteenth century.³⁴⁷

Inverness-shire's linguistic makeup made the navigation of language barriers a common component of daily life and business. Several cases within the criminal processes demonstrate, similarly to Dalcromby's case above, exactly how this was experienced and negotiated by the lower orders in Inverness-shire during this late eighteenth-century period. One case in particular demonstrates the varying modes of language use even within small communities. While offering evidence on an argument between her neighbours, Isobel Dunbar stated that the disagreement escalated to an assault:

after some Conversation betwixt them, the particulars of which the Declarant does not recollect as they spoke in the Gaelic Language which the Declarant does not understand.³⁴⁸

³⁴⁴ The Society of Writers to Her Majesty's Signet, *A history of the Society of Writers to Her Majesty's Signet with a list of the members of the society from 1594 to 1890 and an abstract of the minutes* (Edinburgh, 1890), p. 233.

³⁴⁵ A. E. Whetstone, *Scottish County Government*, p. 17.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, pp. 18-19.

³⁴⁸ NRS, SC29/53/49 [SC29/53/1789/11], Inverness Sheriff Court Criminal Processes 1789, 'Precognitions the Fiscals Agt. Elspat Fraser & her Husband, f. 1.

Dunbar lived on the south side of Castle Street in Inverness, proving that language differences were being negotiated within urban centres as well as in rural areas.³⁴⁹ The accused in this case were Elspat Fraser and her husband, Andrew McPherson, who, as discussed above in the introduction, was sentenced to fifteen days imprisonment in 1782 for beating Katherine Fraser.³⁵⁰ Elspat Fraser's declaration notes that she only spoke Gaelic,³⁵¹ which makes it clear that even close neighbours were sometimes unable to verbally communicate. This constant presence of language barriers within Inverness-shire occasionally had severe consequences. While providing evidence in a suspected murder case, a surgeon named James Roy described his attendance to and treatment of the victim, John McKenzie, leading up to his death from gunshot wounds. He stated:

he was then faint and low, and as he spoke Chiefly the Erse language which I do not understand, I had only a very Imperfect Account of the Circumstances from himself.³⁵²

This demonstrates the extreme end of the range of possibilities raised by the constant negotiation of language use throughout the Highlands. A gunshot victim being unable to provide details of his injuries to the doctor treating him represents perhaps the clearest example found within the sheriff court criminal processes of a Gaelic speaker being disadvantaged. Despite this, it is likely that this language barrier could have been mitigated had Roy sought a translator, and it is not clear from his brief letter to the court why this course of action was not followed.

³⁴⁹ *Ibid.*

³⁵⁰ NRS, SC29/53/7 [SC29/53/1781/13], Inverness Sheriff Court Criminal Processes 1781, 'Defender's Proof and the Sheriff Substitute's Interloqr. Thereon', 18 January 1782. Elspat Fraser was also involved in this case, as mentioned in NRS, SC29/53/7 [SC29/53/1781/13], Inverness Sheriff Court Criminal Processes 1781, 'Petition The Pror. Fiscall To The Sherriffs of Inverness', 10 December 1781, f. 3.

³⁵¹ NRS, SC29/53/51/14 [SC29/53/1789/11], Inverness Sheriff Court Criminal Processes 1789, 'Declaration of Elspat Fraser', 28 August 1789, f. 3.

³⁵² NRS, SC29/53/54 [SC29/53/1790/9], Inverness Sheriff Court Criminal Processes 1790, 'Copy Letter Doctor Roy To The Sheriff of Inverness anent the Shot fired at Ino. McKenzie', 3 February 1790. 'Erse', or 'Earse' was an early modern term for Gaelic, usually used by Lowlanders. See: 'Erse *adj.*, n.2', *Dictionary of the Scots Language* (2004), accessed 14 December 2025 [https://dsl.ac.uk/entry/snd/erse_adj_n2].

A further consideration of women's testimony relating to Gaelic language use is possible through a 1792 case of child murder, that – as was standard at the time – was investigated by the sheriff court prior to a potential circuit court trial. The accused was Jean Bisset, and witness precognitions were collected at Inverness on 8 December 1792. Unfortunately, at some point after the initial recording of the case documents, there has been a mix up regarding the declaration and witness precognitions that has resulted in a significant proportion of the declaration by the accused being lost. The first 4 pages of the document are witness testimony, which then jumps to page 5 of the declaration made by the accused. Despite this, there is still information to be gleaned from the surviving fragments, primarily in the testimony of the first witness, May Johnstone. Johnstone was aged around thirty, married to a sergeant in the 74th Regiment of Foot, and lived in Inverness. She made a living selling bread from a house on the west bank of the river Ness, and testified that on the afternoon of Saturday 1 December 1792, a woman carrying a toddler purchased a penny's worth of bread with two halfpennies of particularly poor quality. Johnstone recognised that the woman and her child were cold and invited them to warm themselves by the fire.³⁵³ Johnstone stated that 'she conversed with the woman in the Gaelic language',³⁵⁴ and that she observed 'from the said womans [sic] Language that she Spoke the Athol or Perthshire dialect'.³⁵⁵ Interestingly, Johnstone appears to have been bilingual, as her testimony was given before Thomas Gilzean and ends with no acknowledgment of her statement being subject to translation.³⁵⁶ Johnstone's conversation with Bisset was long, with Johnstone seemingly trying to establish Bisset's family connections, her reasons for travelling from Perth, and her intended destination.³⁵⁷ This appears to have been questioned within the court, as Johnstone deponed:

³⁵³ NRS, SC29/53/55 [SC29/53/1792/3], Inverness Sheriff Court Criminal Processes 1792, 'Precognitions with respect to a dead Child lately found in the flood mark near Inverness', 8 December 1792, f. 1.

³⁵⁴ *Ibid.*, f. 4.

³⁵⁵ *Ibid.*, f. 1.

³⁵⁶ *Ibid.*, f. 4.

³⁵⁷ *Ibid.*, ff. 2-3.

that the reason of the deponents making so particular enquiry about the said woman was that from her youth & appearance the Deponent suspected that the Child she had in her arms was a Natural Child.³⁵⁸

Despite Johnstone's apparent proclivity for scrutinising potential wrongdoing, Bisset noted in her own testimony that Johnstone treated her with kindness.³⁵⁹ Johnstone also testified that Bisset appeared to be an involved and dedicated parent, and that her child looked to be healthy and cared for, providing crucial context on Bisset's treatment of her child in the days preceding his murder.³⁶⁰ The extant pages of Bisset's testimony paint a picture of a single mother with few surviving family members, and even fewer options regarding the provision of shelter, food or financial support for her and her child. In a long and somewhat confused narrative of the circumstances surrounding her child's death, Bisset confessed to drowning her child after being 'tempted by the Devil'.³⁶¹ The original petition in this case is held in the Highland Council Archive, and describes the crime using the same language; Bisset 'casting off the fear of God, did by the Instigation of the Devil voluntarily drown the said Child in the River Ness'.³⁶² Anne-Marie Kilday has written extensively on the topic of eighteenth-century women's convictions for infanticide, and confirms in her 2007 work *Women and Violent Crime in Enlightenment Scotland* that this kind of language was common to court documents in infanticide cases. Infanticide – defined by Kilday as the murder of newborn children, primarily by their mothers, but here referring to the murder of a slightly older child – was categorised as the ultimate aberration against womanhood, and women capable of this specific act of violence were seen as having contravened even the most basic tenets of humanity and society.³⁶³ The use of this religious language and imagery was therefore a quite literal demonisation of violent women. There is, unfortunately, no information available in the extant parts of Bisset's declaration to indicate

³⁵⁸ *Ibid.*, f. 3.

³⁵⁹ *Ibid.*, f. 8.

³⁶⁰ *Ibid.*, f. 3.

³⁶¹ *Ibid.*, f. 6.

³⁶² HCA, L/INV/SC42/5/9 – 1792 - Agst. Jean Bisset, Suddy: charge — child murder, 11 December 1792, f.1.

³⁶³ A. M. Kilday, *Women and Violent Crime*, p. 61.

whether she was a monolingual Gaelic speaker; as stated above, Thomas Gilzean was not present, and it would therefore appear that if her declaration was given in Gaelic, no formal translator was needed.³⁶⁴ Despite this, Bisset's case documents allow us to observe, albeit filtered through the act of recording and transcription, a conversation between two women conducted in Gaelic, which was clearly one of the few acts of kindness experienced by an extremely marginalised woman and child.

Having now discussed several pertinent cases involving Gaelic language use in the Inverness sheriff courts, as well as the relevant secondary literature, it is necessary to consider the overall merits of such documentary evidence. Although these case documents allow a window into the lives of monolingual Gaelic speakers, whose lived experiences do not survive elsewhere in the historical record, they survive only because of their translation into English. Therefore, the documentary evidence of these lower-order people's lives is itself proof of the marginalisation of Gaelic in the eighteenth-century Highlands; the fact that there are very few Gaelic words recorded in these documents proves the Anglocentrism at play within the judicial system. However, it can also be argued that the overt translation of statements made by monolingual Gaelic speakers in court documents simply exaggerates, and makes more obvious, a process of translation and standardisation of language that was happening in all court documents. The translation of Gaelic speakers' testimony can therefore be seen as simply an extension of this phenomenon. At the risk of becoming repetitive, the sheer rarity of the evidence contained in sheriff court processes cannot be overstated and must be factored into any discussion of the potentially diminished value of translated Gaelic testimony. Many of the interactions recorded within the sheriff court processes, by Gaelic speakers and English and Scots speakers alike, provide a unique window into the lives and events they record. The fact that many of the court personnel were likely bilingual also minimises the risk of mistranslation and arguably closes the gap somewhat between the process of translation of the statements of Gaelic speakers, and the

³⁶⁴ NRS, SC29/53/55 [SC29/53/1792/3], 'Precognitions with respect to a dead Child', ff. 10-11.

process of standardisation imposed on statements made in English. The recording of these statements in English undoubtedly represents a serious loss to the Gaelic historical record, and the translation process was inherently marginalising for Gaelic speakers who found themselves within the court environment. However, on balance, the linguistic and evidentiary protocols maintained by the sheriff court system in Inverness likely mitigated many of the more egregious consequences of this process, and, on the whole, an optimistic view of the evidentiary value of Gaelic testimony is supported by the surviving documentary evidence.

The research aims of this thesis evolved over time from an initial desire to assess the evidentiary value of the Inverness sheriff court processes to gender historians. The wealth of material relating to women's interactions with the law, their negotiations with the court system in pursuit of gaining justice, and their utilisation of and, conversely, resistance to the authority of the court necessitated a shift in focus to examine these themes in more detail. This first section of the thesis has sought to consider, in considerable detail, the institution of the sheriff court and how it operated in the geographical context of late-eighteenth century Inverness-shire. Establishing this, through an examination of the men who administered the law, how geographical barriers to court access were mitigated, and how linguistic barriers were negotiated in court settings, is a crucial first step to the thesis project. It would not be possible to accurately assess, to any degree, the evidentiary value of the documents produced by the court without first considering the sheriff court as an institution in general, and the operation of the Inverness sheriff court in particular. This allows, in the following chapters, an in-depth analysis of specific themes identified as being particularly relevant to gender history more widely, particularly in terms of how women habitually interacted with the law. It is hoped, therefore, that the rigour of this analysis outweighs, and, indeed, incorporates as a core concern Stretton's weighty 'problem of the lawyer's hand'.

The overall purpose of this chapter is to fully establish the practical context in which the law was administered in the eighteenth-century Highlands. The Inverness sheriff court was a complex institution responsible for maintaining law and order over a sprawling, primarily rural jurisdiction. It operated as a focal point for legal and civil administration in the county, acting in a supervisory and cooperative role towards the various court systems which had survived the 1748 cull, and incorporated them into the overarching court structure in a way that extended access to law throughout Inverness-shire. Justices of the peace, messengers-at-arms and even baron baillies commonly operated in a local investigative capacity for the wider court system, hearing complaints, granting warrants, and coordinating the transfer of prisoners to the tolbooth in Inverness. Language barriers were routinely navigated, with court personnel acting as formal translators to ensure monolingual Gaelic speakers were able to both access the law and give testimony to the court. This foundational understanding of exactly how the court operated having now been established, it is now possible to proceed with a thematic analysis of the surviving criminal processes, and to consider fully how access to the law was negotiated and navigated by lower-order women within the Highlands during this period.

3. Lawburrows and Interpersonal Conflict in the Inverness Sheriff Court

Having now examined in detail the institution of the Inverness sheriff court and its legal and social role within Inverness-shire life, it is now possible to move on to an analysis of the opportunities and constraints the law presented to women in Inverness-shire. One element of Scots law that offers considerable insight into this theme is lawburrows, which exists within Scots law as a protective measure against anticipated harm. Therefore, while the sheriff court can be viewed as a punitive institution, the law also provided defensive stratagems for those experiencing harassment or violence. The surviving documents of the Inverness sheriff court criminal processes allow an exploration of how this law was utilised in eighteenth-century Inverness-shire, and how far this protection extended in practice – with a principal focus on whether contemporary gender ideologies affected the experiences of women seeking safety through the court. Lawburrows operated as essentially a type of restraining order, whereby someone could attest to their fear of harm from another and obtain security commanding the offender to keep the peace for a stated period of time. Cases involving lawburrows are, therefore, characterised by victims and witnesses who willingly cooperated with the court for a myriad of reasons – for instance, out of fear, or a sense of justice, or simply out of self-interest. The nature of these interactions can be grouped into several broad themes. Firstly, the extent to which personal agency can be determined in the actions of the accuser, as far as can be seen through the documentation for a given case. The existence and function of lawburrows would suggest a reclamation of legal agency on the part of those seeking protection under its authority. However, as individual cases show, this process was often complicated by the unjust power imbalance inherent within any interactions between the judicial system and individuals. This connects to the second consideration, which was the human cost of reporting crimes to the sheriff court. The consequences faced by those who sought judicial intervention when

wronged by another is an important consideration; this chapter will therefore examine whether it is possible to determine if interactions with the court improved the lives of those seeking protection, and to what extent those improvements were nullified by the negatives.

The role played by lawburrows within Scots law more generally has been examined by various institutional writers, such as Stair and Hume, but the practical use of lawburrows has been described by George Tait, in his 1821 work *A Summary of the Powers and Duties of a Justice of the Peace in Scotland*. Tait described his book as an attempt to correlate the sources of Scots law – ‘statutes, decisions and institutional writers’³⁶⁵ – into a format that was more useful for those without an academic legal education, primarily justices of the peace, or sheriff officers. It is therefore a reference work of how crimes were investigated, and how to manage a criminal case administratively. Initially published in 1815, it contains a series of formulae for court documents that correspond with petitions, witness testimonies and other case documents from the 1770s to the 1790s. Tait’s description of how lawburrows claims functioned is very clear:

The person fearing any of the sorts of wrong ... applied to a justice, and upon swearing to his dread of any such wrong ... gets the person, from whom the wrong is apprehended, ordered to find caution; and if he do not find it within a short time (commonly three days), gets him committed to prison till he find it. No citation of the person complained on is necessary. The applicant’s swearing to his dread of harm is sufficient ... but it seems proper that the judge ask such questions as may ascertain that the application is not malicious, or the occasion altogether trivial.³⁶⁶

However, Tait notes that this procedure worked slightly differently for those seeking protection from a spouse:

³⁶⁵ G. Tait, *Powers and Duties*, p. 1.

³⁶⁶ *Ibid.*, pp. 190-1.

Lawburrows³⁶⁷ are refused to the wife against the husband, unless she bring evidence of cause of fear. They are also refused to the husband against the wife, unless he bring similar evidence; but if he bring such evidence, they will be granted.³⁶⁸

It seems that for those in danger from their spouses, lawburrows functioned in a way much more akin to the normal progression of a criminal case, and therefore did not offer the advantage of bringing the case before a judge without the other party knowing until a warrant was out for their arrest.

Perhaps unsurprisingly, Tait takes much of his description of lawburrows from Stair. In Title IX of Stair's *Institutions*, as part of a larger tract on reparations for crimes, Stair deals specifically with the legal implications of lawburrows as a form of caution.

Lawburrows are granted upon the supplication of parties fearing harm, who without citing the other party, but making Faith upon their Complaint, have Letters of Horning, summarily to Charge the party complained on, to find Caution, *ut supra*.³⁶⁹

This demonstrates the use of lawburrows as a form of preventative caution that did not require a citation against the accused. This pre-emptive function of lawburrows was unusual within the structure of Scots law, but not unique. In his 1809 edition of *Treatise on the Offices of Justice of Peace; Constable; Commissioner of Supply; and Commissioner under Comprehending Acts*, the advocate Gilbert Hutcheson traces the practice of lawburrows to a statute of James I,³⁷⁰ and opined that:

³⁶⁷ Spelling within the court documents is often not standardised, and a considerable amount of variation can be expected. Words will be replicated as written.

³⁶⁸ G. Tait, *Powers and Duties*, p. 191.

³⁶⁹ J. Dalrymple, *The Institutions of the Law of Scotland, Deduced from Its Originals, and Collated with the Civil, and Feudal-Laws, and with the Customs of Neighbouring Nations, in Four Books* (Edinburgh, 1681), p. 109.

³⁷⁰ G. Hutcheson, *Treatise on the Offices of Justice of Peace; Constable; Commissioner of Supply; and Commissioner under Comprehending Acts* (Edinburgh, 1809), p. 390. Hutcheson's footnote for this statute is '1429, c. 129'. However, on RPS, the statute is within the records of the Perth parliament held on 6 March 1430. The correct citation for this statute is therefore K.M. Brown et al. (eds.), *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2024), 1430/24.

The body politic cannot be said to have attained full maturity, or to enjoy perfect health and vigour, while the community have no other security against the disturbance of the public peace, nor individuals against wrong and violence, excepting the infliction of punishments after the offence has been committed.³⁷¹

This is a crucial point in considering the uses, and indeed the limits, of the criminal law as a tool for mitigating harm in people's lives. Hutcheson is clear that the intended function of lawburrows was as a tool of empowerment for those fearing harm and was to be used proactively to inform the courts of potential crimes before they took place. He goes on to cite examples of similar laws and codes in other jurisdictions, such as *cautio de non offendo* and *cautio de damno infecto* in Roman law,³⁷² and *decennaries*, or *frankpledges* in Anglo-Saxon England.³⁷³ Hutcheson also mentions the same point raised in Stair, regarding the lack of citation against the accused. He states that:

The citation of the party complained of is not necessary; because the only security required is, that he shall do no illegal violence, which at any rate would be contrary to his duty as a member of society.³⁷⁴

This raises an important question about the utility of lawburrows, in that if the only requirement demanded of those subject to a lawburrows complaint is that they should not commit violence against the complainer, the impact of this is perhaps lessened by the fact that these actions would already be illegal.

One particular issue debated by contemporaries was lawburrows' considerable potential for misuse, with the lower standard of proof required for lawburrows cases seen as a possible loophole that could be exploited for malicious litigation. This debate ended up in the Court of Session in July 1778, as the end result of a Lanark sheriff court case in which Ninian Anderson had sought protection under lawburrows from siblings James, Robert and Marion

³⁷¹ G. Hutcheson, *Treatise on the offices of justice of peace*, p. 389.

³⁷² *Ibid.*, pp. 389-90.

³⁷³ *Ibid.*, p. 390.

³⁷⁴ *Ibid.*, p. 392.

Sellars. A summary of the case appears in the *Caledonian Mercury*, and describes how:

last week, the Court of Session gave judgment upon a question of most general importance, which had never before been tried, viz. What is incumbent upon one who takes out letters of *Laburrows*?³⁷⁵

Following their provision of surety that they would not harm Ninian Anderson, the Sellars siblings brought a civil case for damages against him, claiming that the case had been unfounded. Anderson claimed that he was only required to testify of his fear of harm, and that evidence of the risk posed to him was not needed. This became the crux of the argument in the Court of Session, with William Craig arguing on behalf of Anderson, and Robert Cullen for the Sellars siblings. Cullen's position was that lawburrows allowed anyone to slander their neighbours with near impunity, with the additional hardship of the accused experiencing imprisonment in the tolbooth until they found caution, and that the practice should be avoided:

unless he can bring some probable evidence of there being good reason for taking such a measure, otherwise it might be in the power of any malicious person to harrass [sic] his neighbours from mere malice.³⁷⁶

In the summary of the case in the published *Decisions of the Court of Session*, Cullen also points out that other legal systems made efforts to protect against malicious litigation, such as England's requirement for the citing of the accused.³⁷⁷ In defence of Anderson, Craig argued:

that Laburrows [sic] was a mode of security allowed by the law to every man who could solemnly make oath to his being in fear; a thing, in its own nature, incapable of proof, being a feeling or sentiment of the mind, of which a man himself only can be conscious ... Laburrows, therefore, is granted to *quiet the minds* of his Majesty's subjects : That it can be no hardship to oblige any person only to find security to keep the peace;

³⁷⁵ *Caledonian Mercury*, issue published Wednesday 8 July 1778, p. 3. I am indebted to Dr David Brown for bringing my attention to this reference.

³⁷⁶ *Ibid.*

³⁷⁷ *Decisions of the Court of Session. From January 1778 to December 1781. Collected by appointment of the Faculty of Advocates* (Edinburgh, 1791), p. 44.

and that, if an application has been malicious, upon proof of that, a party will be punished [emphasis reproduced from the original].³⁷⁸

This categorisation of lawburrows as a peace-keeping, justice-seeking tool is interesting – clearly the Court of Session understood one of the functions of criminal law to be psychological; the general populace were seen to require not only a retributive system that punished wrong-doers, but that additionally discouraged wrong-doing in the first place. The final decision of the appeal case was in Anderson’s favour; ‘the Lords, by a great majority ... found Anderson not obliged to bring any proof,’³⁷⁹ and the Sellars siblings were not owed damages for the inconveniences of having to answer a lawburrows petition. The question of whether a complaint was groundless was left to the personal discretion of the sheriff, the sheriff substitute or, less commonly, the justice of the peace who was tasked with hearing the case, demonstrating that potential corruption or misuse of the law was perhaps not the most pressing issue for the Lords Advocate. Despite this, the issue was at its core a debate about the purpose and function of the criminal law. The lack of requirement for citation or evidence under lawburrows allowed victims of harassment a clear route towards protection, or at least mitigation of harm. Although it would not be wise to draw wider conclusions about the Scottish legal system from the use of one statute, the conclusions drawn by the Court of Session demonstrate that the criminal law was capable of prioritising victims – or indeed potential victims – of crime over the rights of those accused of them. Overall, it is clear that during this period, lawburrows was intended as a preventative tool for those experiencing interpersonal conflict, and its use as such had been decisively protected by the Court of Session. This allows a greater contextual insight into those instigating lawburrows cases, as utilisers of a legal pressure valve designed to promote peace within communities.

In total, there are seventeen lawburrows cases within the criminal processes of the Inverness sheriff court in the date range 1777 to 1795, as well as two

³⁷⁸ *Caledonian Mercury*, Wednesday 8 July 1778, p. 3.

³⁷⁹ *Ibid.*

further assault cases where lawburrows was mentioned and was likely to have been a part of the case, but it is not possible to confirm this from the surviving documentation. The aim is not to analyse the use of lawburrows through a quantitative framework, but rather to look at how women utilised lawburrows through a qualitative examination of case documents. Lawburrows is a useful vector for considering interactions with the law and examining the reasoning behind why someone might seek to protect themselves, and their belongings, through judicial means. Despite the interesting nature of lawburrows, there does not seem to be a great deal of discussion concerning it within the field of legal history. John Finlay briefly comments on its use in his 2015 book *Legal Practice in Eighteenth-Century Scotland*, as part of a longer passage on the rights and obligations of the procurator fiscal, but merely notes that it was used as another form of caution when further harm was feared by the victim of a crime, and does not go into detail regarding its use as a preventative measure before any crime had been committed.³⁸⁰ This lack of scholarly interest may have been at least partly caused by the fact that the majority of lawburrows cases have very little surviving documentation. The preventative nature of lawburrows means that the cases were usually not linked to a criminal trial that would lead to a greater documentary footprint; in most cases only a single petition stating the bare bones of the case survives, a fact which perhaps proves the efficacy of its use as a preventative measure. However, some, such as the lawburrows case of Mary McDonald, have a wealth of information, including – crucially – detailed witness testimony.

The convoluted narrative of this 1781 case allows us to draw some conclusions around the opportunities and constraints offered by the law to lower-order women at this time. The case is atypical due to the amount of surviving testimony, which makes drawing parallels to other lawburrows cases difficult. However, it still raises questions about women's agency before the law, and the role the institution of the sheriff court played in both protecting women, and, conversely, exposing them to danger. Mary Macdonald submitted a

³⁸⁰ J. Finlay, *Legal Practice*, p. 344.

petition for protection under lawburrows on 4 May 1781. She testified that she had ‘good reason to believe that Alex Breck Kennedy in Culleachy Donald Kennedy there his Son, Marian Katharine & Ann Kennedys there his Daughters mean & intend to Deprive her the Petitioner of her Life’.³⁸¹ She was then questioned by the sheriff substitute, Alexander MacPherson, who approved a warrant of commitment against all of the accused except for Donald Kennedy, the justification for which is not included. They were to be found, arrested, and taken to the tolbooth of Inverness until they provided security under lawburrows that Mary Macdonald would be ‘Harmless & Skaithless kept in her person and effects’.³⁸² Thus far, this is a textbook example of a lawburrows petition in terms of how the legal process was described within the document. However, on 5 May 1781, one day after Mary MacDonald submitted her petition and testified that she feared for her life, Alexander Breck Kennedy also submitted a petition, requesting protection under lawburrows, due to alleged harassment experienced from him by Mary MacDonald. This petition was also approved, and Mary MacDonald was to be found and incarcerated in the tolbooth until she found caution.³⁸³ On 30 July 1781, Mary MacDonald was examined by the sheriff depute, and over the course of nine pages of witness testimony, went into a great deal of detail about the circumstances surrounding her enmity with the Kennedys, as well as a timeline of events leading up to – and then the aftermath of – the twin lawburrows petitions. It also gives a fascinating glimpse into the life of a lower-order woman living in Inverness-shire at this time. MacDonald was nineteen and unmarried, and at the time of her testimony lived with her older sister, who was unnamed, and her brother-in-law, Hugh Chisholm, messenger at Fort Augustus. Chisholm was part of the personnel of the court – as a messenger he delivered citations on witnesses and accused, transported people to the tolbooth, and liaised with the wider court personnel system that included procurators fiscal, sheriff substitutes, and justices of the

³⁸¹ NRS, SC29/53/6 [SC29/53/1781/2], Inverness Sheriff Court Criminal Processes 1781, ‘Petition Mary Macdonald To The Sheriff of Invs.’, 4 May 1781.

³⁸² *Ibid.*

³⁸³ NRS, SC29/53/10 [SC29/53/1781/38], Inverness Sheriff Court Criminal Processes 1781, ‘Petition agt. Mary Macdonald’, 5 May 1781.

peace. This perhaps explains MacDonald's familiarity with the protective measures available to her under the law and is worth bearing in mind as her testimony progresses. It is also worth noting that the Kennedys' had frequent interactions with the court system, a topic which will be covered more fully in the later chapter on resistance to judicial authority.

In her testimony, MacDonald described several occasions when she had witnessed the Kennedys with livestock she either strongly suspected or was certain did not belong to them. For example, she recounted an incident where she came across Alexander Breck Kennedy and two of his sons standing on a hillock. As she came up to them, they started a conversation, and McDonald's dog found a cow's head amongst the heather. She testified that she knew for a fact that the cow had belonged to her brother-in-law, because she had been present when the calf was born and she had then helped raise it.³⁸⁴ She was then asked by the court whether she had ever informed her brother-in-law about this or about any of the other suspicious activity she'd witnessed, and she replied:

that She did not as She was then on a Plan of forming a Connection with one of the Kennedy's [sic] called Rory, Brother to the said Angus bain which made her resolved to conceal every thing that could affect any of the Kennedy's [sic].³⁸⁵

From this we can see the tension between McDonald's loyalties to a potential marriage partner, and her role within her own family unit, with its connections to the sheriff court. Any information provided to the court was very likely to permanently sever her connection to the Kennedys, which would have ended her marriage hopes as well as potentially placing her in danger. It is difficult to pinpoint the exact event that caused a breakdown in the relationship between McDonald and the Kennedys, but clearly by early May 1781 both parties had resorted to the use of lawburrows petitions to formally declare their mutual

³⁸⁴ NRS, SC29/53/10 [SC29/53/1781/38], Inverness Sheriff Court Criminal Processes 1781, 'Declaration of Mary McDonell', 30 July 1781, ff. 5-6.

³⁸⁵ *Ibid.*, ff. 6-7.

grievances. It is at this point that MacDonald is first required to testify formally about the events leading up to these petitions, and in the July testimony she described how during her declaration following Alexander Breck's lawburrows petition against her:

there were some Fort William persons in bedd in the open Loft above the Court house & one Henrietta Kennedy a near relation of the said Alexr breck Kennedy was listening from the other side of the Wall separating her place of confinement from the Courthouse & through one or other of these Channells every word said by the Declarent was communicated to the said Alexr. Kennedy & his Connections & owing to the Declarent having then mentioned some facts that consisted with her own knowledge with respect to sheep stolen by some of the Tribe of Kennedy it seems a Plan was laid to shut the Declarents mouth on this subject or else destroy her.³⁸⁶

She was interrogated on this point and asked if she knew she was being listened to, and if this had induced her to conceal anything she had witnessed, and she answered in the affirmative. This, therefore, gives an insight into the sheriff court as a physical institution that was not infallible; witnesses were induced by law to give information to the court that could place them at real risk of harm. Once again, we can see the constraints placed upon McDonald by the law, as well as how she chose to navigate the court environment. Although, unfortunately, this May declaration of McDonald's does not survive, we can infer that this concealment of knowledge may have been an attempt to mitigate the potential consequences of cooperation with the law.

This disagreement between McDonald and the Kennedy clan culminated rather explosively on Thursday 26 July 1781. In the course of her work, McDonald had been sent to the peat moss two miles away from her sister and brother-in-law's house. After she had been there for about an hour, Katharine Scott, spouse to Alexander Breck Kennedy, arrived, and after a short conversation, McDonald alleged that Scott took:

an Ax from below her Apron and said with Oaths & Imprecations that she would murder the Declarent if She would not swear upon the cold Iron

³⁸⁶ NRS, SC29/53/10 [SC29/53/1781/38], 'Declaration of Mary McDonell', 30 July 1781, f. 4.

that She would not in future mention any thing detrimental to her family or Connections.³⁸⁷

A violent physical struggle followed, which ended with McDonald in possession of the axe, and running away, 'making the best speed in her power and crying out murder all along'.³⁸⁸ Scott followed her, but McDonald took shelter in the nearest house and was later accompanied home by a woman named Mary Fraser. McDonald also specified that she kept the axe, and handed it in to the clerk of court as evidence, noting that although she did not recognise the weapon, her sister and brother-in-law both did, and had seen it in Alexander Breck's house.³⁸⁹ This seems overly convenient, but unfortunately neither of their statements survive to provide more details on the context surrounding this crucial evidence.

The fact that this attack happened after McDonald applied for and obtained protection under lawburrows, raises the question of how much safety the law provided, particularly when the subjects of the petition were a criminal family who were open in their resistance to the legal authority of the court. It is also important that McDonald was allegedly attacked by Katharine Scott, who was clearly an important member of the Kennedy family but who was not mentioned in the first lawburrows petition, and therefore had not been forced to state that she would keep the peace. At first glance, McDonald's interactions with the court seem to be evidence of a woman utilising the law for her own benefit – as a protective mechanism. However, the details of her July testimony make the constraints she was operating under far clearer. Her testimony is disjointed; it begins with the axe attack and then, over the course of several pages, meanders through the details of her connections to the Kennedys and the crimes she witnessed in a haphazard, non-chronological manner. McDonald is repeatedly interrogated on specific points of information, forcing her to reveal far more than she seemingly planned to, which is understandable given that even when

³⁸⁷ *Ibid.*, f. 2.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*, ff. 3-4.

she withheld information from the court, her life was still threatened. Despite this, McDonald's actions were not entirely without agency or support. She instigated the legal proceedings through her initial lawburrows petition, and throughout this process, she clearly had the assistance of her sister and brother-in-law.³⁹⁰ McDonald found herself in an unenviable position, between the legal apparatus of the court on one hand with all of its embodiment of state power, and on the other a dangerous criminal family with whom she lived in very close proximity. In this light, her actions both within and outwith the bounds of the law can be seen as attempts to protect herself from harm – rather than being a pawn in her unfortunate circumstances, she was an autonomous actor. This case complicates simplistic readings of cooperation or opposition to the legal system and provides a fascinating glimpse of a young woman of the lower orders, during what was undoubtedly one of the most turbulent periods of her life.

There are a number of other lawburrows cases involving violence committed upon women by women, allowing further analysis of the gendered nature of violence within Inverness-shire at this time. One notable case within this category is the petition for lawburrows applied for by Katharine McIntyre against Sarah Rankine, on 16 June 1781. The petition states that, while walking through Maryburgh (an older name for the village of Fort William), McIntyre was attacked by Sarah Rankine, widow of Allanbane McInnes, apparently striking her on the head with a rock.³⁹¹ Rankine was recorded within the petition as being the aunt of Duncan McInnes, who McIntyre had recently reported to the court had 'Committed a Rape with Violence on your petitioner's Body'.³⁹² He was, at the time of the lawburrows petition, being held prisoner at the garrison in Fort William as a result, and the petition is clear in stating that this accusation was

³⁹⁰ The final chronological document that survives for the case is McDonald's testimony where she reveals that she had concealed knowledge of criminal wrongdoing from her messenger brother-in-law. It is therefore not possible to know whether the support McDonald received from her sister and brother-in-law continued beyond this point.

³⁹¹ NRS, SC29/53/6 [SC29/53/1781/6], Inverness Sheriff Court Criminal Processes 1781, 'Petition Katharine McIntyre To The Sheriff Depute of Invernessshire [sic]', 16 June 1781, f. 1.

³⁹² *Ibid.*

the catalyst for Rankine's assault against McIntyre.³⁹³ This case therefore amply demonstrates the consequences that interaction with the judicial system could entail; McIntyre was assaulted because she had attempted to seek redress against her rapist through judicial means. The personal cost paid by those who sought judicial intervention is clear; while action through the courts was perhaps the only means through which McIntyre could obtain justice, it also made her vulnerable to retaliatory violence. Like McDonald's case above, the act of reporting either feared or actual harm to the sheriff resulted not in an increased level of safety for the pursuer, but, inversely, an increase in violence.

One further case of violence between women which resulted in a lawburrows petition was recorded on 18 July 1783. The petitioner, Mary Hart, alleged that four days previously, she had been attacked by Christian Harvey on the streets of Fort George.³⁹⁴ Both women were married to Gunners stationed at Fort George,³⁹⁵ and the case was firmly entrenched within the military life of the Fort. Hart describes how Harvey 'took hold of her by the hair',³⁹⁶ and 'beat bled & bruised the Petitioner to the great effusion of her blood'.³⁹⁷ Perhaps most importantly, Hart claims that Harvey 'swore if she had the Petitioner without the Fort [i.e. if they were to meet outwith the military encampment], that she would [sic] bereave her of her Life',³⁹⁸ proving the centrality of the Fort and also, arguably, the apparent control exercised by the military against breaches of the peace. Any consideration of the role of military forts within Inverness-shire must take account of the spectre of the '45 which looms over any discussion of the military in the Highlands. Christopher Duffy has noted that in the months following Culloden, 'Inverness served as a base for the subjugation of the

³⁹³ For an example of the surviving documents in the rape case against McInnes, see: NRS, SC29/53/7 [SC29/53/1781/7], Inverness Sheriff Court Criminal Processes 1781, 'Precognition The Pror Fiscall Agt. Dun. Innes alias McInnes'.

³⁹⁴ NRS, SC29/53/22 [SC29/53/1783/26], Inverness Sheriff Court Criminal Processes 1783, 'Petition Hart To The Sheriff of Invs', 18 July 1783, f. 1.

³⁹⁵ In Harvey's case, her husband, William Harvey, was designated as a 'Gunner or Matross', *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

Jacobite north-east'.³⁹⁹ The military encampment at Fort Augustus acted as the staging point for the Duke of Cumberland's attempts to pacify the Western Highlands, with Duffy commenting that 'when Cumberland's troops arrived in strength at Fort Augustus the Highlands felt the full weight of repression'.⁴⁰⁰ This military infrastructure was clearly still an important aspect of life in Inverness-shire during the 1780s and 90s. Fort George, Fort Augustus and Fort William are all mentioned with some regularity in surviving Inverness sheriff court cases, making the long-standing impact of British state interventionism in the post-Culloden Highlands evident.

Interestingly, Hart states within her petition that 'the blood & bruises she Received may be seen by your Lop. if thought necessary',⁴⁰¹ although there is no mention of the sheriff depute taking such a measure, with the petition only recording, similarly to all other lawburrows petitions, that Hart was required to make an oath that she feared further harm from Harvey.⁴⁰² While the assaults seemed to be the instigating incidents, the factor that caused both Hart and McIntyre to seek judicial protection via lawburrows was in both cases the continued threat of harm, and specifically the risk of being assaulted while going about their affairs on public streets. An additional consideration for McIntyre was the impact Rankine's harassment was having in economic terms – she mentions in her petition that she was 'not Safe To Go about her Lawfull [sic] Employment until Caution and Laborros [sic] is found Acted In your Lordships Books as Accords of the Law'.⁴⁰³ While there was clearly an expectation in these, and in all other lawburrows petitions, that the act of obtaining caution under lawburrows would lessen or cease the harassment and violence being experienced by the petitioner, clearly a further aspect was the strategic recording, within the administrative ledgers of the sheriff court, of the

³⁹⁹ C. Duffy, *The '45: Bonnie Prince Charlie and the Untold Story of the Jacobite Rising* (London, 2003), p. 529.

⁴⁰⁰ *Ibid.*, p. 531.

⁴⁰¹ NRS, SC29/53/22 [SC29/53/1783/26], 'Petition Hart To The Sheriff of Invs', 18 July 1783, f. 1.

⁴⁰² *Ibid.*, f. 3.

⁴⁰³ NRS, SC29/53/6 [SC29/53/1781/6], 'Petition Kathrine McIntyre To The Sheriff Depute of Invernessshire [sic]', 16 June 1781, f. 1.

harassment and violence experienced up to that point. Indeed, lawburrows only required the threat or fear of future harm sworn to under oath, meaning that lawburrows petitions could be used strategically as a method of minimising or managing risk of harm. By informing the sheriff court system that they were at risk of harm from a specific member of their social network or wider community, particularly if they had been threatened with grievous violence or death, they created an administrative paper trail which could theoretically ensure appropriate punishment for the perpetrator of that violence. It should be noted that from the analysis carried out thus far into cases involving serious violence or murder that left a documentary mark within the surviving records of the Inverness sheriff court, it has not been possible to assess the validity or utility of this strategic use of lawburrows, in that no cases have been yet identified wherein caution under lawburrows was broken, or, indeed, where the likely perpetrator of violence had been uncovered via the existence of previously obtained caution under lawburrows. However, assaults and the murder cases investigated by the sheriff court which were then tried by the High Court on circuit have not been a central focus of this thesis, and a comparative study of the cases featuring in the Inverness sheriff court and the High Court of Justiciary has not been attempted. There is clearly more work to be done on the topic of lawburrows and how it was utilised intentionally and protectively by the lower orders in the eighteenth century, but it is hoped that this chapter provides an overview of the primary themes, with clear potential for a more in-depth study of its use in other sheriff court jurisdictions.

A further notable use of lawburrows within the jurisdiction of the Inverness sheriff court was as an attempted method of protection for women against violence committed against them by male acquaintances or relatives. Through this lens, we can see the law being used as a tool wielded only when interpersonal relationships had broken down irreparably. In 1781, Mary Grant, resident in Inverness, brought a petition for lawburrows against her son, Alexander Ritchie, after he had assaulted her within her own home. There is only one surviving document that concerns the case, the petition for lawburrows

itself. Although the language of the petition is formulaic, we can glean much of the circumstances surrounding the application for lawburrows, and the violent nature of the disagreement. The petition describes Ritchie flying into a rage and destroying furniture, as well as apparently causing damage to the house itself, although the extent of this is unclear.⁴⁰⁴ The rhetoric of petitions to the sheriff, regardless of the crime reported or the author, was habitually and necessarily emotive, as one of the primary purposes of a petition was to convince the sheriff or sheriff substitute that the alleged crime was serious enough to pursue. This must be considered when assessing the evidentiary value of cases featuring only one surviving petition, with no witness precognitions or other relevant case documents to contrast against. Despite this, the circumstances of the assault against Grant were severe; the petition describes how she was forced to 'desert her own House naked out of Bed & to take Shelter in a House of her Neighbours'.⁴⁰⁵ The exact meaning of 'naked' in this context is unclear, although the Dictionary of the Scots Language suggests it may mean that she was wearing only undergarments or perhaps nightclothes.⁴⁰⁶ It is worth noting that being assaulted within one's own home was considered a significantly aggravating factor for crime within Scots law, to the degree that hamesucken – the premeditated assault of a person in their own home – was at this time punishable by death, although as Cairns notes, it was exceptional by this time for it to be tried as a capital crime.⁴⁰⁷ It is therefore unsurprising that Grant's petition for protection under lawburrows was granted, considering her case featured the threat of bodily harm and harm to her belongings, taking place within her home. It is also interesting that the court was being used in this instance as an intermediary in a dispute within a family unit. Similarly to Angus Smith's case, where he was removed from his home due to violence enacted against his wife and mother, we can infer here that violence committed by men

⁴⁰⁴ NRS, SC29/53/10 [SC29/53/1781/35], Inverness Sheriff Court Criminal Processes 1781, 'Petition Mary Grant To The Sheriff of Inverness', 26 September 1781, f. 1.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ "Nakit *adj.*". *Dictionary of the Scots Language* (2004). Accessed 27 Aug 2025 [https://dsl.ac.uk/entry/dost/nakit_adj].

⁴⁰⁷ J. W. Cairns, 'Hamesucken and the Major Premiss in the Libel', pp. 317-22. See also: D. Hume, *Commentaries on the Law of Scotland, respecting Crimes*, Vol. 2 (1797), pp. 20-21.

against their female relatives was not trivialised by the court – from the surviving documents it seems to have been treated almost identically to any other form of interpersonal violence mediated via lawburrows. This lack of obvious gendered discrimination, even in cases where the gender of the perpetrator and victim would seem to be a relevant factor in the violence enacted, shows a kind of legal ‘gender blindness’ which contradicts the constrictive gender ideologies of the period.

While court intervention in a family dispute represents the logical endpoint of the deeply personal nature of the cases covered within the sheriff court criminal processes, wider community disagreements were also frequently mediated by the courts. In 1786, Ann MacBean sought protection under lawburrows following an assault perpetrated by her neighbour, Thomas Fraser. The dispute between the two seems to have arisen after a two-year-old ‘coll’⁴⁰⁸ (presumably colt), belonging to Fraser, had been found eating MacBean’s ‘corn’⁴⁰⁹ (oats). MacBean put a stop to this, after which Fraser ‘did in a most cruel & barbarous Manner beat and bruise her by whipping [sic] her back side in presence of many witnesses’.⁴¹⁰ This kind of violence can clearly be interpreted as a gender-based punishment against MacBean; in daring to protect her property and food supply, she had apparently transgressed the boundaries of acceptably gendered behaviour in a way that was only rectifiable through public violence. Given that the two lived in close proximity to one another, there was likely some prior personal history that led to the disagreement that is not visible within the surviving court record. The petition specifies that the assault was perpetrated ‘without any just cause or provocation’,⁴¹¹ but this is formulaic legal prose common to lawburrows petitions and should not be read as evidence that there had been no previous contact between those involved in the case. There is a clear element of infantilisation and public humiliation in the specific mode of violence employed by Fraser; an act of corporal punishment carried out in front

⁴⁰⁸ NRS, SC29/53/34 [SC29/53/1786/6], Inverness Sheriff Court Criminal Processes 1786, ‘Petition & Compl. For Ann MacBean & ca.’, 28 June 1786, f. 1.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

of MacBean's local community was clearly intended to shame MacBean into passivity. In fact, in opposition to this apparent intended aim, MacBean took her complaint against her treatment to the highest legal authority immediately available to her. She did not do this immediately – the assault apparently took place in August of 1785, and the lawburrows petition is dated 28 June 1786, but this was due to continued harassment by Fraser; the petition notes that he had 'since threatened and promised to do her further bodily harm and destroy her affects [sic]',⁴¹² which would be a powerful motivator for MacBean to seek protection, rather than redress for the initial assault. Importantly, the petition specifies that MacBean 'craves the protection of the Laws of her Country Against such outrageous [sic] maltreatment and abuse'.⁴¹³ This, in addition to plainly soliciting the intervention of the legal system in her case, is a clear statement of her own importance, the unacceptability of her treatment and her awareness of her rights under law. Ann MacBean is designated as 'spouse to Angus MacDonald possessor of a part of the Lands of Drummond'. This makes her social status somewhat unclear, but given that Thomas Fraser, a tenant in Drummond, felt entirely justified in publicly beating MacBean, this would suggest that MacBean was not landed gentry, but was also perhaps not lower order. Her spouse Angus Macdonald is named 'for his Interest',⁴¹⁴ but was not required to speak at any point. The parish is not specified within the petition, an omission which can imply a close enough proximity to Inverness that the location was perhaps deemed obvious – the 'lands of Drummond' mentioned would therefore seem to be on the banks of the river Ness, within what is now Inverness, but which in the 1780s would have been a couple of miles upriver from Inverness proper.

The eventual outcome of the case is, as is often the case with lawburrows, unclear. MacBean's request for protection under lawburrows was granted by the sheriff substitute, Thomas Gilzean, who granted warrant to sheriff officers to serve Fraser with a copy of the petition, after which he was required to find

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

caution within twenty-four hours – if this was exceeded, he would be incarcerated in the tolbooth until caution had been obtained. He was also required to give in answers to the petition within forty-eight hours of it being delivered, with the short timescales for response another sign of Drummond’s geographical proximity to the court. Beyond this, we have little insight into the degree of protection granted to MacBean by the court. However, the importance of this case lies not with the success or failure of the attempt to seek protection through legal means, but the attempt itself. MacBean, after being publicly punished for acting in opposition to a man, went to the court system and utilised her right to protection from harm under law. This was not an assault case, where MacBean would have been seeking legal restitution for harm, but arguably a more active use of the law, wherein MacBean was enforcing her right to live ‘harmless and skaithless kept’ – in this light the assault and continued harassment can be seen as an attack by Fraser against MacBean’s ability to live freely, which the petition clearly established as MacBean’s prime concern. MacBean’s motivation therefore was not judicial punishment, a valid aim in and of itself considering the description of the assault, but the ability to live within her community without fear of continued violence. This desire to avoid harm is the hallmark of lawburrows petitions, which frequently feature assaults and violence that have already been experienced by petitioners. In each lawburrows case, it is this purposeful use of the court system as a mechanism for protection, rather than punishment, which is their most notable aspect.

It can be argued that dispute resolution is the impetus behind the vast majority of the cases found in the criminal processes of the Inverness sheriff court. Disputes that ended in violence, or long-standing disagreements between neighbours which eventually reached a level requiring court attention, are the explanations behind a great deal of cases in which the more granular detail varies widely. Despite this, by looking *through* the narratives supplied in criminal cases, we can see that the disputes that came to the attention of the courts were only a small fraction of the interpersonal disagreements and violence that were a feature of everyday life in communities throughout Inverness-shire at

this time. This carries the implication that there was a thriving system of informal dispute resolution that operated completely separately from the judicial jurisdiction of the sheriff court, or indeed any other formalised legal system. Occasionally, we can see the sheriff court acting as a last resort for disputes that cannot be settled informally within communities, or indeed, as an arbitrator on occasions when these informal systems were insufficient.⁴¹⁵ One example of this can be seen in a 1794 petition for lawburrows, submitted to the Inverness sheriff court by Andrew Urquhart. Urquhart had attended the wedding of his master's daughter, during which John Smith, alias Gow, had fought physically with Hugh Rose, a tenant in Midleys, Inverness. According to Urquhart, he and some other 'well disposed persons'⁴¹⁶ intervened and separated the men, after which Smith formed a grudge against Urquhart that led him to state repeatedly that 'he woud doe the Petitioner bodyly harm, when he woud gett ane opportunity of doing so.'⁴¹⁷ Smith then later attacked Urquhart on Castle Street in Inverness, and informed him that he would repeat the assault any time their paths crossed in the future.⁴¹⁸ Like Donald Fraser alias Bain in the assault case detailed in the previous section, Smith was described in the petition as 'habit and repute of a very turbulent & Qurealsome [sic] disposition'.⁴¹⁹ This phrase comes up repeatedly in cases of habitual or, perhaps, performative male violence, and is also mentioned in Abrams' study of Highland masculinity, interestingly enough, relating to an 1828 case study involving a physical fight instigated at a wedding.⁴²⁰ Abrams notes the important role played by alcohol in

⁴¹⁵ Bruce Lenman has commented that the end of heritable tenures following the '45 resulted in the wholesale collapse of systems of clan governance, see: B. Lenman, *Integration, Enlightenment*, p. 10. While it is true that clan patriarchs would have likely acted in a mediatory capacity, it should be noted that the kinds of informal dispute resolution under discussion here are interpersonal in nature, and do not appear to be related to pre-existing heritable jurisdictional structures. For more information on medieval and early modern Scottish customary rights in relation to heritable tenures, see R. Houston, 'Custom in Context: Medieval and Early Modern Scotland and England', *Past & Present*, Volume 211, Issue 1 (May, 2011), pp. 35-76.

⁴¹⁶ NRS, SC29/53/10 [SC29/53/1794/10], Inverness Sheriff Court Criminal Processes 1794, 'Petition Andw. Urquhart To The Sheriff of Invs.', 1 September 1794, f. 1.

⁴¹⁷ *Ibid.* All spellings are as written in the petition.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*, f. 2.

⁴²⁰ L. Abrams, 'Highland Masculinity', pp. 108-9.

recreational male violence,⁴²¹ and it seems likely to have played a role in the dispute between Smith and Rose which necessitated Urquhart's intervention. Like in other lawburrows cases, it was not the initial episode of violence which provided the impetus for seeking protection from the sheriff court, but the repeated instigation of violence, as well as the promise of further physical altercations in the future. The petition specifies that Urquhart was 'in danger of his life to gae about his Lawfull affairs';⁴²² it therefore seems clear that although some level of riotous or hooliganistic behaviour at a wedding might have been considered usual and below the sheriff's court's attention, the continuation of a grudge beyond the bounds of such a group social event broke with acceptable norms and represented a far greater threat to one's liberty and health. Abrams has discussed the commonality of male violence at social events, terming the phenomenon as 'social violence',⁴²³ with certain necessary ingredients such as the gathering of groups of men for a social occasion, the addition of alcohol, the occasional long-standing grievance, with the common habit of carrying weaponry often raising the level of potential physical harm. Abrams argues that such displays represented a form of homosocial bonding and mutual reification of masculinity.⁴²⁴ In this light, Urquhart's actions could debatably be seen as a rejection of codes of manhood which defined one's masculinity in relation to one's ability to physically defend oneself. However, it could just as easily be seen as a straightforward attempt to mitigate potential harm within the bounds of the law. Regardless, it provides a useful example to compare the gendered treatment of those seeking lawburrows.

When compared to the above cases involving women seeking protection under lawburrows, it is notable that the progression of the petition, the gravity with which any future potential harassment or violence was treated, as well as the petitioner's treatment by the court as legible within the surviving documentation are all similar, regardless of the gender of the applicant. It

⁴²¹ *Ibid.*, pp. 111-12.

⁴²² NRS, SC29/53/10 [SC29/53/1794/10], 'Petition Andw. Urquhart To The Sheriff of Invs.', f. 2.

⁴²³ L. Abrams, 'Highland Masculinity', p. 109.

⁴²⁴ *Ibid.*

should be noted that the surviving petitions for lawburrows in the Inverness criminal processes were all granted, precluding any analysis of whether there are any observable gendered trends in unsuccessful applications for lawburrows. As already stated, it is also not possible to discover what percentage of the total lawburrows petitions heard by the sheriff court is represented by the seventeen surviving petitions. However, although the standardised legal language of the petitions may obscure the experience of a petitioner within the court, the outcomes experienced across gender are consistent, if not identical. Similarly to MacBean, McIntyre and MacDonald above, Urquhart was required to compare before the sheriff depute or substitute and swear to his fear of harm. A warrant to incarcerate Smith until he found caution under lawburrows was then granted, with the slightly unusual addition that Smith was also required to avoid causing harm to Urquhart's 'good name and reputation',⁴²⁵ perhaps an indicator that in addition to the risk of physical harm, Smith had been inflicting reputational damage to Urquhart within his community. It is within this innocuous and standardised final paragraph that one difference in Urquhart's treatment by the court can be observed. Interestingly, Urquhart's petition states that the conditions of the caution Smith was required to find applied for 'all time coming'.⁴²⁶ As previously noted, a lawburrows petition simply required the accused to formally state within the documentary record of the court that they would not carry out actions to harm another, itself already an illegal act regardless of the method of harm employed. In this light, the requirement for these conditions to be observed in perpetuity was not unreasonable. It can also be compared to the cases above, not in terms of gender, but in terms of the potential longevity of risk experienced by the petitioner; perhaps Smith's alleged statements that he would physically harm Urquhart 'at any time he would [sic] meet him'⁴²⁷ was seen to represent a significant, long-term risk to Urquhart's safety. Indeed, the other case examined in this chapter which features long-term physically violent harassment is that of Mary Macdonald, whose petition for

⁴²⁵ NRS, SC29/53/10 [SC29/53/1794/10], 'Petition Andw. Urquhart To The Sheriff of Invs.', ff. 3-4.

⁴²⁶ *Ibid.*, f. 4.

⁴²⁷ *Ibid.*, ff. 1-2.

lawburrows also ends without any specified time limit, although in her case the phrase ‘in all time coming’ does not feature, and even the standardised language of keeping the petitioner ‘harmless and Skaithless in her person and Effects’⁴²⁸ was a later addition within the cramped margin of the document, having been mistakenly omitted from the initial draft of the petition. This makes it far less clear whether the omission of a specified time period was a purposeful attempt to extend the protection offered to the petitioner, or was instead simply omitted from the usual standardised paragraph due to space constraints on the paper the document was recorded on, or perhaps forgetfulness on the part of the scribe. Ann MacBean’s petition similarly makes no specific mention of a time period that Thomas Fraser was required to keep the peace for,⁴²⁹ however, Katharine McIntyre’s petition requesting protection from Sarah Rankine specified that terms of the caution lasted only for twelve months from the date of the petition.⁴³⁰

Although the oddity of Urquhart being granted protection under lawburrows for ‘all time coming’ is notable, it may signify nothing more than a certain laxity of protocol surrounding the standardised legal language used in lawburrows petitions. Additionally, the small sample size, combined with this lack of definition of terms, do not create a stable foundation for any firm conclusions, and it would not therefore be prudent to draw too much out of these comparisons in terms of any differences in treatment between male and female petitioners. The ephemerality of lawburrows petitions, their brevity, and their lack of closure, even in comparison to the wider dataset of rarely resolved cases within the surviving criminal processes, make it somewhat difficult to analyse and discuss these petitions without devolving into prevarication. However, it is equally important to demonstrate the shortcomings of the records under study as it is to analyse their evidentiary strengths. While the petitions studied thus far are hugely valuable in their illustration of the eighteenth-century lower orders

⁴²⁸ NRS, SC29/53/6 [SC29/53/1781/2], Inverness Sheriff Court Criminal Processes 1781, ‘Petition Mary Macdonald To The Sheriff of Invs.’, 4 May 1781, f. 3.

⁴²⁹ NRS, SC29/53/34 [SC29/53/1786/6], ‘Petition & Compl. For Ann MacBean & ca.’, f. 3.

⁴³⁰ NRS, SC29/53/6 [SC29/53/1781/6], ‘Petition Kathrine McIntyre To The Sheriff Depute of Invernessshire [sic]’, f. 3.

utilising the law for their own benefit, and while each of these petitions represents an act of autonomy, as well as a great amount of effort expended in navigating the bureaucracy and financial costs of the legal system, there are some types of analysis that they do not lend themselves to. It could be argued that it is in lawburrows petitions that the ‘problem of the lawyer’s hand’ becomes most clear, although in this case it could perhaps be more accurately described as the obscuring fog of the formulary. Notwithstanding deviations in language and, consequently, in longevity of assumed protection, the standardised call and response nature of each individual lawburrows petitions obscures much about the possible treatment of petitioners within the process of requesting protection, and the possible differences in treatment one could perhaps expect dependent on gender, age, and placement within the social hierarchy. Each petitioner for lawburrows was questioned on the facts of the case by the sheriff depute or substitute, and the sections describing this within each petition proceeds in every instance almost identically to this sequence from Urquhart’s petition:

The Sheriff Subst. having considered the foregoing Petition Before answer appoints the Petr. To appear & depone on the verity of the facts set furth in the Petition ... Ex die Accordingly Compeared the Petr. Andrew Urquhart Who being solemnly sworn and examined depones That he dreads bodily harm, injury and Oppression from the Before designed John Smith alias Gow and this is truth as he shall answer to God. and Depones he Cannot write.⁴³¹

This clearly cannot be considered as anything approaching the actual words Urquhart uttered in court before the sheriff substitute, and its limitations in this regard are a significant evidentiary limitation of this type of court document. However, it should be noted that the purpose of this document was not in fact to record Urquhart’s precise words, but to establish, within legal protocols, that Urquhart feared harm and was being granted protection as far as could be granted under the law. It is therefore far more evidentially useful to focus on this theme of interactions between individuals and the court, and the tactical,

⁴³¹ NRS, SC29/53/10 [SC29/53/1794/10], ‘Petition Andw. Urquhart To The Sheriff of Invs.’, f. 4.

reciprocal exchanges at play within these petitions. Petitioners presented themselves to the court, and detailed their lives and relationships and disagreements in exchange for an offer of protection under the law. The courts in turn gained some measure of control over private disagreements, allowing them further power to keep the peace within the county. These exchanges become particularly charged when considering the gender of petitioners, in relation to who they sought protection from, and the options available to them in terms of physical protection outwith that offered by lawburrows. Therefore, meeting these documents on their own terms, rather than attempting to bend them to the particular methodologies of any given historical study, provides a far more fruitful mode of analysis for these brief and formulaically constrained documents.

One similarity that can be observed between Urquhart's interactions with the sheriff court and the Fraser brothers' assault case considered in the first section is the brief glimpse this case offers into the resolution and settlement of disputes outwith the sheriff court system. Urquhart intervened in an assault, and then was himself assaulted. However, this was not the propulsive act which drew him into contact with the sheriff court, suggesting perhaps that such interventions and exposure to physical violence may not have been seen as unusual. This topic of dispute resolution will be examined more thoroughly in the next chapter, as it represents almost the polar opposite approach to the sheriff court system to that of lawburrows – instead of willingly seeking out the intercession of the court in personal disputes and affairs, the presence of a documentarily ephemeral mode of interpersonal dispute resolution which did not involve the court at all, even when clear crimes had been committed, represented a form of passive rejection of the overarching legal authority vested in the court system. Examples of this kind of familial or community management of interpersonal quarrels appear occasionally throughout the surviving criminal processes, and range from small scale reconciliations after arguments, such as the case of the Fraser brothers, to large scale community actions against perceived wrongdoers, which can be interpreted as more in line with the wider

European trend of 'rough music', or collective community punishment of moral crimes. One of the most interesting aspects of these dual, opposing approaches to the sheriff court system, is that it is almost impossible to make broad claims on precisely why some Inverness-shire inhabitants immediately chose to seek recourse to the legal system, and why others chose to settle disputes, even assaults, privately and without the involvement of any court personnel. Given that the surviving documentation likely represents only a fraction of the cases tried by the court during this period, and further considering the so-called 'dark figure' of crime, the fact that ostensibly unreported crime can occasionally be glimpsed through the records represents an enormously important addition to the historical record.

The violence, or indeed threatened violence, that lawburrows petitions were seeking to prevent, was overwhelmingly perpetrated by men against men and women, or by women against other women. Of the fourteen surviving cases where a lawburrows petition acted as the initial contact the victim of crime had with the sheriff court, and excluding the complex and mutually accusatory situation detailed in the two lawburrows petitions produced by the feud between Mary Macdonald and the Kennedys, six petitions involved men seeking protection under lawburrows against another man, with three from women against other women, and two women seeking protection from men. However, there is one case within the surviving records featuring a woman who perpetrated violence against a man, who then sought protection from the sheriff court under lawburrows, which is particularly interesting for what it reveals, or rather, for what it fails to reveal, about the gender norms governing violent conduct in eighteenth-century Inverness-shire. On 5 October 1781, John Grant submitted a petition to the sheriff court alleging violence and harassment perpetrated by Mary Davidson, who lived in the settlement of Upper Knock.⁴³² The alleged assault experienced by Grant was both serious and described extensively within his petition. He describes walking past Upper Knock, past an

⁴³² NRS, SC29/53/6 [SC29/53/1781/1], Inverness Sheriff Court Criminal Processes 1781, 'Petition John Grant in Balnapool To The Sheriff of Invs.', 5 October 1781, f. 1.

area where Davidson and others were shearing, at which point 'He was called upon by the said Mary Davidson to come & speak to her, to which he answered That he was a little hurried [sic] & had no time'.⁴³³ After a further exchange, Grant went to speak with Davidson and 'they Saluted Each other in a kind manner'.⁴³⁴ Immediately following this, Grant describes Davidson attacking his legs with her shearing hook, in an attempt to injure him which Grant apparently foiled, as the petition described how:

being disappointed in this attempt she instantly thrust her hand with he said Hook to the Petitioners neck Imagining to Cutt his Throat_ However, luckily [sic] for him in place of the Hook's coming upon his Throat, The same came upon his right Ear & Cut him to the Effusion of his Blood.⁴³⁵

Upon Grant's escape, Davidson apparently threw stones and verbal threats promising further harm, after which the petition proceeds to a standard request for caution under lawburrows.⁴³⁶ One thing noticeably missing from this description, which does feature in other lawburrows petitions such as Katharine McIntyre's, is the circumstances of Grant and Davidson's acquaintance, as well as any possible root cause behind their enmity. This would seem to be a significant and purposeful omission, as if the two had not been acquainted at all, a random attack of this kind would have been seen as a significantly aggravating factor and risk to the public peace, and would likely have been noted as such within the petition as an evidentiary note which strengthened Grant's request for protection under lawburrows. In Grant's oath to the sheriff substitute, he stated that he feared further physical harm from Davidson and additionally specified that he suspected further harm to his goods and gear,⁴³⁷ although his reasons for this suspicion are not recorded. Also notable by its absence is any commentary on the fact of Grant, a man, being assaulted and harassed by a woman. Gender norms are visible in Davidson's designation, as she is stated to

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*, ff. 1-2.

⁴³⁶ *Ibid.*, f. 2.

⁴³⁷ *Ibid.*, f. 3.

be 'spouse to Donald Fraser Tenent [sic]'.⁴³⁸ However, beyond this, no further difference can be discerned between the treatment of Davidson as a male victim of violence perpetrated by a woman, than from any other combination of genders between petitioner and perpetrator or harasser.

This becomes clearer when other comparative cases are considered. A lawburrows petition engendered by a man's violent harassment of another man was heard by the sheriff depute on 22 April 1783. Donald Fraser submitted the petition due to the behaviour of James Fraser, who had apparently recently moved to his community, and had allegedly 'conceived a Deadly hatred, malice, & ill will to the Complainer without any just cause or provocation on his part'.⁴³⁹ The petition states that the reason Donald was seeking protection was due to threats James had made against his life, although in direct contrast to Grant's petition above, there is a distinct lack of specifics regarding the precise events which necessitated Donald's petition; the only information given is that James had 'frequently laid voilent [sic] hands upon him',⁴⁴⁰ suggesting an ongoing pattern of physical harassment and abuse. This lack of specific information on the origin of the enmity between the Frasers corresponds with Grant's petition, which provides exhaustive detail on the specific events of the assault, yet none on how the petitioner and perpetrator knew each other or why their relationship had broken down so dramatically. This arguably suggests that petitioners negotiated the amount of personal or private information they were required to give to the court. The conventions and legal requirements of a petition necessitated a certain sacrifice of privacy. However, the obvious omissions in the descriptions held within lawburrows petitions would seem to hint at a purposeful elision of information deemed unnecessary, or perhaps petty or embarrassing to disclose within the formalised environment of the sheriff court. The level of detail differs from petition to petition, which would support an individualised approach to justice-seeking, whereby each petitioner,

⁴³⁸ *Ibid.*, f. 1.

⁴³⁹ NRS, SC29/53/22 [SC29/53/1783/25], Inverness Sheriff Court Criminal Processes 1783, 'Petition & Complaint of Donald Fraser', 22 April 1783, f. 1.

⁴⁴⁰ *Ibid.*

likely alongside the writer supporting them in the construction of their petition, went through their own editing process regarding how much information they were willing to disclose on the one hand, versus the amount of information they were required to commit to an official court document on the other. This was a negotiation that was likely common in the interactions that victims, and also witnesses of crime, had with the sheriff court, and will be a recurring theme in several of the cases under study within the next two chapters. However, the paucity of information in lawburrows petitions lays bare the transactional nature of these interactions. Within the practice of lawburrows petitions, at their most base level, victims of harassment offered information to the court in exchange for some measure of assistance, or, ideally, the cessation of the violence they were experiencing, a fact which different petitioners seemed to have different levels of comfort with. For example, the language of Donald's petition suggests a slight reticence to the course of action he pursued by submitting a petition for protection under lawburrows; it stresses the severity of the violence and harassment he was suffering, which '[laid] the Petitioner under this Necessity of making this Application to your Lop. Craving the protection of Law agt. Such Voilence [sic] and abuse'.⁴⁴¹ It is fortunate for historians that Donald seemed to see a lawburrows petition as somewhat of a last resort, as this statement summarises the function of lawburrows in a more concise manner than any of the institutional writers had yet managed. This demonstrates exactly how lawburrows was used, as a mitigatory measure against habitual breachers of the peace, which called the attention of the most prominent law-keeping institution operating at a local level to both harm that had already been experienced, as well as the potential for continued future harm if the person complained upon did not experience some form of legal consequences for their actions. It could also be the case that a portion of the more granular detail within these cases was given verbally to the sheriff depute or substitute, and was thus elided by the legal boilerplate text which described the petitioner swearing before the court that they feared harm from their harasser. However, although it is extremely

⁴⁴¹ *Ibid.*

likely that more detail was given to the sheriff depute or substitute, allowing them to either grant or reject the petition, this does not explain the differences in the level of detail offered by petitioners in the initial explanatory portion of their petitions. This proves therefore that this process of constructing a lawburrows petition and the personal information contained within, was a deeply individualised process which reveals much about how the lower orders chose to interact with the sheriff court system.

One of the aims of this thesis has been to analyse the possible reasons which caused some Inverness-shire inhabitants to seek justice from the sheriff court when they experienced harm from another, while many others pursued non-interaction with the court. However, lawburrows petitions demonstrate that this dichotomy is both too broad and too generalised to be analytically useful. Even within the group of people who sought protection or mediation from the court, there are significant differences in how comfortable different victims of crime and petitioners were with the level of access required by the judiciary process. This kind of micro-study of interactions between individuals and the judicial system allows a level of detail rarely attempted by legal histories, despite this point of interaction with the public being the most impactful implementation of the law. It is also notable that while differing levels of cooperation with the sheriff court system can be seen in a comparative study of lawburrows petitions, what is not observable is any apparent difference in treatment for petitioners or harassers based on gender. Violence committed by women against men would seem to be treated no differently from violence committed by men against women, or at least similarly enough for observable patterns of difference not to be notable within the surviving documentation. It would perhaps be more accurate to say that it is this *documentation* of lawburrows petitions which does not betray gendered differences in the treatment of petitioners. However, given that the surviving documentation presents the only way of accessing contemporary court practice and proceedings, the two statements can be conflated without much methodological harm being committed.

It is worth briefly mentioning once again that the experiences of petitioners and their interactions with the court are likely to have been far more fraught, given the navigation of social norms such as class and gender, than are represented within the summarised documentary evidence. Despite this, it seems safe to state that such navigations did not materially impact proceedings in a way that is observable through the records produced by lawburrows cases. Similarly, it is not possible to observe the long-term impact of lawburrows petitions, and whether they ameliorated, harmed, or had no effect on the ability of petitioners to live lives free from the violence and harassment they experienced at the hands of others. However, regardless of the utility of lawburrows as a mediating or pro-active measure against interpersonal violence, it clearly existed as a well-utilised legal process within Inverness-shire at this time. The fact that such a pre-emptive measure was open to all and was used by both women and men to protect themselves against the violence they faced at the hands of their relatives and acquaintances, shows that the lower orders were aware of this resource available to them under the law, and were pro-active in employing it for their own benefit. It is also notable that the surviving documentation suggests a sizeable proportion of those adopting lawburrows petitions as a method of seeking the cessation of violence were women. Instead of pursuing a case of assault, lawburrows petitioners sought the specific use of caution under lawburrows as a way of attempting to mitigate future harm, rather than obtaining justice for harm already committed. This reflects how petitioners interpreted the law and the legal measures they had access to – while bringing a case of assault allowed a victim of crime to seek judicial punishment against the perpetrator of a specific instance of violence, the cases examined within this chapter are petitions for *protection* under lawburrows, and would seem to arise not out of a desire for punishment, but instead for the ability to live freely; to be ‘harmless and skaithless kept’.⁴⁴² These petitions therefore reflect the personalities and wishes of their petitioners in a highly individualised sense beyond what is implied by the formulaic nature of the legal

⁴⁴² NRS SC29/53/6 [SC29/53/1781/2], Inverness Sheriff Court Criminal Processes 1781, ‘Petition Mary Macdonald To The Sheriff of Invs.’, 4 May 1781.

prose that composes them. Each petition represents a documented act of legal self-assertion, and a form of justice-seeking which, while differing from the more traditional route of pursuing a conviction, still demonstrates a desire to use the law to negotiate personal freedom.

4. Resistance to Judicial Authority

While the use of lawburrows raises interesting questions around the use of law by victims of crime and their cooperation with the legal system, it also brings to the fore the issue of concerted resistance to judicial authority. This chapter will consequently examine the ways in which women acted in opposition to the legal authority of the courts. While all lawbreaking can be considered as acting in opposition to the law, the cases under study in this chapter will focus firstly on women living in family units that rejected totally any authority imposed by the court and legal system, and their occasionally violent interactions with legal personnel. The criminality of the Kennedys and other families in Inverness-shire manifested itself primarily through rampant livestock theft – a crime punishable by the death sentence. The attitudes of these criminal families can be characterised by a wholesale rejection of the law itself, and of the sheriff court and wider judicial system as the authorities responsible for the enforcement of the law. This resistance was both active and passive, and an examination of the Inverness sheriff court cases involving these families demonstrates much about the limits of legal authority within a sprawling, rural jurisdiction like Inverness-shire. This resistance was not limited to individual criminal actors; often their families and even their neighbours and wider communities were loyal to them in the face of judicial intervention and acted to prevent their arrests by sheriff officers and messengers. This suggests a profound lack of faith in the Inverness sheriff court as an institution of justice, or as a source of legal protection and safety, and this must be taken into account when considering the likelihood that someone would invoke the secular judicial system if they found themselves a victim of crime. It would be impossible to ascertain wider societal attitudes towards the judicial system to any degree of certainty. However, from cases such as those under study in this chapter, it seems clear that there were geographical areas within Inverness-shire that harboured a more general disdain for the legal system.

The question of gender in relation to these attitudes of resistance is a central one. Women can be found acting within their families and communities in accordance with strict codes of loyalty, frequently acting outwith the law to protect their family members from perceived intrusions by state authority, and at times placing themselves at risk of physical harm in the pursuit of their goals. One of the contextual questions relevant to these case studies is how women operated within family units, and what their status and role was within kinship groups. When considering women as actors within kinship groups, the gendered dynamics that come into play are myriad. As discussed earlier within this thesis, Elizabeth Ritchie's work sheds considerable light on the deference women were expected to show within the home towards husbands and fathers, who were expected to manage family worship and lead their families in religious observance. Yet women's criminality, it should also be noted, represented a challenge to other eighteenth-century gender norms. Much of Anne Marie Kilday's earlier work revolves around the consideration of women accused of violent crimes as deviants under patriarchy, such as in her 2007 monograph *Women and Violent Crime in Enlightenment Scotland*. As discussed above, this work is a consideration of how violent female criminality breached gender norms. She argues that women were equally capable of depravity and violence as men,⁴⁴³ an important point to consider in the context of the following cases.

Many of the cases examined within this chapter are cases of deforcement, a crime in which violence was directed towards a sheriff officer, to a degree which made it impossible to perform his duties. In examining the legal definitions and categorisations of resistance, it is once again necessary to refer to Hume, whose *Commentaries* shed more light on the theoretical basis behind the definition of deforcement, and the subversive threat it posed:

The reprehension due to [deforcement] is ... more especially, because it is a contempt of the authority of the King, as represented in his Courts of

⁴⁴³ A. M. Kilday, *Women and Violent Crime*, p. 23.

justice, and in the course of legal process; and is thus a matter of evil and very dangerous example, which tends to the unhinging of government.⁴⁴⁴

Hume therefore explicitly links the crime of deforcement to treason and thus establishes the authority of the sheriff court as a manifestation of the highest form of state power:

The servants and executors of the law, how low soever their degree, are part of the great plan of judicial establishment; and are the necessary instruments of the Courts of justice, without whose assistance the orders of those tribunals would be fruitless.⁴⁴⁵

This has the effect of making the actions of each sheriff officer an extension of the King's will and therefore amplifies the implied degree of any resistance to the will of the court. It also complicates relations between sheriff officers and those they come into contact with during the course of their duties. Sheriff officers and messengers-at-arms – the court personnel primarily responsible for the serving of warrants and making arrests – were not separate from local society; they lived within communities, and were well known to their neighbours and throughout the counties they operated in. This raises some interesting questions around the power dynamics inherent in policing. It would be a mistake, however, to draw this argument out too far. Deforcement was primarily an offence against the state, rather than the individual. Sheriff officers were targeted due to their role in executing court warrants and, by extension, their function in reinforcing state power, rather than due to personal enmity. When considering the gendered aspect of these power relations, although deforcement was committed by both men and women and cannot be considered a gendered crime, it is worth pointing out the obvious – there were no women sheriff officers (or indeed court personnel of any kind, although it is possible that the court may have had a woman housekeeper). Therefore, the

⁴⁴⁴ D. Hume, *Commentaries*, Vol. 2, p. 165.

⁴⁴⁵ *Ibid.*

power conferred on these postholders by the state and the crown was explicitly patriarchal.

When considering the men who wielded this power, and how it was used in practice, Hutcheson's work is once again useful. Deforcement was a crime defined, perhaps unsurprisingly, by the law officer being deforced, although the exact circumstances surrounding this definition are unusual. Hutcheson describes how:

deforcement being a crime which has a distinct punishment affixed to it, the messenger, it has been argued, when resisted, should break his wand of peace, and protest for *remeid of law*, and is not justifiable in killing, unless he be seriously attacked with offensive weapons.⁴⁴⁶

Deforcement was therefore defined partially by the actions of the enforcer of the law whose actions were being disrupted, with the act of physically breaking his wand of peace having both symbolic and literal meanings as to the application of the law. The semiotics of this action deserves further scholarly attention – it apparently developed within the legal system as a practical communication of the physical obstruction of the law, and amply demonstrates the traditions and protocols of the legal system which spawned its use, as well as the physical environment the law was being enforced within. More specifically, the geographical context of law enforcement within the Highlands meant that messengers and sheriff officers were bestowed with the authority to enforce the law in communities far distant from the administrative centre of court practice in Inverness. As well as an immediate signal of obstruction, this act of breaking the wand of peace also signified the isolation of those tasked with serving and enforcing warrants and additionally produced a form of physical evidence which could be later cited within a court setting. Therefore, although seeming at first to be a somewhat performative sort of pageantry, breaking one's wand of peace was a highly demonstrative act which reveals a great deal about court practice,

⁴⁴⁶ G. Hutcheson, *Treatise on the offices of justice of peace*, p. 325.

and the physical realities faced by Inverness-shire court personnel in the enforcement of their duties.

Any resistance or banditry was, unsurprisingly, a particular concern of the sheriff court, and the appointment of Simon Fraser of Farraline to the post of Sheriff Depute in May 1781 led to a renewed focus on the problem.⁴⁴⁷ The historian Alexander Mackenzie, writing in 1896, tells how at the time of Farraline's appointment:

the country was in a very unsatisfactory condition. A band of marauders infested the county between that period and the Battle of Culloden,⁴⁴⁸ and although his predecessors in the Sherifffdom, David Scrymgeour of Birkhill, and Alexander Campbell of Delnie, after repeated endeavours to extirpate a notorious band of robbers who infested the shire, failed in doing so, Sheriff Fraser ultimately succeeded ... With the assistance of a strong and courageous Highlander, well-known in his day, John Mackay, messenger-at-arms, Fort-Augustus, as his assistant ... he traversed the most inaccessible districts, often incurring great personal danger on his journeys ... he never travelled on these occasions without a brace of loaded pistols ready for immediate use.⁴⁴⁹

This romanticised view of Farraline and his henchmen can be safely assumed to be an exaggeration, in that there have been no documents found within the 1781-95 date range that describe Farraline personally enforcing the law in this manner, but there are many dozens of executions submitted to the court by sheriff officers and messengers-at-arms, describing the processes of serving warrants and transporting prisoners. The only mention of Farraline even travelling outwith Inverness burgh in his duties as sheriff depute is within a 1781 petition to the court from the procurator fiscal, which states that Farraline had travelled to Maryburgh (Fort William) in June of that year and precognosced witnesses in a rape case,⁴⁵⁰ although Farraline precognosing witnesses in a court setting is an entirely different circumstance from the kind of potential physical peril and implied masculine virility described by Mackenzie. While we

⁴⁴⁷ A. Mackenzie, *History of the Frasers of Lovat*, p. 546.

⁴⁴⁸ For clarity, this means the period 1746-81.

⁴⁴⁹ A. Mackenzie, *History of the Frasers of Lovat*, pp. 546-7.

⁴⁵⁰ SC29/53/7 [SC29/53/1781/7], Inverness Sheriff Court Criminal Processes 1781, 'Petition James Cuming to the Sheriff Depute of Inverness', 18 July 1781, f. 3.

cannot preclude Farraline's personal involvement in such adventures, as an unknown number of the sheriff court criminal processes have not survived, there is currently only Mackenzie's unsourced, non-contemporary account to support it. Additionally, Hume specifies in his discussion of deforcement that it was an offence that primarily threatened sheriff officers, as the sheriff depute had 'no part in the actual execution of any sentence or order',⁴⁵¹ implying that if true, Farraline's actions would have been unusual to say the least. Also mentioned within the passage above is John Mackay, who was seemingly a minor celebrity in his day, at least within the county of Inverness-shire. As part of the above account, Mackenzie recounts a tale of Mackay outwitting several Kennedys by entering the alehouse they were drinking in on his own, persuading them they were surrounded by sheriff officers, and handcuffing them before they realised the truth of the situation.⁴⁵² This narrative of the quick-witted, daring sheriff court personnel pitted against the rough thuggery of the bandits is key to Mackenzie's characterisation of the conflict. There are several cases involving Mackay within the Inverness-shire court documents, and one of these will be examined in some detail later in this chapter, during a discussion on the limits of law enforcement and the consequences of civilian casualties.

Perhaps the more interesting part of Mackenzie's account concerns the system of governance within these areas where banditry was most concentrated. He writes that in 1781:

the only way to protect the property of the lieges was by an existing arrangement to pay voluntary blackmail in money or cattle to the bands of robbers who then scoured over the Highlands and did pretty much what they liked.⁴⁵³

Farraline's solution was thus:

Acting on the well-known adage, of setting "a thief to catch a thief," he appointed Donald Mor Cameron, in Leckroy of Lochaber, himself reputed a notorious cattle lifter, as one of the constables of the county of

⁴⁵¹ D. Hume, *Commentaries*, Vol. 2, p. 166.

⁴⁵² A. Mackenzie, *History of the Frasers*, p. 547.

⁴⁵³ *Ibid.*, pp. 546-7.

Inverness, and thus secured his services on the side of good order in his district. By Donald's aid the whole tribe of Kennedies who lived by tribute or blackmail over a wide range of country were hunted down, one of them having been hanged in Inverness, while several more were banished across the seas.⁴⁵⁴

Some of this process is visible within the case documents – the idea of a concerted effort to eradicate the criminal business practices of the Kennedys can perhaps explain the level of antipathy experienced by sheriff officers attempting to arrest those who were part of or closely connected to the Kennedy clan. At a wider level, this conflict can also be seen as a rivalry between two opposing authority groups. On one side were the Kennedys, who had apparently established themselves through violence and threats as what would now be called a 'mafia' administration for their immediate area. On the other side, there was the sheriff court, who sought to re-establish the authority of the state and overturn the control wielded by crime families. As will be discussed in more detail below, women's role in this conflict was as autonomous actors within their family units, acting explicitly in defiance of state authority.

With this context in mind, we can move on to an examination of deforcement and resistance as manifested within the Inverness sheriff court criminal processes. This theme of resistance to judicial authority can be roughly divided into two categories. Firstly, intentional or malicious attempts to ignore or subvert the orders of the sheriff court, for example, through physically blocking sheriff officers from serving warrants or carrying out arrests, or more succinctly, deforcement. Secondly, the harbouring of outlaws, by sheltering them from the authority of the court and its associated legal consequences. Of the two, deforcement is the more active, violent resistance, whereas harbouring outlaws can be characterised as non-violent resistance, through subverting the will of the sheriff court. Both represent a rejection of the law in concept and practice. While someone choosing to physically prevent the lawful arrest of an individual or shelter them from facing the trial or sentence that the judicial system deemed

⁴⁵⁴ *Ibid.*, p. 547.

necessary, represents, on a micro level, a rejection of one particular application of the law, on a macro level, these actions were interpreted by the court as a subversion of the system of authority which placed the judgment of the courts above the judgment of the individual. While some people clearly felt entirely justified in this resistance to the law, differences of attitude can be observed within those involved in the cases under study. This section will primarily consider the phenomenon of women defending their male relatives from the threat of arrest, by physically blocking or harming sheriff officers, and the implications of these acts in terms of the gender norms of the time. The first of these examples relates directly to the Kennedys; a 1783 deforcement case in which someone connected to the primary Kennedy household was suspected of livestock theft, and subject to a warrant of commitment. On 25 August 1783, a twenty-three year old sheriff officer named Dougald MacDonell was deforced while serving a warrant on Evan Robertson alias Dyker.⁴⁵⁵ MacDonell came across Robertson on a hill adjacent to – and, crucially, within earshot of – the house of Ranald Dow Kennedy, where he worked as a servant. When Robertson resisted arrest, the alarm was raised, and Katharine Kennedy and Katharine McDonald ran from the house to his aid.⁴⁵⁶ Kennedy was married to Angus Bain Kennedy, while McDonald was married to John Bain Kennedy; both husbands were brothers of Ranald Dow Kennedy, seemingly the primary patriarch of the wider family unit.⁴⁵⁷ This case is briefly mentioned by Iain S. Macdonald in his 1999 article on Highland lawyers during a discussion of the role of sheriff officers, although it is notable that neither Kennedy nor McDonald are mentioned by name, instead being described as ‘the wives of other members of the Kennedy family’,⁴⁵⁸ and ‘the two women’.⁴⁵⁹

⁴⁵⁵ NRS, SC29/53/17 [SC29/53/1783/14], Inverness Sheriff Court Criminal Processes 1783, ‘Extract Criminal Trial and Sentence given therein, Pror. Fiscal Agt. Katharine Kennedy and Katharine McDonald’, 20 November 1783, f. 12.

⁴⁵⁶ *Ibid.*, ff. 13-14. While spellings of Katharine McDonald or MacDonell’s name are somewhat inconsistent, within the trial and sentencing document her name is spelt as McDonald. This has therefore been chosen as the spelling to be used here for consistency.

⁴⁵⁷ *Ibid.*, f. 10.

⁴⁵⁸ I. S. Macdonald, ‘Some Highland Lawyers and Their Clients’, *Review of Scottish Culture*, Vol. 12 (1999), p. 90.

⁴⁵⁹ *Ibid.*

While generally a standard example of a deforcement perpetrated against sheriff court personnel by a crime family well-known to them, this case provides an opportunity to compare how Kennedy's and McDonald's reactions to Robertson's arrest differed, and the difference in their respective judicial punishments as a result. Kennedy's actions during the deforcement are described in considerable detail by MacDonell. He deponed that:

the said Katharine Kennedy said and swore by many bloody Oaths, that She would find people to cutt the said Dougald MacDonell's head off his Body and would have his head of [sic] his Neck, and would be revenged also of John Mackay messenger at Fortaugustus and otherwise breake his the said Dougald McDonell's Bones, or words of that nature, at the same time She made an attempt herself to Strike at his head and pull at his hair.⁴⁶⁰

In comparison, McDonald's actions were relatively sedate. While she, along with Kennedy, physically restrained MacDonell in an attempt to prevent Robertson's arrest,⁴⁶¹ a primary feature of the testimony was MacDonald's seeming reluctance to involve herself too heavily in the deforcement. MacDonell mentions that while Katharine Kennedy was making her way towards him at:

full Speed, and taking every Short Cutt for that purpose and Swearing to the other Pannell Katharine MacDonell who was following her and abusing her for not making greater haste and the people below at Kytry who had turned back as aforesaid were crying aloud to the Pannell Katharine MacDonell to make haste.⁴⁶²

MacDonell also says explicitly later in his testimony that 'it appeared to the Deponent that the Pannell Katharine MacDonell was not so keen or Sanguine in the matter as the other Pannell Katharine Kennedy',⁴⁶³ suggesting an awareness by all present that McDonald was being deliberately reticent in her involvement, while also perhaps being coerced by Kennedy and other family members to involve herself in the crime.

⁴⁶⁰ NRS, 'Extract Criminal Trial and Sentence given therein, Pror. Fiscal Agt. Katharine Kennedy and Katharine McDonald', 20 November 1783, ff. 6-7.

⁴⁶¹ *Ibid.*, f. 6.

⁴⁶² *Ibid.*, f. 15.

⁴⁶³ *Ibid.*, f. 17.

The outcome of the trial reflects this disparity between the actions of each of the accused. Katherine Kennedy was found guilty - the sheriff depute judged that she should be returned to the tolbooth until 12 December 1783 – a further 20 days after the trial concluded – when she should be led about the streets of Inverness by a rope by the common executioner, with a 'lybell' (presumably on a placard) on her chest reading 'Deforcer of a sheriff officer'.⁴⁶⁴ After this she was to be set at liberty until 14 January 1784, from which date she was banished from the county of Inverness for three years. Katharine McDonald was found guilty of being involved with the deforcement, but to a much lesser degree than Katharine Kennedy, and was sentenced to remain in the tolbooth until 28 November 1783 – a further six days of post-trial imprisonment – after which she was to be set free. Kennedy appealed her conviction and sentence to the spring circuit of the High Court of Justiciary. An extract sentence for this appeal survives within the Inverness sheriff court records, stating that Robert MacQueen of Braxfield found that the verdict was 'regular & Sufficient',⁴⁶⁵ rejected the arguments made by the procurators for the pannels and reaffirmed the sentence pronounced by the inferior court.⁴⁶⁶ Overall, this case suggests that there were limits to how far someone was willing to resist the sheriff court, even in the face of overwhelming pressure from their family. Both Kennedy and McDonald faced the same scenario, and yet while Kennedy acted violently and seemed committed in her opposition to the court regardless of consequences, McDonald seemingly found herself trapped between the expectations of her criminal family, and the authority held by the sheriff court. As with Mary McDonald's case in the previous chapter on lawburrows, these case documents allow us to identify women acting in their own interests in the face of overwhelming pressure from two sides that could not be more opposed. Katharine MacDonald therefore attempted to act in a way which appeased her

⁴⁶⁴ NRS, 'Extract Criminal Trial and Sentence given therein, Pror. Fiscal Agt. Katharine Kennedy and Katharine McDonald', 20 November 1783, f. 30.

⁴⁶⁵ NRS, SC29/53/27 [SC29/53/1783/14], Inverness Sheriff Court Criminal Processes 1783, 'Ext. Sentence In the Appeal at the instance of Katharine Kennedy Agt. The Pror. Fiscal of Inverness', 4 May 1784, f. 1.

⁴⁶⁶ *Ibid.*, ff. 1-3.

family unit's expectations, while also minimising her own risk of serious judicial punishment.

Now that the level of opposition to judicial intrusions by the sheriff court within these criminal families has been established, it is necessary to consider how the sheriff court policed its own actions within this conflict. In 1785, John Mackay found himself before the court, charged with improper use of force in the execution of a warrant. The accusation stemmed from a somewhat botched attempt to take an alleged criminal into custody at a wedding, after which a large number of the wedding guests pursued Mackay and his party of sheriff officers through a wooded area. The documentation for this case includes a sprawling series of witness precognitions, from both the judicial officers involved in the arrest, and the wedding guests, allowing the rare opportunity to compare contrasting perceptions of an event where the court officers were the wrongdoers. The first precognitions in the case were gathered the day after the incident by Colin Campbell, the sheriff substitute for the Fort William district, and begin with a complaint from Donald McGlassick alias Campbell, a tenant in the parish of Kilmonivaig. The incident began within his home, as friends had gathered to celebrate the wedding of one of his daughters.⁴⁶⁷ At around eight in the evening, John Mackay arrived alongside a group of soldiers, and forcibly arrested James Ferguson for an alleged horse theft. The arrest seems to have almost immediately gone awry. Donald McDonell,⁴⁶⁸ also known as Donald Duke, a mainstay of the Kilmonivaig criminal network, was precognosced on 13 January 1785, and stated that after hearing of the ongoing arrest, he witnessed Hugh Chisholm physically restraining James Ferguson. He specified that he did not believe Chisholm had informed Ferguson of why he was being arrested, and particularly noted that although Ferguson asked specifically to see the warrant of imprisonment naming him, Chisholm did not respond or produce the warrant,⁴⁶⁹ which was later corroborated by Donald McGlassick in his own

⁴⁶⁷ NRS, SC29/53/30 [SC29/53/1785/6], Inverness Sheriff Court Criminal Processes 1785, 'Precognition Agt. John Mackay Messr. at Ft. Augustus', 12-13 January 1785, f. 10.

⁴⁶⁸ Although Donald Duke's surname is usually spelt as McDonald in court documents, he signs his precognition as Donald McDonell.

⁴⁶⁹ NRS, 'Precognition Agt. John Mackay Messr. at Ft. Augustus', 12-13 January 1785, f. 6.

testimony.⁴⁷⁰ At this point, the lights in the room went out, causing a period of significant confusion, the eventual result of which was the attending messengers succeeding in bringing Ferguson out of the house.⁴⁷¹ Donald Duke describes the wedding attendees pursuing the arresting party out through the surrounding landscape, to a small hollow where a confrontation ensued.⁴⁷²

In the first set of precognitions gathered, the wedding attendees concur that there did not appear to be any violence forthcoming from their group towards the court personnel. Donald McGlassick states that 'he observed one man take up a Kabber [a heavy pole or spar] at the door and at the Deponents desire he laid it down without touching any Body'.⁴⁷³ Duke states that during the confrontation at the hollow, he 'did not observe any of them cast stones at the party'.⁴⁷⁴ The confrontation turned dangerous, with the arresting party apparently feeling threatened by the group of unarmed civilian wedding attendees, who for their part seemed to be protesting both the improper conduct of the messengers, and their poor treatment of the prisoner. The physical distance between the wedding and arresting parties varies within testimonies but seems to have been around twenty to thirty yards.⁴⁷⁵ Duke states that:

at this time he heard the said Hugh Chisholm call to the military men to prime and load but to keep up their fire and he heard the order fire given as he believes by the said John McKay.⁴⁷⁶

This question of the order to fire, who gave it, and the consequences thereof, are the crux of this case. McGlassick also testified that the order to fire came from Mackay.⁴⁷⁷ James Fraser, another wedding attendee, agreed that the order came from the arresting party, but could not specify the man responsible.⁴⁷⁸ A

⁴⁷⁰ *Ibid.*, f. 11.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*, ff. 6-7.

⁴⁷³ *Ibid.*, ff. 11-12.

⁴⁷⁴ *Ibid.*, f. 7.

⁴⁷⁵ *Ibid.*, f. 7, and f. 12.

⁴⁷⁶ *Ibid.*, f. 7.

⁴⁷⁷ *Ibid.*, f. 12.

⁴⁷⁸ *Ibid.*, f. 13.

separate Donald McDonell who had also attended the wedding recalled Chisholm giving an order not to fire, shortly before another unspecified member of the arresting party called to fire.⁴⁷⁹

The shots fired by the military party injured three of the civilian wedding attendees, as described in detail by McGlassick:

Duncan McIntosh Chelsea Pentioner [sic] late of the 74th Regiment now at Inveroyre foresaid a Nephew to the Complainers received a Ball in the Breast which went throw [sic] his body & out at his right shoulder which wound is believed to be mortall also Ewen Kennedy packman in Achnasheene was also wounded in the shoulder and Catharine McGlassick alias Campbell spouse to Archibald McDonell in Inveroyre foresaid was wounded in the arm both with lead shott fired by the said party but the two last is thought not to be dangerously wounded.⁴⁸⁰

This description was confirmed by the testimony of a Maryburgh surgeon, John McDowall, who had attended the injured parties, although McDowall equivocated about whether McIntosh's wound was likely to prove fatal.⁴⁸¹ McIntosh had died of his injuries by March 1785.⁴⁸² Despite treating Catharine McGlassick's wound, he did not know her name, likely a reflection of either her comparatively minor injuries compared to McIntosh and Kennedy, or perhaps of a casually sexist attitude marginalising a female victim of crime.⁴⁸³ McGlassick's description of the injuries sustained also reveals that McIntosh was his nephew, making his role as the primary complainant against Mackay clearer. Not only the homeowner and father of the bride, he was also a close relative of the man killed by the military party, explaining his emotional investment in obtaining justice. During further precognitions gathered at the end of March 1785, William MacIntosh, who was employed as a servant to Thomas Ross, the minister at Kilmonivaig, stated that he and another man had thrown stones at the military

⁴⁷⁹ *Ibid.*, f. 15.

⁴⁸⁰ *Ibid.*, f. 2.

⁴⁸¹ *Ibid.*, ff. 9-10.

⁴⁸² NRS, SC29/53/30 [SC29/53/1785/6], Inverness Sheriff Court Criminal Processes 1785, 'Precognition Anent. The Death of Dun. McIntosh in Inveroyre of Lochaber', 29 March 1785, f. 17.

⁴⁸³ NRS, 'Precognition Agt. John Mackay Messr. at Ft. Augustus', 12-13 January 1785, f. 10.

party, while standing at a distance of around twelve yards.⁴⁸⁴ As Gilbert Hutcheson comments in his treatise on the roles and responsibilities of various inferior court personnel:

that if any man resist the execution of his majesty's laws, by messengers or other public servants, in that case the messenger cannot proceed to kill ... but if the resister do also proceed to offer violence, by drawing upon the messenger, in that case the messenger may lawfully kill him, without the necessity of proving that he would have been in danger of his life, if he had not killed.⁴⁸⁵

Although not directly mentioned within the two sets of precognitions gathered from wedding attendees, the direction of questioning and detail within statements strongly suggests an attempt to establish whether the military party feared for their safety during the arrest of James Ferguson. The focus of the court, particularly in this second set of precognitions, seems to have been on establishing malicious or violent intent from the civilians against the military group as a way of exculpating the court personnel from the lethal violence they had inflicted.

The actions of the wedding party can be seen as a form of protest not precisely against the authority of the court, but against this authority being wielded improperly, or violently, against their friends and relatives. This was a community who had regular interactions with sheriff court personnel, and were consequently well aware of proper procedures, as well as their rights under law. As noted above, Duke drew specific attention within his precognition to Chisholm's refusal to produce the arrest warrant. This was corroborated by McGlassick, who recalled Ferguson asking Chisholm if he was being apprehended for a 'civil debt',⁴⁸⁶ with no response provided. For his part, Mackay claims that he refused to show the warrant to McGlassick as he knew him to be illiterate, a strange defence given the protocols in place within sheriff

⁴⁸⁴ NRS, 'Precognition Anent. The Death of Dun. McIntosh in Inveroy more of Lochaber', 29 March 1785, f. 4.

⁴⁸⁵ G. Hutcheson, *Treatise on the offices of justice of peace*, pp. 325-6.

⁴⁸⁶ NRS, 'Precognition Agt. John Mackay Messr. at Ft. Augustus', 12-13 January 1785, f. 11.

court settings to accommodate illiteracy, with literacy skills recorded in statements and statements read back to witnesses who were unable to read.⁴⁸⁷ Duke also states that Ferguson, upon being physically seized by Chisholm within McGlassick's home, stated that 'he would peaceably go with Chisholm if he would let go his hair and that ... he would answer his call to meet him where he pleased,'⁴⁸⁸ intentionally calling into doubt the need for such an invasive and violent arrest.

It would be fair to categorise the relationship between the sheriff court and these community and kinship-bonded criminal networks as highly oppositional, and their account of events as perhaps suspect in consequence of this. However, the dynamics of wrongdoing within this case also cast doubt on the statements of the court personnel, as, in an inverse of the usual court proceedings, Mackay, Chisholm, and the military personnel employed to assist them had perpetrated lethal violence against civilians. Their statements must therefore be interpreted similarly to those of all accused, in that their presentation of events is likely to minimise or deflect their role in the crime alleged. Additionally, given that the accused had an intimate working knowledge of the law, as well as being personally acquainted with the men responsible for passing judgement, attempting to enforce court proceedings against court personnel came with corresponding difficulties. A prime example of the complications that could arise from such proceedings can be seen during the documentation of the first series of precognitions gathered in the case. McGlassick, as the complainer, called into question the gathering of precognitions – rather than declarations – from the military personnel responsible for the gunfire. Evidence from these soldiers was being gathered as exculpatory proof in the case against Mackay, which McGlassick correctly identified as improper, with the soldiers clearly legally identifiable as 'art and part' of the said crime.⁴⁸⁹ Following this, Mackay himself requested that:

⁴⁸⁷ NRS, SC29/53/28 [SC29/53/1785/6], Inverness Sheriff Court Criminal Processes 1785, 'John McKays Precognition of Exculpation', 12 January 1785, f. 16.

⁴⁸⁸ NRS, 'Precognition Agt. John Mackay Messr. at Ft. Augustus', 12-13 January 1785, f. 6.

⁴⁸⁹ *Ibid.*, ff. 17-18.

as he was threatened to be put to trouble by the Complainer Donald McGlasrick [sic] he craved that the sheriff would appoint the said Donald McGlasrick should find Instant Security for the ... Cost Skeath & Damages in any prosecution he commenced against him.⁴⁹⁰

This attempt to force the complainer to shoulder the financial burden of the prosecution was an obvious, even blatant attempt by Mackay to halt any legal proceedings that may have held him accountable. The sheriff substitute for the Fort William district, Colin Campbell, immediately refused this request and further required Mackay to obtain caution, in the sum of five hundred Scots merks, that he would attend any proceedings brought against him.⁴⁹¹ Clearly the cronyism Mackay had perhaps expected to benefit from did not materialise at this point in the proceedings. Campbell was manifestly uninterested in shielding Mackay from judicial examination, and indeed specified that if Mackay was unable to obtain caution by the following day, he would be found and imprisoned in the garrison of Fort William,⁴⁹² which would undoubtedly have been a humiliating experience for a widely known messenger-at-arms regularly placed in command of military personnel.

It is unfortunately not possible to trace this case further through the documents of the Inverness sheriff court. It is not clear whether the case proceeded further in the sheriff court, although the title page of the later set of precognitions noted that an extract of the document had been sent to the crown agent,⁴⁹³ confirming that the High Court was aware of the case, if not whether it was pursued further. Given that Mackay regularly features in other cases throughout the remaining period under study, he was not removed from his post, making it extremely unlikely that he ever faced any lasting judicial consequences for directly causing a man's death. This case can be seen as a large-scale community action against the authority of the sheriff court, and,

⁴⁹⁰ *Ibid.*, f. 19.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*, f. 20.

⁴⁹³ NRS, 'Precognition Anent. The Death of Dun. McIntosh in Inveroy more of Lochaber', 29 March 1785.

further, against the improper use of force by court personnel and their intrusion into community social practices. Although not classified as a deforcement, as the court personnel were not physically prevented from exercising their duties, this case can be seen as an extension of the tensions and community politics underpinning the preceding deforcement cases. Men and women acted within their kinship group, and in this case, their wider community, in an extremely clear expression of dissatisfaction with the way the law was being administered by the Inverness sheriff court. It is also notable that this arrest took place at a wedding. This was a deliberate disruption of community and social practice by court personnel, which resulted in the slow and painful death of a direct relative of the bride, for which they likely did not obtain any judicial restitution. Mackay's stated reason for this incursion was Ferguson's apparent intention to leave the country immediately after the wedding, 'and unless he securd [sic] the said James Ferguson that night he had little chance of catching him',⁴⁹⁴ although if that was the case, this does not fully explain the refusal to serve a warrant against Ferguson when he was actually located. Far from the kind of mythologised accounts of sheriff court personnel such as John Mackay that survived into the nineteenth century, this case proves that the blame for the antagonistic relationship between these rural kinship groups and court personnel did not lie solely with those arrested and convicted for crimes, but was instead a more complex interplay between various oppositional loyalties and relationships with the law.

One less aggressive mode of resistance to judicial authority was the harbouring of those designated as outlaws by the court. The support and protection provided by these harbourers not only shielded outlaws from judicial punishment, but also, in some cases, allowed them to continue their criminal activity. Such actions were regarded with particular ire by Hume, who notes that anyone offering 'food, harbourage, or assistance'⁴⁹⁵ to a thief within forty-eight hours of the theft being committed risked being charged as art and part of the

⁴⁹⁴ NRS, 'John McKays Precognition of Exculpation', 12 January 1785, f. 2.

⁴⁹⁵ D. Hume, *Commentaries*, Vol. 2, p. 353.

theft itself. Although evidence of convictions for this are rare within the surviving documentation, there are two cases in which women were central in protecting male criminals from the court. In 1786, Janet Chyne, alias Marshall, was convicted of harbouring and protecting Archibald Macdonald and Angus Bain Kennedy, who were both by this time known outlaws. The criminal libelled summons for the case noted in particular that the crime was 'dangerous to the Commonwealth',⁴⁹⁶ which can be seen as a clear commentary on the threat posed by aiding those on the run from the law, by undermining the authority of the court. More interesting than the men Chyne was sheltering, was the specific aid she offered them. According to the summons, she:

Not only receipt maintain and give meal and Harbour and Assistance ...
But also Supplied [sic] them with powder and Shot and washed and
dressed their Linens knowing them to be Fugitives Rebels [sic] and Out
Laws.⁴⁹⁷

This can be seen as a specifically gendered form of assistance, and a more passive form of resistance that adhered more closely to societal norms. Despite Chyne's aid being situated firmly within the domestic sphere, in contrast to the direct physical interventions women were carrying out in deforcement cases, her actions were clearly seen as a serious threat to public order, and a firm rejection of the kinds of morality codified in Scots law. Chyne petitioned for banishment on 18 January 1786, ahead of her trial, and was accordingly sentenced to banishment from the county for seven years by the sheriff depute,⁴⁹⁸ perhaps a harsh punishment for such a passive crime, but one clearly seen as necessary by the sheriff court to maintain their judicial authority.

There is one other case which features a woman sheltering outlaws as a key feature, although in this case the woman in question does not appear to have been charged, and her protective role was instead revealed through the witness

⁴⁹⁶ NRS, SC29/53/36 [SC29/53/1786/21], Inverness Sheriff Court Criminal Processes 1786, 'Criminal Lybelled Summons The Pror Fiscal Agt. Janet Chyne alias Marshall', 1786, f. 2.

⁴⁹⁷ *Ibid.*, f. 5.

⁴⁹⁸ NRS, SC29/53/36 [SC29/53/1786/21], Inverness Sheriff Court Criminal Processes 1786, 'Petition for Janet Chyne', 18 January 1786.

precognitions for a murder case. In February 1784, John Kennedy, a Lochaber resident, provided a remarkable statement to the court, in which he described his own detailed investigations of his brother Roderick Kennedy's disappearance and murder. During the course of his investigations, he eventually sought out Angus Bain Kennedy; one of the last people to see his brother alive, and his suspected murderer. Roderick was last seen at an inn named Shealhouse, where Angus Bain and other Kennedy outlaws were sheltering after absconding from the law.⁴⁹⁹ The precognitions make clear that the landlady of the inn was responsible for sheltering them, and indeed acted as a gatekeeper against those seeking access to the outlaws. This was a formalised arrangement involving group collusion against the authority of the court; anyone who sought to speak to Angus Bain was first required to obtain tokens of endorsement from trusted individuals, as a form of proof that they did not intend harm. These tokens were then assessed by the landlady of the inn, before access was provided. John Kennedy describes the system in more detail:

The Declarant afterwards went to Shealhouse, and having got some tokens from Rod. Kennedy in Glengarry Brother to Angus Bain Kennedy a Fugitive and another token from Alexr. Cameron at Lowbridge, by which the said Angus Bain being an outlaw might be satisfied that he was safe to speake [sic] to the Declarant, and the Declarant having given these tokens to the Landlady of Shealhouse, the said Angus Bain Kennedy immediately came to Speake [sic] to him.⁵⁰⁰

This establishes that not only was the landlady colluding to harbour outlaws, but she was also a trusted and authoritative figure within the Kennedy criminal network. This testimony is additionally important for its recording of this 'token' system of safeguarding and certification for those obtaining access to fugitives. No other literature discussing the use of this system has yet been found, and it is not possible to estimate how commonly used it may have been. It seems therefore to be an example of the true historical utility of criminal precognitions,

⁴⁹⁹ NRS, SC29/53/26 [SC29/53/1784/24], Inverness Sheriff Court Criminal Processes 1784, 'Precognition anent the murder of Roderick Kennedy', 27 February 1784, f. 2.

⁵⁰⁰ *Ibid.*, f. 4.

in that it provides an account of an aspect of life within eighteenth-century Inverness-shire that may not have survived elsewhere in the historical record.

Theresa Mackay has written about the vitally important economic role played by women innkeepers in the Highlands in the late-eighteenth and early-nineteenth centuries, and she importantly notes that many women innkeepers were astutely ‘commercialising their domestic responsibilities’,⁵⁰¹ in response to the changing face of the Highlands tourist economy. These women were therefore utilising the gendered labour required of them within their households for economic gain, with inns, and by extension innkeepers, becoming important focal points of economic and social activity within their communities. By describing his investigations into his brother’s disappearance to the sheriff court, John Kennedy recorded for posterity this figure of a woman innkeeper, clearly respected and trusted by the Kennedys, who chose to use her authoritative place within her community to resist and undermine the sheriff court. No case against this woman survives in the Inverness criminal processes, and it is not clear whether the sheriff court ever pursued her for this organised opposition to the law. Despite this, her actions survive as an example of a non-violent, but distinctly autonomous form of resistance.

Harbouring outlaws was not the only passive form of resistance to judicial authority that was faced by the sheriff court. The court also viewed the informal punishment of crimes within communities as a clear threat to its authority, and to legal practice. This kind of community practice features rarely within the court record but can be seen in two cases where groups of people punished perceived moral crimes committed by their neighbours, and employed ritualistic public humiliation as the chosen sentence. This phenomenon was far from exclusive to Inverness-shire, and this ‘rough music’ was a common feature of European life throughout the early modern period. Much is owed to E.P. Thompson’s 1992 article on the subject, which defines ‘rough music’ as ‘a rude cacophony, with or without more elaborate ritual, which usually directed

⁵⁰¹ T. Mackay, ‘Women at Work: Innkeeping in the Highlands and Islands of Scotland 1790–1840’, *Journal of Scottish Historical Studies*, Vol. 32, Issue 2 (November 2017), p. 156.

mockery or hostility against individuals who offended against certain community norms',⁵⁰² directly comparable to the French practice of *charivari* and German *katzenmusik*.⁵⁰³ Thompson chooses to employ 'rough music' as a more general umbrella term covering a wide range of potential customs and practices, which often had ritualistic variations between communities.⁵⁰⁴ Writing over thirty years earlier, Victoria Alford's article in *Folklore* bemoans the lack of scholarly interest on the subject within the English context,⁵⁰⁵ given its ubiquity throughout European history. She asserts:

Never was there so tenacious a characteristic of the European peoples as this will of theirs to register disapproval of acts which in themselves may not be agin the law.⁵⁰⁶

Alford's article serves as a useful overview of regional examples and variations of the practice, and notes the common cause to be various forms of community intervention against perceived harm experienced in romantic partnerships, i.e. adultery, intimate partner violence, or a pairing which in some way deviated from accepted social norms.⁵⁰⁷ Anthony Fletcher also notes, in his study of early modern English masculinity, that rough music could be levelled at men who failed to successfully perform their gender, most likely through a publicly known lack of control of their household. Husbands who experienced verbal or physical abuse from their wives were not interpreted as victims of violence, but rather as deviants whose weakness required community remediation.⁵⁰⁸ This is supported by Martin Ingram's analysis of popular culture in early modern England, which agrees that instances of 'female domination'⁵⁰⁹ were the most common catalyst for this form of community action. Although this scholarship is useful, it would

⁵⁰² E. P. Thompson, 'Rough Music Reconsidered', *Folklore*, Vol. 103, No. 1 (1992), p. 3.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ V. Alford, 'Rough Music or Charivari', *Folklore*, Vol. 70, No. 4 (Dec., 1959), p. 505.

⁵⁰⁶ *Ibid.*, p. 506.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ A. Fletcher, 'Manhood, the Male Body, Courtship and the Household in Early Modern England', *History*, Vol. 84, No. 275 (July 1999), p. 433.

⁵⁰⁹ M. Ingram, 'Ridings, Rough Music and the "Reform of Popular Culture" in Early Modern England', *Past & Present*, No. 105 (Nov., 1984), p. 90.

be fair to state that this topic has been significantly understudied in the Scottish context. The case studies under consideration here therefore represent a significant contribution to our understanding of community punishment of moral crimes within the Highlands.

The particular variation of rough music which appeared within the Inverness sheriff court records was 'riding the stang', a specific and violent form of community castigation which Alford states was primarily seen in northern England.⁵¹⁰ On 30 September 1790, a group of men led by James Riley were found guilty of a 'manifest breach of the peace',⁵¹¹ for an organised group assault carried out against Alexander Fraser, tailor in Stewartown in the parish of Pettie. Apparently, the group dragged Fraser from his home, and 'attempted to put him on an undressed Tree or Cabber, in order to make him ride the Stang'.⁵¹² Although the reason for their targeting of Fraser is not recorded within their sentence, the profession of the men involved would seem to be notable. James Riley and John Goudie were shoemakers, James Baveridge was a baker, and John and Alexander Denoon were tailors, all within Stewarton. It therefore seems likely that the case stemmed from a personal disagreement between artisans, although the punitive nature of 'riding the stang' strongly suggests an organised, moral component to the 'riotous proceedings'.⁵¹³

There is further evidence within the criminal processes demonstrating that this kind of immediate group or community action against a moral or legal wrong was seen as not simply a minor bypassing of court authority, but rather a serious crime in its own right. In 1782 John Clark Smith, a constable, was charged with assault and convoking a mob against William Scott, a mason in Inverness, charges which carried a significant risk of serious legal consequences.⁵¹⁴ The sheriff depute describes Scott as his 'Lovite', a term which apparently denotes

⁵¹⁰ V. Alford, 'Rough Music', p. 508.

⁵¹¹ HCA, L/INV/SC32/32 – 1790 – Extract Sentence and Warrant of Imprisonment against James Riley, shoemaker and others for breach of the peace in forcing Alexander Fraser to 'ride the stang', f. 2.

⁵¹² *Ibid.*, f. 1.

⁵¹³ *Ibid.*, f. 2.

⁵¹⁴ NRS, SC29/53/12 [SC29/53/1782/16], Inverness Sheriff Court Criminal Processes 1782, 'Criminal Summons Scott &c. Agt. Clark', 25 October 1782, ff. 1-5.

respect, or that someone is a family member or a dependant.⁵¹⁵ The timeline of events as established through the witness precognitions is somewhat murky, but a large group of people seem to have spontaneously gathered outside a 'house of bad fame on the Green of Muirtown' that Scott had been seen entering,⁵¹⁶ in protest against his repeated patronage of the establishment, which can be safely assumed to have been a brothel. The group requested the aid of Smith, who in his role as constable was seen as having the authority to investigate the suspected crime. He then sent two young men into the building to investigate, during which time they did not locate Scott. When Scott left the building, the group was incensed, and ducked him in the nearby River Ness in retribution for his blatant contravention of eighteenth-century social mores.⁵¹⁷ After the witness statements had been heard by the court, the sheriff depute found the libel against Smith not proven, and assoilzied him with no expenses due to the court, an extremely favourable outcome given the serious nature of the crimes Smith found himself accused of, and apparently necessitated by Scott's obvious impropriety.⁵¹⁸ One of the witnesses had even helpfully noted that Scott was a married man, while arguing that he should have been treated more gently by the mob 'for his wife's sake',⁵¹⁹ in an interesting interpretation of the fair treatment of wives.⁵²⁰ It is clear that William Scott's actions were seen as wholly unacceptable by his community, itself a fascinating insight into the gender norms of the period. A man of Scott's rank procuring sex from sex workers, or even being perceived to be doing the same, was not interpreted as an ordinary or unavoidable consequence of a naturally robust male libido, but instead as a manifest failure of control. Harriet Cornell has convincingly argued that the unifying force behind these collective displays of morality was the kirk, and that the influence of the shame-based sentencing practices of the kirk session can

⁵¹⁵ "Luvit *ppl. adj.*". *Dictionary of the Scots Language* (2004). Accessed 14 Dec 2025 [<http://www.dsl.ac.uk/entry/dost/luvit>].

⁵¹⁶ NRS, SC29/53/12 [SC29/53/1782/16], Inverness Sheriff Court Criminal Processes 1782, 'Proof in the Criminal Process The Pror. Fiscal & Scott Agt. John Clark', 26 October 1782, f. 2.

⁵¹⁷ *Ibid.*, ff. 1-7.

⁵¹⁸ *Ibid.*, f. 7.

⁵¹⁹ *Ibid.*, f. 3.

⁵²⁰ *Ibid.*, ff. 2-3.

also be seen in both secular law and in society more widely. She comments that ‘parameters of personal behaviour were set by state regulation and popular subscription to that regulation because of commonly held religious beliefs’,⁵²¹ and states clearly that patriarchy was the basis for the social mores spread and enforced by the kirk.⁵²² Although Cornell is writing in an early modern context rather than a late eighteenth-century one, it would be difficult to argue against her conclusions. This linkage to religion provides a useful matrix through which to analyse the actions of the ‘mob’ within this case – although rebuked by the court as extremists, in this light the group could be seen as collectively enforcing the commonly held moral standards of their shared religion, with reification of presbyterian morality being seen as a community concern.

This case also reveals something that in hindsight is glaring; namely the complete lack of any other records featuring judicial punishment or court anxieties regarding the presence of sex workers within the jurisdictional bounds of Inverness-shire. It must be noted that sexual crimes were usually the province of the kirk session, and it may be that the sheriff court was satisfied with the kirk’s management of this issue and saw no need to intercede jurisdictionally. Alternatively, it may have been an issue overseen by the town council, and it would be worth exploring the Inverness burgh records to investigate whether any record of their prosecution of brothels survives. It should also be noted that due to the proximity of Inverness to Fort George, it would be reasonable to assume that any brothels within the town were likely being frequented primarily by soldiers, raising another possible avenue of study for military and gender historians. Further, it is uncertain why the crowd focused so particularly on Scott’s patronage of this brothel, as his reputation locally is unknown. Although this case perhaps raises more questions than it answers, it is useful as an example of both community enforcement of moral standards and dubious sheriff court practices. Vigilante community action was instigated against a man

⁵²¹ H. Cornell, ‘Controlling Subjects: Shame, the State and the Ritual of Punishment in Early Modern Scotland’, in M. McGill and A. Raffe (eds.), *The Scottish State and the Experience of Government, c. 1560-1707: Essays in Honour of Julian Goodare* (Edinburgh, 2025), p. 165.

⁵²² *Ibid.*

suspected of adultery and frequenting sex workers, and due to his connections to the sheriff depute, the constable who was asked to investigate the matter by the community itself was instead charged with multiple crimes. In addition to providing further evidence of the sheriff court's dim view of vigilantism, this case also raises questions of nepotism and favouritism within the court. It seems clear that the case against Smith was raised in the first instance because of the connection between Scott and Farraline, although this favouritism did not extend to finding Smith guilty of crimes he had obviously not committed, suggesting that corruption within the court, while present, had its limits. It is additionally ironic that Scott's litigiousness acted against his historical reputation, in that it produced a court record of his infidelity which is likely to be one of the few surviving records of his existence.

It is also worth stating explicitly that the forms of resistance under study in this chapter do not appear to align neatly with the kinds of Highland resistance more commonly focused on by historians, i.e. nineteenth-century land resistance movements. There is a great deal of literature concerning organised community actions protesting clearance. Lynn Abrams has argued that one of the consequences of state repression in the Highlands following the 1745 Jacobite rebellion was the erosion of clan kinship structures,⁵²³ resulting in the loss of a system of reciprocal obligation which had historically tied landowners to their tenants. Closely aligned with this process was the Enlightenment ideal of 'improvement', which a significant number of Highland landowners applied to their agricultural interests with zeal. Roughly summarised, these changes involved the introduction of enclosure and the correspondent loss of communal grazing land, and a general shift in focus in land use from communal, subsistence level farming, to a capitalist system which aimed to increase the efficiency of the land in order to produce surplus crops and materials, primarily livestock, for sale.⁵²⁴ These developments 'accelerated in the last quarter of the eighteenth century',⁵²⁵ and as small plots were subsumed into larger single-tenant farms,

⁵²³ L. Abrams, 'The Taming of Highland Masculinity', p. 106.

⁵²⁴ T. M. Devine, 'Social responses to agrarian "improvement"', pp. 148-9.

⁵²⁵ *Ibid.*, p. 150.

communities were removed from the land they subsisted on, resulting in the term 'the Highland clearances'.⁵²⁶ This phenomenon has been covered extensively in the secondary literature,⁵²⁷ and it is clear that it was ideologically underpinned by the intellectual writings of the landowning elite. See, for example, Henry Home, Lord Kames' 1776 'tome'⁵²⁸ *The Gentleman Farmer*, which includes an appendix on the 'Imperfection of Scotch Husbandry', in which he writes:

A Scotch farmer behaves worse than Esau: the latter got a mess of pottage for his birthright; the former surrenders his to weeds, without any recompense.⁵²⁹

T. C. Smout has argued that such attitudes were utilised by improving landowners as justification for the imposition of new modes of land use.⁵³⁰ They saw their task as not only to improve the efficiency of the land in terms of material yields, but also to improve the morals of the local population, seeing themselves as 'crusader[s] against idleness'.⁵³¹ In practice, this meant that if the Highland communities living on the estates of such landowners resisted change, this signalled their poor moral character, and justified their wholesale removal from the land in pursuit of more industrious, energetic tenants.⁵³² The categorisation of traditional modes of land use as backward dismissed the knowledge of local communities and established landowners as arbiters of morality, greatly marginalising the experiences of poor rural Highlanders.

⁵²⁶ *Ibid.*, p. 152.

⁵²⁷ A. Ross, 'Improvement on the Grant Estates in Strathspey in the Later Eighteenth Century: Theory, Practice, and Failure?', in R. W. Hoyle (ed.), *Custom, improvement and the landscape in early modern Britain* (Farnham, 2011), p. 289.

⁵²⁸ A. Durie, and S. Handley, 'Home, Henry, Lord Kames (1696–1782), judge and writer', *Oxford Dictionary of National Biography* (2004) [Retrieved 17 Mar. 2021, from <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-13643>].

⁵²⁹ H. Home, *The Gentleman Farmer: Being an attempt to improve agriculture, by subjecting it to the test of rational principles* (Edinburgh, 1776), p. 364.

⁵³⁰ T. C. Smout, 'Landowners in Scotland, Ireland and Denmark in the Age of Improvement', *Scandinavian Journal of History*, Vol. 12, Issue 1-2 (1987), p. 83.

⁵³¹ *Ibid.*, p. 84.

⁵³² *Ibid.*

This backdrop of clearance, although not directly relevant to the cases under study in this thesis, is certainly important in providing context for the evolving relationships between the lower orders who most frequently found themselves within the sheriff court, and the landed gentry who adjudicated the law.⁵³³ Resistance to clearance has been covered at length within the historiography, including influential works by Eric Richards and Christine Lodge. It is clear from this scholarship that the process of clearance, driven by the landowning elite, was nevertheless intertwined with the system of governance of which the sheriff court was a crucial part – Richards describes an incident of clearance on Strathconan Estate in Ross-shire in 1850, where estate officials were assisted in their efforts to clear families from the land by sheriff officers.⁵³⁴ Christine Lodge's 1996 thesis notes that prior to the more organised land protests of the later nineteenth century, resistance to clearance was sporadic and spontaneous in character, and that this early period of protest against clearance is often overlooked due to its limited impact; in other words, clearance continued unabated despite scattered attempts to challenge it.⁵³⁵ Lodge argues that women's involvement in this early wave of resistance is difficult to quantify; although they were very likely present, their involvement is not noted in surviving documentation of these actions, with women only appearing with regularity in legal documentation relating to clearance protests from the 1820s onwards.⁵³⁶ Although these changes in agrarian practice in land management were undoubtedly affecting Inverness-shire inhabitants during this time period, the instances of resistance examined within this chapter do not appear to be motivated by clearance. With the exception of outlaw harbouring, which represents a more pre-meditated, consistent mode of resistance, they appear to be spontaneous actions motivated by a rejection of the legal authority of the

⁵³³ See also J. Hunter, *The Making of the Crofting Community* (Edinburgh, 1976), in particular the first chapter titled 'The End of an Old Order: The Highlands in the Eighteenth Century', for a summary of the decline of feudalism in the Highlands context.

⁵³⁴ E. Richards, *The Highland Clearances: People, Landlords and Rural Turmoil* (Edinburgh, 2002), p. 26.

⁵³⁵ C. Lodge, *The Clearers and the Cleared: Women, Economy and Land in the Scottish Highlands 1800-1900*, PhD Thesis, University of Glasgow (1996), p. 127.

⁵³⁶ *Ibid.*, pp. 128-9.

court. The kinship groups featured in the deforcement cases examined here were habitual criminals involved primarily in livestock theft, and there is no evidence to suggest that their actions were motivated by resistance to the removals occurring throughout the Highlands at this time.

What the above cases demonstrate is that resistance to the legal authority of the Inverness sheriff court was both varied and relatively common within certain areas of the county, such as Kilmonivaig, within the wider area of Lochaber. Much of this resistance, both violent and passive, was concentrated within the wider communities around organised criminal families, with the Kennedys in particular leaving a large amount of surviving material relating to their long-standing opposition to the court and its personnel. However, in addition to the deforcements and harbouring of outlaws, both of which represent a distinct and unified form of opposition, resistance to the law manifested itself in a number of ways. The court interpreted any forms of collective moral policing within communities as trespassing on the judicial practice it controlled. Due to the intermediary position occupied by the sheriff court, between the civilian populace and the state, even minor forms of resistance were seen as a circumvention of state authority that threatened public order. Without a comparative study with a comparable sheriff court in the Lowlands, it is not possible to state whether the Inverness sheriff court was unusual in its jealous guardianship of legal administration. However, considering the geopolitical background of the eighteenth-century Highlands, with the spectre of the '45 still fresh in the minds of the political establishment, it seems impossible that these factors did not influence the responses of court personnel. Despite the concern displayed by the court at more minor forms of resistance, and perhaps also despite the rarity of such cases in the surviving court record, it does not seem that communities were aware of or recognised that such actions were outwith their own legal remit. Community punishment of moral crimes is a topic deserving of far more detailed study. However, what the above cases reveal is that many communities saw no need for recourse to legal institutions to settle matters best handled internally. This can be seen sporadically throughout the

surviving records, and these glimpses suggest that there was likely a thriving system of self-policing and conflict resolution taking place within communities, likely never coming to the attention of the sheriff court. Despite the opportunities for punitive justice offered by the court in the interests of public peace, in communities with oppositional relationships to the state, the sheriff court was not the first port of call for judicial assistance. The surviving sheriff court records show communities with strong moral codes, who did not view passively observing immoral or criminal acts, and only later reporting them to the proper authorities, as an appropriate course of action. The interventions enacted by these communities were clearly seen as necessary actions, and frequently employed public humiliation as the chosen sentence, demonstrating the prime importance of reputation and one's place within one's community.

When considering how the question of gender can be applied to the more physically violent forms of resistance analysed within this chapter, Kilday's assertion that physically violent women were breaching established gender norms is highly relevant. Taken further, it could be argued that women who resisted the court were not only rejecting patriarchal gender norms, but also the patriarchal institution of the sheriff court and wider state apparatus. However, it should be stressed that it is extremely unlikely that the women within the above-described deforcement cases would have considered their actions in these terms. Rather than acts of proto-feminism, it seems that female deforcers instead often saw their actions as acts of solidarity with their communities, in contravention of societal norms regarding women and violence. In contrast, harbourers of outlaws were often acting within their ascribed roles, and were indeed utilising the kinds of gendered labour expected of them to undermine state authority. When considering group responses to perceived moral wrongs, women acted as part of these groups with no apparent distinctions made between male and female participants. This suggests that, while each of these themes demands a different consideration of gender, one common factor was women's loyalty to and willingness to act alongside their families and communities, in accordance with their own sense of justice and morality,

regardless of whether that sense differed from the morality enforced by the state through law. Kinship groups and wider communities were the foundation of civic life, and perhaps what these cases demonstrate most clearly, is the instinct of women and men to act together to defend these groups from perceived threats, whether those threats were moral, or interventions initiated by the personnel of the Inverness sheriff court.

5. Rape and Violence Against Women

While themes such as lawburrows and resistance to judicial authority reveal much about how women navigated the sheriff court, no crime demonstrates the gender norms at play in eighteenth-century Inverness-shire as clearly as rape. Cases involving sexual violence, as well as other forms of male violence against women, provide the opportunity to examine how women sought judicial retribution for violent crime. The case studies under examination in this chapter will be grouped around several main themes, with the primary conclusion drawn being that women more commonly sought legal punishment for their rapists with the support of their families. In one case, the legal process was only undertaken against the rapist after the death of the victim, and was solely instigated by the woman's family members. In another, a murder victim's parents travelled a considerable distance in order to support the legal proceedings against her murderer. When considering the wider picture, it may seem obvious that legal redress was more likely when women were supported by their family units. However, having confirmation of this, together with witness precognitions allowing detailed examinations of the social networks involved, gives an extraordinary source of information on lower-order women's lives. The other main theme is the extreme vulnerability of women in employment, particularly when young women were working in other families' households as domestic servants. This once again may seem unsurprising, but obtaining first-hand accounts of women's working lives, and the difficulties they faced in navigating their vulnerability to male violence in these settings, allows a more in-depth consideration of how women negotiated gender norms on a day-to-day basis.

Rape is one of the rarest crimes for which there is surviving documentation in the Inverness sheriff court, and we can safely assume that these scant few cases represent only a tiny fraction of the sexual violence being perpetrated in the late eighteenth-century Highlands. Of the surviving cases, unsurprisingly all are cases of rape and sexual violence perpetrated against women by men, and were

among the most extreme forms of patriarchal, gendered violence experienced by eighteenth-century women. In the years under study, there is documentation for only eight cases of rape or sexual violence.⁵³⁷ Given the small number of cases under consideration, it is likely that there were other rape cases which came to the attention of the sheriff court, for which the documentation has not survived. It is worth once again noting at this point the position of the sheriff court within the Scots legal system. As the primary inferior court, the sheriff court had jurisdiction over all crimes but the four pleas of the crown; murder, rape, robbery, and wilful fire-raising. Therefore, where there are surviving sheriff court documents for cases involving rape, in these cases the sheriff court would be acting in an investigative role rather than a judicial one. The actions of court personnel would be restricted to collecting precognitions and depositions and attempting to locate and incarcerate the accused ahead of the twice-yearly circuit courts of the High Court of Justiciary, held in Spring and Autumn. This is not always clear from the documentation, as the petitions and precognitions in these cases are not formulated differently to those of cases which were under the sheriff court's jurisdiction.

It is also worth briefly noting that rape, as one of the four pleas of the crown, was jurisdictionally under the control of the secular courts, in contrast to other sexual crimes, such as incest, fornication, and adultery, which could be dealt with by either the sheriff court or the kirk session.⁵³⁸ Within the period under study in the Inverness-shire sheriff court, there were very few cases involving sexual crimes of this kind, but the ones that do appear reveal a great deal about the collaborative nature of the wider judicial system, and the separate but hierarchical order of the kirk session and sheriff court's relative jurisdictions. In 1781, a petition was submitted to the justices of the peace in Maryburgh by Alexander Fraser, minister of the parish of Kilmalie.⁵³⁹ In the petition, Fraser

⁵³⁷ There are five rape cases, and three further attempted rape cases.

⁵³⁸ K. Barclay, 'Marriage, Sex, and the Church of Scotland: Exploring Non-Conformity Amongst the Lower Orders', *Journal of Religious History*, Vol. 43, Issue 2 (July 2019), p. 165.

⁵³⁹ Fraser also wrote the Old Statistical Account entry for Kilmalie. See: A. Fraser, 'Number XXIV, The Parish of Kilmalie', in J. Sinclair (ed.), *The Statistical Account of Scotland*, Vol. 8 (Edinburgh, 1793), pp. 407-47.

named seven separate men who had been repeatedly cited to appear before the kirk session for adultery, with one case of sabbath-breaking also mentioned. The reason for the petition was cited to be the men's refusal to submit to the authority of the kirk session; Fraser therefore requested the aid of the secular court system, represented in the first instance by the justices of the peace, in maintaining moral order as viewed by the kirk.⁵⁴⁰ A second petition related to the case shows that a court was to be held at Maryburgh on 15 June 1781, but, as none of the defendants appeared, the justices of the peace recommended the case to the procurator fiscal, so that a new prosecution could be raised at his instance within the sheriff court infrastructure.⁵⁴¹ This cooperation between the different court systems in 1780s Inverness-shire clearly shows the legal hierarchies at play. When the authority of the lowest jurisdictional level was not respected by those accused of crimes, the sheriff court was called upon to reinforce moral order by secular legal means. While obvious, it is also worth stating once again that these interlapping systems were controlled at all levels by men; when the power conferred on parish ministers by an intensely patriarchal kirk system was not respected or accepted, the secular legal system acted to shore up the lower power structures. These petitions are the only surviving documentation relating to this case, and it is not possible to know whether the procurator fiscal chose to instigate a process against these men within the sheriff court. It does, however, show that men at all levels of judicial administration were aware of, and sought to utilise, the connections and greater authority afforded by the sheriff court.

When considering judicial attitudes towards rape at this time, it is necessary once again to return to the institutional texts. It is also important at this point to establish precisely what was considered to be rape, in the legal framework the Inverness sheriff court operated within. Rape being a crime only ever committed

⁵⁴⁰ NRS, SC29/53/8, [SC29/53/1781/21], Inverness Sheriff Court Criminal Processes 1781, 'Petition The Revd. Mr Alexr. Fraser Agt. Allan Cameron & others', 8 June 1781.

⁵⁴¹ NRS, SC29/53/8, [SC29/53/1781/21], Inverness Sheriff Court Criminal Processes 1781, 'Petition Justices of the Peace for the County of Inverness to the Sheriff Court', 16 June 1781. This document also features Simon Fraser of Farraline acting as one of a group of justices of the peace in Maryburgh, after his apparent appointment to the role of sheriff depute in May 1781.

by men against women was seen as so self-evident as to be not worth explicitly defining, as seen in the first paragraph of Hume's chapter on rape in his *Commentaries on the Laws of Scotland*, where he describes the crime as:

one of the most grievous injuries an individual can sustain : being a robbery of that wherein a woman's honour, her place in society, and her estimation in her own eyes, depend.⁵⁴²

Much of Hume's subsequent commentary may read as somewhat modern to twenty-first century sensibilities, but this apparent modernity is arguably a demonstration of the continuities in attitudes towards rape across the centuries. He stresses that in contrast to commentaries on Roman law, where *Crimen Raptus* was dependent on the forcible abduction of a woman, 'the custom of Scotland ... holds the crime of rape to be complete, without any abduction, by the unlawful carnal knowledge of the woman's person, forcibly, and against her will.'⁵⁴³ He goes on to discuss the various interpretations of 'force', including, interestingly, the exact parameters of 'resistance'. Hume stresses that 'resistance ... must be continued to the last ; so that it is only by main force and terror that the violation is accomplished',⁵⁴⁴ and specifically cites a hypothetical in which, if a woman has been confined, continually pressured into sex, and eventually submits to her attacker, that 'this is not a rape, but a crime of a different, although perhaps still more based and infamous description'.⁵⁴⁵ However, he then goes on to define 'forcible knowledge' in a manner that is broader, more open to interpretation, and, in some ways, more sensitive to the specific harms caused by sexual violence perpetrated by men, against women. Hume spends considerable time here setting out possible circumstances in which a woman would be incapable of resisting rape 'to the last', such as due to physical disability, or falling unconscious during the rape. He also specifies that if a rapist employs the threat of murder against a woman, and the victim thereby does not resist due to reasonable fear for her life, this would still be defined as

⁵⁴² D. Hume, *Commentaries*, Vol. 2, p. 1.

⁵⁴³ *Ibid.*, p. 2.

⁵⁴⁴ *Ibid.*, pp. 4-5.

⁵⁴⁵ *Ibid.*, p. 4.

rape. Hume compares this to a robbery, where a victim hands over their belongings at knifepoint – a victim attempting to survive a potentially lethal encounter does not therefore negate the crime committed against them.⁵⁴⁶ This appears somewhat contradictory to the legal requirement of physically resisting rape throughout; a course of action which would seem to increase the risk of physical harm experienced by the victim. This jurisprudential vacillation seems to hinge on the issue of rape only being legally definable through the actions of the victim, rather than the rapist; proving that women being blamed for the sexual violence perpetrated against them was baked into the very fabric of the law being practised in Inverness-shire and elsewhere in Scotland at this time.

Although not directly relevant to the cases under study in this chapter, it is worth discussing the somewhat complex position of married women within contemporary commentaries on rape. Hume states that a husband ‘cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort.’⁵⁴⁷ However, Hume stresses that there was room within the law for a husband to be tried as art and part on a charge of rape, if, for example, he was an accessory to a rape committed against his wife by another man.⁵⁴⁸ This issue of the legality of marital rape was far from clear cut. J. W. Cairns has discussed the 1989 trial that led to the end of the marital rape exemption in Scots law.⁵⁴⁹ The case conclusions argued that the earliest precedent in Scots law for this exception was Hume himself, and that prior to this there is no mention of a separate approach to marital rape within the institutional texts.⁵⁵⁰ The prevailing view therefore is that Hume acquired this idea of legal marital rape from Hale’s *Historia Placitorum Coronae*, an English text on criminal law dating from 1736. In this work, Hale stated:

⁵⁴⁶ *Ibid.*, p. 5.

⁵⁴⁷ *Ibid.*, p. 10.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ J. W. Cairns, ‘Hamesucken and the Major Premiss in the Libel’, pp. 311-13.

⁵⁵⁰ Scotland. High Court of Justiciary. “Johnson Davis Stallard v. H.M. Advocate [15 March 1989].” *Annual review of population law*, Vol. 16 (1989): 123 [Accessed 27/05/2025 at <https://pubmed.ncbi.nlm.nih.gov/12344079/>].

the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.⁵⁵¹

The similarities in language are clear. Hume's *Commentaries on the Laws of Scotland Respecting Crimes* was first published in 1797, meaning that for much of the period under discussion, there was effectively no marital rape exemption in Scots law. It is unfortunately not possible here to examine how this operated in practice, as none of the surviving rape cases within Inverness-shire for this date period feature women accusing their husbands of rape. Given the lack of knowledge regarding how many cases have survived, it is not possible to draw firm conclusions, but it could be argued that the absence of such cases may suggest that Hume's interpretation of marital rape may have been part of a general cultural understanding regarding marital sex and consent during this period. The effect of Scotland's various methods of irregular marriage on this are somewhat unclear. However, it can likely be assumed that regardless of the method of marriage, if a woman was considered to be a wife, her right to refuse sex became legally and culturally complex. Even prior to marriage, women demonstrating an initial resistance to sex, even if desired, was seen as a crucially important aspect of gender normative courtship and would likely have been seen as a required first step in the negotiation of sexual contact between men and women. As Katie Barclay has noted in her study of consent in the eighteenth century:

the importance placed on female resistance to sexual activity before marriage shaped both men and women's sexual behaviour and, in particular, put women in a position where their will was something to be overcome.⁵⁵²

⁵⁵¹ M. Hale, *Historia Placitorum Coronae*, Vol. 1 (London, 1800), p. 629.

⁵⁵² K. Barclay, "From rape to marriage: questions of consent in eighteenth-century Britain", in A. Greenfield (ed.), *Interpreting Sexual Violence, 1660-1800* (London, 2013), p.35.

This puts into perspective Hume's insistence that the legal classification of rape required resistance 'to the last'⁵⁵³; presumably in this cultural context, if all resistance to sex was classified as a lack of consent in legal terms, a great deal of sexual relations would have fallen within the legal definition of rape. This raises broader questions about how both men and women viewed consent in this period, and how women's experiences of sexual desire were both understood internally and negotiated externally. As Susan Brownmiller wrote in her modern sociological study of rape written in the 1970s, 'rape is the only crime of violence in which a victim is expected or required to resist'.⁵⁵⁴ This legal framework placed almost sole responsibility upon rape victims; it was their actions, not those of the men who raped them, that decided whether the crime committed against them could be legally defined as rape and therefore tried judicially. While there are no other mentions of marital rape in contemporary institutional texts, marriage itself receives more attention. Stair, in his *Institutions*, devotes an entire chapter to the subject of 'Conjugal Obligations', in which he defines the term *Jus Mariti*:

Jus Mariti, as a Term in our Law, doth signifie the right that the Husband hath in the Wifes [sic] Goods, yet it may well be extended to the power he hath over her person, which stands in that oeconomical power and authority, whereby the Husband is Lord, Head and Ruler over the Wife, by the express Ordinance of God.⁵⁵⁵

At this point, Stair commences a long and meandering justification for the patriarchal subjugation of women, drawing on various biblical concepts and the comparative customs of different nations, concluding that 'by the Custome [sic] of Scotland, the Wife is in the power of the Husband'.⁵⁵⁶ While not directly relevant to legal consideration on the crime of rape, it nonetheless illuminates the gender norms at play within a text that was almost uniquely influential on women's lives and rights in law. The practice within Scots law of venerating certain institutional texts as sources of law in their own right, means that Stair's

⁵⁵³ D. Hume, *Commentaries*, Vol. 2, pp. 4-5.

⁵⁵⁴ S. Brownmiller, *Against Our Will: Men, Women and Rape* (Harmondsworth, 1977), p. 360.

⁵⁵⁵ J. Dalrymple, *Institutions*, p. 33.

⁵⁵⁶ *Ibid.*, p. 35.

comments cannot be regarded as simply one seventeenth-century man's view of women's place in his world, but rather as one seventeenth-century man's views on gendered difference which were then used to define women's legal rights for subsequent centuries.

The crime of rape transparently unmasks patriarchal power relations, and consequently, rape and sexual violence have received a great deal of attention from feminist historians and theorists. Much is owed to Susan Brownmiller's *Against Our Will: Men, Women and Rape*, first published in 1975. Brownmiller's central thesis is that rape's primary function is as a tool of patriarchal control, and its use against women is something all men benefit from, regardless of their personal opinions on sexual violence or, indeed, patriarchy.⁵⁵⁷ Brownmiller's work, among others, provided the basis for Garthine Walker's 2013 article examining the figure of the rapist in early modern England. Walker examines the continuities in the actions and motivations of rapists across disparate time periods, noting that the most common defence against accusations of rape in the early modern period was not a denial that sexual contact took place, but a claim that it had been consensual.⁵⁵⁸ Subversion of blame had the potential to be a particularly effective tactic in eighteenth-century Scotland considering the kirk's punishment of fornication. The article seeks to examine the dichotomy between a more everyday form of sexual violence, such as the kind of 'rough wooing' that was seen as a common part of the seduction process at the time, and the more extreme forms of sexual violence which drew censure from newspapers and judicial punishment from the courts.⁵⁵⁹ Of course, both forms of sexual violence exist on a spectrum of violent male sexuality which would not exist without the wider patriarchal system. Patriarchal cultural norms of gender and sexual difference provided the foundation for this societal understanding of

⁵⁵⁷ S. Brownmiller, *Against Our Will*, p. 15. It should be noted that Brownmiller has been criticised for the limitations of her analysis in relation to how rape culture has impacted Black women in the American context; see, for example, b. hooks, *Ain't I a Woman: Black Women and Feminism* (New York, 2015), pp. 76-78.

⁵⁵⁸ G. Walker, 'Everyman or a Monster? The Rapist in Early Modern England, c.1600-1750', *History Workshop Journal*, Vol. 76, Issue 1 (Autumn 2013), p. 5.

⁵⁵⁹ *Ibid.*, pp. 24-6.

sexual behaviour in the eighteenth century, where men's sexual desires were seen as something beyond their control.⁵⁶⁰ Women were therefore made responsible for the regulation of sexual activity, through compliance with marriage as a containment method for male sexual urges,⁵⁶¹ and through the established legal requirement for sustained physical resistance, and therefore increased physical injury, to sexual assaults or rapes. Walker also states that 'routine forms of sexual violence rarely made it into court',⁵⁶² an important point to note in the consideration of the cases of sexual violence dealt with in this chapter.

The primary discussion of the case studies in this chapter will concern the levels of familial support experienced by the victim of rape, and how this affected the pursual of judicial consequences against the perpetrator. Firstly, it is useful to examine cases where women pursued justice alongside and with the support of their family members, usually parents. This question of family support also demonstrates a particular point of law in relation to rape. Hume details how it was possible for the family or close connections of a victim of rape to pursue prosecution on her behalf, even if she still lived, and even more interestingly, even if she herself did not want to seek judicial intervention against her rapist. Hume does not specify exactly why this is the case, but instead offers several likely reasons, including the fact that the crime of rape may also have been seen as injurious to a woman's family, since it apparently permanently damaged her social standing. He also posits that 'the peculiar nature of the offence, which she may be unwilling to bring before a court of justice',⁵⁶³ may have been a factor. It would follow, although Hume does not pursue this logical thread, that the shame rape victims experienced may have resulted in lower reporting rates than those seen for other crimes, although as definitive crime figures for this time period are beyond reach, this is purely speculative. Although there do not appear to be any cases of rape or sexual

⁵⁶⁰ *Ibid.*, pp. 9-10.

⁵⁶¹ *Ibid.*, p. 8.

⁵⁶² *Ibid.*, p. 17.

⁵⁶³ D. Hume, *Commentaries*, Vol. 2, p. 13.

violence within Inverness-shire that were pursued against the victim's will, there are several cases which amply demonstrate the crucial role family support played in attempts to pursue and gain justice. This section will examine three cases where justice was pursued solely by the victim's family, due in two cases to the victims' death, and in the other to the victim being in a seemingly permanent catatonic state following the assault. This absence of the victim within the surviving case record may be viewed as a weakness in terms of the documentary value of this evidence in relation to gender, and women's interactions with the courts. However, viewing how sexual crimes committed against women were viewed by their families, and the extent of the actions undertaken by these familial groups in pursuance of judicial retribution, provides crucial insight into the value placed on women's lives and safety in this period. In 1780, a girl named Henrietta or 'Henny' Campbell, aged about sixteen or seventeen years, was allegedly raped by Alexander McIntosh, the tacksman of Balspardon, in the parish of Pettie. The case first came to the attention of the court via 'a report ... Circulated through the Country',⁵⁶⁴ apparently instead of a direct report from the victim or victim's family. The initial petition to the sheriff specified that the case should be investigated as ever since the alleged rape, Campbell had apparently been in a catatonic state, 'deprived of her mind & Judgement'.⁵⁶⁵ A further petition from James Cuming, dated 9 January 1781, requested that McIntosh be apprehended and incarcerated in the tolbooth, noting not only that rape was one of the pleas of the crown, but also that the crime was considered to be highly aggravated due to McIntosh being a married man.⁵⁶⁶ In light of Walker's comments on the societal purposes of marriage, this additional crime of adultery would have likely been interpreted as a manifest failure of control by McIntosh – in other words, the institution of marriage had been insufficient to contain his baser or more 'immoderate' sexual desires,

⁵⁶⁴ NRS, SC29/53/6 [SC29/53/1780/7], Inverness Sheriff Court Criminal Processes 1780, 'Petition Jas. Cuming Pror. Fiscal To The Sheriff of Inverness', 27 December 1780.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ NRS, SC29/53/6 [SC29/53/1780/7], Inverness Sheriff Court Criminal Processes 1780, 'Petition Jas. Cuming Pror. Fiscal To The Sheriff of Inverness', 9 January 1781, f. 5.

demonstrating a lack of moral character which would have been deemed particularly abhorrent.

McIntosh's declaration was taken on 28 December 1780. He stated that on the afternoon of 15 September 1780, McIntosh, along with his daughter Katharine, Henny Campbell, and her sister Anny Campbell, who seem to have been family friends or acquaintances, were walking along a public road, journeying back to McIntosh's home from the house of an acquaintance. McIntosh presents an extremely muddled account of the events surrounding the time of the alleged rape. Most clearly, he states that he was walking with Henny Campbell, while her sister and his daughter walked together around forty yards behind them. McIntosh seems to depict Campbell as mentally unstable, and as experiencing some sort of completely unprompted severe mental break. He describes how, upon seeing a farm labourer approaching on the road, Campbell 'said that there was the Devil & his Angels coming up'.⁵⁶⁷ After a short conversation with the labourer:

they proceeded on their way and the said Henny Campbell gave a cry or Roar and having gone on a little further, she pretended that her Cloaths and shoes were loose and that she behooved to tie them and thereupon sat down upon the roadside.⁵⁶⁸

At this point Anny and Katherine came across them, with a discussion proceeding regarding Campbell's obvious distress. After this, the party returned to McIntosh's home, dined with his family, and the two sisters departed the next morning.⁵⁶⁹ This somewhat sparse narrative, although clearly suspicious, does not provide any clarity on the actual events surrounding the severe symptoms of mental distress that Campbell had been exhibiting for the several months following the alleged assault. It is interesting that, perhaps due to the additional complication of adultery, McIntosh's defence was an absolute denial that any assault had taken place, rather than a claim that any contact had been

⁵⁶⁷ NRS, SC29/53/6 [SC29/53/1780/7], Inverness Sheriff Court Criminal Processes 1780, 'Declaration of Alexr. McIntosh', 28 December 1780, f. 4.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*, f. 5.

consensual. Precognitions were collected on 29 December, and this appears to have continued until at least 30 December. As discussed in the earlier chapter considering the Inverness sheriff court, McIntosh submitted a petition to the court while these precognitions were being heard, requesting access to this process, and thereby knowledge of who was testifying as to the events, and what precisely they were saying.⁵⁷⁰ This was rejected by the court as 'improper & Incompetent & unprecedented',⁵⁷¹ a succinct and robust dismissal which demonstrates the extent to which McIntosh was attempting to circumvent court procedure for his own benefit. This case demonstrates the crucial importance of family support for rape victims within court proceedings. In Campbell's absence, this attempt to gain judicial punishment was pursued directly by the court, with witness statements provided by a range of Campbell's family and friends. Campbell's injuries were not superficial; the procurator fiscal's petition takes care to stress that in addition to being essentially catatonic for several months, Campbell had 'been confined to her Room in a very bad state of health otherways and her Life is now despaired of'.⁵⁷² This violence and its consequences were clearly seen as abhorrent by the court, with this case therefore providing a clear example of justice being pursued on behalf of a victim of crime, not only by their kinship groups, but by the court system itself. In cases such as this, the victim of crime had no direct interaction with the court; the importance of these cases to this thesis, therefore, is the study of court interventions against sexual violence and violence against women more generally, when women were unable to seek justice for themselves.

Two further cases demonstrate this phenomenon of a female victim absent from the court record, with their relatives engaging in concerted efforts to gain justice for violence committed against them. In both cases, the absence of the victim from the proceedings was due to their deaths; one woman was murdered by her partner, and the other died as a result of injuries sustained during the

⁵⁷⁰ NRS, SC29/53/6 [SC29/53/1780/7], Inverness Sheriff Court Criminal Processes 1780, 'Petition for Alexr. McIntosh To The Sheriffs of Invs.', 30 December 1780, f. 1.

⁵⁷¹ *Ibid.*, f. 2.

⁵⁷² NRS, SC29/53/6 [SC29/53/1780/7], Inverness Sheriff Court Criminal Processes 1780, 'Petition Jas. Cuming Pror. Fiscal To The Sheriff of Inverness', 9 January 1781, f. 5.

alleged rape. These cases represent the most extreme examples of violence against women within the surviving documentation of the Inverness sheriff court, and accordingly, the documents produced in the course of these crimes being investigated contain graphic descriptions of violence and the consequent injuries suffered by the victims. It should perhaps go without saying that each reader should therefore approach the following material with an awareness of the mental cost that comes from engaging with material of this kind, and should prioritise their own wellbeing first and foremost. It is also worth stating before proceeding that this material is being examined solely to demonstrate the reality of the abuse suffered by the women within these cases and will not be expanded upon beyond the necessary scope of this analysis.

The first of these cases demonstrates the lengths to which family members acted in support of their loved ones, and their interactions with the sheriff court system in pursuit of this goal. In 1791, Hugh MacDonald and Agnes Diamond testified before Colin Campbell, the sheriff substitute in Fort William, regarding the circumstances leading up to their daughter, Mary MacDonald's murder by her partner. They had travelled there from their home in Dumfries, after receiving letters of passage from both the sheriff depute of Dumfries sheriff court, and their local parish minister. Extract copies of these letters survive as part of the case record, and they clearly show the lengths to which MacDonald and Diamond were prepared to extend themselves to obtain justice for their daughter. They were described by John Ewart, minister in Troqueer as 'real Objects of Charity, and as such are Recommended to the Aid of the Charitable'.⁵⁷³ In addition to their daughter Mary, they had four children living at home, with the youngest only six. Despite the difficulties inherent in making the journey from Dumfries to Fort William under such circumstances, the letter of passage was clear that the aim was explicitly to aid in the conviction of their daughter's murderer: 'their going to Inverness will contribute to the Conviction of Michael Wilson as they know him too well'.⁵⁷⁴ MacDonald testified that he

⁵⁷³ NRS, SC29/53/55 [SC29/53/1791/5], Inverness Sheriff Court Criminal Processes 1791, 'Precognitions Agt. Michael Wilson alias Welsh', 1 August 1791, f. 8.

⁵⁷⁴ *Ibid.*, f. 8.

was informed of his daughter's murder via a letter from John Welsh, the sheriff substitute of Dumfriesshire, after which he and Diamond travelled with their two youngest children first to Glasgow, and then onwards to Fort William.⁵⁷⁵ Here, MacDonald was tasked with positively identifying the man accused of his daughter's murder. During a fraught conversation in the guard house of Fort William, MacDonald:

charged the said Prisoner with the Murder of his daughter but the Prisoner Solemnly averred that she had killed herself, but the declarant did not believe a word of it.⁵⁷⁶

Following this confrontation, and during their statements in court, court personnel asked both Hugh MacDonald and Agnes Diamond to identify clothes suspected of belonging to their daughter, as well as those removed from their daughter's body prior to her internment. MacDonald recognised several items and listed them in his testimony, but then noted:

that the Rest of the Clothes now Shewn him are so Stained with Blood, that he cannot know them, whether they are his said Daughter's Cloaths or not.⁵⁷⁷

In Agnes Diamond's testimony, she again positively identified Wilson, stating that she knew 'him too well to her cost and sorrow to be the man that carried off her daughter Mary'.⁵⁷⁸ She also confirmed her husband's opinion of which clothes had belonged to Mary, but when shown the blood-stained clothes described above, it was recorded:

that she could not Examine them with that Attention to know them as the shocking sight of these occasioned her fainting in Court at the sight of them.⁵⁷⁹

⁵⁷⁵ *Ibid.*, f. 4.

⁵⁷⁶ *Ibid.*, f. 5.

⁵⁷⁷ *Ibid.*, ff. 5-6.

⁵⁷⁸ *Ibid.*, f. 6.

⁵⁷⁹ *Ibid.*, f. 7.

This is a remarkable document, which shows a lower-order couple acting with great bravery to attempt to ensure that their daughter's murderer faced legal consequences. They travelled with two young children across a considerable distance, with essentially nothing but papers of recommendation to aid them, demonstrating much about the administrative co-operation between different sheriffdoms. It should also be noted that in the process of gathering evidence against Wilson, the court personnel within this case subjected MacDonald and Diamond to severe emotional distress. It could be argued that although the court and Mary MacDonald's parents were acting in pursuit of the same goal, the actions of identification necessary for the case created a hostile court environment which clearly had severe emotional and physical consequences. However, this hostile environment did not apparently result in any denigration directed towards the victim. Mary MacDonald's actions prior to her death went against the moral codes of the time – she was a married woman who absconded from Dumfries with Wilson after a short acquaintance, leaving thirty shillings worth of debt in her father's name,⁵⁸⁰ but at no point in the precognition document (the only surviving sheriff court document in the case) is anyone but Wilson seen as responsible for MacDonald's death. This crucial document tells us much about the interlocking network of law-keeping that governed Scotland at the county level in the late eighteenth century. Additionally, on a more emotional level, it reveals a great deal about the devotion parents showed to their daughters, whose lives were greatly valued in defiance of the patriarchal cultural modes which dehumanised women and devalued their lives.

This theme of posthumous justice-seeking is also seen in a rape case dating from early 1787. One of the most striking aspects of this case is how it demonstrates the complex transmission of information in cases of sexual violence, and the nuances inherent within cases involving multiple witnesses. The initial petition submitted by the procurators fiscal states that there was:

a Current Report in and about the Town of Inverness That Alexander Fraser Apprentice to William Falconer Blacksmith in Inverness had about

⁵⁸⁰ *Ibid.*, ff. 3-4.

twenty days ago committed a Rape upon Janet MacKenzie daughter to John MacKenzie ... And that ... MacKenzie died yesterday and had been confined from the above period untill [sic] her death to bed in great pain and agonies. And that it was owing to the said Alexander Fraser's ravishing her that occasioned her death.⁵⁸¹

That this was a topic of conversation throughout Inverness was hardly surprising given the details of the case. Alexander Fraser was examined by the court the same day the petition was submitted, along with several witnesses, after which it was stated that 'it appears to the Sheriff that there was no Just foundation for the Report',⁵⁸² at which point the warrants were recalled and Fraser set free.⁵⁸³ This seems a remarkable course of action by the court, given that a woman's death remained unexplained, and arguably presents the clearest example of the sheriff court acting to minimise sexual crime, and of institutionalised misogyny influencing the actions of the sheriff depute.

Within the first sentence of his judicial declaration, Fraser mentions that he was 'doing some business for Provost Phineas McIntosh of Drummond',⁵⁸⁴ in a rather obvious attempt to leverage his connections with the Inverness administrative class, of which the sheriff court personnel were a crucial part. The inciting incident in the case was an evening where Fraser and MacKenzie, both of whom worked in the same community in Inverness, had ended up alone within a butcher's slaughtering house for an indeterminate period of time, after they had been locked in there by a passing child, apparently as a prank.⁵⁸⁵ MacKenzie was living within the household of Donald Fraser, a butcher in Inverness, and it was members of this household and wider community that testified during the initial precognition. MacKenzie vehemently denied the rape had taken place to her employers – Melissa Fraser, Donald Fraser's spouse,

⁵⁸¹ NRS, SC29/53/38 [SC29/53/1787/11], Inverness Sheriff Court Criminal Processes 1787, 'Petition the Prors Fiscalls Agt. Alexander Fraser', 3 February 1787, f. 1.

⁵⁸² *Ibid.*, f. 3.

⁵⁸³ *Ibid.*

⁵⁸⁴ NRS, SC29/53/38 [SC29/53/1787/11], Inverness Sheriff Court Criminal Processes 1787, 'Declaration of Alexander Fraser', 3 February 1787, f. 1.

⁵⁸⁵ NRS, SC29/53/38 [SC29/53/1787/11], Inverness Sheriff Court Criminal Processes 1787, 'Precognition The Pror. Fiscalls Anent The Rape said to be Committed upon Janet MacKenzie by Alexr. Fraser', 3 February 1787, ff. 1-3.

testified that after Mackenzie had been informed of local gossip casting aspersions on her for spending time alone with Alexander Fraser, she 'said that if she [would] recover she would prosecute them all before the Commissary Court',⁵⁸⁶ presumably for slander. This provides a fascinating, if second hand, example of a woman clearly aware of the legal avenues available to her.

Similarly to Henny Campbell and Mary MacDonald, this case was initiated in MacKenzie's absence. However, in contrast to the above cases, MacKenzie's words and actions survive in the testimony of those around her. After the onset of her illness, she returned home, where she was cared for until her death. The dismissal of the case following the evidence heard by the court on 3 February is particularly egregious considering the glaring absence of any testimony from MacKenzie's family, or others who spoke to her and cared for her in the time leading up to her death. This was rectified a few days later, when further precognitions were gathered from precisely this group. Their testimony reveals that Fraser visited MacKenzie on her deathbed, an action viewed by her family as a clear act of harassment.⁵⁸⁷ Donald Macpherson, who was related to MacKenzie by marriage, was present during Fraser's visit and apparently defused the situation by ordering most of those present to leave. He then questioned MacKenzie about the allegations of rape, urging her 'to tell the truth as Considering herself on the verge of Eternity'.⁵⁸⁸ She then confirmed, both before this group, and again once Fraser had been asked back into the room, that Fraser had had 'Carnal Connection'⁵⁸⁹ with her, and that this rape was the cause of the injuries she was then dying of.⁵⁹⁰ Acting in his apparently self-imposed role of adjudicator between the two parties present, Macpherson firmly rejected Fraser's denial of the rape, stating:

his Oath could not be taken in Opposition to the Declaration of a Dying Woman, for that it was Natural for a Man who Committed Sin to deny it,

⁵⁸⁶ *Ibid.*, f. 5.

⁵⁸⁷ NRS, SC29/53/38 [SC29/53/1787/11], Inverness Sheriff Court Criminal Processes, 1787, 'Precognition Anent The Rape said to be Committed by Alexr. Fraser', 6-7 February 1787, f. 1.

⁵⁸⁸ *Ibid.*, f. 2.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ *Ibid.*

And upon this the said Alexr. Fraser kept silent, And Soon thereafter went away.⁵⁹¹

MacKenzie's proximity to death was therefore seen as inducing a greater propensity to truthfulness, far outweighing Fraser's denials. It is interesting that her family were clearly aware of the likely tactics Fraser could potentially utilise to deny the rape, and Macpherson clearly takes great pains to establish Fraser's conduct before MacKenzie's death and mitigate against potential defences. They therefore acted in advance of their relative's death, gathering evidence and testimony, and had that testimony witnessed by others, in the knowledge that MacKenzie would be unlikely to survive until court proceedings took place.

Macpherson's testimony also records the moment that MacKenzie's family decided that intervention by the sheriff court was necessary:

it was concerted that the said John McKenzie should go to Inverness in order to procure a Warrant of Committment [sic] agt. the said Alexr. Fraser, and he went there with some others accordingly.⁵⁹²

This was clearly a group of people aware of the opportunities for justice available to them under law, the proper avenues for bringing a crime to the attention of the court, as well as the correct form of legal documentation to seek from the sheriff. Also included within these later precognitions is the testimony of Janet Gordon, who described in detail the symptoms suffered by MacKenzie in the time leading up to her death. This was important testimony in the case against Fraser, as it made clear that MacKenzie had likely suffered internal injuries during the rape perpetrated by Fraser which she was not able to recover from. Both Gordon and the following deponent, Ann MacKenzie, seem to have provided care for Janet MacKenzie preceding her death, as they were able to describe the condition of her body both before and immediately following her death.⁵⁹³ This kind of care was clearly gendered, and the participation of these women in the evidence gathering process reveals the

⁵⁹¹ *Ibid.*, f. 3.

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*, ff. 4-8.

importance of women's testimony, which in cases such as this provided details that men were not privy to, due to the prevailing societal norms of the time.

There are obvious similarities between this case and the murder of Mary MacDonald examined above. Both cases have victims who are absent from the court record, whose family groups were heavily involved in efforts to obtain justice against the perpetrator of violence. However, perhaps the most notable aspect of MacKenzie's case is that her family apparently instigated the court's actions, rather than simply cooperating with an ongoing investigation. It is notable, and somewhat suspicious, that the family's involvement is not mentioned within the initial petition in the case, and that their evidence was not gathered until after the perpetrator had been examined by the court and released. This can be interpreted as one of the clearest examples of institutional misogyny covered within this thesis. Without extrapolating beyond what this evidence is able to support, it does at least seem reasonable to assume that such attitudes may have contributed to the paucity of surviving documentation relating to sexual crime in the criminal processes of the Inverness sheriff court.

It is worth stating clearly that the violence suffered by MacKenzie happened while she was employed away from home. It seems that once she returned to her family unit, they acted together to attempt to obtain justice for the sexual violence she had experienced. This connects to another recurrent theme within the surviving documentation relating to sexual violence – women's vulnerability while in employment. The final case study to be considered in this chapter relates to a case of sexual assault inflicted on Margaret Mackay at Ness Castle, where she was employed as a servant primarily caring for the children of Captain Thomas Fraser.⁵⁹⁴ The assault stemmed from a disagreement between Mackay and the perpetrator, Donald Macpherson, after Mackay had been instructed by her mistress to slip a shilling into his pocket, as a method of forcing him to enlist in the army.⁵⁹⁵ This was apparently a common enough practice to elicit no

⁵⁹⁴ NRS, SC29/53/61 [SC29/53/1793/7], Inverness Sheriff Court Criminal Processes 1793, 'Precognition agt. Donald MacPherson', 21 May 1793, f. 14.

⁵⁹⁵ *Ibid.*

particular explanation within the precognitions gathered. However, further context is provided within Gilbert Hutcheson's early nineteenth-century work dedicated to civil and legal administration. During a chapter considering soldiers, Hutcheson describes the recruitment process, noting that 'care is taken to prevent any person from being inlisted without his deliberate consent'.⁵⁹⁶ How this worked in practice was as follows; after being willingly or unwillingly enlisted, the prospective soldier would report to a magistrate or justice of the peace (importantly, they should not report to an army officer):

and before such justice or magistrate he shall be at liberty to declare his dissent to such inlisting ; and, on such declaration, and returning the inlisting money, and paying 20s. for the charges expended on him, he shall be forthwith discharged.⁵⁹⁷

The administrative tasks and payment of fees involved in this rejection of enlistment were required to be completed within a matter of days,⁵⁹⁸ placing a significant burden on any man who wished to avoid military service. The context of the apparent enmity between Mackay and Macpherson therefore becomes significantly clearer. The involvement of justices of the peace in this process also raises another important point – the role played by the judicial system in Inverness was not easily divisible from the role played by the military, and cooperation between the two is a common feature in sheriff court cases, most commonly relating to the transferral and imprisonment of alleged criminals. It is clear, therefore, that the sheriff court system and the military operated within the Highlands as two arms of the British state apparatus, both dedicated to maintaining order within this politically contested region.

This point requires further consideration. The military was a central aspect of Highlands life, both in terms of the performance of accepted gender roles, and, more widely, the upholding of state power. Rosalind Carr has considered this topic in her study of eighteenth-century patriotism in the Highlands, and stresses particularly the importance of military recruitment as a factor in

⁵⁹⁶ G. Hutcheson, *Treatise on the Offices of Justice of Peace*, p. 28.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

contemporary perceptions of non-elite Highland men. A discursive dichotomy arose whereby urban elites adopted refined, enlightened ideas of civilised masculinity, and positioned themselves above a martial manhood applied to lower-order Highland men.⁵⁹⁹ Both masculine identities were seen as patriotic; Carr comments that 'refined manhood embodied social morality which in turn embodied national strength'.⁶⁰⁰ The martial masculinity applied to the Highlands was more complex. Carr asserts that patriotic Highland martial manhood cannot be separated from colonialism; it was intimately connected to an interpretation of the Highlands as a separate entity, or as a previously troublesome colonial possession existing in an earlier state of economic and social development than the urbanised Lowlands.⁶⁰¹ Disproportionate levels of military recruitment in Highland communities fostered the idea of 'loyalty to the British state',⁶⁰² thus establishing Highland martial manhood as a form of patriotism, rather than a challenge to Britain as it had been during the '45. However, Carr concludes that these two modes of patriotic masculinity were not equally regarded. The idea of the Highlands as peripheral and poverty-ridden ran deeply in the British psyche, meaning that the Highlands were denied equal access to a 'North British identity'.⁶⁰³ Stana Nenadic has examined the role of the Highland gentry in the officer class of the British military, offering a useful counterpart to Carr's study of lower-order military recruitment. She highlights a trend in the second half of the eighteenth century towards Highland gentry families increasingly using the military as a method of disposing of younger sons.⁶⁰⁴ The army offered a cheap alternative to the more traditional path involving an English boarding school education, followed by university and perhaps legal training. Commissions purchased for teenage sons were significantly more cost-effective, and had the added benefit of an assured income.⁶⁰⁵ However, one distinctive characteristic

⁵⁹⁹ R. Carr, 'The gentleman and the soldier: patriotic masculinities in eighteenth-century Scotland', *Journal of Scottish Historical Studies*, Vol. 28, Issue 2 (2008), p. 103.

⁶⁰⁰ *Ibid.*, p. 107.

⁶⁰¹ *Ibid.*, pp. 114-5.

⁶⁰² *Ibid.*, p. 114.

⁶⁰³ *Ibid.*

⁶⁰⁴ S. Nenadic, 'The Impact of the Military Profession on Highland Gentry Families, c. 1730 – 1830', *Scottish Historical Review*, Vol. 85, Issue 1 (April 2006), p. 80.

⁶⁰⁵ *Ibid.*, p. 84.

of the British army's officer class was its mix of economic backgrounds, and the importance of performing the correct 'cosmopolitan sociability'⁶⁰⁶ put many officers from less wealthy gentry backgrounds into significant amounts of debt.⁶⁰⁷ Therefore, despite the attractions of a military occupation, for both younger gentry sons and their families, officers often became sources of financial liability for their families, and therefore the performance of elite urban masculinity had a profound impact on the Highland landed gentry.⁶⁰⁸

There is also an important connection to be made between military recruitment in the Highlands and attitudes to clearance. Devine has argued that the policy of large-scale military recruitment in the Highlands fostered a system whereby land was given in exchange for military service, deepening people's emotional connection to their tenancies. This system represented a continuation of the culturally perceived reciprocity of clan kinship, but also caused a greater sense of betrayal in these communities when policies of clearance were pursued by landowners.⁶⁰⁹ This interpretation is supported by Eric Richards' 2000 book on the Highland Clearances, in which he describes an incident of resistance from 1813 whereby tenants refused to be removed until the men they had contributed to the army were returned.⁶¹⁰ Indeed, Andrew Mackillop has argued that one of the key tenets of the push for agricultural improvement which resulted in the policy of clearance was the demilitarisation of the tenantry, and the wholesale switch from a feudal land management system based on the reciprocal exchange of land for military service to a capitalist system which exploited land for commercial profit.⁶¹¹ Mackillop also notes that army recruitment disproportionately targeted the lower orders; landowners encouraged enlistment among cottars and servants on their estates in order to 'maximise the profitability of their populations'.⁶¹² This has implications for the

⁶⁰⁶ *Ibid.*, p. 89.

⁶⁰⁷ *Ibid.*, p. 60.

⁶⁰⁸ *Ibid.*, p. 94.

⁶⁰⁹ T. M. Devine, 'Social responses to agrarian "improvement"', p. 161.

⁶¹⁰ E. Richards, *The Highland Clearances*, pp. 132-3.

⁶¹¹ A. Mackillop, *'More Fruitful than the Soil': Army, Empire and the Scottish Highlands, 1715-1815* (Edinburgh, 2000), p. 86.

⁶¹² *Ibid.*, p. 162.

case under study here, and provides a potential motive for why Mackay would have been asked by her mistress to forcibly enlist a male servant.

One of the most valuable elements of the surviving documentation of this case is that it records the manner in which men spoke about women when they were not present. The most illuminating witness testimony in the case was given by John MacBean, a fellow servant at Ness Castle who was present for the assault as well as most of the preceding events. The attempt to forcibly enlist Macpherson was discussed widely within the castle, and MacBean records several comments made by MacPherson and others in the days following. Macpherson apparently declared his desire not to be enlisted to a Baillie Inglis, and MacBean states:

Macpherson mentioned to the Deponent That at the time of Consignation Baillie Inglis Asked him when Margaret McKay presented her Beating orders to him Mcpherson, why he Macpherson did not present his Beating orders to her, and that this was all that passed between Macpherson & Baillie Inglis, That the Deponent considered this Speech as nothing else than a Joke without any serious meaning.⁶¹³

The misogyny inherent in such a comment hardly needs emphasised. Although this account was second hand, MacBean would have had to have been reasonably certain of the veracity of MacPherson's claims in order to testify that such a comment had been made by a serving baillie. The fact that a casual threat of violence against a nineteen-year-old maid was considered an acceptable source of humour between men clearly demonstrates the manner in which men invoked the spectre of patriarchal violence as a method of homosocial bonding. This misogynistic bantering, with Mackay as the punchline, did not end with Baillie Inglis' comments. Even more extreme was a discussion that passed between several men, including Macpherson, MacBean, and William Chisholm, a sixty-eight-year-old man who confirmed within his own testimony that he was an elder within the parish of Dores.⁶¹⁴ During a discussion regarding the

⁶¹³ NRS, SC29/53/61 [SC29/53/1793/7], 'Precognition agt. Donald MacPherson', 21 May 1793, f. 5.

⁶¹⁴ *Ibid.*, f. 3.

attempted forced enlistment, Macpherson further alleged that Baillie Inglis had previously:

said to him Fie on you why would not you have ado with her by which the Deponent understood, That Macpherson should have got Margt. Mackay with Child, That Macpherson ought to have done so on [account] of her attempting to enlist him & they in particular appealed to the Deponent for his opinion as an Elder of the Church & whether the Deponent would forgive him if he had done so, That the Deponent agreed in opinion with the other persons present and said That he would forgive Macpherson both at Kirk Session & Presbytery.⁶¹⁵

What this remarkable record shows is the extent to which misogynistic attitudes permeated daily life, as well as the open encouragement of violence against women by men with positions of legal authority. As a parish elder, Chisholm would have been involved in the Dores kirk session, which wielded significant power to try moral crimes within its parish boundaries. Here Chisholm seems to have been specifically referring to punishments meted out for fornication, and he stresses at the end of his testimony that Macpherson had never mentioned within his presence any plan to rape Mackay. However, it seems impossible to interpret a forced impregnation in any manner other than rape. It is also unclear precisely why the idea of punishing a woman by impregnating her was being considered, and the fact that this is not discussed in detail suggests once again that this was a common enough practice or cultural idea to merit no further explanation within testimony.

The combination of Chisholm's encouragement of violence as a parish elder, with Inglis' initial suggestion of violence while working in his capacity as a baillie within the wider sheriff court structure, amply demonstrate the extent to which such cultural ideas permeated the legal apparatus of the time. It may well be the case that during these discussions the men involved did not seriously intend for Mackay to be harmed and were instead partaking in casual sexist banter with no expectations that it would go further. Despite this, these men had to testify in court regarding exactly what had been said about Mackay during these

⁶¹⁵ *Ibid.*, ff. 3-4.

discussions, precisely because they were seen by the court as having contributed in some manner to the sexual violence which Macpherson committed against Mackay. This verbal reinforcement of misogyny between men was not meaningless; it was based in patriarchal modes of thought which devalued women's lives and which made violence against women permissible.

Mackay was the eighth witness to testify during the precognitions, and her testimony details an escalating pattern of harassment following the attempted forced enlistment, noting that Macpherson would make verbal threats 'particularly when she was walking with the children'.⁶¹⁶ This eventually culminated in the assault, which took place in a garden at Ness Castle. Mackay reported that MacBean entered the garden where she was working, to warn her that Macpherson intended to harm her. Macpherson then arrived and took hold of her, at which point MacBean stated:

that he would leave the Garden that he might not be a witness to what should happen That the Deponent called out to him not to leave the Garden for that if he would, she would never forgive him, notwithstanding of this McBean went out of the Garden & closed the Garden door after him.⁶¹⁷

MacBean further states that after he left the ongoing assault, he:

went to the Kitchen windows & called to the servants within to go in to the Garden for fear Mcpherson would do any hurt to the said Margaret McKay, That after giving the Servants notice as above, the Deponent stood at the Kitchen window until [sic] he saw the two maids within the Garden.

The two maids mentioned were Elizabeth McDonald and Margaret McIntosh, who immediately went to Mackay's assistance, with McDonald consequently also being assaulted and injured by Macpherson while attempting to separate him from Mackay.⁶¹⁸ Perhaps the most interesting element of this is the willingness of women to intervene against male violence, while MacBean, apparently the only male witness to the assault, stood and watched while

⁶¹⁶ *Ibid.*, f. 14.

⁶¹⁷ *Ibid.*, f. 16.

⁶¹⁸ *Ibid.*, f. 17.

women were harmed. The only charitable explanation for this is that MacBean feared Macpherson, although this is not definitively clear from the surviving court documents. The above witness statements also do not account for the full range of gendered responses to this assault. Several other women who worked as servants at the castle were working within sight and earshot of the assault while it was taking place, and testify that they were told to ignore the situation by an Isobel Fraser, who had investigated the noise within the garden and reported to them 'that whatever happened in the Garden was no part of her Business & she did not wish to concern herself with it'.⁶¹⁹ Clearly to Fraser this form of sexual violence was seen not only as shameful, but as something which could potentially taint her own reputation by association, providing an interesting view of how women negotiated patriarchal norms.

This case therefore allows an examination of the interplay of gendered dynamics and norms in significant detail, making it a highly unusual and valuable form of evidence for gender historians. The escalation of harassment against Mackay, and the manner in which she was discussed by men within her wider community, comprehensively illuminates the everyday forms of misogyny which were likely extremely common within eighteenth-century Inverness-shire, and which are rarely visible within legal documents. The ability to see so unequivocally how gendered norms negatively impacted the life of a young woman within her place of employment is of enormous value, and the level of detail regarding these norms is practically unique even within the evidentially rich criminal processes of the Inverness sheriff court. The practice of forced enlistment can also be seen as a form of assault against one's bodily autonomy unique to men living under patriarchy. The expectation that only men were capable of or expected to perform military service is a form of physical endangerment peculiar to men, and which is fundamentally rooted in patriarchal norms. The fact that Macpherson's response to this experience was to sexually assault Mackay can arguably be seen as a reification of his own bodily autonomy at the expense of hers. There is also the added factor that the sexual assault was

⁶¹⁹ *Ibid.*, ff. 11-12.

explicitly an attempt to forcibly impregnate Mackay against her will, itself an act so steeped in gendered norms and patriarchal hatred of women that it would require far more theoretical space than is available within this thesis to analyse fully. Mackay stressed within her testimony that Macpherson verbally confirmed this intention to her during the assault, stating that 'Mcpherson said he would not part with her until he got the better of her, and got her with Child',⁶²⁰ which she describes as the moment she realised the extent of the danger she was in.⁶²¹

Of particular interest for the aims of this thesis is the recording of these events undertaken by the sheriff court. The points of discussion and details given within precognition often imply the course of questioning undertaken by the court personnel, in this case Thomas Gilzean, the sheriff substitute. What the direction of these precognitions makes clear is that the sheriff court saw as highly relevant the misogynistic banter exchanged between Macpherson and others in the time leading up to the assault, as well as the dismissive non-intervention of other servants who witnessed the assault while it was happening. This suggests that the court was aware of the influence such attitudes had on the violence Mackay faced, and without stressing this point too far, it at the very least confirms that those living in the eighteenth century were aware of the patriarchal nature of their society, and perhaps also therefore aware of its negative impact on women. It would be manifestly incorrect to state that the Inverness sheriff court was in any way anti-patriarchal in its outlook or practice. However, what this example demonstrates is that the investigative processes carried out by the sheriff court took into account, at least within this case, how the wider cultural milieu could motivate the crimes they investigated and tried.

When this selection of cases is considered overall, the richness of the surviving documents is perhaps the most obvious conclusion to draw. While the other topics and themes under study in this thesis reveal much about how the law was administered in eighteenth-century Inverness-shire, and a great deal

⁶²⁰ *Ibid.*, ff. 16-17.

⁶²¹ *Ibid.*, f. 17.

about the point of interaction between lower-order women and the court system, the cases examined within this chapter provide the clearest evidence about how gender factored into these interactions. They also reveal a great deal about how the institution of the sheriff court navigated and enforced patriarchal norms. The investigation of the murder of Mary MacDonald suggests a court system which took violence against women extremely seriously, and which provided administrative assistance to witnesses who needed to travel significant distances to participate in court proceedings. Similarly, although the outcome of Margaret Mackay's case is unknown, it was thoroughly investigated by the sheriff court, and although a rape did not take place, the sexual component of the crime was clearly acknowledged. However, this image of an egalitarian court is contradicted by Janet MacKenzie's case. The perpetrator, having flaunted his connections to men within the civil administration of Inverness, was dismissed from court based on the merit of his own denial, with very minimal initial investigation. The motivation behind the subsequent further investigations is not definitive, but it would be reasonable to link this further action by the court to the fact that MacKenzie's family sought court intervention and were clearly knowledgeable about the opportunities for justice available under the law.

This leads to the other aspect of these cases which has dominated the analysis – the importance of familial support for victims of rape and violence against women. The reason behind the paucity of such cases within the surviving documentation cannot be established with any certainty. However, the evident importance of family support within the cases analysed demonstrates that it was likely far more difficult for victims who attempted to navigate such cases alone. In each of the cases under study, it is possible to see women providing supportive actions for victims of rape and sexual assault, for example by physically intervening in an ongoing assault despite the risks involved, or providing nursing care for an acquaintance after they were injured during a rape. Conversely, it is also possible to see the impact of dominant attitudes which disadvantaged victims of sexual crime. MacKenzie's employers and their friends spread rumours about her throughout their local community, and several of

Mackay's fellow servants directly witnessed her assault and did not intervene. Through these records we can therefore see the wide range of societal responses to violence against women. The stringent nature of the law regarding rape at this time has been considered at length and undoubtedly narrowed the number of cases investigated by the sheriff court. However, the surviving documentation for the cases that were investigated are a rich resource for gender historians which demonstrate the courage of victims of this kind of crime, and the crucial nature of the support provided to them. More than any other kind of evidence consulted during this thesis, these examples allow a close analysis of the operation of patriarchy within this period, at a local and individual level.

6. Conclusion

In conclusion, this thesis represents a significant and original addition to the fields of Highlands legal, social, gender, and administrative history. While Whetstone's and Murdoch's works allowed a crucial initial window into the overlapping spheres of influence of the administrative class,⁶²² it is hoped that the micro-level approach of this work further clarifies precisely how the sheriff court system operated at the local level. There was a possibility that during the research process, the analysis of gender, the core aim of the thesis overall, may have become more equally balanced with, or perhaps even secondary to, the analysis of the court structure and the operation of the legal system in Inverness-shire. On the contrary, however, the work of situating the Inverness sheriff court in the legal system, in civic society, and in its significant impact on the ordinary Inverness-shire inhabitants who became embroiled in legal processes as victims, witnesses or those accused of crimes, was crucial to adequately assessing the court's impact on women (and, comparatively, on men). Therefore, it was necessary to engage deeply with the court as an institution, and to consider in detail the patriarchal power wielded by its personnel, in order to reveal a fuller picture of how interactions with the court influenced women's lives. This additionally led to a reconsideration of exactly what these documents reveal about women. Instead of encouraging a consideration of women in isolation, or rather allowing the *addition* of women back into the historiographical frame, the documents instead force the researcher to consider women *in situ*, as members of their kinship groups and wider communities. They show in great detail how women and men lived within the societal norms of their time, how language barriers were negotiated, how insular remote communities navigated interpersonal disputes, how daughters were treated within patriarchal family units, or, indeed, patriarchally structured situations of employment, as well as any number of other situations. The minutiae of the social lives of the lower orders can be extremely difficult for the

⁶²² A. E. Whetstone, *Scottish county government*, and A. Murdoch, *The People Above*.

historian to reconstruct, and court records provide the almost unique opportunity to do so. It can of course be argued that criminal processes do not present a representative picture of daily life, due to the often-unusual nature of the crimes they record. However, the opposite can just as easily be argued. As Anne Crowther comments in her article examining High Court of Justiciary precognitions, 'in fact, what they capture are routine activities, suddenly frozen in time by the occurrence of a remarkable event'.⁶²³ Therefore, what these documents allow is an evaluation of women's lives that attempts to incorporate an understanding of the various forms of patriarchal authority negotiated with, complied with or resisted by women, from the personal to the state levels.

This project therefore addresses a methodological and historiographical shortfall between the legal and social history fields. Legal historians have examined the technical aspects of the sheriff court, but there is perhaps an over-focus on the 'top-down' view, with many monographs, chapters and articles devoted to advocates and the upper echelons of the legal system, with far less focus on how the day-to-day operations of the inferior sheriff courts impacted those living within their jurisdictions. Comparatively, social historians have been understandably drawn to the massive evidentiary value of court records of all kinds, with, unsurprisingly, a particular focus on those records which have proved most easily accessible to researchers, most commonly those of the High Court of Justiciary. Sheriff court studies do exist and have been discussed at length within this thesis. However, they often do not engage sufficiently with the impact of the institutional power wielded by the court. The sheriff court becomes a somewhat faceless placeholder of state power, with much of how the law was enacted upon the lower orders in practice being assumed, or at least not often explicitly defined. Historians of administration, such as Whetstone and Murdoch, have engaged far more fruitfully, and in far more detail, with the concept of legal administration, and their two monographs have been perhaps the most influential secondary literature on this thesis not related to the field of gender history. However, their studies were not intended to

⁶²³ M. A. Crowther, 'Criminal Precognitions', p. 78.

analyse sheriff court processes qualitatively, with a focus on what the records illuminate about the lower orders. It should be stressed that the above described 'shortcomings' are not criticisms of these works – they were researched and written with specific aims in mind, within the methodologies of their respective fields, and very frequently achieve these aims to the benefit of Scottish history more widely. However, producing works within specific historiographical enclaves arguably limits our understanding of the wider historical value of sheriff court records.

The primary aim of this thesis as a work of gender history has been fulfilled by studying the point of interaction between the lower orders and the sheriff court system, with a particular focus on cases involving women. These cases have been considered on their individual merit, for what they demonstrate about these interactions, as well as for what they reveal, or indeed, what they do not reveal, about the impact of the gendered norms underpinning the legal system on the women and men who found themselves within the sheriff court. This has allowed a much broader consideration of gender than had been envisaged at the beginning of this project. For example, in addition to the more obvious themes of violence against women, enforcement cases have revealed a great deal about women acting in concert with their kinship groups. In addition, lawburrows shows how people used the law for their own benefit and protection, as well as how women acted when they were threatened with violence, or in the face of ongoing harassment. This has allowed a study of gender which, rather than removing women from their lived contexts and considering them in individualised isolation, places them more fully in the gendered contexts of their time. It has been possible to consider in detail women's working lives, their responses to crisis, how they lived within their communities, and, perhaps most crucially, how they chose to utilise the law, or, conversely, to reject its authority over them. One of the most crucial tenets of feminist thought is that although men are inexorably privileged by patriarchy, they are not fully spared from the brutality of the patriarchal system.⁶²⁴ An analysis of the records relating to the

⁶²⁴ b. hooks, *The Will to Change: Men, Masculinity and Love* (New York, 2004), p. 9.

inherently violent practice of forced conscription has been possible, which in one case raised the tension between one man's inherently dehumanising experience of attempted forced conscription, and the sexual violence he then perpetrated on the woman who had been attempting, at her employer's behest, to conscript him. This combined approach, of considering the evidentiary value of these records in terms of what they reveal about gender, while firmly rooting this analysis in a consideration of how the law was administered, arguably more fully demonstrates the varied potential of these records.

To explore this point in more detail, the chapters within this thesis can be considered, to assess collectively what they have added to our knowledge of Highlands life and society during this period. Firstly, the three analytical chapters concerning lawburrows, resistance to the court, and violence against women, can be summarised together, as they are somewhat unified in their approach in analysing women's experiences as seen through the court records, both within and outwith the court setting. Lawburrows petitions provide the unique opportunity to assess how the law was accessed in anticipation of harm, as a way of mitigating against potentially violent outcomes, or perhaps as an attempt to ensure that any subsequent violence would be punished by the court. Throughout the surviving lawburrows petitions women can be seen acting in their own interests, being aware of and exercising their rights under law for their own benefit. As seen throughout the chapters within this thesis, the sheriff court could be accessed in a variety of ways, and access to the law seems to have been a particular focus for Farraline during his tenure as sheriff depute. John Mackay's posting as messenger-at-arms in Fort William, the existence of a sheriff substitute for the Fort William district, a post filled by Colin Campbell, as well as the habitual reliance of the court on justices of the peace, who continued in many areas to serve an important role in the investigation of crime and the associated granting of warrants and transportation of prisoners, all paint a picture of the Inverness sheriff court as not solely an Inverness institution, but instead taking pains to ensure the law could be accessed and applied throughout its extensive jurisdiction. Lawburrows has rarely, if ever, been discussed at

length within the secondary literature, and this chapter therefore represents an original addition to discussions of how the law was utilised by the lower orders.

It can be argued that efforts to expand access to and enforcement of the law were an explicit response by the sheriff court to pockets of resistance spread throughout its jurisdiction, most notably in Lochaber, rather than an altruistically motivated attempt to increase access to justice. This resistance to judicial authority manifested itself in a variety of ways in which women were common participants. Violent deforcements are by far the most common form of resistance against authority of the sheriff court for which documentation survives in the criminal processes. Women charged with deforcement acted in support of their kinship groups to resist arrests and physically prevent sheriff officers and messengers-at-arms from being able to perform their duties. This kind of violence was both a clear transgression of gendered norms, as well as a robust rejection of the sheriff court, the law, and, by extension, the patriarchal state. However, it would be overzealous to classify these crimes as any kind of organised effort to destabilise state power. They can instead be classified more easily as spontaneous and likely impulsive responses to the imposition of judicial authority, enacted by women and men in cooperation, against a state morality with which they did not live in accord. Other forms of resistance to the court are recorded within the surviving documentation. The harbouring of outlaws in particular seems to have been a role women fulfilled within communities living outside of the law, as a non-violent form of resistance which women could perform while still conforming to ascribed gender norms. As discussed above, the harbouring of outlaws by an innkeeper allows a glimpse into the life of a woman who was clearly economically autonomous to some degree and was regarded as a trusted figure by the outlaws she was aiding. Cases such as these allow a fuller picture of individual lower-order women's involvement with their local communities and economies, which is an extremely rare form of historical evidence. Finally, community punishment of moral crimes is an important theme, and can be seen as a significant form of resistance to judicial authority. Communities who engaged in such 'rough music' were exercising their own

moral authority against their neighbours, not necessarily in opposition to, but entirely separately from the apparatus of the sheriff court. Resistance to the legal authority held by the Inverness sheriff court was therefore complex and driven by a range of factors. Court personnel jealously guarded their jurisdictional powers and viewed all of the above examples as threats to their ability to administer the law. This chapter therefore explores a significantly under-researched form of crime, and, crucially, point of interaction between the state apparatus of the court and local communities.

The final chapter on rape allows a close analysis of the patriarchal norms under which eighteenth-century Inverness-shire inhabitants lived their lives. Here, the point of interaction between women and the court becomes more troubled. Several of the cases under study feature victims who were either killed or permanently incapacitated by the violence they had faced and were consequently unable to seek justice on their own behalf. At this juncture, the familial support offered to victims of sexual violence, and violence against women more widely, becomes key to the analysis. It is possible within these cases to see the kinship groups of women going to extreme lengths to testify on their relative's behalf, and in the case of Janet MacKenzie, to gather evidence and initiate court proceedings in the knowledge that she would die before justice could be obtained. While the details of these crimes are disturbing, the consequent court proceedings allow us to see women valued by their families, and the actions taken to cooperate with legal proceedings were clearly borne from the desire to seek retribution for the unacceptable harm caused to their relatives. Cases of sexual violence baldly expose the patriarchal structures that underpinned eighteenth-century society. Analysis at an individual level of precisely how lower-order women and men negotiated patriarchy is rare within the existing historiography, and no studies have been found during the course of research for this thesis which looked specifically at the cases considered here. This chapter therefore represents a wholly original addition to the secondary literature on sexual violence within the Highlands. It amply demonstrates the quality of material on this theme available within surviving sheriff court records,

and the opportunities this presents for further research on this topic, which is of crucial importance to historians of gender.

Finally, the second chapter on the structure and personnel of the Inverness sheriff court represents a different kind of addition to the historiography. The primary purpose of this chapter was to explore and define the sheriff court as an institution in general terms, and the Inverness sheriff court itself in specific. The place occupied by the court within the wider legal and civil administrative systems amply demonstrates its importance to eighteenth-century Highlands society. Its close connections to Inverness burgh politics, and its co-operation with court systems both above and below it in the legal hierarchy, meant that the institutional power it wielded was far-reaching and formidable. The surviving documentation of the court allows a micro-level analysis of the court personnel, who were invariably men, giving a greater sense of how precisely this power was wielded against Inverness-shire inhabitants. It is clear that elements of nepotism, or favouritism more generally, crept into court practice during the decades under study. This becomes most apparent in a handful of cases presided over by Simon Fraser of Farraline as sheriff depute, wherein the person who had raised the process was referred to as Farraline's 'lovite'. This is a term defined by the *Dictionary of the Scots Language* as denoting a dependent, or someone otherwise closely connected with the speaker, commonly seen in various forms of legal documentation.⁶²⁵ The implications raised by those with close connections to the court having the capability to influence court practice is significant, and it has not been possible to fully explore this theme of judicial corruption within this thesis. Nevertheless, it is important to note that the personnel of the Inverness sheriff court were fallible and did not always wield the enormous authority they held fairly. This chapter provides a clear and detailed introduction to anyone seeking to understand the institution of the sheriff court, and how its place within the court system allowed access to all branches of law-keeping in late eighteenth-century Scotland.

⁶²⁵ Luvit *ppl. adj.* ". *Dictionary of the Scots Language* (2004). Accessed 14 Dec 2025 [<http://www.dsl.ac.uk/entry/dost/luvit>].

The original contributions of this thesis can therefore be summarised as follows. Every surviving document produced by the Inverness sheriff court in relation to any criminal case has been examined for the period 1777-95, across two archival collections, and assessed for their value in relation to gender history. Although Abrams' study of Highland masculinities also deals with Inverness sheriff court material, her analysis makes clear that the primary focus of her work were documents held in the Highland Council Archive, and that an in-depth analysis of the NRS collection was not attempted. This makes the depth and breadth of the research contained within this thesis entirely unique within the historiography. The approach to this material has been rooted in the methods and traditions of qualitative gender history, itself a well-established field, and has combined these methods with a comprehensive examination of the legal system, the law, and legal administration. This has allowed a more thorough analysis of the documents under study, mitigating the perceived flaw of court documents – their position as mediated objects becomes the subject of analysis, rather than a flaw to work around. There have been no other studies found using court records in the Highlands which incorporate this approach of centring the institution of the sheriff court in the analysis. Finally, the evidence uncovered using these methods, relating to women's lives in the Highlands, represents an original contribution to our knowledge about this topic. Almost none of the cases under examination have been found elsewhere in the literature, and where they have been this has been noted explicitly. This work therefore resituates these women as historical actors and presents an original and wholly integrated view of them within their communities and families, through analysing their interactions with the legal system. These interactions show women aware of their legal rights, acting in their own and their families' interests, throughout the period under study. This thesis therefore presents an optimistic view of women's autonomy before the law, in spite of the near total control exerted by patriarchal ideologies over all levels of society.

Overall, this thesis has succeeded in its aims. The surviving criminal processes of the Inverness sheriff court for the period specified have been examined in

utmost detail, and the enormous value of these records to various fields of historical study has been discussed at length. Women's involvement in these records has been considered from a multitude of angles, with analysis of women as victims, witnesses, and accused criminals. Their practical experiences with the law, from how court personnel investigated crimes, to the transferral of women prisoners to tolbooths, including their experiences within those tolbooths, has been covered extensively. Thematic analysis of various types of crime in relation to women, patriarchy, and the enactment of gendered norms has been considered at length. Women's access to law, how lawburrows petitions could be used as protective measures, forms of resistance to the judicial authority of the court, as well as cases of sexual violence have all been considered for what they reveal about the point of interaction between women and the law. Additionally, at all points, these analyses have included discussions of how men interacted with the legal system, allowing a more complete picture of gender overall. Where overt discrimination against women within court settings has been observed it has been considered fully. However, the sheriff court does not seem to have been an unusually sexist environment, beyond the scope of the prevailing social norms of the time. It operated as a deeply patriarchal institution, staffed primarily by middling to elite men, whose attitudes towards the lower-order women who found themselves in contact with the court were typical of wider eighteenth-century society. Although this evidence is important and indicative of how patriarchy functioned on a local level, the true value of the records under study in this thesis is their ability to show lower-order women not only as individual, personalised figures, but additionally as women living deeply interconnected lives within their kinship groups and wider communities. The purpose of this thesis has therefore been to illuminate lower-order women's lives in their full and varied humanity, navigating the opportunities and constraints of the legal system, as manifested in the Inverness sheriff court.

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