

INSANITY, IDIOCY AND RESPONSIBILITY :  
CRIMINAL DEFENCES IN NORTHERN ENGLAND  
AND SOUTHERN SCOTLAND, 1660-1830

David James Adamson

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Insanity, idiocy and responsibility. Criminal defences in  
northern England and southern Scotland, 1660-1830.

David James Adamson

A thesis submitted to the University of St Andrews for the  
degree of Doctor of Philosophy

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*Abstract*

This thesis compares criminal defences of insanity and idiocy between 1660 and 1830 in northern England and southern Scotland, regions which have been neglected by the historiographies of British crime and “insanity defences”. It is explained how and why English and Scottish theoretical principles differed or converged. In practice, however, courtroom participants could obtain to alternative conceptions of accountability and mental distraction. Quantitative and qualitative analyses are employed to reveal contemporary conceptions of mental afflictions and criminal responsibility, which provide inverse reflections of “normal” behaviour, speech and appearance.

It is argued that the judiciary did not dictate the evaluation of prisoners’ mental capacities at the circuit courts, as some historians have contended. Legal processes were determined by subtle, yet complex, interactions between “decision-makers”. Jurors could reach conclusions independent from judicial coercion. Before 1830, verdicts of insanity could represent discord between bench and jury, rather than the concord emphasised by some scholars. The activities of counsel, testifiers and prisoners also impinged upon the assessment of a prisoner’s mental condition and restricted the bench’s dominance.

Despite important evidentiary evolutions, the courtroom authentication of insanity and idiocy was not dominated by Britain’s evolving medical professions (including “psychiatrists”) before 1830. Lay, communal understandings of mental afflictions and criminal responsibility continued to inform and underpin the assessment of a prisoner’s mental condition. Such decisions were affected by social dynamics, such as the social and economic status, gender, age and legal experience of key courtroom participants. Verdicts of insanity and the development of Britain’s legal practices could both be shaped by micro- and macro-political considerations. This thesis opens new avenues of research for British “insanity defences”, whilst offering comparisons to contemporary Continental legal procedures.

I, David James Adamson, hereby certify that this thesis, which is approximately 100,000 words in length, has been written by me, that it is the record of work carried out by me, and that it has not been submitted in any previous application for a higher degree.

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## Notes

All contemporary works were published in London unless otherwise stated.  
 The place of publication is dropped after the first citation.  
 All monetary values refer to sterling unless otherwise stated.

## Abbreviations

<u>AJLH</u>	American Journal of Legal History
<u>C&amp;C</u>	Continuity and Change
<u>DNB</u>	Dictionary of National Biography
<u>ECL</u>	Eighteenth Century Life
<u>ECS</u>	Eighteenth Century Studies
<u>HP</u>	History of Psychiatry
<u>HJ</u>	Historical Journal
<u>HR</u>	Historical Research
<u>HS</u>	History of Science
<u>LHR</u>	Law and History Review
<u>LSR</u>	Law and Society Review
<u>MH</u>	Medical History
<u>JCH</u>	Journal of Criminal History
<u>JHMAS</u>	Journal of the History of Medicine and Allied Sciences
<u>JLH</u>	Journal of Legal History
<u>NH</u>	Northern History
<u>P&amp;P</u>	Past and Present
<u>SHR</u>	Scottish Historical Review

*Heard you not lately of a Man,  
 That went besides his Wits:  
 And naked thro' the Streets he ran,  
 Wrapt in his frantick Fits,  
 My honest neighbours it is I,  
 Hark how the people flout me.  
 See where they cry the "Mad Man comes",  
 With all the boys around me,  
 ... Tom Bedlam's but a sage to me  
 For more strange Visions I do see,  
 Then he in All his Madness.*

Anon., The Madman's Marice, (London, c.1740)

“Former Ages railed such as wrote ill, but ours against such as write well; they were sometimes so unjust as not to reward merit; but we are so malicious as to persecute it: Thus we can neither want new Books, nor deserve them; And it hath been well observed, that it would seem now, that none but mad men write or censure.”

Sir George Mackenzie of Rosehaugh, Pleadings in some remarkable Cases, Before the supreme Courts of Scotland, Since the Year, 1661. To which, the Decisions are subjoyn'd, (Edinburgh, 1704 edition), f.A1

“[Captain Thomas Wilcocks] began again to think that my brain was disturbed, of which he gave me a hint, and advised me to go to bed in a cabin he had provided. I assured him that I was well refreshed with his good entertainment and company, and as much in my senses now as ever I was in my life ... He added, that his suspicions were much increased by some absurd speeches I had delivered at first to the sailors, and afterwards to himself ... as well as by my odd looks and behaviour while I was at supper”.

Jonathan Swift, Gulliver's Travels, (1726), “A Voyage to Brobdingnag” Ch. VIII pp.133-134.

## *Introduction*

*"Of all human afflictions, madness is the greatest: 'tis the death of our intellect and virtue; leaving the mere frame extant".<sup>1</sup>*

Historical study of social, medical and legal aspects of insanity and idiocy in Europe has dilated over the past thirty years. Historians have revealed and explained contemporary perceptions and experiences of mental afflictions, stimulated by broader academic interest in the lives of persons who were "marginalized" by traditional historical focuses. Thus, the "lower orders" of society and gender interactions have become important subjects for study, as scholars seek to understand how the institutions and fabric of society shaped people's lives on a daily basis.<sup>2</sup> "New" social histories have embraced different methodological approaches from inter-related social sciences, such as economics, anthropology and sociology. This dissertation employs quantitative and qualitative analysis to explain how insanity and idiocy were understood and experienced during the "long eighteenth century", a term that here denotes the period between 1660 and 1829.<sup>3</sup>

This thesis investigates the composite relationships between mental afflictions and legal theories, practices and institutions, with reference to interconnected literary, "lay" and medical conceptions. The terms "insanity", "idiocy" and associated phrases (ranging from the vernacular "crack'd in the brain" to the legal

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<sup>1</sup> L.T. Rede York Castle in the Nineteenth Century; Being an account of all the principle offences committed in Yorkshire, from the year 1800 to the present period; with the lives of the capital offenders ... (1831) p.160.

<sup>2</sup> R.A. Houston Madness and Society in Eighteenth-Century Scotland (2000) pp.1-3.

<sup>3</sup> R. Porter Mind Forg'd Manacles. A History of Madness in England from the Restoration to the Regency (1987) uses the term "long eighteenth century" to represent the period c.1660 to 1820.

formulary “*non compos mentis*”) are treated as broad socio-cultural categories of description. They related to a diversity of mental afflictions; Burton’s Anatomy of Melancholy (1621) contained references to over forty individual “causes” of insanity and a wide variety of symptoms, for instance.<sup>4</sup>

Perceptions and experiences of mental abnormality were coloured by society and culture.<sup>5</sup> This thesis rejects notions that madness and imbecility were purely social or cultural constructs; contemporaries perceived mental afflictions to be real and truly disturbing pathologies.<sup>6</sup> Stanley Jackson and Roy Porter have concluded that modern ideological paradigms relating to mental afflictions should not be imposed arbitrarily upon the past.<sup>7</sup> A persuasive historical analysis must be based upon contemporary interpretations of mental maladies. The terms “insanity” and “idiocy” were not employed merely to characterise all persons who acted “differently”, or who sometimes behaved unconventionally.<sup>8</sup> Mental afflictions could be enigmatic, but these terms were used specifically to describe persons who displayed perpetual or conspicuous paragons of socially redundant, abnormal or unacceptable conduct.<sup>9</sup>

Many studies of insanity and idiocy are based upon prescriptive materials created by medical professionals or persons who were engaged with the “trade in

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<sup>4</sup> R. Burton, The Anatomy of Melancholy, (1621).

<sup>5</sup> Houston Madness p.2.

<sup>6</sup> Porter Mind Forg’d pp. vii-xi. Houston Madness pp.1-4, 14 and 39. Houston “Class, Gender” p.45.

<sup>7</sup> S. Jackson, Melancholia and Depression from Hippocratic times to modern times, (1986) *passim*.

Porter Mind Forg’d p. ix.

<sup>8</sup> Porter Mind Forg’d pp. viii-xi. Houston Madness p.2.

<sup>9</sup> *Idem*.

lunacy”.<sup>10</sup> Historians have investigated a variety of documentation, from medical notes through to diaries and asylum admissions, to weave a rich historiographical tapestry.<sup>11</sup> Roy Porter’s work has piloted research into less charted regions, revealing the commonplace observations of Britain’s “laity” (persons with no occupational association with either the specialist mad-trade or generic medical professions) and how they witnessed, experienced, described and understood insanity.<sup>12</sup> This comparison of English and Scottish insanity and idiocy defences between 1660 and 1829 broadens the history of mental afflictions “beyond the asylum”. Legal processes are investigated to discover what sort of persons authenticated mental distraction. These criminal hearings offer valuable impressions of how “lay”, “legal” and “medical” persons perceived mental afflictions and how these perceptions altered over time.

A sophisticated historiography has emerged concerning British criminal defences of insanity and idiocy. Nigel Walker’s seminal work provides lucid comparisons between English, Scottish and European philosophies of legal responsibility, alongside penetrative analysis of the practical procedures that

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<sup>10</sup> Houston Madness p.3.

<sup>11</sup> See notably, K. Jones, Lunacy, law and conscience, 1744-1845. The social history of the care of the insane, (1955). W.L. Parry-Jones, The trade in lunacy: a study of private madhouses in England and Wales in the eighteenth and nineteenth centuries (1971). A. Digby, “Changes in the asylum: the case of York, 1777-1815” Economic History Review 36, 2, (1983). *Ibid*, Madness, Morality and medicine: a study of the York Retreat, 1796-1914 (1985). J. Andrews, “Case notes, case histories, and the patient’s experience of insanity at the Gartnavel Royal Asylum, Glasgow, in the nineteenth century”, Social History of Medicine, 11, 2, (1998). J. Andrews and A. Scull, Undertaker of the Mind. John Monro and Mad-Doctoring in Eighteenth-Century England, (2001). Andrews and Scull, Customers and Patrons of the Mad-Trade. The Management of Lunacy in Eighteenth-Century London. With the Complete Text of John Monro’s 1766 Case Book, (2003).

<sup>12</sup> Porter, Mind Forg’d. *Ibid*, A Social History of Madness. Stories of the Insane, (1987). *Ibid*, “Introduction” and “Laymen, doctors and medical knowledge in the eighteenth century. The evidence of the Gentleman’s Magazine”, in Porter (ed.) Patients and Practitioners. Lay Perceptions of Medicine in pre-Industrial Society (1985).

underpinned insanity defences.<sup>13</sup> Walker's analysis has been developed expansively by Joel Eigen in an English context, who has focused upon defences which were entered after 1760 at the Old Bailey (for crimes committed in London and Middlesex).<sup>14</sup> Eigen's work has dismantled simplistic assumptions about crime and insanity, such as Frank McLynn's loose generalisation that the identification of insanity and idiocy in eighteenth century England's criminal courts relied upon "medical experts".<sup>15</sup>

Historical interest has extended beyond atypical criminal defences of insanity, like James Hadfield's famous insanity defence for shooting treasonably at King George III in 1800.<sup>16</sup> Hadfield's crime and trial were highly politicised and publicised, unlike most insanity defences. Hadfield's case was also of legal interest, because the defence counsel's contentious argument that the prisoner was "delusional", or insane upon one point of reason, was upheld in court. By contrast,

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<sup>13</sup> N. Walker, Crime and Insanity in England. Volume I: The historical perspective, (1968) *passim*. See also N. Walker and S. McCabe, Crime and Insanity in England. Volume two: New Solutions and New Problems, (1973).

<sup>14</sup> R. Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)", LSR, 19, 3, (1985). J.P. Eigen, "Intentionality and insanity: what the Eighteenth Century juror heard", in W Bynum et al, The Anatomy of Madness, vol. II, (1986). *Ibid*, "Delusion in the Courtroom: The Role of Partial Insanity in Early Forensic Testimony", MH, 35, (1991). *Ibid*, "I answer as a physician: opinion as fact in pre-McNaughtan insanity trials", in Clark and Crawford (eds.), Legal Medicine in History, (1994). *Ibid*, Witnessing Insanity. Madness and Mad-Doctors in the English Court, (1995). *Ibid*, "Criminal Lunacy in Early Modern England – Did Gender Make a Difference?", International Journal of Law and Psychiatry, 21, 4, (1998). S. Landsman, "One Hundred Years of Rectitude: Medical Witnesses at the Old Bailey, 1717-1817", LHR, 16; 3, (1998). M.J. Weiner "Judges v. Jurors; Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth Century England", LHR, 17, 3, (1999). T. Ward "Observers, Advisers or Authorities? Experts, juries and criminal responsibility in historical perspective", Journal of Forensic Psychiatry, 12, 1, (2001). Andrews and Scull Undertaker of the Mind contains a detailed account of earl Ferrers' insanity defence, at the House of Lords in 1760, as well as the case of Margaret Nicholson who assaulted King George III.

<sup>15</sup> F. McLynn, Crime and Punishment in Eighteenth Century England, (1991), p.41.

<sup>16</sup> See Moran "Hadfield" *passim* and Eigen Witnessing pp.22 and 48-54 for accounts of this crime and trial.

recent historiography has focused upon less sensational criminal defences to reveal commonplace contemporary perceptions of mental abnormality and to appreciate how criminal processes functioned during such hearings.

This thesis uses fresh materials relating long eighteenth century provincial British hearings. No work has been published regarding criminal responsibility in a northern English context. Dana Rabin has completed a doctoral dissertation which concerns northern English insanity defences between 1660 and 1800.<sup>17</sup> Rabin investigates the relationships between sensibility and criminal responsibility, whilst emphasising how prisoners were not always passive “victims” of oppressive legal processes.<sup>18</sup> Rabin’s work is here expanded upon, particularly how defendants who suffered from mental afflictions could influence their own hearings. By including trials between 1800 and 1829, this study contextualises the changes and continuities in legal practices and theoretical understandings of mental afflictions. Much of Rabin’s analysis is grounded upon pre-trial depositions which can be informative, yet restrictive, mines of information. A wider variety of published and unpublished materials are employed here to illustrate and explicate conceptions of criminal responsibility and the way in which the prisoner’s mental condition was evaluated in court.

Whilst Rabin concentrated upon the English experience, this dissertation compares English and Scottish defences of insanity and idiocy. British and

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<sup>17</sup> D. Rabin “Of Persons Capable of Committing Crimes”. Law and Responsibility in England 1660-1800” (PhD Thesis, University of Michigan, 1996).

<sup>18</sup> *Ibid* p.40.

Continental legal systems are also juxtaposed.<sup>19</sup> There has been little recent, published interest in Scottish criminality despite the promise of abundant historical material.<sup>20</sup> Scottish child-murder and witchcraft prosecutions have been scrutinized, but the study of fatuity and furiosity defences has been launched only recently by Robert Houston.<sup>21</sup> Houston has focused upon criminal hearings at the supreme High Court of Justiciary, in Edinburgh.<sup>22</sup> This study expands this nascent Scottish historiography to include criminal hearings which took place upon the southern circuit of Scotland's Court of Justiciary.

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<sup>19</sup> For research into European insanity defences see A. Abbiateci, "Arsonists in Eighteenth Century France: An Essay in Typology of Crime", R. Forster and O. Ranum, Deviants and the Abandoned in French Society. Selections from the Annales Economies, Societes, Civilisations, 4, (trans. E. Forster and P.M. Ranum), (1978). R.A. Nye, Crime, Madness and Politics in Modern France, (1984). R. Harris, Murders and Madness. Medicine, Law and Society in the fin de siecle, (1989). G. Speak, "An Odd Kind of Melancholy; reflections on the glass delusion in Europe (1440-1680)", History of Psychiatry, i, (1990). Y. Ripa, Women and Madness. The Incarceration of Women in Nineteenth Century France, (tr. C. du Peloux Menage), (1990). M.N. Wessling, "Infanticide trials and forensic medicine: Wurttemberg, 1757-93", in M. Clark and C. Crawford, (eds.), Legal Medicine in History, (1994). For Irish perspectives, see P.M. Prior, "Mad not bad: crime, mental disorder and gender in nineteenth century Ireland", HP, 8, 32, (1997). Gibbons, Mulryan and O'Connor, "Guilty but insane: the insanity defence in Ireland, 1850-1995", British Journal of Psychiatry, 170 (1997). N. Garnham, "The trials of James Cotter and Henry, Baron Barry of Santry: two case studies in the administration of criminal justice in early eighteenth century Ireland", Irish Historical Studies, xxxi, 123, (1999). For an "Atlantic" perspective see M.A Jimenez, Changing Faces of Madness. Early American Attitudes and Treatment of the Insane, (1987).

<sup>20</sup> M.A. Crowther "Scotland: a country with no criminal record" Scottish Economic and Social History Review, 12, (1992). Some aging work has concerned Scottish crime and the criminal courts, see J.I. Smith and I. MacDonald, "An Introduction to Scottish Legal History", Stair Society, 20, (1958). Smith, "Selected Justiciary Cases 1624-1650", Stair Society, 27, (1972). Meston, Sellar and Cooper, "The Scottish Legal Tradition", Stair Society and Saltire Society, (1991).

<sup>21</sup> Houston Madness. Ibid, "Madness and Gender in the long eighteenth century", SH, 27, 3 (2002). Ibid, "New Light on Anson's Voyage, 1740-4: a mad sailor on land and sea", Mariner's Mirror, 88, 3, (2002). Ibid, "Professions and the identification of mental incapacity in eighteenth-century Scotland" Journal of Historical Sociology XIV, 4, (2002). Ibid, "Courts, Doctors and insanity defences in 18<sup>th</sup> and early 19<sup>th</sup> century Scotland" International Journal of Law and Psychiatry, 26, (2003). Ibid, "The Face of Madness in Eighteenth- and Early-Nineteenth Century Scotland" Eighteenth Century Life, 27, 2, (2003). Ibid, "Class, Gender and Madness in Eighteenth-Century Scotland" in J. Andrews and A. Digby (eds.) Sex and Seclusion, Class and Custody. Perspectives on Gender and Class in the History of British and Irish Psychiatry, (2004)

<sup>22</sup> Houston Madness considers the criminal trials of John Douglas (1796), James Fisher (1814-1815) and John Halliday (1818), which were tried initially on the southern circuit. Houston has also considered civil court "brieves" which originated in southern Scotland. John Halliday's family had failed to have him "cognosed" as insane at a civil tribunal mere months before he was tried for the crime of arson.

Scottish and English legal philosophies held to different conceptions of criminal responsibility. Scots Law had independent roots, influences and practices to England's Common Law.<sup>23</sup> Scots Law incorporated some "Anglicised" processes, but Continental "Civilian" philosophies continued to have a major bearing upon Scottish procedures. It is investigated how England's Common Law held to a narrower definition of criminal responsibility than in Scots Law and whether such abstract conceptions were applied universally in court. These alternative understandings of criminal accountability impinged upon practical understandings of insanity and idiocy within England and Scotland. The English and Scottish legal codes also shared some similar principles; it is explained how "intent" (also known as "dole" in Scotland) was fundamental to constructions of criminal responsibility in both traditions.<sup>24</sup>

Besides an account of legal theories, this dissertation compares how mental maladies were perceived during English and Scottish criminal hearings and how these notions altered between 1660 and 1829. Broadly-held conceptions of

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<sup>23</sup> J.W. Cairns "Importing our Lawyers from Holland: Netherlands' influences on Scots law and lawyers in the eighteenth century" in G.G. Simpson (ed.) Scotland and the Low Countries, 1124-1994, (1996). *Ibid*, "The Civil Law Tradition in Scottish Legal Thought" in Carey Miller and Zimmermann (eds.) The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays, (1997). *Ibid*, "Legal theory" in The Cambridge Companion to the Scottish Enlightenment, (2003). L. Farmer "Criminal Law, Tradition and Legal Order. Crime and the Genius of Scots Law, 1747 to the present", in D.L. Carey and D.W. Meyers (eds.) Comparative and Historical Essays in Scots Law, (1992). W.M. Gordon, "A Comparison of the Influence of Roman Law in England and Scotland" in D.L. Carey Miller and R. Zimmermann (eds.) The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays, (1997). Meston, Sellar and Cooper, "The Scottish Legal Tradition", Stair Society and Saltire Society, (1991). W.D.H. Sellar, "The Resilience of the Scottish Common Law" in D.L. Carey Miller and R. Zimmermann (eds.) The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays, (1997).

<sup>24</sup> Eigen Witnessing p.3. Eigen "Intentionality" *passim*. Houston Madness pp.72-90.

normality can be highlighted by the study of atypical conduct.<sup>25</sup> Two influential scholars, Michel Foucault and Roy Porter, were adamant that the history of reason and unreason must be concomitant.<sup>26</sup> Roy Porter described madness as the “mirror of logic”, for instance.<sup>27</sup> Descriptions of heterotypical behaviour can transpose observations regarding what was perceived to be normal, acceptable conduct.

The authentication of a prisoner’s mental condition was framed and informed by legal procedures and structures. Defences of madness or imbecility cannot be understood without considering how key “decision-makers” operated and interfaced within the English and Scottish criminal processes.<sup>28</sup> In all English and most Scottish hearings, the criminal trial jury took the final decision regarding the prisoner’s mental capacities and criminal responsibility. It falls to the historian to unravel how the jurors reached their conclusions.<sup>29</sup> Following published assessments of British insanity defences, the courtroom interactions between judges, juries, legal representatives, witnesses, prisoners and prosecutors are examined.

Joel Eigen has suggested that judges could dictate the jury’s estimation of the prisoner’s mental condition at England’s Old Bailey between the 1760s and

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<sup>25</sup> M.S. Moore, *Law and psychiatry. Rethinking the relationship*, (1984) pp.416-419. M. MacDonald, “Madness, suicide and the computer” in Porter and Wear (eds.), *Problems and methods in the history of medicine*, (1987) pp.1-9. Houston *Madness* p.1 and fn.2.

<sup>26</sup> M. Foucault, *Madness and Civilisation. A History of Insanity in the Age of Reason*, translated by R. Howard, (1971, 5<sup>th</sup> edition 1997). Porter *Mind Forg’d* pp.6-9. *Ibid*, *Social History of Madness* pp.3-4.

<sup>27</sup> Porter *Social History of Madness* p.3.

<sup>28</sup> P. King, “Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800”, *HJ*, 27, 1 (1984). *Ibid*, *Crime, Justice and Discretion in England 1740-1820*, (2000).

<sup>29</sup> Eigen *Witnessing* pp.12-18.

1840s.<sup>30</sup> Eigen's thesis reinforces broader interpretations of England's criminal processes, presented by the likes of Douglas Hay and Thomas Green, who have argued that criminal hearings and verdicts were directed strongly and regularly by the opinions of the bench.<sup>31</sup> By the late eighteenth century, British judges were most vociferous where complex points of law (such as theories of criminal responsibility) needed clarification. However, a single focus upon the judge's influence oversimplifies the legal processes. John Langbein and Peter King, for example, have stressed how the judge's influence could be restricted by other courtroom players, including the jury.<sup>32</sup> With such critiques in mind, Eigen's thesis regarding the importance of the judge to Old Bailey verdicts in insanity defences must be considered carefully. It is examined how the principal courtroom actors interfaced during provincial criminal hearings.

The historiography of Scottish crime and criminal processes is thin, but the English historiography cannot be grafted carelessly onto the Scottish scene. Scotland's bench could act differently to its English cousin, owing to independent

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<sup>30</sup> Eigen "Intentionality" pp.34-49.

<sup>31</sup> T.A. Green, "The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution" in Padoa-Schioppa (ed.) The Trial Jury in England, France and Germany 1700-1900 (1987). *Ibid.*, "A Retrospective on the Criminal Trial Jury, 1200-1800", in JS. Cockburn and T.A. Green (eds.) Twelve Good Men and True (1988). D. Hay, "Property, Authority and the Criminal Law", in D. Hay et al (eds.), Albion's Fatal Tree Crime and Society in Eighteenth Century England, (1975). *Ibid.*, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century" in J.S. Cockburn and T.A. Green (eds.), Twelve Good Men and True. The Criminal Trial Jury in England, 1200-1800, (1988). J. Innes and J. Styles, "The Crime-Wave: Recent Writing on Crime and Criminal Justice in Eighteenth Century England", Journal of British Studies 25, 4, (1986).

<sup>32</sup> King, "Decision-Makers". *Ibid.*, Crime. J.L. Langbein "Albion's Fatal Flaws" P&P 98 (1983). *Ibid.*, "Shaping the Eighteenth Century Criminal Trial: a view from the Ryder Sources", University of Chicago Law Review, 50, (1983). *Ibid.*, "The English Criminal Trial Jury on the Eve of the French Revolution", in A. Padoa-Schioppa (ed.) The Trial Jury in England, France and Germany 1700 1900, (1987). *Ibid.*, "Historical Foundations of the Law of Evidence: a view from the Ryder Sources", Columbia Law Review, 96, 5 (1996).

legal traditions, theories and practices. It is explained how Scottish judges, rather than jurors, could assess the prisoner's fitness to stand trial between 1660 and 1829.<sup>33</sup> But Scotland's "assize" (jury) evaluated defences which argued that prisoners had been unsound mentally when committing crimes. In these latter types of trial, Houston suggests that the bench guided and informed the "assize", but did not enforce or dictate its opinions upon the jurors.<sup>34</sup> Houston has employed a sophisticated approach to the courtroom interactions and thereby posited an alternative conclusion to Eigen's findings for the Old Bailey. These divergent hypotheses for Edinburgh's High Court and London's Old Bailey are tested within the context of provincial English and Scottish circuit courts. Such analysis requires an appraisal of the function of the jury, as well as the judge, within Britain's criminal courtrooms between 1660 and 1829.

New avenues of research are opened beyond the remit of bench and jury. The roles of British legal representatives (principally barristers and advocates) during these types of trial are compared. Published material has assumed rather than established the impact of counsel during British trials; this shortcoming is rectified in this thesis.<sup>35</sup> A novel investigation of the quantitative and qualitative influences

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<sup>33</sup> Houston *Madness passim*, "Courts, Doctors" pp.339-354 and "Professions" pp.441-466.

<sup>34</sup> Houston *Madness* pp.50-51. *Ibid.* "Courts, Doctors" pp.341. ID. Willock, "The origins and development of the jury in Scotland", *Stair Society*, (1966) p.98 makes a similar point for Scottish criminal trials in general.

<sup>35</sup> J.S. Beattie, "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", *LHR*, 9, 2 (1991). D. Duman, *The Judicial Bench in England 1727-1875. The Reshaping of a Professional Elite*, (1982). *Ibid.*, "The English Bar in the Georgian Era", in W. Prest (ed.) *Lawyers in Early Modern Europe and America* (1981). J.B. Post, "The Admissibility of Defence Counsel in English Criminal Procedure", *JLH*, 5, 3, (1984). Houston "Courts" pp.245-354. A. Murdoch, "The Advocates, the Law and the Nation in Early Modern Scotland" in W. Prest (ed.) *Lawyers in Early Modern Europe and America*, (1981).

of legally trained representatives upon Britain's "superior" circuit courts is offered within the context of insanity and idiocy hearings. Defence and prosecution "advocates" were involved in Scottish proceedings from at least the seventeenth century. By contrast, counsel was not guaranteed to be present during English Assize hearings. Most litigants did not employ counsel, but the reasons why barristers began to appear during defences of insanity are explored.

Legal practice and the interactions between courtroom participants evolved during the long eighteenth century, particularly in England. Focusing upon Old Bailey trials, Stephan Landsman has suggested "Adversarial" criminal legal routines emerged during the eighteenth century.<sup>36</sup> Landsman argues that a litigious clash of proofs characterised such "adversarial" hearings, rather than the non-contentious judication which typified seventeenth century trials.<sup>37</sup> New procedural and evidential guidelines developed. Litigants became responsible for the production of testimonial proofs. Counsel became a feature of such trials, initially in the 1730s and increasingly after the 1760s, because of their ability to prepare and present sound legal cases.<sup>38</sup> Landsman has suggested that this greater focus upon proof and the emergence of counsel altered the role of the bench during criminal hearings, although the evolution of the "adversarial" courtroom was incomplete before 1830. Judges became less involved in the production of evidence and more

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<sup>36</sup> S. Landsman, "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England", *Cornell Law Review*, 75, (1990) pp.498-603. C. Crawford "The Emergence of English Forensic Medicine. Medical evidence in common-law courts, 1730-1830" (unpublished PhD thesis, University of Sussex) pp.160-161 refers to such procedures as "accusatory".

<sup>37</sup> Landsman "Rise" pp.500-502.

<sup>38</sup> *Idem*.

involved in the clarification of legal principles and precedent. These broader theses about the development of England's "adversarial" courtroom demands to be tested in the context of Northern Assize insanity trials. An investigation of Scottish procedural developments provides a fascinating comparison with English practices, especially given the theoretical and practical impact of the "Romano-Civilian" traditions upon Scots Law.

The courtroom interactions during British trials are also compared with European legal practices and developments. Eighteenth century Continental practices have been characterised as being "Inquisitorial" in nature, whereby the judicial bench dominated trials. "Inquisitorial" benches took evidence, questioned witnesses and decided whether defendants were responsible for their actions. The bench also sentenced guilty parties. Contemporary English commentators distinguished Continental practices from their own. As one rhymester noted, "In foreign Realms, not as in This, 'Tis there Arbitrium Judicis", but such generalisations have been deconstructed intelligently by legal historians.<sup>39</sup> "Continental" law was not monolithic and that these legal systems could obtain to different practices and evolutions.<sup>40</sup> Whilst European judges were rarely restricted to a passive, adjudicating role, their activities could be constrained by the proofs

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<sup>39</sup> Anon. (Gentleman of the Middle Temple), A northern circuit described, in a letter to a Friend: a poetical essay, (1751), p.15. G. Gorla and L. Moccia, "A 'Revisiting' of the Comparison between 'Continental Law' and 'English Law' (16<sup>th</sup> to 19<sup>th</sup> Century)", JLH, 2, 2 (1981) pp.143-152. Farmer "Criminal Law" pp.33-39.

<sup>40</sup> E.M. Becker, "Judicial Reform and the Role of Medical Expertise in Late Imperial Russian Courts", LHR, 17, 1 (1999) pp.1-8. N.Z. Davis, Fiction in the Archives. Pardon Tales and Their Tellers in Sixteenth Century France, (1987). F. López-Lázaro, "'No Deceit Safe in Its Hiding Place' The Criminal Trial in Eighteenth Century Spain", LHR, 20, 3 (2002) pp.451-477. Wessling "Infanticide" pp.117-138.

entered at court and the involvement of counsel.<sup>41</sup> Continental judges orchestrated trials, but they did not necessarily act arbitrarily. Stereotypical generalisations should be avoided, but specific European procedures and developments can be employed usefully to contextualise English and Scottish practices.

The assessment of Britain's courtrooms would be deficient without considering witnesses and testimonies. Some scholars have suggested that, after the mid eighteenth century, the classification of mental maladies became dominated by medical professionals, including specialist "mad-doctors" (who might not have received formal medical training).<sup>42</sup> Thomas Szasz, for instance, contended that madness was purely a social construct, invented and perpetuated by "psychiatric" professionals. Szasz concluded that the concepts and terms of insanity and idiocy were designed to label and control persons who refused to conform to norms which governed behaviour. Klaus Dörner has contended similarly that the "labelling" and incarceration of mad people was an extended means of controlling the conduct of society's labouring poor.<sup>43</sup> This sort of methodology has been challenged strongly. Roy Porter has pointed out that the "mad-trade" ought not to be considered as a formal, unified "psychiatric" profession during the period before the 1820s. Porter

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<sup>41</sup> Farmer "Criminal Law" pp.36-39. López-Lázaro "No Deceit Safe" p.465.

<sup>42</sup> T. Szasz The myth of mental illness: foundations of a theory of personal conduct, (1961). Ibid, Law, Liberty and Psychiatry. An Inquiry into the Social Uses of Mental Health Practices, (1963) Ibid, The Manufacture of Madness. A Comparative Study of the Inquisition and the Mental Health Movement, (1971) p.15. Scull Museums of Madness, (1979) pp.14 and 124-129. Scull has reconsidered some of his views, see Scull The Most Solitary of Afflictions. Madness and Society in Britain 1700-1900 (1993) and "Museums of Madness Revisited" Social History of Medicine 6, 1, (1993).

<sup>43</sup> K. Dörner, Madmen and the Bourgeoisie. A Social History of Insanity and Psychiatry, (1969, tr. Neugroschel and Steinberg 1981) pp.1, 37 and 67. See Porter Mind Forg'd p.9 for a synopsis of this historiography.

argued further that the “mad-trade” could not have evolved as a viable concern without the financial support of affluent “patients” and their households. Persons belonging to society’s elites and middling sorts could also suffer from mental distraction and be supervised, treated and interned.

“Anti-psychiatric” methodology and its critics can be evaluated within the milieu of criminal hearings. Published research has suggested that medical and specialist testimonies did have a greater impact upon insanity defences after 1760 in England.<sup>44</sup> Also, medical witnesses were more involved in Scottish criminal proceedings by the early nineteenth century.<sup>45</sup> Nevertheless, these studies have found that the courtroom identification of insanity and idiocy persisted to be dominated by “lay” persons and their evidences, not “expert” testimony from generic medical professionals or “specialists” in the identification of mental disturbance. The emergence of medical and expert testimony was prompted by legal professionals who were increasingly concerned with establishing “proof beyond a reasonable doubt”.<sup>46</sup> The qualitative and quantitative impact of “lay”, “medical” and “expert” witnesses and their proofs are therefore ascertained in the context of provincial English and Scottish court cases.

It is examined how developments in the “law of evidence” affected the type of witness which were adduced at court and the content of their testimonies. This

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<sup>44</sup> Eigen *Witnessing* esp. pp.18-28 and 108-160. T.R. Forbes *Surgeons at the Bailey. English Forensic Medicine to 1878* (1985) *passim*. Landsman “Rectitude” p.454.

<sup>45</sup> Houston *Madness* pp.46-49 and 141. *Ibid* “Courts, Doctors” *passim*.

<sup>46</sup> Eigen “Intentionality” pp.34-49. *Ibid* *Witnessing* pp.182-189. Houston “Professions” pp.441-446. *Ibid* “Courts, Doctors” pp.345-354.

reveals what kinds of deponent and testimony were perceived to be persuasive (and why) during provincial British insanity and idiocy defences. The reader is encouraged to view these criminal trials through the lens of contemporary understandings of proof and truth, rather than distorting the records by imposing modern evidential standards upon the past.<sup>47</sup> Such an investigation has not been attempted in the context of defences of mental incompetence, but a wide range of scholarship has considered the broader evidential developments which occurred during the long eighteenth century.<sup>48</sup>

Social historians have emphasised how a person's social characteristics, such as their gender, occupation, socio-economic standing and age, could shape and determine human experience. Accordingly, it will be investigated how these "contingencies" impinged upon decision-making processes during British insanity and idiocy defences.<sup>49</sup> These broader analyses raise further historiographical debates relating to the function of the criminal law and perceptions of justice and criminal responsibility within society. Scholars have suggested that society's

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<sup>47</sup> Kilday "Maternal Monsters" makes this mistake in her analysis of Scottish child-murder cases. Initially, Kilday considers the changes in evidential standards in Scotland c1750 to 1815 (pp.158-160). Kilday outlines how proofs which today might be regarded as being "circumstantial" (such as neighbourhood gossip) were imparted by midwives and doctors who were not "detached" or "impartial" witnesses (pp.161-162). Kilday slips into a modern understanding of legal proof when she opines that such evidences were "derisory" (p.161). By contrast, this thesis recognises that these forms of testimony and testifier could be persuasive (and not necessarily flawed) during long eighteenth century British trials.

<sup>48</sup> Crawford "Emergence". *Ibid*, "Legalizing Medicine: early modern legal systems and the growth of medico-legal knowledge", in M. Clark and C. Crawford (eds.), Legal Medicine in History, (1994). Landsman "Rise". J.L. Langbein, "Understanding the Short History of Plea Bargaining", LSR, 13, 2, (1978/1979). *Ibid*, "Historical Foundations of the Law of Evidence: a view from the Ryder Sources", Columbia Law Review, 96, 5, (1996). S. Shapin, A Social History of Truth, Civility and Science in Seventeenth Century England, (1994). B. Shapiro, Beyond Reasonable Doubt, (1991). *Ibid*, "The Concept "Fact": Legal Origins and Cultural Diffusion", Albion, 26, 1, (1994). *Ibid*, A Culture of Fact, England, 1550-1720, (2003).

<sup>49</sup> Houston Madness pp.91-107.

propertied elites were able to manipulate the law, thereby maintaining and justifying their elevated status within society.<sup>50</sup> Such interpretations contend that the elites were therefore able to regulate the conduct of the “labouring poor” by imposing concepts of order and justice through the law. Recent research has challenged such simplistic interpretations, however.<sup>51</sup> The lower and middling orders of society could participate as litigants, witnesses and decision-takers, thereby imparting their understandings of criminal accountability and expectations of justice at court. It is suggested that a broad spectrum of provincial society could shape hearing and that prisoners could have their mental conditions evaluated by persons of similar social station.

Historians have also considered how a person’s gender shaped their experience of crime, criminal responsibility and the courtroom. In the context of mental afflictions, some scholarship has argued that mental distraction was perceived and experienced as a “female malady” during the long eighteenth century.<sup>52</sup> It is questioned whether such a simplistic construction informed or reflected contemporary understandings of mental afflictions and criminal responsibility at Britain’s provincial courts. It has also been suggested that women played a restricted role in the identification of mental afflictions both within and without the

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<sup>50</sup> J.M. Beattie, Crime and the Courts in England (1660-1800), (1986). Green “Retrospective”. Hay “Property, Authority”. Hay “Class Composition”. Innes and Styles “Crime Wave”. E.P. Thompson, Whigs and Hunters: the origins of the Black Act, (1975). *Ibid.* Customs in Common, (1991).

<sup>51</sup> King, “Decision-Makers”. King Crime. J.A. Sharpe, “The People and the Law”, in Reay (ed.), Popular Culture in Early Modern England, (1985).

<sup>52</sup> P. Chesler, Women and Madness, (1974) p.16. Y. Ripa Women and Madness. The Incarceration of Women in Nineteenth Century France, (1990) pp.158-160. E. Showalter The Female Malady. Men, Madness and English Culture, 1830-1980, (1987) pp.3-5 (this argument is later moderated, see p.58).

courtroom. These arguments contend that women who refused to conform were labelled as being insane by male-dominated and oppressive processes. These theories have also been challenged.<sup>53</sup> In light of insanity defences, both Eigen and Houston have found that perceptions and experiences of mental afflictions were gendered subtly. Houston has suggested that “there was no uniquely female construct of madness” in Scotland, a hypothesis which is echoed in the work of MacDonald and Eigen.<sup>54</sup> It is therefore considered how interactions between courtroom participants were affected by their gender, alongside other social characteristics, such as age, “class” and occupation.

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<sup>53</sup> J. Busfield, “The Female Malady? Men, Women and Madness in Nineteenth Century Britain” *Sociology*, 28 (1994) p.259-277. *Ibid*, Men, Women and Madness: Understanding Gender and Mental Disorder, (1996) pp.25-35. N. Tomes “Feminist histories of psychiatry” in M.S. Miscal and R. Porter (eds.) Discovering the History of Psychiatry (1994) pp.348-383.

<sup>54</sup> Houston “Madness and Gender” p.325. Eigen “Did gender matter?” p.419. M. MacDonald, “Women and Madness in Tudor and Stuart England”, Social Research, 53, 2 (1986) p.271.

## 1.

*Source materials*

All of the northern English trials studied took place at the criminal "Assize" meetings. The "Assizes" dealt with the most serious kinds of transgression and transgressor between 1660 and 1829, although minor offences could also be tried.<sup>1</sup> By the 1660s, England's provincial Assizes were arranged into six independent circuits and one of them, the "Northern", has been examined for this thesis.<sup>2</sup> It has been suggested, mistakenly, that all of England's Assizes met twice per annum during the long eighteenth century.<sup>3</sup> Biannual meetings were held for the town Corporation of York and County of Yorkshire (both at York); but the meetings for Northumberland and the Corporation of Newcastle (both held in Newcastle), Cumberland (Carlisle) and Westmoreland (Appleby) met once per annum before 1819 and twice-yearly thereafter. A court also met at Kingston-upon-Hull at varied intervals before 1799, after which trials for this locality were removed to York.<sup>4</sup> Additionally, this study includes the incomplete records for the "Palatinate" courts of Durham and Lancaster, the latter of which also convened biannually. Palatinate courts enjoyed independent histories and privileges, but they were treated as extensions of the "Northern Assizes" in practice.<sup>5</sup>

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<sup>1</sup> J.S. Cockburn, *A History of the English Assizes from 1558 to 1742*, (1972) pp.46. *King Crime* p.39. Civil court business was also dealt with at these Assizes, but these forms of legal hearing are not investigated at length in this thesis.

<sup>2</sup> Additionally, up to eight court sessions were held at the Old Bailey for Middlesex and London per annum. Cockburn *English Assizes* pp.19-23.

<sup>3</sup> R. McGowan, "'He beareth not the sword in vain': Religion and the Criminal Law in Eighteenth Century England", *ECS*, 21, 2, (1987/1988), p.192.

<sup>4</sup> J.S. Cockburn, "The Northern Assize Circuit", *NH*, 3, (1968) p.128.

<sup>5</sup> Cockburn *English Assizes* pp.43-46.

Separate legal traditions, theories and procedures existed in Scotland and England throughout the long eighteenth century. The Union of 1707 robbed Scotland of her parliament, but it also enshrined the independence of her legal system. In 1672, the Court of Justiciary was established as the superior criminal court in Scotland, with its base at the High Court in Edinburgh. In this thesis, important procedural changes are explained and contextualised by reference to High Court trials and decisions.<sup>6</sup> Scotland's Court of Justiciary also held the power to try provincial criminal cases.<sup>7</sup> There were three Justiciary circuits: north, west and south. These circuits were held infrequently before 1707.<sup>8</sup> The biannual Justiciary Court circuit meetings which took place at Ayr, Dumfries and Jedburgh are here investigated systematically.<sup>9</sup> Ayr belonged originally to the western circuit, but it was removed to the southern in 1748. The Scottish sample also includes Ayr hearings from between 1708 and 1747. These southern Scottish circuit courts were the closest equivalent to England's Northern Assizes and Palatinate courts. They all held the power to try crimes which were perceived to be most serious in nature and could apply the severest penalties, such as transportation or death, to those found guilty.<sup>10</sup>

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<sup>6</sup> See Houston, *Madness* for High Court furiosity and fatuity defences c.1740-1818.

<sup>7</sup> W.C. Dickenson "The High Court of Justiciary" p.411 and J.I. Smith "Criminal Procedure" pp.426-442, both in "An Introduction to Scottish Legal History", *Stair Society*, (1958). P.Raynor, B. Lenman and G. Parker "Handlist of Records for the study of crime in early modern Scotland (to 1747)", *List and Index Society*, (special series) (1982) pp.30-33. Willock "Origins" p.143.

<sup>8</sup> Dickenson "High Court" p.411. The 1747 Heritable Jurisdictions (Scotland) Act, 20 Geo II c.43 also regularised the practice of holding two Justiciary circuits per annum.

<sup>9</sup> Much like the English Assizes, cases from specific regional jurisdictions were tried at these circuit courts. Ayr covered Ayrshire and Wigtonshire, Dumfries covered Dumfrieshire and the stewardry of Kirkudbright, Jedburgh covered Berwickshire, Roxburghshire and Selkirkshire.

<sup>10</sup> Dickinson "High Court" p.411.

This thesis concentrates upon the “superior” criminal courts in England and Scotland. A contemporaneous network of local criminal and civil jurisdictions also existed in Britain. In England, regional Justices of the Peace presided over the Petty and Quarter Sessions which met more frequently than the Assizes. In Scotland, a “complex web” of courts co-existed, such as the Sheriff, “franchise” and “burgh” courts.<sup>11</sup> Some of these regional courts could also hold extensive powers of trial and punishment. Before they were abolished in 1747, Scotland’s “heritable” franchise courts of “Regality” could own similar authority to try and punish offenders as the Court of Justiciary, for instance. Under certain conditions, prisoners could be removed (“repledged”) from the Justiciary to the franchise courts for trial.<sup>12</sup> A selective examination of English and Scottish “local” courts confirmed that these “local” courts could indeed deal with criminal business, but no defences of insanity and idiocy were unearthed.<sup>13</sup> Nevertheless, further research is required to establish the relationship between the “circuit” and “local” jurisdictions in cases of insanity and idiocy.

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<sup>11</sup> See Raynor, Lenman and Parker, “Handlist of Records” for an overview of Scottish criminal and civil jurisdictions.

<sup>12</sup> *Ibid* pp.113-114. Houston *Madness* p.31.

<sup>13</sup> Research into Cumberland’s Quarter Sessions records revealed no criminal defences of insanity or idiocy. It seems that such defences entered rarely, if at all, at the north-eastern and north-western English Quarter Sessions during this era. I am grateful to Peter Rushton for sharing his knowledge in this respect, saving a largely fruitless trawl through a considerable amount of historical material. For further comment, see Rushton “Idiocy” and Morgan and Rushton *Rogues*. Research into selected sheriff, burgh and franchise court records found no fatuity or furiosity defences. Series searched: JC 1/1 and 1/3 (Dumfries burgh), JP13/2 (Selkirk JP records), SC 15 (Dumfries sheriff court), SC 62 (Jedburgh sheriff court), RH 11/19 (Bailiary of Cunningham).

Legal documents form the foundation of this investigation. The official “minutes” and papers relating to trials were examined.<sup>14</sup> Generally, England’s Minute Books contain brief transcripts of courtroom particulars, such as the names of the judges, prisoners and jurors, alongside the crimes prosecuted and the verdicts delivered.<sup>15</sup> This information was supplemented and duplicated in the books of “Gaol Delivery”.<sup>16</sup> These “minutes” are incomplete for the northern English courts, however, especially during the seventeenth century. Durham and Lancaster’s minutes are also lacking for the period before 1750. The surviving English Minute and Gaol books provide a solid basis for study, but can be restrictive records.

Until the 1760s, the southern Scottish Minute Books register trials in greater detail than their English counterparts.<sup>17</sup> Clerks could include the names of witnesses and the principle facets of their testimony, alongside legal debates between legal professionals. The minutes become condensed by the 1760s, however. These records are incremented by “Dittay” (indictment) Books which contain abbreviated synopses of the prosecutor’s evidence.<sup>18</sup> The minute and “Dittay” books provide only a skeletal impression of court proceedings in Scotland, just as in England. A diverse set of historical materials were therefore employed to breathe life into these provincial criminal hearings.

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<sup>14</sup> Northern England: PL 27, ASSI 44 and 45. Southern Scotland JC 26 and AD 14.

<sup>15</sup> ASSI 42 (some Minute Books can also be found in the ASSI 41 series), PL 28 and DURH 16.

<sup>16</sup> ASSI 41.

<sup>17</sup> JC 2, 3, 8, 12 and 13.

<sup>18</sup> Series JC 17.

The historian of northern English and southern Scottish criminal trials is blessed by the survival of detailed written records regarding the pre-trial investigation of crimes. Statements from witnesses, prosecutors and the accused exist which relate directly to the cases studied. These records, known collectively as “processes”, “precognitions” or “small papers” in Scotland and “depositions” in England, provide vital details about the crime and the persons involved in the formal legal procedure. They facilitate quantitative and qualitative analysis regarding the deponent’s sex, age, social standing and occupation. In relation to defences of insanity and idiocy, these documents tender priceless illustrations of how contemporaries perceived mental afflictions.

These pre-trial statements did not necessarily reflect the final testimony of witnesses, or vocal input of litigants, at court. Testators could change the content of their testimony between the initial investigation and the courtroom hearing itself. Take the evidences provided by John Wastdell relating to the murder of his brother, Thomas, at Staiths in Yorkshire during 1775.<sup>19</sup> In his pre-trial deposition, John remarked that he had discovered the murderer, James Rice, “standing in an amaze” near to the scene of the crime.<sup>20</sup> Jurors might have interpreted the reference to Rice’s “amaze” as an indication that the murderer was in a stupefied state and was therefore unsound mentally at the time of committing the crime. In court, however, John Wastdell stated firmly that Rice had been sane at the time of the crime and

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<sup>19</sup> ASSI 42/9. Deposition of John Wastdell or Westdell.

<sup>20</sup> ASSI 24/32/2/139.

omitted any reference to the prisoner's "amaze".<sup>21</sup> Like other witnesses from Staiths, John Wastdell believed that Rice ought to be found responsible for his actions and be hanged for his atrocious crime. Community opinion prevailed on this occasion and Rice was hung after being found guilty in 1777.<sup>22</sup>

Official legal documents must be treated with caution, for at best these were second-hand accounts of what was spoken. These reports were structured and filtered by formal processes and legal personnel.<sup>23</sup> The local office-holders who superintended examinations of British prisoners could be experienced, if not trained, in legal matters. The questions presented to prisoners were composed in a legal format and addressed the legal issues and terminology concerning insanity and criminal responsibility.<sup>24</sup> Examiners sought out evidence which promised persuasive indicators of the prisoner's state of mind in accordance with contemporary evidential standards. As a result, these records could be condensed accounts of the information which examiners and clerks perceived to be important. Evidence which was deemed to be of little consequence could be omitted. At Ayr in 1823 for instance, a "Magistrate admitted that the whole of what the declarant had said was not taken down" by the clerk during the examination of James Connacher.<sup>25</sup> The examiners did not record Connacher's interview because they deemed his ability interact verbally, by employing language rationally, had been

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<sup>21</sup> The Trials at Large of the Felons in the Castle of York, At the Lammas Assizes, 1776 (York, 1776) pp.4-5. Trials ... Lammas Assizes (1777) pp.9-10.

<sup>22</sup> Knipe Criminal Chronology of York Castle, with a register of criminals capitally convicted and executed at the County Assizes (1379-1867), (1867) p.90.

<sup>23</sup> Houston Madness p.356.

<sup>24</sup> A. Ingram, The Madhouse of Language. Writing and Reading Madness in the Eighteenth Century (1991), p.91.

<sup>25</sup> JC12/35. Air Advertiser April 17<sup>th</sup> 1823.

removed by his mental affliction.

Official legal materials are supplemented by contemporary printed accounts of trials and crimes. These provide narratives of the hearings themselves, thereby animating the important courtroom details which might be lost through reference to legal documents alone. Newspapers and pamphlets record how prisoners and witnesses falter, judges pass sarcastic remarks, lawyers leap rhetorically into the fray and spectators laugh, cry or shout out "shame". This fabric aids our understanding of the processes which shaped the identification and authentication of the prisoner's mental state.

Studies of crime and criminal responsibility at the Old Bailey, in London, have focused upon printed materials.<sup>26</sup> Narrative reports of Old Bailey trials were published from the seventeenth century and continued to be sold through to 1830.<sup>27</sup> These accounts were intended for public consumption and are known collectively as the Old Bailey Sessions Papers (or OBSP), transcripts of which can now be viewed via the internet.<sup>28</sup> The OBSP are useful but incomplete records of the hearings: John Langbein has noted that editors could exclude important legal details, such as the judge's summary.<sup>29</sup> No comparable run of narratives exists for British provincial trials, but details of around one-hundred trials which were entered at York, entitled The Trials at Large of the Felons at York Castle, were printed by local publishers

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<sup>26</sup> See, for instance, Eigen Witnessing, Forbes Surgeons, Landsman "Rectitude". Langbein "Shaping".

<sup>27</sup> Eigen Witnessing pp.7-10.

<sup>28</sup> [www.oldbaileyonline.org](http://www.oldbaileyonline.org)

<sup>29</sup> Langbein "Shaping" pp.21-24.

during the 1770s.<sup>30</sup> They mimic the style and scope of the OBSP. Two insanity cases, those of John Sutcliffe (July 1776) and James alias “Dutch” Michael Rice or Rijks (July 1775-July 1777), are included in this series. These narratives tender exceptional insights into northern English insanity defences of the 1770s. They reveal that barristers participated in these hearings, for instance.

Provincial newspapers such as the York Herald began to carry trial narratives from the 1790s onwards, alongside descriptions of noteworthy crimes. By the late eighteenth century, publications with “national” audiences also carried reports of regional criminal trials.<sup>31</sup> Illustrations of provincial hearings can be found in newspapers like the London Morning Herald, the Times and the Gentleman’s, Scots and Edinburgh magazines. Detailed narratives were included to satisfy the interests and meet the heightened demands of the consumer by the late eighteenth century. Published accounts of crimes and criminal trials could both delight and terrify the audience. They also relay important details of trials to the historian of crime and the criminal law. Such courtroom narratives are available for forty-nine northern English insanity and idiocy defences between 1776 and 1829. Similarly detailed printed narratives exist for twenty-one Scottish cases between 1786 and 1829.

These printed accounts were designed to read like “verbatim” narratives of proceedings, but they could be edited heavily. Where prisoners spoke at their trials

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<sup>30</sup> The Trials at Large of the Felons at York Castle ... (1775-1777), originals available at the York Central Library.

<sup>31</sup> For a seventeenth century pamphlet-report of infamous defence of “furiousity” at Edinburgh, see the Tryal of Philip Standsfield ... (Edinburgh, 1688).

but did so ineffectually, for instance, publications might record simply that the “prisoner said nothing in defence”.<sup>32</sup> Newspapers could carry significant political sympathies, too. It is perhaps unsurprising that the liberal Carlisle Journal reported the courtroom successes of the “Whiggish” barrister, Henry Brougham, with relish. The politically conservative Carlisle Patriot, meanwhile, focused upon lawyers with known “Tory” sympathies, such as Alan Park.<sup>33</sup> Journalists could also mould their reports to meet the final verdict. The Carlisle Patriot opened its report of Richard Routledge’s trial in 1824 with the retrospective assertion that “On being called to plead, he all at once assumed insanity”.<sup>34</sup> Other reports suggest that Routledge’s dissimulation was not detected until the final stages of his trial, although he was ultimately found guilty of his crime. The Patriot’s report reinforced the shared opinion of court and community that Routledge feigned insanity, thereby reinforcing common perceptions of normal and abnormal mental states. The Patriot’s report also suggested that Routledge’s insanity was apparent from the outset of the hearing, but this patently was not the case.

Trial documents and narratives were supplemented by the investigation of English and Scottish legal records pertaining to post-trial clemency.<sup>35</sup> Unlike recent published research upon British insanity defences, this thesis considers applications for mercy, both for full pardons and reductions in sentence.<sup>36</sup> The comparison of

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<sup>32</sup> Langbein “Shaping” p.24.

<sup>33</sup> See p.392.

<sup>34</sup> Carlisle Patriot August 28<sup>th</sup> 1824.

<sup>35</sup> England: Series HO 13 and HO 47. Scotland: Series C3. Newspapers also recorded applications and outcomes for clemency. Justiciary Court Minute Books also recorded instances where the judge applied immediate, discretionary clemency.

<sup>36</sup> Eigen Witnessing. Weiner “Judges V Jurors”. Houston Madness. Walker Crime and Insanity I

Scottish “Remissions” (formal supplications to the Crown for mercy) with the English pardoning processes emphasises the key differences within the English and Scottish conceptions of mental disturbance and criminal responsibility during this era.

This thesis compares broader contemporary perceptions of mental afflictions in England and Scotland, as well as how these may have evolved between 1660 and 1829. It is assessed whether medical professionals governed the authentication of insanity and idiocy within Britain’s courtrooms. A corpus of “specialist” literature did exist during the long eighteenth century, which outlined the perceived causes, nature and cure of mental afflictions, such as John Burton’s Anatomy of Melancholy (1621) and George Cheyne’s English Malady (1733).<sup>37</sup> Such extra-legal material can be compared with legal writings and documents, to illustrate perceptions and descriptions of mental afflictions. The study of insanity and idiocy defences must be underpinned by a comparison of English and Scottish legal theory and commentary. Legal texts and principles are therefore evaluated in the next chapter.

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does compare insanity as an avenue of post-trial clemency in England and Scotland. This discussion is expanded upon in Chapter 8, pp.331-8 and 351-60, below.

<sup>37</sup> Burton’s Anatomy of Melancholy went through five editions between 1621 and 1638. See Burton Anatomy of Melancholy ed. Jackson (1972) pp. v-xvii. Cheyne, The English Malady, or, a Treatise of Nervous Disorders of All Kinds, (London, 1733). Andrews and Scull Customers and Patrons contains a transcript of the case-notes belonging to the “mad-doctor” John Monro, which provide a fascinating comparison with medical, “specialist” and lay testimonies regarding mental afflictions.

## 2.

***English and Scottish theoretical principles of  
criminal responsibility, 1660 to 1829***

*“In criminal causes, as felony, &c., the act and wrong of a madman shall not be imputed to him; for in those causes ... he is ... without his mind, or discretion”.*<sup>1</sup>

In 1676 the famous Scots jurist, Sir George Mackenzie of Rosehaugh, surveyed Scotland’s legal literature, compared it to neighbouring European and English codes, and asserted glumly, “The Laws of other Nations are oppressed, but ours is starved”.<sup>2</sup> When Mackenzie wrote, the legal systems in England and the Low Countries certainly possessed a larger corpus of legal theory and commentary than the Scottish tradition.<sup>3</sup> Scotland’s legal scholarship expanded so that, after the 1660s, both Scottish and English lawyers could draw upon a variety of written works concerning their civil and criminal laws. At the very heart of “Matters Criminal” lay the febrile subject of criminal responsibility, or who could be tried, punished and held responsible for criminal transgressions, and who could not.<sup>4</sup> What concern us here are the roots, evolutions and continuities of English and Scottish conceptions of criminal responsibility between the late seventeenth and early nineteenth centuries. The theoretical premises, values and principles that underpinned English and Scottish criminal defences of insanity and idiocy are

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<sup>1</sup> Anon. Grounds and Rudiments of law and equity, alphabetically digested; containing a collection of rules and maxims... (1749) p.13.

<sup>2</sup> Mackenzie Pleadings in some remarkable Cases, Before the supreme Courts of Scotland, Since the Year, 1661. To which, the Decisions are subjoyn’d, (Edinburgh, 1672), p. A1.

<sup>3</sup> Walker Crime and Insanity I pp.35-46 and 119-142. Gordon “Roman Law” pp.135-136.

<sup>4</sup> Mackenzie The Laws and Customs of Scotland in Matters Criminal. Wherein is to be seen how the Civil Law and Customs of other Nations do agree with, and supply ours (Edinburgh, 1678).

compared.

This chapter focuses upon legal commentaries and philosophies, rather than the statutory laws and practicalities of proof, although these affected British hearings in important ways and are discussed elsewhere. The sources of contemporary legal philosophy are considered firstly, including the emergence of printed texts and how works might be altered by successive editors with legal training. Jurists (legal professionals who produced legal texts) provided detailed accounts of when and why a prisoner's mental incompetence might affect criminal cases. They explained how insanity and idiocy could postpone trial or sentence, as well as remove the criminal's responsibility for their transgression. Additionally, such texts reflect perceptions of mental afflictions within Britain's legal frameworks. England and Scotland possessed pervasive legal cultures which influenced wider society. Legal conceptions of insanity and idiocy could therefore both reflect and inform "lay" and "medical" understandings of the mentally afflicted.

Jurists from both traditions categorised and segregated *non compotes*; it is explained how insanity and idiocy were differentiated. Research has demonstrated that the English and Scottish legal traditions were evolving processes, rather than static entities.<sup>5</sup> This chapter considers the significant changes in legal theory which occurred during the long eighteenth century. Perceptions of insanity and idiocy altered, whilst different jurists might offer alternative understandings of mental afflictions in relation to criminal accountability. Understandings of "partial"

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<sup>5</sup> Walker *Crime and Insanity* I pp.35-27 and 119-142.

insanity, such as delusion and monomania, are also explicated.

Both English and Scottish jurists paid heed to what might be termed the “Natural Law”, or common principles which governed the conduct and activity of human beings.<sup>6</sup> But the criminal laws of Scotland and England obtained to independent influences and theoretical principles. Scots law was imbued strongly with “Civilian” or “Roman” law traditions and practices which prevailed in contemporary Europe.<sup>7</sup> “Roman” law was a term used to describe the legal codes which were employed within the defunct Roman Empire, or at least the texts which originated in that era. Continental “Civilian” laws were based upon and evolved from the “Roman” codes.<sup>8</sup> Many Scots lawyers completed their legal education on the Continent, typically in Holland, before the late eighteenth century and imported European theories and practices back to Scotland.<sup>9</sup> Although Scottish precedents were sought out and applied by Scots jurists, they recognised that “Romano-Civilian” traditions could supply suitable principles and precedents.

English lawyers, by contrast, preferred to perceive that their legal code owed less to Civilian and Roman influences.<sup>10</sup> The sovereignty of the “Common Law” was associated intimately with English legal (and broader) identities. Recent research has suggested that the “Common” and “Civilian” codes could influence one-another, but English lawyers were more comfortable in assuming that the

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<sup>6</sup> Cairns “Civil Law Tradition” pp.201-202.

<sup>7</sup> *Ibid* pp.191-201. Gordon “Roman Law” pp.135-136.

<sup>8</sup> *Idem*.

<sup>9</sup> See Cairns “Importing” *passim*.

<sup>10</sup> Gordon “Roman Law” pp.135 and 142-143.

different traditions could adopt similar suppositions and deductions.<sup>11</sup> Medieval Scotland also owned to independent “Common Law” principles, but Scottish jurors turned increasingly to England’s practices and principles after the Union of the Parliaments in 1707.<sup>12</sup> In the preface to his Commentaries (1797), the Scots jurist David Hume (nephew to the famous philosopher of the same name) decried the use of English precedent. Hume later contradicted himself by referring to the English jurist, Matthew Hale, and English cases within his formulation of criminal responsibility.<sup>13</sup> English examples evidently impressed upon Scottish theorists, but Scots Law maintained to some conceptions of criminal responsibility which were alien to English “Common Law”. Whilst English jurists preferred not to cite any European authors or concepts, Scottish lawyers and Scots law could still influence English precedent and practice. Thomas Erskine’s famous defence of James Hadfield, in 1800, will be scrutinized in this respect.

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<sup>11</sup> *Idem.*

<sup>12</sup> Sellar “Scottish Common Law” pp.150-151.

<sup>13</sup> Hume, Commentaries on the Law of Scotland, respecting the description and punishment of Crimes, (Edinburgh, 1797) I pp.30-31.

*Sources*

Historians have drawn upon legal tracts, collated and composed by experienced legal professionals, to elucidate the English and Scottish principles of criminal responsibility. At the heart of this corpus of legal materials stood the legal treatise, which offered commentary upon the key principles, case-histories and statutory laws that framed civil and criminal law. Thus, Scottish works such as George Mackenzie's Matters Criminal (Edinburgh, 1674) and John Erskine's An Institute of the Law of Scotland (Edinburgh, 1773), can be compared.<sup>14</sup> In an English context, Matthew Hale's Pleas of the Crown (1736) and William Blackstone's Commentaries on the Law of England (1765-9) proffer important developments and continuities regarding mental instability and criminal accountability in the context of English "Common Law".<sup>15</sup>

Besides broad treatises, other kinds of legal documents were produced between the seventeenth and nineteenth centuries. Some dissertations focused upon inter-related legal themes, such as John Brydall's Non Compos Mentis (1700), which considered the process of evaluating a person's mental state at law.<sup>16</sup> Commentaries upon the statutory laws were also produced, such as the anonymous Readings on

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<sup>14</sup> Mackenzie Matters Criminal (Edinburgh, 1674). Erskine, An Institute of the Law of Scotland. In Four Books. In the Order of Sir George Mackenzie's Institutions of that Law, (Edinburgh, 1773).

<sup>15</sup> Hale, A History of the Pleas of the Crown, (1736). Blackstone, Commentaries on the Law of England, (1765-1769).

<sup>16</sup> Brydall, Non Compos Mentis: or, the law relating to natural fools, Mad-Folks, and Lunatick Persons, (1700).

the Statute Law (1723-1725),<sup>17</sup> whilst legal dictionaries provided succinct definitions of legal terminologies.<sup>18</sup> Reports of important “Decisions” and case-studies were produced in both counties throughout this period.<sup>19</sup> Practical handbooks, in the mould of Michael Dalton’s famous text, The Country Justice (1618), also illuminated legal issues of criminal responsibility.<sup>20</sup> Dalton’s authoritative definitions of insanity, idiocy and criminal accountability were cited by Hale and Blackstone.

Typically, legal works were circulated in manuscript form before the late seventeenth century in Britain. They were designed for and restricted to an audience of legal professionals. Some British legal texts were printed and published in the sixteenth century, particularly practical handbooks such as Fitzherbert’s L’Office et Auctorité de Justices de Peace (1514).<sup>21</sup> Printed texts flourished from the late seventeenth century as legal works were collated and written with the express intention of publication. The production of published works could enhance the lawyer’s occupational prospects. Both Blackstone and Hume had intended their

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<sup>17</sup> Anon. (Gentleman of the Middle Temple), Readings on the Statutory Law. Alphabetically digested wherein the most Obscure and Difficult Points are Clear’d up and Illustrated by Resolutions and adjudg’d Cases, Taken from the Best Authorities Extant, 5 vols. (1723-1725). See also Jacob The Statute-Law Common-Placed. Or a Second General Table to the Statutes (1719). For Scotland, see Steuart of Goodtrees, Dirleton’s Doubts and Questions in the Law of Scotland. Resolved and Answered, (Edinburgh, 1715).

<sup>18</sup> For English dictionaries, see for instance Cowell The Interpreter or Booke containing the Signification of Words ... (Cambridge, 1607) and Jacob A New Law Dictionary containing the Interpretations and Definition of Words and Terms used by the Law ... (1729). For Scotland, Bell A Dictionary of the Laws of Scotland intended for the use of the public at large, as well as of the profession (Edinburgh 1807 and 1826).

<sup>19</sup> See, for instance, Dalrymple of Stair The Decisions of the Lords of Council and Session, in the most important cases debated before them; from July 1671 to July 1681 (Edinburgh, 1687).

<sup>20</sup> Dalton The Country Justice: containing the Practice of the Justices of the Peace, as well as out of their Sessions, etc. (1618). See also Burns The Justice of the Peace and the Parish Officer and (in a Scottish context) Tait A Summary of the Powers and Duties of a Justice of the Peace in Scotland ... (Edinburgh, 1815).

<sup>21</sup> Fitzherbert L’Office et Auctorité de Justices de Peace (1514). Originally published in (legal) French, this text was later reproduced in vernacular English (1538).

legal Commentaries to be published, for instance, and were promoted subsequently to the bench.<sup>22</sup> Authors could also benefit materially from their literary enterprises.

English texts were routinely printed in the vernacular by the eighteenth century, rather than “legal” Latin or French.<sup>23</sup> Legal French had been dispensed in England before the late seventeenth century. The publication of books in English reflected broader developments within England’s legal proceedings and frameworks, whereby the vernacular supplanted Latin. England’s official Assize Minutes ceased to be recorded in shorthand Latin after 1733. Vernacular publications also had greater prospective markets. The advertisement to the thirteenth edition of Blackstone’s famous treatise, published in 1800, assumed boldly that, “The Commentaries on the Law of England form an essential part of every Gentleman’s Library”.<sup>24</sup> Literacy levels varied by region, class and occupation in Britain, yet it seems likely that legal texts reached a broader audience by the early nineteenth century than had been the case two-hundred years earlier.<sup>25</sup> Legal knowledge could also be disseminated orally to men and women outside of society’s elites.<sup>26</sup> Legal expositions of insanity, idiocy and criminal responsibility were propagated beyond the English and Scottish legal professions.

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<sup>22</sup> Blackstone Commentaries (first published in four volumes between 1765 and 1769). Hume Commentaries (1797), see also Hume’s Trial for Crimes (1800).

<sup>23</sup> Scottish texts were routinely published in Scots from the late-seventeenth century onwards, although jurists from both traditions were adroit at weaving natty Latin quotations into their texts.

<sup>24</sup> Blackstone Commentaries (1800).

<sup>25</sup> R.A. Houston Literacy and Education in Early Modern Europe, 1500-1800 (2<sup>nd</sup> ed. 2001) *passim*.

<sup>26</sup> W. Prest “Lay legal knowledge in Early Modern England”, in J.A. Bush and A. Wijffels (eds.), Learning the Law. Teaching and the Transmission of Law in England, 1150-1900, (1999), p.12.

Copied manuscripts and printed versions of juristic works could reflect multiple authorial voices, rather than the articulations of the original composer. Juristic works were grand compilations of the legal interpretations of antecedent jurists as well as collections of pertinent statutes, rulings and case-studies. With the greater advent of printed texts, nonpareil legal commentaries could go through many editions and thereby evolve. The author might edit new versions of his original text. William Blackstone amended eight different versions of his instructive Commentaries between 1765 and his death in 1780, for instance.<sup>27</sup> Further editions could also be published after the composer's death, edited by legal professionals who could amend and update the work at will. The lawyer Edward Christian noted that nineteenth century editions of Blackstone's Commentaries bore a very "different character" to the original work.<sup>28</sup> Of course, as editor of the sixteenth (1811) edition of Blackstone, Christian's criticisms may have been designed to increase the market value of his version of the famous tome. Such "textual evolutions" indicate how laws and principles changed, but they also reflected the editor's interests and concerns. Some editions of legal texts were vilified for misconceiving legal principles. In 1716, for instance, the lawyer and editor Jacob Giles lambasted the precursant version of Hale's Pleas of the Crown: In Two Parts because it was "very faulty and corrupt throughout".<sup>29</sup>

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<sup>27</sup> Blackstone (ed. Christian) Commentaries (16<sup>th</sup> ed. 1811) preface.

<sup>28</sup> *Idem.*

<sup>29</sup> Hale (ed. Jacob) Pleas of the Crown: In Two Parts. Or a Methodological Summary... (1716), preface.

The principles presented within these texts could be challenged, rather than blindly accepted. The written word was not necessarily regarded as being the most commanding form of communication during the long eighteenth century. A vibrant oral culture persisted amongst Britain's legal professionals.<sup>30</sup> Establishments such as England's Inns of Court and Scotland's Faculty of Advocates provided forums for formal and informal legal discussion.<sup>31</sup> Printed textbooks could provide points of reference for legal students, but the lecture theatre remained a prominent source of information and inspiration.<sup>32</sup> Juristic works can present a false sense of certainty, or at least inflexibility, to historians studying contemporary legal principles. Nevertheless, these jurists were cited in court and their (edited) works can offer important observations concerning the nature of the criminal law in England and Scotland between 1660 and 1829. These juristic works explain why and how mentally troubled persons could be exempted from trial and punishment. It is to these issues which we shall turn next.

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<sup>30</sup> For a discussion of the *viva voce* aspects of examinations for entry into Scotland's Faculty of Advocates, see J.W. Cairns, "Advocates Hats, Roman Law and Admission to the Scots Bar, 1580-1812", *JLH*, 20, 2 (1999). *Ibid*, "Affenus Varus and the Faculty of Advocates: Roman Visions and the Manners that were Fit for Admission to the Bar in the Eighteenth Century", *Ius Commune. Zeitschrift für Europäische Rechtsgeschichte* 28 (2001).

<sup>31</sup> J.H. Baker *An Introduction to English Legal History* (1990, 3<sup>rd</sup> ed.) p.595. Murdoch "Advocates". Cairns "Affenus Varus".

<sup>32</sup> For a printed source of this type, see Paton (ed.) "Baron David Hume's Lectures, 1786-1822", *Stair Society* 6 vols. (1939-1957).

*British defences of insanity and idiocy*

In the seventeenth and early eighteenth centuries, the principal English jurists maintained that mad and idiotic prisoners could be punished for minor offences, such as misdemeanours, trespasses and "civil" injuries, which carried sentences like pillorying, fining and whipping.<sup>33</sup> Brydall's Non Compos Mentis (1700) explained that this was because, in crimes which were considered to be "of an inferiour Nature", England's "law doth rather consider the Damage of the Party wronged than the Malice of him that was the Wrongdoer".<sup>34</sup> According to Brydall and his contemporaries, insanity and idiocy was only an acceptable defence for serious transgressions which carried statutory sentences of death.<sup>35</sup> England's "Bloody Code" of capital offences rose from about fifty at the turn of the eighteenth century to around two hundred individual transgressions at the turn of the nineteenth century.<sup>36</sup> Defences of insanity and idiocy could therefore be admitted in response to a broader range of crimes as the long eighteenth century progressed. There is also evidence to suggest that later jurists conceived that the insane and idiotic could not be held responsible for any criminal transgression, no matter how slight. In 1767, Blackstone referred generally to "criminal cases" when describing how the "deficiency of will excuses from guilt".<sup>37</sup> This theory reflected practice at the Northern Assizes where criminals indicted of misdemeanours were found to be

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<sup>33</sup> Brydall Non Compos Mentis (1700) p.107

<sup>34</sup> *Idem.* Walker Crime and Insanity I pp.44-45.

<sup>35</sup> Walker Crime and Insanity I p.44. Walker cites Hale and Coke in this instance.

<sup>36</sup> Eigen Witnessing pp.15-17.

<sup>37</sup> Blackstone Commentaries (1769) IV p.24.

insane and thereby exempted from punishment.<sup>38</sup> In practice, the rule regarding “capitals” was relaxed in northern England by the mid eighteenth century.

Scottish jurists also considered that defences of fatuity and furiosity were most appropriate to capital offences, even in the early nineteenth century.<sup>39</sup> There was also an increase in the individual crimes which carried the death penalty in Scotland, although fewer capital offences existed in Scotland than in contemporary England.<sup>40</sup> The Scottish jurists Mackenzie and Hume conceived that defences of furiosity were most readily acceptable for violent inter-personal crimes, like murder, which carried sentence of death. Hume suggested that, “the defence of madness is less suspected, and will more easily be received, against a charge of murder, mutilation, or other violent crime, than of those offences, like theft or forgery, which can hardly be executed without art and steadiness of purpose”. Likewise, in his capacities as a public prosecutor, Mackenzie challenged the notion that a prisoner might enter a defence of madness in response to a charge of arson, but fail to do so for a charge of murder.<sup>41</sup> Similar sentiments appeared in some English texts, too, especially before the mid eighteenth century. In 1742, an editor of Dalton’s Country Justice chose to insert that, in “Cases of Homicide”, persons “wanting Discretion” were exculpated because “such Things happen by an involuntary Ignorance” on the part of the actor.<sup>42</sup> The intent of the actor was central

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<sup>38</sup> See the trial of Edward Sinton, Yorkshire March 1761 (ASSI 41/3 and 42/7).

<sup>39</sup> See, for instance, Hume Commentaries (Edinburgh, 1799, 1819 and 1829 editions) and Hume’s supplementary Commentaries respecting Trial For Crimes (Edinburgh, 1800 and 1814).

<sup>40</sup> Crowther “Criminal record” p.83.

<sup>41</sup> See the trial of James Douglas, at the High Court in Edinburgh in 1686, for the offences of murder and arson, JC 2/16.

<sup>42</sup> (Dalton) Country Justice (1742) p.334.

to British conceptions of criminal responsibility. These particular British jurists suggested that a lack of intent was more likely to be found in persons who committed violent or passionate crimes. Subsequent chapters investigate whether provincial defences of insanity and idiocy were predominantly entered in response to violent crimes, particularly murder.

Whilst some lawyers deemed that defences of insanity and idiocy were restricted to certain types of crime, juristic works also provided broader theories regarding criminal responsibility. English and Scottish theory acknowledged mutually that mentally incompetent persons lacked responsibility for their actions and therefore should not be punished. William Blackstone's Commentaries stated that, "In criminal cases ... idiots and lunatics are not chargeable for their own acts, if committed when under these capacities: no, not even for treason itself".<sup>43</sup> The same principle was established in Scots Law, where Mackenzie directed that "... the Law protects furious [and fatuous] Persons from Punishment, because they want all Judgement".<sup>44</sup> David Hume noted an atypical High Court ruling from 1704, where an insane prisoner called James Sommerville was acquitted of the crime of murder and received no corporeal punishment, but was ordered to pay an "assythement" (fine) to the family of the deceased in material compensation.<sup>45</sup> Sommerville's fine was not approved of as a sound precedent, but it does indicate

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<sup>43</sup> Blackstone Commentaries (1769) IV p.24.

<sup>44</sup> Mackenzie Matters Criminal (Edinburgh, 1678) I I VIII p.15 and Erskine Institute (Edinburgh, 1773) I p.4 and IV pp.753-754.

<sup>45</sup> Hume Commentaries (Edinburgh, 1797) I pp.30-36. Court records: JC 3/1 July through to December 1704; JC3/2 for Sommerville's subsequent petitions for release from the Correction House in Edinburgh, upon returning to his senses.

that contemporary juristic principles could be ignored or modified in practice.

British jurists also explained the grounds for their conceptions of criminal responsibility. In both England and Scotland, a crime could only be committed if a malicious intent to transgress was present in the offender.<sup>46</sup> Dalton's declaration that "no felony or murder can be committed without a felonious intent and purpose" echoed British jurists who both proceeded and preceded him.<sup>47</sup> The notion that guilt was associated not only with the commission of a crime, but also the will to do harm, can be found in Henri de Bracton's thirteenth century work, De legibus et consuetudinibus Angliae, and has been traced back to the sixth century A.D. in Justinian's Digest.<sup>48</sup> In Scotland, felonious intent was also known by a Latin derivative, "*dole*". As the Scots jurist John Erskine declared during the 1770s, there was "no proper crime without the ingredient of *dole*, i.e. without the wilful intention in the actor to commit it".<sup>49</sup> The will or capability to intend and inflict harm was common to British theories of criminal responsibility and this same paradigm surfaced in practice at court, too.<sup>50</sup>

Nigel Walker has suggested that Michael Dalton's Countrey Justice (1618) was the first English legal text to equate "the will or mind to do harm" with a test of the

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<sup>46</sup> Hale Pleas I p.27, Blackstone Commentaries (1765-9) IV pp.21-25 and Erskine Institute (1773) IV p.752. Walker Crime and Insanity I pp.39-47 and p.138-142. Smith Trial by Medicine p.72. Eigen Witnessing pp.31-57. Houston Madness pp.72-90.

<sup>47</sup> Dalton Countrey Justice (1618), p.215. This definition remained unchanged through several editions to 1742.

<sup>48</sup> Eigen Witnessing p.35. Justinian, The Digest of Roman law: theft, rapine, damage and insult, transl. C.F. Kolbert, (1979).

<sup>49</sup> Erskine Institute (1773) p.752.

<sup>50</sup> Eigen Witnessing pp.31-35.

prisoner's "knowledge of good and evil".<sup>51</sup> A person's failure to comprehend that an activity was morally wrong indicated a disturbed or deficient mental condition. Such a test of morality was also used in Scotland, and persisted throughout the long eighteenth century in both countries.<sup>52</sup> Hume referred to the "knowledge of good and evil, [or] right and wrong" in his Commentaries, for example, although he qualified these statements by indicating how to approach such a "delicate question" in court.<sup>53</sup> Even in the 1820s, both English and Scottish judges continued to suggest that the inability to distinguish between "right and wrong" could be indicative of mental disturbance in a prisoner.

Insanity and idiocy were most regularly entered in exculpation of punishment and to excuse criminal actions in both countries. Also, hearings were postponed if prisoners were mentally incompetent and unfit to plead at court. We may turn once again to Blackstone, who clarified that, "if a man in his sound memory commits a capital offence, and before arraignment, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought". The same dogma applied to Scottish hearings, where the prisoner might enter a defence of furiosity or fatuity "in-bar-of-trial" (postponement of the hearing).<sup>54</sup> Additionally, judgement could not be pronounced upon British prisoners who lost their senses "after [being] tried and found guilty". It was also accepted that "if, after judgement [the prisoner] becomes of nonsane memory, execution shall be

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<sup>51</sup> Dalton Country Justice (1618), p.215. Cited by Walker Crime and Insanity I p.41.

<sup>52</sup> Hume Commentaries I pp.23-24.

<sup>53</sup> *Idem*

<sup>54</sup> Erskine Institute (Edinburgh, 1773) IV p.786.

stayed; peradventure, says the humanity of English Law, had the prisoner been of sound memory, he might have alleged something in stay of judgement or execution".<sup>55</sup> These citations are drawn from Blackstone, but they applied equally to Scots law.

In both England and Scotland, therefore, trial and sentencing could be suspended owing to the prisoner's insanity or idiocy. These prisoners might have been sane at the time of committing offences and were therefore responsible for their actions. Prisoners could return to their senses after their trial was postponed and be tried, found guilty and punished fully for their offences.<sup>56</sup> Where the prisoner was mentally unsound at court, it was not the defendant's responsibility for the crime which was investigated. Instead, it was understood that troubling mental conditions robbed the prisoner of the ability to engage rationally with legal proceedings or organise their defence properly. As John Erskine affirmed in a Scottish context, prisoners who were mad or imbecilic "cannot possibly defend [themselves] in a criminal trial, or even answer with judgement to that first question which is put to all pannels [prisoners], *Whether guilty, or not guilty?*".<sup>57</sup> The same rationale explained why insane and idiotic persons could not be sentenced. As Erskine continued, "one who is either void of reason, or does not enjoy the use of it, is incapable of correction, which is one of the great purposes of punishment".<sup>58</sup>

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<sup>55</sup> Blackstone *Commentaries* (1769) IV pp.24-25.

<sup>56</sup> James Rice was found insane and unfit to plead at four separate Assizes before being found guilty of murder in July 1777 and being hung later that year. ASSI 41/7, 22/9 and 24/32/2, *Trials ...* (July 1776, March 1777 and July 1777). Knipe *Criminal Chronology* p.90, *York Courant*, March 26<sup>th</sup>, July 20<sup>th</sup> and 30<sup>th</sup> 1776, July 22<sup>nd</sup> 1777.

<sup>57</sup> Erskine *Institute* (Edinburgh, 1773) IV p.786.

<sup>58</sup> *Idem.* Blackstone *Commentaries* (1769) IV pp.24-25.

Mentally troubled or incompetent persons were not alone in lacking the ability to employ reason correctly. British jurists recognised that infants could lack rationality, intent and culpability and therefore classed children alongside the mentally debilitated. As Robert Houston has argued, this does not mean that the mentally incapacitated were universally regarded as children by the law, or that these two “categories” of person were treated in identical ways within the legal processes.<sup>59</sup> The study of criminal responsibility and mental affliction benefits from an examination of contemporary theoretical understandings of the mental capacities of children. In Britain, the minimum age of criminal responsibility was typically presented as being seven years old, an age which was associated with the passing of “infancy”.<sup>60</sup> No intent could be present in infants because “where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will”.<sup>61</sup> Persons who were afflicted by mental troubles were therefore deemed to own similar mental abilities to children, at least in legal terms. It was considered that the mental abilities of “natural” idiots had never developed beyond those of an infant, for instance.

British legal commentators also recognised that the mental faculties of persons above the age of infancy might not have fully matured, thereby rendering them both

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<sup>59</sup> Houston Madness p.37.

<sup>60</sup> Eigen Witnessing p.36. Dalton Country Justice (1618) placed the upper limit of infancy at nine-years-old. P. Hoffer and N.E.H. Hull, Murdering Mothers: Infanticide in England and New England 1558-1803, (1981) p.xiii note that the age of infancy could be considered to extend to those of eight-years-old in Tudor England.

<sup>61</sup> Blackstone Commentaries (1765-9) IV p.21. For Scotland, see Mackenzie Matters Criminal (1678) p.13. Hume Commentaries (1797) I p.46.

incapable of entering into a legally binding contract and unaccountable for their criminal activity. It was suggested that an “age of discretion” existed amongst humans, when it might be assumed that a person of sound mind was perfectly capable of acting with intent, discernment and malice.<sup>62</sup> Jurists could disagree as to the precise “age of discretion”, but by the late eighteenth century it was typically set at fourteen for males and twelve for females.<sup>63</sup> Puberty, with the onset of physical and mental maturity, was closely related to this “age of discretion”. In Scotland, such a period between infancy and early adulthood was termed “pupilarity”.<sup>64</sup> Thus wrote John Erskine, “Idiots and furious persons must be as incapable as pupils of committing crimes, since a malicious intention cannot be charged against either of them”.<sup>65</sup>

Yet the prisoner’s precise age was less important to the assessment of criminal responsibility than might be expected. This was because criminal responsibility (and legal accountability or legitimacy in the civil laws) was not only concerned with a specific age, but involved a subjective appraisal of the “strength of the delinquent’s understanding and judgement”.<sup>66</sup> Jurists maintained that persons between the ages of eight and fourteen could be responsible for their transgressions, but only if it were proven that they understood the (immoral and illegal) nature of their actions. Persons under the age of fourteen were punishable if “*capaces doli*”,

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<sup>62</sup> Eigen *Witnessing* p.36.

<sup>63</sup> *Idem. Houston Madness* p.57.

<sup>64</sup> Houston *Madness* p.57.

<sup>65</sup> Erskine *Institute* (1773) II p.753.

<sup>66</sup> Blackstone *Commentaries* (1769) IV p.23.

or the aptitude to form intent, were proven.<sup>67</sup> Those “within the Age of Discretion” were not responsible for crimes unless “by Circumstances, it appeareth [they] could distinguish between Good and Evil ... as if [they] hide the Dead, make Excuses, &c”.<sup>68</sup> This was a flexible concept of criminal accountability which recognised that there was no universal rate of physical or mental development amongst humans. It was the function of the judge and jury to decide whether an individual of such tender years had the capacity for criminal intent, just as the court decided whether adult prisoners were divested of the facilities to reason, control the will and intend their actions.

Britain’s legal theorists differentiated between those who were mentally immature and incapable of forming intent and those whose mental faculties had developed, who could form intent and were therefore accountable for their crimes. In practice, as Peter King has suggested, a period of “youth” was perceived to extend between the “age of discretion” and a person’s mid-twenties.<sup>69</sup> In both countries, youthful prisoners benefited from mitigated sentences because it was perceived that they had not yet learned to control their will. As we shall see, such mental immaturity was not used regularly to earn complete exculpation at court, but was instead argued as a just cause for post-trial alleviation of punishment.<sup>70</sup>

Alongside infants, those below the “age of discretion” and mentally disturbed

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<sup>67</sup> *Erskine Institute* (1773) IV p.753.

<sup>68</sup> Hale (ed. Jacob) *Pleas of the Crown* (1716) I pp.43-44.

<sup>69</sup> King “Juvenile” p.121.

<sup>70</sup> See pp.328-355.

persons, British jurists presented a further category of *non-compote*: “he who hath by his own vicious act deprived himself of his memory for a time, such as a drunkard”.<sup>71</sup> A state of alcoholic intoxication was understood to affect a person’s capacity to act rationally, but English jurists argued that such “artificial, voluntarily contracted madness, by drunkenness or intoxication” did not afford a sound criminal defence and did not remove the prisoner’s criminal responsibility.<sup>72</sup> Drunkenness was a statutory offence in England which was liable to exacerbate, rather than alleviate, crimes.<sup>73</sup> Prisoners who had chosen to imbibe were presumed to understand the consequences of their actions. They were therefore responsible for any offences committed whilst drunk. The voluntary nature of intoxication set itself apart from the involuntary affliction of insanity. Yet where severe addiction to alcohol alienated a person’s will (even making the act of intoxication involuntary), this could be regarded as a complete form of insanity and argued as a sound criminal defence.<sup>74</sup> Defences of insanity which stemmed from repetitive consumption of strong alcoholic beverages were entered in provincial England and Scotland.<sup>75</sup>

The late seventeenth century Scots jurist, Sir George Mackenzie, held a somewhat conflicting view to contemporary English legal theorists. Mackenzie advocated a mitigation of punishment for persons who were drunk and lacked

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<sup>71</sup> Dalton *Countrey Justice* (1618) p.215.

<sup>72</sup> Blackstone *Commentaries* (1764-9) IV pp.25-26.

<sup>73</sup> 4 Jac I c5. See also Blackstone *Commentaries* (1764-1769) IV p.26.

<sup>74</sup> D. McCord, “The English and American History of Voluntary Intoxication to Negate *Mens Rea*”, *JLH*, 11 (1990).

<sup>75</sup> James Towers, Westmoreland 1822 (ASSI 41/13). Agnes Bailie, Jedburgh 1808 (JC 12/26)

“*dole*, and Malice ... especially if they were cheated, upon Design, into that condition by others”.<sup>76</sup> He distinguished between the “*ebriosis*” who was habitually drunk and thus “should be most severely punished, both for their Drunkenness, and for the Crimes occasioned by it” and those who were rarely so.<sup>77</sup> Mackenzie related this principle to that of “diminished responsibility” which is examined shortly.<sup>78</sup> Eighteenth and nineteenth century jurists, such as Erskine and Hume, challenged directly Mackenzie’s application of diminished responsibility to these intoxicated prisoners. Hume argued that Mackenzie had cited an inappropriate example from Roman Law, which applied only to drunken soldiers who harmed themselves and was not relevant as a general principle.<sup>79</sup> Hume further claimed that Scottish custom utterly disowned the distinction between “habitual” and “accidental” drunkenness.<sup>80</sup> To Mackenzie’s successors, intoxication was neither a sound criminal defence in exculpation of crime nor a cause for mitigation of sentence, for precisely the same reasons presented by their English counterparts.

Imbecilic and mad prisoners must be viewed in the context of the broader conceptions of criminal responsibility. Guilt was based upon a moral awareness of the wrongfulness of illegal activities and because this was connected to the “strength of the delinquent’s understanding and judgement”, it followed that mentally debilitated persons could not be guilty of crimes.<sup>81</sup> Idiots and the insane

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<sup>76</sup> Mackenzie Matters Criminal (1678), I, I, VII, p.15.

<sup>77</sup> *Idem*.

<sup>78</sup> See pp.55-63.

<sup>79</sup> Hume Commentaries (1797) I pp.37-38.

<sup>80</sup> *Ibid*, p.39.

<sup>81</sup> Blackstone Commentaries (1769) IV p.23.

were persons of at least the age of discretion, but who were as incapable of forming intent as an infant, or a person who was unable to appreciate the difference between a morally good and evil act. We shall next turn our attentions to precisely how idiocy and insanity was perceived by British theorists, as well as how these afflictions were understood to affect a person and remove their criminal responsibility.

*Of persons "Non Compos Mentis": insanity and idiocy compared*

British jurists considered that insane and idiotic persons lacked the capacity to form intent, but legal theorists also held that madness and imbecility were distinctive. This section investigates how and why legal commentators differentiated between these persons *non compos mentis* in England and Scotland. Juristic approaches to the difficult concept of a "partially" debilitating form of mental affliction, which did not fully or permanently remove a person's reason, are also explicated.

Citing Coke, Michael Dalton's Countrey Justice provided three separate categories of "persons accompted *non compos mentis*", which were adhered to broadly in both England and Scotland during the long eighteenth century.<sup>82</sup> Firstly, Dalton introduced the idiot, or "foole naturall, who is so (*a nativitate*) from his birth; and in such a one there is no hope of recoverie". The next two categories both concerned persons who suffered from forms of insanity. Dalton stated that a mad person was "once of good and sound memorie and after (by sicknes, hurt or other accident, or Visitation of God) loseth his memorie". Dalton related such persons to "lunatics", or persons who were "sometimes ... of good understanding and memorie, and sometimes *non compos mentis*". British conceptions of insanity, or the loss of the reasoning faculties and memory, are here considered firstly.

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<sup>82</sup> Dalton Countrey Justice (1618) p.215.

*Insanity*

English jurists employed the term “insanity” to denote a broad spectrum of mental afflictions which robbed adults of their aptitude to form criminal intent. The insane were therefore persons who were older than infants, whose ability to reason had matured, but whose mental capabilities were debilitated by the onset of “sickness, hurt or other accident, or Visitation of God”.<sup>83</sup> Appropriately, commentators utilised a variety of idioms (such as madness, lunacy and melancholy) to describe the kaleidoscopic combination of symptoms and afflictions which rested under the broad umbrella of “insanity”. The meaning of these words could alter over time. The word “melancholy” could be used to describe the global species of madness during the late seventeenth century. By the late eighteenth century, however, “melancholy” was most commonly ascribed to persons who suffered from severe depression of spirits, despair or “lowness of the mind”. Retrospective diagnoses ought to be undertaken cautiously, but late eighteenth century melancholy was similar to modern clinical depression.<sup>84</sup>

Scots Law also recognised the existence of mental conditions which obstructed “the application of ... reason to the ordinary purposes of life”, thereby depriving the afflicted adult of his or her abilities to control the will.<sup>85</sup> Such afflictions were known collectively as “furiosity” within the Scottish legal tradition, although the term “insanity” was also understood in Scotland and carried the same general

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<sup>83</sup> Dalton *Countrey Justice* (1618) p.215.

<sup>84</sup> Porter *Mind Forg'd Manacles* p.ix.

<sup>85</sup> Erskine *Institute* (1773) IV p.149.

meaning as in England. "Furiosity" was used to describe insane persons who displayed manic, frenzied behaviour as well as those who were "low-spirited" or melancholic.<sup>86</sup>

Both the English and the Scottish legal traditions held that the "insane" could suffer from totally debilitating mental conditions which stripped them permanently of their reasoning faculties.<sup>87</sup> Drawing inspiration from Dalton, the anonymous author of the Grounds and Rudiments (1747) opined that some insane persons had "wholly [lost their] memory and understanding".<sup>88</sup> Hale described such afflictions as "perfect" and "total" insanity.<sup>89</sup> Likewise, the Scots jurist Mackenzie presented a form of "absolute furiosity" whereby the sufferer was afflicted permanently.<sup>90</sup> Such enduring forms of insanity formed sound criminal defences in Britain because the actor was incapable of forming criminal intent. Only those who were absolutely devoid of reason, will and understanding were exempted from trial, sentencing or punishment for their transgressions. Leaning heavily upon Hale, David Hume reflected both Scottish and English legal theory when he affirmed that, "To serve the purpose, therefore, of an excuse in law, the disorder must amount to absolute alienation of reason ... which deprives the patient of the knowledge of the true position of things about him, and of the discernment of friend from foe".<sup>91</sup> Those

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<sup>86</sup> Hume Commentaries (1779) I pp.31-33. Houston "Class, Gender" p.46 suggests that melancholy and fatuity could carry similar interpretations at law. Future research may discover that mental distractions were classed by the predominant mood of the afflicted (Houston p.c.).

<sup>87</sup> Walker Crime and Insanity I pp.36-39. Houston Madness p.74.

<sup>88</sup> Anon Grounds and rudiments (1749) p.247.

<sup>89</sup> Hale Pleas (1736) p.30.

<sup>90</sup> Mackenzie Matters Criminal (1678) p.15. Walker Crime and Insanity I p.139. Houston Madness p.74.

<sup>91</sup> Hume Commentaries (1797) p.23.

who suffered from a total loss of rationality and sanity on a permanent basis were exempted from the rigours of England and Scotland's criminal codes. They were not responsible for their criminal actions, nor were they capable of being tried or receiving sentence.

*Insanity as a transient condition*

“A total permanent want of reason”<sup>92</sup> acquitted defendants, but the insanity defences at the English and Scottish superior courts rarely involved persons who were devoid perpetually of reason.<sup>93</sup> As David Hume stated, “it is not material that [insanity] be total in respect of time” to serve as a sound criminal defence.<sup>94</sup> In both traditions, insanity could be a transient condition, whereby the afflicted suffered from periodical bouts of irrationality, but also enjoyed lengthy spells of rational lucidity. Blackstone's Commentaries conceived that sufferers from mental afflictions might return to their senses.<sup>95</sup> Likewise, Scotland's “furious” could benefit from lucid spells, wherein they were “frequently known to reason with acuteness”.<sup>96</sup> Fits of insanity might be repeated at regular intervals, but not necessarily so.

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<sup>92</sup> Hume Commentaries (1797) p.41.

<sup>93</sup> Eigen Witnessing p.38.

<sup>94</sup> Hume Commentaries (1797) p.27.

<sup>95</sup> Blackstone Commentaries (1769) IV pp.24-25.

<sup>96</sup> Erskine Institute (1773) I pp.149.

Matthew Hale associated this species of impermanent insanity with the fluctuating periods of distraction and lucidity which epitomised the plight of the “lunatic”.<sup>97</sup> The term “lunacy” was employed in both Scotland and England between 1660 and 1829. Erskine’s Institute clarified that, “Lunatics are those who are seized with periodical fits of frenzy”.<sup>98</sup> Seventeenth and eighteenth century jurists persisted to associate the onset of insanity amongst these lunatics with the lunar cycle. Mackenzie wrote that furiosity could be experienced in “tides, and Waxes and Wanes, like the Moon upon which it depends,” whilst almost one-hundred years later, Blackstone claimed that insanity could depend “upon the change in the moon”.<sup>99</sup> As late as 1800, a character witness claimed that Thomas Hadfield’s madness was linked to the lunar calendar.<sup>100</sup> In 1829, the comments of Archer Ryland, the editor of the eighteenth edition of Blackstone’s Commentaries, indicate that such beliefs were treated less seriously by the late-1820s. Ryland lambasted Blackstone’s connection of the moon to insanity, claiming that such opinion was “doubted or denied by the best practical writers upon mental disorders”.<sup>101</sup> Impermanent forms of insanity continued to be understood as “lunacy”, although some lawyers ceased to associate such madness with lunar cycles.

British lunatics (or sufferers from transitory forms of insanity and furiosity)

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<sup>97</sup> Eigen Witnessing p.37.

<sup>98</sup> Erskine Institute (1773) I p.149.

<sup>99</sup> Blackstone Commentaries (1769) I p.303.

<sup>100</sup> Edinburgh Evening Courant June 30<sup>th</sup> 1800. This testimony was produced by Hadfield’s sister-in-law. Although Hadfield was found to be insane, the evidence connected to lunar cycles was not necessarily accepted as good proof of insanity at this trial.

<sup>101</sup> Blackstone Commentaries (18<sup>th</sup> ed. 1829) I p.303.

were not deemed to be responsible for any offence which they committed whilst *non compos mentis*. Just like sufferers of permanent forms of mental distraction, the criminal responsibility of a lunatic was negated during a spell of insanity because they had completely lost the ability to act rationally or with intent. Likewise, a lunatic who was pronounced insane at court could not be tried. Yet, as Blackstone clearly argued, “if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he has no deficiency”.<sup>102</sup> If it were proven that a lunatic had intentionally perpetrated a crime whilst in a rational state of mind, then this person was fully accountable for their actions. Nevertheless, an impermanent form of insanity, which completely removed a person’s will or intent whilst the affliction lasted, was accepted as a sound legal defence by both English and Scottish lawyers.<sup>103</sup>

An insanity defence usually required persuasive proofs of a history of mental affliction to be successful in both England and Scotland. Defences of “sudden phrenzy”, where the prisoner was gripped briefly by insanity, were entered and sustained in Britain during the long eighteenth century. Such “sudden phrenzy” could be received sceptically at court, especially where the mental distraction “quickly subsided, and never again returned”.<sup>104</sup> Despite such doubts, episodic insanity was an acceptable defence, so long as “the utter alienation of reason” was proved for the time when the crime was committed.<sup>105</sup>

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<sup>102</sup> Blackstone *Commentaries* (1765-9) IV, p.25.

<sup>103</sup> *Eigen Witnessing* p.37.

<sup>104</sup> Hume *Commentaries* (1797) I p.30.

<sup>105</sup> *Ibid* p.32.

*“Partial insanity” and Scotland’s “Rule of Proportions”*

In contrast to English theory, a partial “degree” of furiosity was recognized as an apposite criminal defence in mitigation of sentence within the Scottish courtroom. A less than absolute form of furiosity was considered to obscure partially the pannel’s use of reason, thus diminishing the offender’s criminal responsibility.<sup>106</sup> Mackenzie, who believed that madness was “but too sticking a Disease, and is seldom ever cured”, illustrated this, “It may be argued, that since the Law grants a total Impunity to such who are absolutely furious, that therefore it should be by the Rule of Proportions, lessen and moderat the Punishments of such, as though they are not absolutely mad, yet are Hypochondrick and Melancholy to such a Degree, that it clouds their Reason ...”.<sup>107</sup> Erskine’s *Institute* reiterated Mackenzie’s position, “lesser degrees of fatuity, which only darken reason, without totally obscuring it, afford not a total defence to the pannels, but barely save from the *poena ordinaria*”.<sup>108</sup> Erskine’s comments concerning punishment were important, because a partial degree of insanity was only accepted in mitigation of sentence in Scotland, as Mackenzie’s “Rule of Proportions” suggested. A lesser degree of furiosity could be argued legitimately in mitigation, yet only an “absolute furiosity” was deemed worthy of full exculpation of sentence in Scotland, just as it was in England.

Unlike their Scottish counterparts, the principal English jurists did not subscribe

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<sup>106</sup> Walker *Crime and Insanity* I p.11. Houston *Madness* pp.55-56.

<sup>107</sup> Mackenzie *Matters Criminal* (1678), I, I, VIII, pp.15-16. Houston *Madness* p.74.

<sup>108</sup> Erskine *Institute* (1773) IV, p.754. See also Hume *Commentaries* (1797) I p.27.

to the concept of “diminished responsibility” within their models of criminal accountability. It has been established that transitory, but utterly debilitating, forms of insanity could be accepted as a sound criminal defence by English jurists. A partial or lesser degree of insanity was not. Lunacy could be transient, but the afflicted were exculpated of their crimes because they were understood to have completely lost the use of their reason, will and understanding whilst the period of insanity lasted. English legal theorists argued that lunacy had to rob prisoners of their reasoning faculties (and hence ability to form intent) to be an acceptable criminal defence. It was therefore conceivable that an English prisoner might suffer from mental distraction, but that the affliction did not remove their ability to reason or control their will.<sup>109</sup> According to English jurists, in contrast with Scottish theorists, such mentally disturbed prisoners were subject to the full penalty at law.

Whilst no “Rule of Proportions” existed in England, English jurists recognised that partially debilitating forms of mental distraction could exist. Matthew Hale’s posthumously published Pleas contained a discussion of *non-compotes* and the existence of partial insanity<sup>110</sup> Joel Eigen has suggested that this passage was the first expatiatory consideration of partial degrees of insanity amongst English jurists.<sup>111</sup> Hale’s work presented two distinct types of “partial” insanity. One of these was “partial insanity” in “respect of degrees”, which afflicted “very many, especially melancholy persons”. Hale stated that those who suffered from a “partial degree” of madness were “not wholly destitute of the use of their reason; and this

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<sup>109</sup> Eigen Witnessing pp.35-39.

<sup>110</sup> Hale Pleas (1736) p.30.

<sup>111</sup> Eigen Witnessing p.36.

partial insanity seems not to excuse them in the committing of any offence". This principle which Hale offered needs to be examined and compared with Scottish legal theory.

Hale advised that a "partial degree" of insanity could not be accepted as a sound legal defence because the prisoner's ability to form intent was not removed. Hale associated such forms of insanity with "melancholy persons ... who for the most part discover their defect in excessive fears and griefs".<sup>112</sup> Such mental afflictions existed, but they did not remove the person's ability to understand the wrongful nature of their criminal actions. Hale offered criteria to aid the "judge and jury" whilst they deliberated whether the prisoner was sane enough to stand trial and receive sentence. Relating such cases to the broader concept of criminal responsibility, the Pleas stated that a person could be held criminally responsible if they had "ordinarily as great understanding, as ordinarily a child of 14 years hath".<sup>113</sup> The age of fourteen was significant, because Hale considered this to be the "age of discretion". Within Hale's construct, someone who did not have the understanding commonly associated with the "age of discretion" was considered to be *non compos mentis*; to be totally lacking in will and intent.

In England, sufferers from "partial degrees" of insanity were observed to be capable of criminal intent and could therefore be found guilty of committing a crime. They received no mitigation of punishment. As outlined by Blackstone, less

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<sup>112</sup> *Idem.*

<sup>113</sup> Hale Pleas (1736) p.30. Eigen Witnessing p.37 and Walker Crime and Insanity I pp.36-37.

incapacitating forms of madness did not remove a prisoner's "consciousness of doing wrong and of course discretion, or discernment, between good and evil".<sup>114</sup> Nigel Walker has suggested that such theory had developed into a rigid and narrow test of insanity in England by the eighteenth century.<sup>115</sup> Later chapters will investigate whether courtroom participants might hold to different, more flexible, perceptions of insanity and idiocy in practice, with particular reference to the "partial verdicts" of the eighteenth century.<sup>116</sup>

Hale's other conception of "partial insanity" was "in respect to things", whereby persons had "a competent use of reason in respect to some subjects, [but were] under a particular *dementia* in respect of some particular discourses".<sup>117</sup> Hale was imprecise, however, as to whether such forms of insanity were fully incapacitating.<sup>118</sup> Blackstone's Commentaries failed to elucidate upon this species of distraction. Nevertheless, impressions of criminal insanity had evolved in Britain by the 1820s to include concepts such as "delusion" and "monomania". The term "delusion" was used to describe persons who appeared to be capable of rational thought, but who misapplied their reason and argued from false premises. This was very similar to the conception of insanity which had been offered by Locke as early as the seventeenth century.<sup>119</sup> "Monomania" was associated with delusional insanity, but was typically used to describe instances where the delusion, or

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<sup>114</sup> Blackstone Commentaries (1765-9) IV pp.195-6.

<sup>115</sup> Walker Crime and Insanity I p.38.

<sup>116</sup> See pp.328-342.

<sup>117</sup> Hale Pleas (1736) p.30.

<sup>118</sup> Eigen Witnessing pp.37-38.

<sup>119</sup> *Ibid* p.49.

insanity, was focused upon a single subject alone, or else an array of interconnecting topics.

Delusional insanity was successfully presented at Thomas Hadfield's famous trial, at the Old Bailey in 1800.<sup>120</sup> Hadfield was arrested and prosecuted for treason after discharging two pistols at King George III, as the monarch watched a play at Drury Lane. It became apparent that Hadfield had planned to shoot at (if not injure or kill) the monarch. It became evident also that Hadfield's rationale had been perverted by a particular millenarian religiosity, whereby he wished to usher the "second coming" of Jesus Christ by offering his life as a sacrifice to God. Hadfield did not wish to die by his own hand, for suicide was morally abhorrent and condemned by the Bible, but he reasoned that the perpetration of a treasonable act might ensure that he was hung, thereby achieving his greater goal.<sup>121</sup>

At court, Hadfield's defence was led by the legendary barrister, of Scots extraction, Thomas Erskine.<sup>122</sup> Erskine opined that Hadfield was insane, but only upon the subjects of his millenarian fantasy and the necessity of shooting at the King. This was what Hale might have described as "partial insanity" (or "*dementia*") relating to "some particular discourses". Hadfield's strange explanation for his actions smacked of the false application of reason, or a Lockean

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<sup>120</sup> For published commentaries of Hadfield's trial see Walker *Crime and Insanity* I, Moran "Insanity as a Special Verdict", Eigen "Intentionality". *Ibid* *Witnessing*. For the English development of the defence of "delusion" (after 1800) see Eigen "Delusion in the courtroom" and "Opinion as fact".

<sup>121</sup> See, for instance, the contemporary account of this trial in the *Edinburgh Evening Courant* June 30<sup>th</sup> 1800. Moran "Insanity as a Special Verdict" pp.489-493.

<sup>122</sup> Thomas Erskine (1750-1823) only trained for and practiced on the English bar. *DNB* VI pp.853-861.

conception of insanity. Erskine argued that Hadfield's delusion precluded an ability to differentiate between right and wrong, which meant that the prisoner could not be criminally responsible. In legal terms, Erskine contended that Hadfield could not have chosen to shoot at the monarch, because he was incapable of controlling his will. Erskine further contended that Hadfield's delusion was permanent and enduring. The prisoner's delusion robbed him of self-control and the ability to reason correctly; thus he could not be responsible for his actions. Erskine argued that Hadfield's delusional, partial insanity fulfilled the traditional criteria of insanity because it removed the prisoner's ability to act voluntarily or form intent.

Despite persistent historiographic interest, Hadfield's trial should not be regarded as a "landmark" trial regarding the evolution of English legal theory.<sup>123</sup> The Criminal Lunatics and the Safe Custody Acts were provoked by Hadfield's offence, trial and the legality of his subsequent incarceration.<sup>124</sup> Erskine's arguments were not universally or immediately accepted in England, however. The new statutes were added to nineteenth century editions of Blackstone's Commentaries, but Erskine's concept of delusion was not included by successive editors through to 1829. After 1800, delusional insanity was not argued at the Old Bailey again until the spectacular failure of John Bellingham's defence in 1812, for the murder of Spencer Perceval.<sup>125</sup> Such insanity defences were not entered regularly during English criminal trials before 1830.<sup>126</sup>

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<sup>123</sup> Walker Crime and Insanity I p.81. Moran "Special Verdict" *passim*. Eigen Witnessing pp.48-54.

<sup>124</sup> *Idem*.

<sup>125</sup> Eigen Witnessing pp.52-54.

<sup>126</sup> *Ibid* p.51.

Joel Eigen has suggested that Hadfield's defence introduced the "first successful form of "partial insanity" into English jurisprudence", but Thomas Erskine's opening speech would actually suggest otherwise.<sup>127</sup> Erskine referred to the precedent set by "Greenwood's case", where Erskine had once again been defence counsel in a murder trial.<sup>128</sup> Erskine pointed out that this defence had been upheld by one of the judges who presided over Hadfield's hearing. Like Hadfield, Greenwood's insanity also focused upon a single subject; in this case that his brother had poisoned him and that he killed his brother in self-defence. Similar arguments were employed at the Northern Assizes from at least the 1770s onwards. Although the terms "delusion" and "monomania" were not widely employed before the nineteenth century, Thomas Erskine could draw upon practical precedents when presenting Hadfield's defence of "partial insanity" in 1800. The defence offered in Hadfield's trial was by no means the first of its kind in England.

The concept of delusion and insanity upon a specific subject were also apparent in southern Scottish theory and practice during the 1790s.<sup>129</sup> Archibald Gordon of Kinloch was tried at Scotland's High Court during 1795 for the murder of his brother.<sup>130</sup> The similarity to Greenwood's case is striking, for Kinloch's insanity was also revealed specifically in the deluded conviction that his brother had

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<sup>127</sup> Eigen *Witnessing* p.48.

<sup>128</sup> *Edinburgh Evening Courant* June 30<sup>th</sup> 1800. A search of the "Proceedings of the Old Bailey" ([www.oldbaileyonline.org](http://www.oldbaileyonline.org)) failed to unearth this trial. Greenwood may have been tried at a different jurisdiction, perhaps on circuit or at the King's Bench.

<sup>129</sup> Houston "Courts" p.351.

<sup>130</sup> JC 7/50.

administered poison to him.<sup>131</sup> By the mid-1790s, it was accepted in Scotland that partial insanity pertaining to a particular topic (or *dementia*) could form a sound criminal defence in exculpation of a crime. It was recognised that such insanity removed the will and responsibility of the prisoner.

In 1797, this Scottish practice was afforded a printed theoretical background by Hume's Commentaries, which described a condition which was similar to delusion and referred to the Kinloch case.<sup>132</sup> Hume stated that if an afflicted person (such as Kinloch) was "possessed with the vain conceit that ... all about him are engaged in a foul conspiracy to abuse him", he might not understand the true nature of his actions.<sup>133</sup> Because this proceeded "on a false case, or conjuration of his own fancy, his judgement of right and wrong, as to any responsibility that should attend it, is truly the same as none at all".<sup>134</sup> A marginal note from the advocate John Burnett, who owned one of the surviving copies of Hume's Commentaries, revealed lingering doubts about this "dangerous doctrine".<sup>135</sup> Burnett cautioned that "whims and fancies" were not sound proofs of insanity.<sup>136</sup> Despite such criticism, Hume had published theoretical bases to delusional and monomaniacal insanity at law.

Scottish theory and practice may have influenced perceptions of delusional insanity in England. Thomas Erskine received his training in England, but he was

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<sup>131</sup> Scots Magazine July 1795 pp.477-9 and August 1795 pp.541-543.

<sup>132</sup> Hume Commentaries I pp.26-37.

<sup>133</sup> *Ibid.*, p.25.

<sup>134</sup> *Idem.*

<sup>135</sup> Hume Commentaries I p.25. This copy is held by the NLS.

<sup>136</sup> *Idem.*

the younger brother of the famous Scottish advocate "Harry" Erskine.<sup>137</sup> Thomas Erskine may therefore have been aware of Kinloch's case and Hume's exposition and imported this knowledge to the English courtroom. Erskine was not the only contemporary Scot to practice English law. Scottish lawyers such as Hume were not cited widely within the English tradition, but knowledge of Scottish legal tracts amongst English lawyers should not be discounted. Scots Law may therefore have influenced both Thomas Erskine's understanding of partial insanity and broader conceptions of mental distraction within the English tradition.

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<sup>137</sup> DNB XVII pp.436-439.

### *Idiocy*

Recently, it has been suggested that British literary conventions failed to distinguish between idiocy and insanity before the mid nineteenth century.<sup>138</sup> Likewise, it has been suggested that institutional supervision did not distinguish between these two forms of *non compotes* before 1800.<sup>139</sup> By contrast, Britain's legal conventions did differentiate the insane from the idiotic, which were also known as the "fatuous" in Scotland. This section will outline how and why idiocy and insanity were perceived to differ.

Both legal traditions compared idiocy with the mental abilities of an infant. In simple terms, idiots were people who had reached the age of discretion, but whose mental faculties and facilities had not developed beyond those of infants. Similarly, it was assumed at law that persons who were born "deaf, dumb and blind" were "looked upon by the law as in the same state with an idiot ... being supposed incapable of understanding [and] wanting those senses which furnish the human mind with ideas".<sup>140</sup> Authors suggested guiding principles to aid the process of differentiating between idiots, insane persons and those of sound mental abilities. Blackstone offered that idiots might be incapable of recognising their own parents.<sup>141</sup> Mackenzie cited a test which prevailed in the courts and legal texts of

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<sup>138</sup> J. Andrews, "Begging the question of idiocy: the definition and socio-cultural meaning of idiocy in early modern Britain: Part I", *HP*, ix, (1998) pp.65-66. Dickenson "Idiocy in nineteenth century fiction compared with medical perspectives of the time", *History of Psychiatry*, xi (2000) p.291.

<sup>139</sup> *Idem.* N. Anderson and A. Langa (ed. H. Freeman), "The development of institutional care for "imbeciles and idiots" in Scotland", *HP*, viii (1997) pp.245-249.

<sup>140</sup> Blackstone *Commentaries* (1769) I pp.292-293.

<sup>141</sup> Blackstone *Commentaries* (1769) I p.304.

both Scotland and England when he suggested “if a Person can count their ten Fingers, they are not accounted Idiots”.<sup>142</sup> Mackenzie cited the Dutch theorist “Zackeus” as the authority for this test, which indicates how Scots Law was influenced by Continental, but particularly Dutch, legal theories and practices during the late seventeenth century.<sup>143</sup> Tests were not necessarily conclusive indicators of idiocy, but they did inversely reflect the sort of behaviour, knowledge, or level of numeracy and literacy, which was regularly expected of adults within society.<sup>144</sup>

Typically, British legal theorists presented idiocy as being a congenital condition.<sup>145</sup> Blackstone echoed the pre-eminent English and Scottish jurists when he declared that, “An idiot, or natural fool, is one that hath no understanding from his nativity; and therefore is by law presumed never likely to attain any”.<sup>146</sup> Idiots had never developed the ability to use reason or form intent, which was expected of sound-minded adults. This was in contrast to the insane, whose mental faculties had developed, but whose ability to reason was removed (sometimes temporarily) by their troubling mental conditions. There were some exceptions to the rule that idiocy was purely a congenital affliction. By the mid eighteenth century, some legal

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<sup>142</sup> Mackenzie Matters Criminal (1672) p.88.

<sup>143</sup> Cairns “Civil Law Tradition” pp.191-220. Cairns “Importing” pp.138-152. Gordon “Roman Law” pp.135-143.

<sup>144</sup> Houston Madness pp.76-77. *Ibid*, “Class, Gender” pp.54-58.

<sup>145</sup> Andrews “Idiocy ... part I” pp.66 and 83. Andrews “Idiocy ... part II” p.199. Dickenson “Idiocy” p.292. Houston Madness pp.76-77. Neugebauer “Mental Handicap in Medieval and Early Modern England: Criteria, Measurement and Care” in P. Bartlett and D. Wright (eds.) Outside the Walls of the Asylum – The History of Care in the Community, 1750-2000, (1999) p.25. P. Rushton “Idiocy, the family and the Community in early modern North East England”, in D. Wright and A. Digby (eds), From idiocy to mental deficiency: historical perspectives on people with learning difficulties, (1996) p.47.

<sup>146</sup> Blackstone Commentaries (1769) I p.302. See also Hale Pleas (1736) p.28. For Scotland, see Mackenzie Pleadings (1704) p.87 and Erskine Institute (1773) I. p.149.

writers suggested that people could regress into an idiotic, child-like mental state through the effects of disease, injury or old-age.<sup>147</sup> This marked a significant shift in British conceptions of idiocy. Erskine, for instance, described how idiots were “not accounted moral agents” because they had “either never had reason, *or have lost the use of it*”.<sup>148</sup> The interpretation that idiocy could develop after birth was voiced in England from at least the early nineteenth century onwards, too. The forensic commentator, John Haslam, asserted in 1817 that idiocy, “whether it be *ex nativitate*, or supervene at any period of life, implies a deficiency of intellectual capacity”.<sup>149</sup> Legal and medical theoretical understandings of idiocy altered during the course of the long eighteenth century. In practice, however, most provincial British prisoners who were found to be idiotic had been so since attaining the “age of discretion”.<sup>150</sup>

Whilst idiocy was not always expected to be congenital, it continued to be perceived as a permanent form of mental impairment by British jurists before 1830.<sup>151</sup> Idiocy was only presented as a curable affliction from the 1840s onwards.<sup>152</sup> Before then, idiots were regarded to have “no hope of recoverie” because they had never attained the use of reason.<sup>153</sup> Likewise, recuperation was not anticipated where persons regressed into imbecility. In legal theory, insanity could

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<sup>147</sup> Andrews “Idiocy ... part II” p.198.

<sup>148</sup> Erskine *Institute* (1773) I p.4 (my emphasis).

<sup>149</sup> Haslam, *Medical Jurisprudence as it relates to Insanity according to the Law of England*, (1817) p.86.

<sup>150</sup> For instance, 22-year-old James Cheesbrough had been in that state “for about 12 years” (ASSI 41/12 and *York Herald* March 9<sup>th</sup> 1818).

<sup>151</sup> Andrews “Idiocy ... part I” p.66. Dickenson “Idiocy” p.292.

<sup>152</sup> *Idem*.

<sup>153</sup> Dalton *Country Justice* (1618) p.215.

be understood as a temporary affliction, but not so idiocy. Like the infant, the idiot was totally incapable of forming intent. Unlike infants, it was not expected that idiots would develop the ability to employ rationality which was associated with mature adulthood. Idiocy and infancy were thus distinguished.<sup>154</sup> In terms of criminal responsibility, an idiot was permanently distressed, utterly incapacitated and incapable of criminal intent. The idiotic could neither be tried nor responsible for their crimes.

Scottish jurists maintained that the completely debilitated and permanently fatuous were exculpated of their crimes. Scots theorists also contended that less incapacitating degrees of imbecility could mitigate a prisoner's sentence, according to the "Rule of Proportions". Such constructions echoed Lockean conceptions, whereby imbecility could affect persons in varying degrees.<sup>155</sup> The "weak-minded" had developed some reasoning capabilities and could form criminal intent, but their ability to control their will or utilise reason were impaired. Sufferers from a "partial degree" of idiocy, or "weak-mindedness", were not fully responsible for their actions.

Only a complete lack of intent was presented as sound criminal defence by England's jurists. The idiot was utterly incapable of forming criminal intent and was therefore privileged in English law. A partially impaired level of understanding was not accepted in theory, either in terms of insanity or weak-mindedness. True,

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<sup>154</sup> Houston *Madness* p.37.

<sup>155</sup> Rushton "Idiocy" p.49.

the late sixteenth century English jurist Edward Coke proposed a reduced form of idiocy in his concept of the “*stultitia*” who was troubled by a less severe form of imbecility than the full-blown “*fatuitas*”.<sup>156</sup> But Coke proposed that the less acute “*stultitia*” benefited from a full defence, not a proportional reduction of sentence as happened in Scotland. Proceeding English jurists disowned Coke’s exposition. Blackstone stated that only a “total idiocy”, where no “glimmering of reason” was discernable, could acquit because the prisoner could not form intent.<sup>157</sup>

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<sup>156</sup> Walker *Crime and Insanity* I pp.36 and 41.

<sup>157</sup> Blackstone employs the phrase “total idiocy”: *Commentaries* (1765-9) I p.304 and IV p.25.

*Conclusions*

British legal treatises converged upon how mad and imbecilic prisoners failed to appreciate the nature of their actions, lacked a will or intention to act, and were deficient in reason. Consequently, persons who suffered from such afflictions could not be held responsible for their crimes. The same principles meant that prisoners who were insane or idiotic at the time of their court hearing were mentally unfit to stand trial, be judged or receive punishment. Such attitudes towards insane and idiotic prisoners were grounded in broader philosophies concerning criminal responsibility, whereby culpability was understood in terms of moral guilt as well as the physical perpetration of a crime.<sup>158</sup> Despite independent legal traditions and influences, the laws of England and Scotland therefore shared some broad principles regarding criminal accountability.

Yet some critical distinctions persisted between English and Scottish theoretical conceptions of criminal responsibility between 1660 and 1829. English and Scottish jurists presented alternative interpretations of how partially debilitating forms of mental affliction affected the prisoner's responsibility. By conforming to the "Rule of Proportions", Scots Law adhered to broader, more flexible theoretical constructions of criminal responsibility and mental afflictions than its English neighbour. Scottish prisoners who suffered from mental afflictions that merely obscured or constrained, rather than completely obstructed, the use of their reason were deemed to be less than fully responsible for their crimes. Consequently,

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<sup>158</sup> Eigen *Witnessing* pp.35-58. Houston *Madness* pp.72-90.

Scottish prisoners who suffered from a partial obstruction of their reason received proportional amelioration of punishment if they were found guilty. The existence of such a strong dogma of diminished responsibility stood in stark contrast to the English legal tradition. English jurists insisted upon a narrower definition, whereby only “total” insanity or idiocy (which completely removed the prisoner’s intent) could be accepted as a sound criminal defence and only in exculpation of sentence. Unlike Scots jurists, English theorists argued that less than fully debilitating forms of mental affliction could not earn a partial reduction of the prisoner’s sentence.

There were some parallel developments in England and Scotland regarding what Hale called “partial insanity ... in respect to some subjects ... [or] some particular discourses”.<sup>159</sup> This chapter has begun the process of tracing the intellectual origins of Thomas Erskine’s famous defence of James Hadfield in 1800, which argued that such “partial insanity” restricted severely the prisoner’s criminal intent and could therefore be accepted as a sound basis of acquittal. Further research is required, but Erskine could have drawn upon British legal precedents of practice and theory, beside broader philosophical ideas. Subsequent chapters will establish that “partial insanity ... in respect to subjects”, which later became associated with delusion and monomania, could be proposed as an acceptable defence in both countries from at least the late eighteenth century onwards.

The study of published legal commentaries provides valuable indications of how contemporaries understood mental incompetence, at least within the context of

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<sup>159</sup> Hale *Pleas* (1736) p.30.

criminal and civil tribunals. British legal tracts shared broad conventions regarding persons *non compos mentis*. English and Scottish jurists produced similar categories of mental affliction, with both traditions differentiating between idiocy (fatuity) and insanity (furiosity). It was understood that insanity robbed a person of their ability to employ reason, control the will and form criminal intent. Insanity could be a transient, even infrequent, affliction whereby the sufferer's ability to reason was removed temporarily. "Lunatics" could be accountable for their crimes if it were proven that they had been lucid at the time of committing their transgression. By contrast, English and Scottish "natural" idiots had never developed such mental capacities and possessed, in essence, a mental state which was akin to infancy. Idiocy was understood to be a perpetual and irrecoverable condition, although by the late eighteenth century it was understood that mentally mature persons might "regress" into such a state.

Some British juristic works indicated that insanity and idiocy could only be accepted in defence of capital felonies, although this "rule" was relaxed in practice by the late eighteenth century. In theory, defences of mental affliction were restricted to fewer types of crimes in the seventeenth than the nineteenth century, because fewer crimes then carried the death sentence. The next chapter will present quantitative analyses of provincial insanity and idiocy defences. This will establish whether pleas of insanity and idiocy became more common during the late eighteenth and early nineteenth centuries, as juristic values altered regarding the acceptability of these types of defence. The supposition that defences of insanity

were most acceptable and understandable when the prisoners had committed violent crimes, such as murder, is examined also. It is considered whether insanity was associated primarily with violent forms of behaviour in Britain during the long eighteenth century. Subsequent chapters also question whether juristic principles were employed universally in practice during insanity and idiocy defences. By the late eighteenth century, practical and theoretical considerations of "partial insanity" could clash at the Northern Assizes. Similarly, "weak-mindedness" which did not amount to a full degree of idiocy was accepted in mitigation of sentence in early nineteenth century England.

## 3.

***Paradigms of the mentally perturbed.  
Underlying patterns in British insanity and idiocy defences, 1660-  
1829.***

This chapter establishes the pertinent quantitative patterns relating to insanity and idiocy defences in northern England and southern Scotland. The following statistical analyses are based upon formal legal documents and printed narratives. These materials carry limitations, but aggregative trends can be offered which help us to understand the nature of British insanity and idiocy defences. These patterns are compared with published findings for the contemporary Old Bailey and High Court of Justiciary. This study of criminal hearings is also related to published works upon the experience of the mentally afflicted at civil courts and English Quarter Sessions tribunals, alongside materials such as asylum admissions.

Comparisons between the Northern Assizes, Old Bailey and Scotland's Justiciary court are tempered by the existence of alternative types of source material. Joel Eigen's work on the Old Bailey has been based upon extensive printed descriptions of trials, reinforced by formal court records. Few published accounts of provincial hearings exist before the 1790s; quantitative data is therefore based upon court minutes, gaol records and pre-trial depositions. Where possible, narratives have been used to supplement this material. Using these sources, the incidence of incidence of insanity and idiocy defences in northern England and southern Scotland is compared, in relation to the global rates of formal

prosecutions. The success-rates of provincial English and Scottish defences of insanity and idiocy are also presented. The materials available for the Northern Assizes does bear comparison with Nigel Walker's older projection of the average acquittal-rate during all English Assize insanity defences, which was also based upon formal court documents.<sup>1</sup>

A closer inspection of what may have affected the success of such defences supplements these broader aggregative outlines. The types of crimes which were committed by insane and idiotic offenders are investigated. For the Old Bailey, Joel Eigen has argued that insanity defences pled in response to crimes of interpersonal violence met with a higher acquittal rate after 1800 than defences which were entered for property transgressions.<sup>2</sup> Published studies of British insanity defences have indicated that sufferers of insanity and idiocy were not universally violent in nature, but that there was an intimate association between a loss of rationality and violent behaviour.<sup>3</sup> These paradigms are here evaluated in a provincial context.

Additionally, the important correlation between capital crimes and British criminal defences of lunacy or idiocy is investigated.<sup>4</sup> Historians of crime and the courtroom in England have demonstrated that complex layers of formal and informal mitigation alleviated the bloody rigours of the criminal code. Both the English and Scottish criminal codes were "sanction specific"; meaning that the

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<sup>1</sup> Eigen *Witnessing* pp.9 and 18-28. Walker *Crime and Insanity I* pp.67-72.

<sup>2</sup> Eigen *Witnessing* pp.22-28.

<sup>3</sup> *Idem.* *Houston Madness* pp.216-221.

<sup>4</sup> Walker *Crime and Insanity I* p.45.

prisoners' sentences were designated and restricted by the crime which they were found guilty of committing. Subsequent chapters challenge whether insanity and idiocy defences were simple extensions of formal mitigatory processes. Such debates are better appreciated by establishing the quantitative patterns concerning the sentences which were coupled with the prisoners' crimes.

*Sample*

This survey excludes persons who committed suicide but were mentally disturbed and not held responsible for their actions. This follows published methodologies regarding British insanity and idiocy defences.<sup>5</sup> Self-murder (*felo de se*) was a felony in England.<sup>6</sup> Inquests into English suicides were undertaken regularly before a coroner, rather than at the Northern Assizes. A coroner's jury reached a verdict regarding the suicide's state of mind, not the Assize's "petty" (trial) jury.<sup>7</sup> The results of the coroner's inquest might be reported to the Assize meeting and recorded in the minute books, but the mental condition of the accused was not decided through Assize court procedures and structures.

In Scotland, suicide was technically a crime but in practice it was punished rarely as a criminal offence. Suicide cases were not recorded systematically amongst southern Scotland's Justiciary court records.<sup>8</sup> The Scottish historiography lacks detailed study of self-murder, although the connection between self-harm and mental distraction has been examined in the context of Scottish criminal and civil court hearings.<sup>9</sup> Mental discomposure was affiliated with self-destruction and self-mutilation, but comparisons of provincial British inquests into suicide must await separate research.

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<sup>5</sup> Walker *Crime and Insanity* I. *Eigen Witnessing*. Houston *Madness*.

<sup>6</sup> Blackstone *Commentaries* (1769) IV p.189.

<sup>7</sup> M. MacDonald and T.R. Murphy *Sleepless Souls. Suicide in Early-Modern England*, (1990) p.223.

<sup>8</sup> Mackenzie *Matters Criminal* (1678) XIII, I pp.144-147. Erskine *Institute* (1773) IV p.769. Houston p.c.

<sup>9</sup> Houston "Madness and Gender" pp.323-325 and "Class, Gender" pp.52-53.

Joel Eigen unearthed 331 “insanity trials” within the trial narratives and court records for Middlesex and London between 1760 and 1843, including failed defences.<sup>10</sup> 142 northern English insanity and idiocy hearings were unearthed for the period between 1660 and 1829. Some prisoners made multiple appearances at the Assizes, especially where persistent distraction caused hearings to be postponed.<sup>11</sup> Richard Waddy was found insane and unfit to stand trial for the murder of his father three times at the Yorkshire Assizes between 1726 and 1727, for example.<sup>12</sup> The 142 “insanity trials” studied therefore involved 104 individual prisoners.

The lack of detailed court narratives for northern English hearings before the nineteenth century precludes comprehensive comparison with Eigen’s findings. The northern English Assize court minutes record most verdicts of mental incompetence. However, minute books are not a reliable guide to the incidence of insanity and idiocy trials because they tend to obscure failed defences, where the prisoner’s guilt was proven.<sup>13</sup> Simple verdicts of “not guilty” could also mask successful defences of insanity, particularly before the nineteenth century.<sup>14</sup> Minutes register “not guilty” verdicts against the hearings of Charles Jackson

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<sup>10</sup> 37 prisoners were found to be *non compos mentis* at the Old Bailey between 1717 and 1799, source: [www.oldbaileyonline.org](http://www.oldbaileyonline.org).

<sup>11</sup> The Criminal Lunatics Act (1800), 39&40 Geo III c94, allowed for the indefinite incarceration of prisoners who were mentally incapable of standing trial. As a consequence, fewer prisoners had their mental condition assessed more than once at court after 1800.

<sup>12</sup> ASSI 41/2.

<sup>13</sup> Eigen *Witnessing* pp.7-11

<sup>14</sup> *Idem*.

(1665) and John Sutcliffe (1776), for instance, whilst other sources reveal that these prisoners were actually acquitted on the grounds of insanity.<sup>15</sup>

To rectify this imbalance, depositions relating to 2,600 northern English cases were scrutinized for instances where witnesses referred to the prisoner's state of mind, either at the time of committing the crime or whilst lying in gaol awaiting trial. This sample of cases was selected randomly and included all types of crime. 600 cases were examined for the early period between 1660 and 1730, when criminal business was lighter and the depositions series are fragmented. Business becomes heavier and the associated records more complete after 1730. For each decade between 1730 and 1829, the depositions relating to two-hundred cases were examined for signs of insanity defences. This study of formal, pre-trial records was supplemented by an investigation of 2,000 detailed, printed, courtroom narratives for the period 1775-1839. This sampling of court records and narratives paid dividends. The minutes made no reference to any defence of mental affliction for thirty-seven of the 104 northern English prisoners who were unearthed by this study; these thirty-seven defendants account for just over one-third of the total English sample.

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<sup>15</sup> Jackson: ASSI 42/1 and ASSI 45//7/2 nos. 69-70. Sutcliffe: ASSI 41/7, ASSI 24/32/2, York Chronicle August 2<sup>nd</sup> 1776, York Herald July 30<sup>th</sup> 1776 and Trials (Lammas 1776).

<i>Jurisdiction</i>	<i>Prisoners</i>	<i>Courtroom Appearances</i>
Northern Assizes	104	142
Southern Justiciary	35	35

*Table 3.1. Comparison of number of prisoners whose state of mind was examined at court, and the total number of appearances they made at court, 1660-1829.*

<i>Jurisdiction</i>	<i>Dates covered</i>	<i>Total number of insanity and idiocy hearings</i>
Old Bailey <sup>16</sup>	1760-1843	331
Northern Assizes	1660-1829	142
SCSCJ <sup>17</sup>	1660-1829	35
High Court, Edinburgh <sup>18</sup>	1739-1818	13

*Table 3.2. Total number of criminal trials where the prisoner's insanity or idiocy is known to have been entered as a defence. Comparison of the Old Bailey, the Northern Assizes, southern circuit of Scotland's Court of Justiciary and supreme High Court in Edinburgh.*

Fewer furiosity and fatuity defences were entered at Scotland's superior criminal courts than at either England's Old Bailey or Northern Assizes. Between 1739 and 1818, only thirteen cases are known to have occurred at Scotland's High Court in Edinburgh.<sup>19</sup> Thirty-five fatuity and furiosity defences occurred on the

<sup>16</sup> Taken from Eigen *Witnessing* p.9.

<sup>17</sup> Southern circuit of Scotland's Court of Justiciary.

<sup>18</sup> Modified figure based upon Houston *Madness* pp.72-90.

<sup>19</sup> Houston *Madness* pp.72-90 found twelve cases during this period. Houston's research does not include the case of Susan Tinny, in 1816. The High Court Minutes omit Tinny's defence of furiosity,

southern circuit of Scotland's Court of Justiciary between 1708 and 1829, involving thirty-five individual prisoners (Tables 3.1 and 3.2). In Scotland, cases where the pannel's mental distraction postponed or "barred" trial could be remitted to the superior criminal court at Edinburgh for further consideration. This contrasted to the cyclical re-appearance of prisoners at the Northern Assizes before the nineteenth century.<sup>20</sup>

The southern Scottish sample was also based upon Minute Book records of pleas and verdicts. Legal counsel were involved more regularly in Scotland than in England and they were required to enter and debate any special defences, such as fatuity or furiosity, at the outset of the trial (known as the "relevancy").<sup>21</sup> This procedure means that failed defences of insanity are more visible amongst the Scottish minutes than their English counterparts. Every recorded plea, "relevancy" debate and verdict was scrutinized amongst the southern Scottish records. Until the 1760s, Scottish Minute Books are more detailed than their English equivalents and include lists of witnesses and the evidence that they supplied. These condensed narratives indicate what proofs were offered at court and whether the witnesses discussed the prisoner's mental capabilities. As with the English sample, these minutes were supplemented by an examination of a random selection of precognitions (pre-trial witness statements). Precognitions to 900 southern Scottish

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but the jury recommended mercy on account of her insanity. See *Scots Magazine* 78 (March 1816) p.233.

<sup>20</sup> Some, such as Susan Tinny, were tried subsequently at the High Court in Edinburgh. John Bertram's hearing at Jedburgh in 1747 was ordered to be remitted to Edinburgh but the case was never re-tried.

<sup>21</sup> See pp.262-265.

cases were inspected for occasions where at least one witness spoke about the prisoner's mental state. These 900 cases account for about half of all the southern circuit trials that were recorded officially between 1660 and 1829. Systematic, detailed, printed accounts of southern Scottish hearings do not appear until the early nineteenth century. 450 of these narratives were investigated for signs of furiosity or fatuity at court. Eight of the southern Scottish prisoners studied for this thesis were discovered through this random sampling. The Justiciary Court minute books failed to record every occasion where the prisoner's mental condition was either rejected, or accepted or argued in mitigation of sentence at court.

It should be expected that greater numbers of insanity and idiocy defences were heard at the Old Bailey than provincial England and Scotland. A substantially larger number of formal accusations were tried annually at the Old Bailey than in the provinces. Around 1,600 prosecutions were entered between 1708 and 1829 in southern Scotland. By comparison, at least 53,673 hearings occurred at the Old Bailey between 1714 and 1799, a figure that dwarfed formal prosecutions in contemporary northern England.<sup>22</sup> England's capital and hinterlands were more densely populated than most provincial areas and there were concerted efforts to curb criminal activity in and around London.<sup>23</sup> By the eighteenth century, eight separate criminal sessions were required per annum to deal with formal prosecutions from London and Middlesex. This does not necessarily indicate that

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<sup>22</sup> See [www.oldbaileyonline.org](http://www.oldbaileyonline.org) for records of Old Bailey trials, including statistical analyses.

<sup>23</sup> Emsley *Crime and Society in England, 1750-1900*, (2<sup>nd</sup> ed. 1996) p,154. R.B. Shoemaker "Male honour and the decline of public violence in eighteenth century London" *Social History*, 26, 2 (2001), p.191.

the “real” crime rate was lower in Scotland or northern England per capita of population, but rather that fewer crimes were pursued formally at these regional criminal courts.<sup>24</sup>

Faced with this regional diversity of prosecuted crime, historians have compared the proportion of all criminal trials which included insanity defences.<sup>25</sup> For the Old Bailey, Joel Eigen has discovered that between four and eight insanity defences were undertaken per one-thousand criminal trials.<sup>26</sup> Such figures do not reflect the incidence of mentally disturbed persons as a proportion of London and Middlesex’s population as a whole, but instead refer to the criminal population. Eigen’s figures indicate that a very low percentage of formal prosecutions were met with direct evaluations of the defendant’s mental condition. Conclusions are tempered by the immeasurable “dark figure” of crime; transgressors who evaded apprehension, offences which were unreported, or cases where the victim chose not to prosecute.<sup>27</sup> Likewise, the incidence of insanity and idiocy defences does not include occasions where the offender was perceived to suffer from a debilitating mental condition and this informed a victim’s discretionary choice not to prosecute.<sup>28</sup>

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<sup>24</sup> S. Mercer, “Crime in Late-Seventeenth Century Yorkshire: an Exception to a National Pattern?”, *NH*, 27, (1991), pp.106-177.

<sup>25</sup> Eigen *Witnessing* p.9. These results extend and supplement Walker’s conclusions, see Walker *Crime and Insanity* I p.67 (Table 2).

<sup>26</sup> Eigen *Witnessing* p.9. This equates to between 0.4% and 0.8% of all criminal trials at the Old Bailey.

<sup>27</sup> King *Crime* p.28 and “Punishing Assault” pp.62-63. R.B. Shoemaker, “Using Quarter Sessions records as evidence for the study of crime and criminal justice”, *Archives*, xx, 89-90, (1993) p.153.

<sup>28</sup> Houston *Madness* pp.72-90.

In both northern England and southern Scotland, the ratios of insanity and idiocy defences amongst criminal prosecutions were greater than at the Old Bailey. At England's Northern Assizes, a prisoner's mental state was evaluated in between eight and fourteen cases per thousand trials. Criminal defences of furiosity and fatuity were more prominent in southern Scotland than at either the contemporary Northern Assizes or the Old Bailey. Fatuity and furiosity defences accounted for between twenty-one and twenty-five hearings per thousand criminal cases tried on the southern circuit; at least three-times the proportion discovered for the Old Bailey.<sup>29</sup>

Scotland's independent legal traditions provide one reason for the higher relative incidence of "insanity defences" in southern Scotland when compared with the English courts. Scotland's principle of "diminished responsibility" meant that partially debilitating mental conditions could be accepted as sound legal defences in mitigation of sentence.<sup>30</sup> By contrast, "partial degrees" of insanity or idiocy were not accepted as sound legal defences in the English courtroom. Of the thirty-five hearings uncovered for southern Scotland, fourteen of them were defences on grounds of "diminished responsibility". Twenty-one defences (sixty-percent) argued that prisoners were either incapable of standing trial or should be fully exculpated of their crimes owing to their mental afflictions. This type of plea was most akin to English defences of insanity and idiocy. Excluding defences of "diminished responsibility", fatuity and furiosity accounted for between ten and

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<sup>29</sup> Houston *Madness* provides no specific ratio for furiosity and fatuity defences per criminal hearings of all kinds entered at Edinburgh.

<sup>30</sup> See pp.328-342.

sixteen hearings per one-thousand cases in southern Scotland. This is only slightly higher than the integers for the Northern Assizes.

Jurisdiction	Defences arguing prisoner either had no responsibility for crime, or was incapable of standing trial	Proportion per one-thousand criminal trials
Northern Assizes	142	8-14
SCSCJ	21	10-16

*Table 3.3. Comparison of northern English and southern Scottish trials excluding defences of "diminished responsibility", 1660-1829.*

Compared with English processes, Justiciary Court procedures paid greater attention to the prisoner's state of mind and this generated defences of fatuity and furiosity. During pre-trial examinations, Scottish interrogators and their clerks were required to affirm that the prisoner uttered statements voluntarily and whilst in their "sound mind and sober senses". This was not just legal formulary, for examiners could testify at court about the prisoner's mental competence. John Fairbairn's hearing in 1759 included evidence from both the Justice of Peace (JP) who questioned the prisoner upon his arrest and the clerk who recorded the pre-trial examination.<sup>31</sup> Their testimony was fundamental to the evaluation of the prisoner's mental abilities. Less formal emphasis was placed upon recording the offender's state of mind at this stage of English criminal proceedings. English coroners, JPs

<sup>31</sup> Jedburgh April 1759. JC 12/9 and 26/163.

and their clerks might observe the prisoner's mental condition, but they did not attest regularly at court to the prisoner's mental condition.

A greater proportion of the British provincial criminal trials that were studied featured an insanity or idiocy defence than at the Old Bailey. This requires explanation. The different types of source material that are available for the Old Bailey and the Northern Assizes must have affected this outcome. Hypotheses apart from the vagaries of the historical materials can be proposed, however. Pre-trial procedures and the attitudes of England's prosecuting officials may provide a supplementary explanation. Legal officials such as JPs (who played a key role in instigating and preparing prosecutions for the superior courts) could evaluate the prisoner's state of mind outside of the formal, courtroom setting and deal with insane felons in a summary fashion. These officials might show discretion to mentally perturbed offenders by declining to enter a formal prosecution; there is also evidence that such mad and idiotic criminals were incarcerated without trial in gaols, poorhouses and private madhouses.<sup>32</sup> Some mentally distracted criminals who were apprehended never faced formal prosecution at court.

Alternative pre-trial processes developed in London, which was more densely populated and crime-intensive than the northern conurbations and rural areas studied. London's prosecutors and officials may have demonstrated such summary

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<sup>32</sup> R. Paley, (ed.) "Justice in Eighteenth Century Hackney: the justicing notebook of Henry Norris and the Hackney Petty Sessions Book", London Record Society Publications, xxviii, 28, (1991); cases mentioned on pp.47 and 136.

“discretion” towards mentally afflicted persons more often than in northern England, although such activity is difficult to quantify. Some Northern Assize insanity defences were entered in response to trivial offences, such as petty theft or misdemeanour, which could have been tried at an inferior jurisdiction, such as the Quarter Sessions. These cases seem to have been referred to the Assizes because the prisoner’s mental condition needed to be evaluated. Prisoners such as John Windle, who was charged with being “a dangerous [lunatic] person” at the Yorkshire Assizes in March 1756, may have been entered at the Assizes because an order of detainment was required and the circuit court was regarded as the most authoritative jurisdiction in such matters.<sup>33</sup> The Assizes may also have been used because they were the next formal court meeting in the locality.

According to both the English and Scottish samples studied, the proportion of insanity and idiocy defences increased in relation to all criminal defences from the 1790s onwards. These ratios were not as linear as Table 3.4 (below) might suggest, for they fluctuated by year and decade, just as at the Old Bailey.<sup>34</sup> Again, such an apparent change corresponds strongly with the enhanced documentation of criminal hearings. However, there is evidence that insanity defences did become more common at the Old Bailey from the 1760s onwards. Provincial British patterns of incidence may have followed a similar progression at roughly the same time.

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<sup>33</sup> ASSI 41/4 and 42/7.

<sup>34</sup> *Eigen Witnessing* pp.18-28.

Jurisdiction	Ratio of insanity and idiocy defences as a proportion of 1,000 criminal trials	
	1700-1789	1790-1829
Northern Assizes	8	14
SCSCJ	21	25

*Table 3.4. Ratio of insanity and idiocy defences per 1,000 criminal trials. Comparison of England's Northern Assizes and Scotland's southern circuit of Justiciary, 1700-1829.*

This real rise in the incidence of insanity and idiocy defences reflected an increased awareness of mental afflictions and mentally troubled criminals within society. By the 1760s, crimes committed by persons who were purported to be mad were sensationalised and their trials well-publicised, like the hearing of earl Ferrers in 1760.<sup>35</sup> George III was assaulted in both 1788 and 1800 by mentally disturbed offenders.<sup>36</sup> Such notorious (yet atypical) insanity defences may have fostered an enhanced association between crime and insanity, whilst also broadcasting perceptions about mental abnormality. Both the Scots Magazine and the Edinburgh Magazine carried detailed accounts of James Hadfield's trial for shooting at King George in 1800, for instance. Subsequently, these journals published the essays "On Insanity" and "On the Cause and Cure of Melancholy", whilst an article entitled

<sup>35</sup> Andrews and Scull Undertaker pp.193-214. Walker Crime and Insanity I pp.62-63.

<sup>36</sup> Andrews and Scull Undertaker pp.215-254. J. Brooke King George III (1972) *passim*. Eigen Witnessing pp.22 and 48-54. Forbes Surgeons pp.173-176. Walker Crime and Insanity I pp.74-78.

“The Frantic Lover” appeared in both.<sup>37</sup> It has been established that printed media could be disseminated beyond literate, educated persons, although there was no universal interpretation of such information.<sup>38</sup> Published accounts of the causes of mental distress, as well as the speech, appearance and behaviour of the afflicted person, could have informed and reflected broader awareness and perceptions of criminal insanity.<sup>39</sup>

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<sup>37</sup> Scots Magazine 62 (1800) pp.359, 528 and 602. Edinburgh Magazine 15 (1800) pp.397 and 16 (1801) p.168.

<sup>38</sup> Barker, Newspapers, Politics and English Society 1695-1855, (2000), *passim*.

<sup>39</sup> Eigen “Intentionality” pp.41-42. Jones Lunacy pp.44-48. I. Macalpine and R. Hunter George III and the Mad-Business, (1969) *passim*. Walker Crime and Insanity pp.70-72. Houston Madness p.116.

*Types of crime committed in relation to insanity and idiocy defences*

The majority of southern Scottish fatuity and furiosity defences were pled in response to property crimes between 1708 and 1829 (Table 3.5). Offences such as arson, housebreaking and theft proliferated in southern Scotland, rather than assault or murder. There was also a reduction in the numbers of interpersonal transgressions which spawned insanity and idiocy defences after 1800. This pattern contrasted with that of the contemporary High Court in Edinburgh and the Northern Assizes (Table 3.6), where prisoners who alleged madness or imbecility were charged most regularly with offences of interpersonal violence.<sup>40</sup>

This southern Scottish pattern was akin to that of the Old Bailey, where property offences accounted for around seventy-percent of all insanity defences between 1760 and 1829.<sup>41</sup> Southern Scotland's sample-base is small, however, so any generalisations must be treated cautiously. Nevertheless, there was a stronger correlation between mental disturbance and property, rather than interpersonal, crimes in southern Scotland. Combined with Joel Eigen's work upon England's Old Bailey, these findings indicate that insane and idiotic criminal behaviour in Britain was not violent universally. Scots jurists suggested that insanity defences were most readily accepted in cases of inter-personal violence, but these defences were also accepted in crimes against property.<sup>42</sup> Contemporaries perceived mentally disturbed

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<sup>40</sup> Houston "Courts" p.345. The same pattern existed in nineteenth century Ireland, see Gibbons, Mulryan and O'Connor "Guilty but insane" pp.467-472.

<sup>41</sup> Eigen *Witnessing* pp.18-28.

<sup>42</sup> See pp.37-48.

prisoners to be capable of committing offences against material goods (including real estate) as well as against fellow human beings.

Dates	Number of trials	% Property Crimes	% Personal Crimes	% Combined Property & Personal Offences	% Other
1708-1799	15	46.7	46.7	-	6.6
1800-1829	20	75	20	5	-
Overall	35	62.7	31.5	2.9	2.9

*Table 3.5. Categories of crime committed by Southern Scottish prisoners who used furiosity and fatuity defences, 1710-1829.*

The pattern at the Northern Assizes contrasted with the Old Bailey and southern Scotland. In northern England, just as at the High Court in Edinburgh, most insanity and idiocy defences were pled in response to violent personal crimes rather than offences against property (Table 3.6). Just over sixty-one-percent of the northern English hearings that were studied involved crimes against the person. This was double the proportion found either in southern Scotland or at the Old Bailey, where only around thirty-percent of all insanity and idiocy defences were pled by prisoners who were charged with violent interpersonal transgressions.

Dates	Number of trials	% Property Crimes	% Personal Crimes	% Combined Property & Personal Offences	% Other
1660-1799	68	30.9	52.9	7.4	8.8
1800-1829	74	25.9	64.9	5.4	3.8
Overall	142	29.6	57.7	5.6	7.1

*Table 3.6. Categories of crime committed by Northern English prisoners who entered insanity and idiocy defences, 1660-1829.*

A strong relationship between violence and mentally disturbed prisoners existed at the Old Bailey, despite the preponderance of insanity defences for property crimes. Personal crimes were over-represented amongst insanity defences when weighed against the general trend of indictments. Joel Eigen calculated that personal crimes were pled “three or four times [greater than] their proportion in the general caseload” during Old Bailey insanity trials.<sup>43</sup> No comprehensive analysis has been published regarding the categories of crime which were prosecuted in either southern Scotland or northern England.<sup>44</sup> Tentative surveys can be proposed, based upon the wide sample of criminal cases examined for “hidden” insanity defences in both England and Scotland (Table 3.7). According to this research, violent transgressions appeared amongst Northern Assize insanity and idiocy defences at two-to-three times the ratio of violent offences amongst all criminal indictments.<sup>45</sup> By contrast, southern Scottish furiosity and fatuity defences were not grossly over-represented amongst crimes of interpersonal violence. Accusations of

<sup>43</sup> Eigen *Witnessing* p.18.

<sup>44</sup> Some aspects of northern English crime have recently been discussed. Jackson “New-born child murder”. King “Juvenile Delinquency”. Mercer “Exception to a National Pattern?”.

<sup>45</sup> Excluding Grand Jury decisions of “No Bill” or “Ignoramus”.

violent offences accounted for around thirty-one-percent of fatuity and furiosity defences and thirty-eight-percent of all criminal cases tried on the southern circuit between 1708 and 1829. This suggests that there was a stronger association between interpersonal aggression and mental distraction amongst formal indictments at England's Old Bailey and Northern Assizes than those for southern Scotland.

Jurisdiction	Number Of Trials	% Property Crimes	% Personal Crimes	% Combined Property & Personal Offences	% Other
Northern Assizes	2600	59	27	10	4
Southern Justiciary	850	48	38	8	6

*Table 3.7. Survey of categories of crime indicted at the Northern Assizes (1660-1829) and southern Justiciary Court (1708-1829), based upon random samples of cases.*

Amongst British insanity and idiocy defences which were entered for interpersonal crimes, a high proportion of the victims were either related to the prisoner or else belonged to the same household (including servants, apprentices and masters).<sup>46</sup> Relatives and household members were the victims in around seven-tenths of northern English insanity defences which involved violent interpersonal aggression (Table 3.8). The figure for southern Scotland stood nearer to three-fifths. These prosecutions reflect the development of broader perceptions that such violent

<sup>46</sup> Stone, "Interpersonal violence in English Society (1300-1980)", *P&P*, 101, (1983), pp.27-28 claimed that the majority of violent, interpersonal crimes were directed towards persons who did not belong to the offender's household or kin. This argument has been questioned by James Cockburn, who suggested that most victims of interpersonal violence were familiar with their perpetrator (Cockburn "Patterns in violence in English Society: Homicide in Kent 1560-1985", *P&P*, 130, (1991) p.105).

behaviour was excessive and unacceptable. Recourse to physically aggressive conduct was condemned more widely during the eighteenth century than in the seventeenth.<sup>47</sup>

Jurisdiction	% of victims belonging to same household or related to the prisoner
Northern Assizes	71.9
Southern circuit of Justiciary	62.3

*Table 3.8. Proportion of victims of violent interpersonal crime who were either belonged to the same household or were related to the prisoner. Comparison of the Northern Assizes and Scotland's southern circuit of Justiciary, 1660-1829.*

Jurisdiction	% of Males	% of Females
Northern Assizes	47.7	81.3
Southern circuit of Justiciary	50	100

*Table 3.9. Proportion of insanity and idiocy defences which were entered for interpersonal violence upon household members or kin, by the prisoner's gender. Comparison of the Northern Assizes and Scotland's southern circuit of Justiciary, 1660-1829.*

<sup>47</sup> E. Foyster "At the limits of liberty: married women and confinement in eighteenth-century England", *C&C*, p.40. King "Punishing assault" pp.60-61. Sharpe, "The history of violence in England: some observations" *P&P*, 108, (1985). Shoemaker, "Quarter Session records" p.206. Shoemaker "Male Honour" *passim*. Stone "Interpersonal Violence" p.32. Stone "The history of violence in England: a rejoinder" *P&P*, 108 (1985), p.32.

Violent criminality was not sex-specific, but the association between intra-household violence and insanity was especially strong amongst the English and Scottish females (Tables 3.8 and 3.9). In both northern England and southern Scotland insanity and idiocy defences, around half of the violent, male prisoners had attacked household members or kin. By comparison, such victims accounted for four of every five cases involving violence by females in northern England. Only three mentally disturbed women were prosecuted for violent crimes in southern Scotland; all of them had attacked relations.

The statutory crime of child-murder informed these different patterns for males and females, though few child-murderers entered insanity defences at court (Table 3.10).<sup>48</sup> Exactly half of northern England's female prisoners who were mentally disturbed had killed their infants, a figure which replicates Eigen's findings for the Old Bailey.<sup>49</sup> In Scotland, two of the three violent female offenders studied were arraigned for child-murder. In Britain, the statutory offence of child-murder was principally restricted to women who concealed and killed illegitimate progeny.<sup>50</sup> Women accounted for the vast majority of persons who committed "neonaticide", or the murder of new-born children.<sup>51</sup> Contemporaries included children up to the age of seven in their conception of "infanthood", so studies of "infanticide" should

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<sup>48</sup> In their study of child-murder, Hoffer and Hull found that 90% of assaults against children were performed by women and that these were typically domestic crimes, *Murdering Mothers* p.xviii and 98. Kilday found a similar pattern in her study of southern Scottish child-murder, "Maternal Monsters" pp.164-165. See also Symonds *Weep not for me* p.83 and "reconstructing rural infanticide" p.65.

<sup>49</sup> Eigen "Did Gender matter?" p.418.

<sup>50</sup> For England, 21 Jac I c.24 (1624). For Scotland, 2 Chas II c21 (1690).

<sup>51</sup> Hoffer and Hull *Murdering Mothers* p.xiii. They employ the term "Filicide" to describe the murder of offspring who were more than a day old, p.148.

be extended to include physical assaults upon children and new-born babies.<sup>52</sup> Depending upon the interpretation of “infanticide”, this crime was not as sex-specific as some studies seem to suggest.<sup>53</sup> Males could kill infant offspring and be acquitted owing to mental distraction, but the murder of infants accounted for a lower proportion of violent crime amongst males than females.<sup>54</sup> The murder of infants accounted for fourteen-percent of the violent offences committed by insane males in northern England, compared with eighteen-percent in southern Scotland (Table 3.10). Both men and women could be perceived to transgress norms regarding domesticity and parenthood by murdering children. In both countries, such activity was associated with mental instability amongst adults of both sexes.

Jurisdiction	Proportion of violent offences that were “child-murders” (%)	
	Males	Females
Northern Assizes	14	50
Southern circuit of Justiciary	18	n/a <sup>55</sup>

*Table 3.10. Proportion of violent offences committed by criminal insane and idiotic which were perpetrated against infants, northern England and southern Scotland 1660-1829.*

<sup>52</sup> Blackstone *Commentaries* IV p.24. Dalton *Country Justice* set the upper limit at nine-years-old.

<sup>53</sup> Beattie *Crime* p.135. Sharpe *Crime* pp.114-115.

<sup>54</sup> See, for instance the trials of Jonathan Swift at Yorkshire in 1785 (ASSI 41/8, 41/9 and 45/34/4) and James Connacher at Ayr in 1823 (JC 12/35 and AD 14/23/7).

<sup>55</sup> Only three women committed violent offences and entered pleas of fatuity or furiosity in southern Scotland, two of them were accused of child-murder.

Although violent crime could be associated strongly with mental imbalance, not all violence was perceived to be insane or idiotic in nature. Contemporaries believed that they could distinguish between “bad” and “mad” deeds, violent or otherwise. The context of the prisoner’s criminal behaviour, rather than their crime *per se*, indicated their mental state. Violent conduct was most persuasive as an indicator of insanity where such behaviour was unusual in the prisoner, thereby suggesting an altered state of mind. John Gibson’s failed defence of madness, at Jedburgh in 1814, illustrates this.<sup>56</sup> Gibson believed that his wife, Janet Renwick, was engaged in an extra-marital affair and was trying to poison him. Gibson confronted his wife, they argued and in the struggle which ensued, Gibson stabbed his wife to death. But witnesses were convinced that such behaviour represented Gibson’s “violent and irritable temper, rather than the alienation of mind”. Aggressive belligerence was typical of Gibson’s usual character and demeanour. The violence represented Gibson’s usual, rather than an altered, state of mind; thus he was deemed to have been sane and guilty of his crime.

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<sup>56</sup> JC 12/28 and 26/366.

*Global patterns of success*

The English “success-rates” are based upon the proportion of known insanity and idiocy defences where the prisoner’s mental distraction was proven, either earning an acquittal or postponement of trial. Joel Eigen has followed the same methodology.<sup>57</sup> English (and Scottish) prisoners could earn a full pardon or mitigation on the grounds of their insanity or idiocy, via post-trial applications to clemency. Few documents relating to English pardons exist before the 1780s and the resources are unsystematic before the nineteenth century.<sup>58</sup> An examination of minutes, newspaper reports and papers relating to applications for pardon unearthed a mere five northern English prisoners who benefited from formal, post-trial mitigation because of mental infirmity.<sup>59</sup> Four of these prisoners were tried between 1816 and 1829, when records are more complete. Pardons therefore account for less than five-percent of the northern English sample of “insanity defences”.

Papers relating to around 400 pardons (from all England’s regional courts) between 1782 and 1829 were examined to establish whether mental affliction was regular cause for clemency outside of northern England. The prisoner’s state of mind was considered directly in only five of these applications, or just over one-percent of the cases studied. This research therefore reinforces Dana Rabin’s conclusion that post-trial alleviation was granted rarely in England on the grounds

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<sup>57</sup> Eigen *Witnessing* pp.18-30.

<sup>58</sup> Series HO 13 and 47.

<sup>59</sup> See pp.355-359 for a discussion of Elizabeth Ward’s pardon (1816).

of the prisoner's mental incompetence.<sup>60</sup> Nor was insanity the only cause for clemency in the few cases discovered. In 1785, for instance, a pardon was mooted for George Oliver because of the prisoner's insanity and the presiding judge's belief that Oliver had been convicted "on circumstantial Evidence".<sup>61</sup>

Comparisons between the "success-rates" of insanity defences in England and Scotland are tempered by the alternative conceptions of criminal responsibility that existed within these neighbouring countries. In Scotland, guilty pleas were entered alongside express attempts to procure mitigated sentences owing to reduced degrees of insanity. In 1759, for instance, John Fairbairn's weak-mindedness and youth were argued to restrict his sentence, but he also pled guilty to his crime and petitioned to be banished.<sup>62</sup> It was presented successfully that Fairbairn's mental state should earn him a mitigation of sentence, but no full acquittal. Scottish juries could also consider prisoners to be guilty but worthy of recommendations to mercy on account of "partial" degrees of imbecility or madness. The failure to include these types of verdict within the quantitative analysis would misrepresent Scottish perceptions of mental affliction and criminal responsibility. Trials such as John Fairbairn's were "successful" because it was proven that the prisoner suffered from a debilitating mental condition.

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<sup>60</sup> Rabin "Law and Responsibility" p.138.

<sup>61</sup> HO 13/228-230.

<sup>62</sup> JC 12/9 and JC 26/163.

Dates:	Northern England:		Southern Scotland:	
	Total insanity and idiocy defences	% successful	Total insanity and idiocy defences	% successful
1700-1759	31	77.4	9	44.4
1760-1799	28	67.9	6	66.7
1800-1829	74	64.9	20	70
Overall 1700-1829	133	68.4	35	62.8

*Table 3.11. Global success-rates during insanity and idiocy defences at the northern English and southern Scottish circuit courts, 1700-1829.*

Overall, insanity and idiocy defences were more successful in northern England than in southern Scotland. Compared with southern Scottish hearings, these types of criminal defence were almost twice as likely to succeed in England before the 1760s (Table 3.11), although failed hearings can be difficult to trace. Acquittal-rates in provincial England and Scotland followed divergent trends throughout the long eighteenth century. Between 1760 and 1799, the success-rate rose in Scotland, but fell at both the Northern Assizes and Old Bailey. About fifty-percent of Old Bailey cases ended in the proof of madness during the 1760s, dropping to a low of thirty-seven percent during the 1790s, before increasing again after 1800.<sup>63</sup>

<sup>63</sup> *Eigen Witnessing* pp.22-24, Figure 1.2.

The success-rates of both northern English and southern Scottish defences are appreciably higher than published figures for insanity defences. Nigel Walker has suggested that only one-third of English insanity defences were proven during the eighteenth century.<sup>64</sup> Joel Eigen has demonstrated that, with the exception of two anomalous decades, the acquittal-rate during Old Bailey insanity defences stood at around fifty-percent between 1760 and 1843. At both provincial circuits, the success-rate hovered at around two-thirds of all insanity and idiocy defences between 1760 and 1800 (Table 3.11). Undoubtedly, failed insanity defences have been veiled by the vagaries of the provincial criminal materials that were investigated. This failing has been corrected somewhat by the surveys of depositions and narratives. Comparisons between Eigen's work and this research must be considered carefully, yet it would seem that criminal defences of insanity and idiocy were more successful in provincial England and Scotland than at the Old Bailey, at least after 1760. In contrast to Walker's conjecture, the provincial prisoner's insanity or idiocy was proven in the majority of northern English and southern Scottish cases. Such high proportional success-rates suggest that the provincial courts were not predisposed to regarding all insanity and idiocy defences with scepticism.

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<sup>64</sup> Walker *Crime and Insanity* I p.72.

*Explaining success-rates: types of crime committed and associated sentences*

Joel Eigen has provided a lucid explanation for the changing rates of acquittal in Old Bailey insanity defences. Eigen bifurcated the prisoners' transgressions into offences against persons and property, finding significantly different patterns of acquittal for "personal" and "property" crimes. Successful insanity defences for interpersonal, violent offences rose sharply from around forty-percent in the 1790s to over sixty-percent in each decade between 1800 and 1830. By contrast, the success-rate in property offences did not alter significantly.<sup>65</sup> Eigen argued that the increased acquittals in violent crime were connected to the Criminal Lunatics and Safe Custody Acts of 1800, which were drafted and implemented following James Hadfield's infamous insanity defence.<sup>66</sup>

Similar trends were not perceptible in either northern England or southern Scotland. The Scottish acquittal-rate fell from sixty-seven-percent in the late-1700s to forty-percent between 1800 and 1829 (Table 3.12). In southern Scotland after 1800, in contrast to both northern England and the Old Bailey, a higher proportion of insanity and idiocy defences were successful in relation to property offences (Table 3.13). Some Parliamentary statutes regarding criminal insanity were not applicable to Scotland, such as the terms included in the 1744 Vagrancy Act for the detention of "dangerous" persons who were mentally disturbed.<sup>67</sup> The Criminal

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<sup>65</sup> Eigen *Witnessing* pp.22-23.

<sup>66</sup> Walker *Crime and Insanity I* pp. 74-82. Moran "Origins" pp.487-504. Eigen *Witnessing* p.23.

<sup>67</sup> Houston "Poor Relief and the Dangerous and Criminal Insane in Scotland during the long eighteenth century" (unpublished paper) p.1.

Lunatics and Safe Custody Acts of 1800 did apply to Scotland, however. These acts neither sparked nor regularised a higher acquittal rate amongst fatuity and furiosity defences which were pled to exculpate violent interpersonal crimes on the southern circuit of Justiciary.

	Northern England	Southern Scotland
1760-1799	83%	67%
1800-1829	76%	40%

*Table 3.12. Proportion of insanity defences which were successful in response to violent crimes against the person. Northern England and southern Scotland 1760-1829.*

	Northern England	Southern Scotland
1760-1799	57%	67%
1800-1829	57%	73%

*Table 3.13. Proportion of insanity defences which were successful in response to property offences. Northern England and southern Scotland 1760-1829.*

After 1800, the acquittal-rate also fell in northern England regarding insanity defences for violent offences. Eighty-three-percent of such cases earned acquittals between 1760 and 1799, whilst the success-rate fell to seventy-six-percent between 1800 and 1829 (Table 3.12). Eighteenth century sources may have masked failed

defences, thereby hiding a real increase in success-rates after 1800. It seems unlikely, however, that the acquittal-rate at the Northern Assizes rose by twenty-percent as occurred at the Old Bailey between 1760 and 1843.<sup>68</sup> For such a proportional increase to have occurred in northern England, a further fifteen cases (sixty-percent of the total already discovered) would need to be uncovered for the period between 1760 and 1799. All of these cases would need to be failed defences for violent crimes. It seems unfeasible that such a bulk of cases would evade scrutiny, especially given that court records relating to 1,400 cases and 2,000 printed narratives were examined for the period 1760-1829 in an effort to identify failed insanity defences. It is more realistic to suggest that Hadfield's trial, and the legislative changes which followed, did not have the same impact upon acquittals in northern England as at the Old Bailey.<sup>69</sup>

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<sup>68</sup> *Eigen Witnessing* p.23.

<sup>69</sup> It might be possible to speculate that such famous cases led to an increased awareness of criminal lunacy and the ramifications of such a verdict at law, although adequate proof is lacking to support such a thesis.

*Capital offences*

The success-rate of insanity and idiocy defences for capital offences fell in both regions after 1800. The northern English acquittal rate in "capitals" fell by twenty-percent after 1799 (Table 3.14). A less dramatic decline in success-rate occurred in southern Scotland. An enlarged number of specific offences carried the death penalty over the course of the long eighteenth century within both legal traditions. Despite this, capital punishment was regarded increasingly with distaste and was reserved as an exemplary punishment for serious crimes. Aversion to hanging was epitomized by British juries who mitigated sentences by returning "partial verdicts", whilst there were Parliamentary calls to reform judicial codes from the late eighteenth century.<sup>70</sup> If insanity or idiocy was used as a simple means of mitigating harsh penal codes, then an enhanced acceptance of this type of plea might be reflected by an increased success-rate at court. That the opposite was true suggests that false pleas of mental distraction were not accepted or invented as a regular form of mitigation in capital cases. Courtroom participants applied the concepts of mental disability and distraction selectively, rather than indiscriminately.

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<sup>70</sup> S. Devereaux, "The Making of the Penitentiary Act, 1775-1779", *HJ*, 42, 4, (1999) pp.408-412. A.J. Draper, "Cesare Beccaria's influence on English discussions of punishment, 1764-1789", *History of European Ideas*, 26, 3-4, (2000), *passim*.

	Northern England	Southern Scotland
1760-1799	83%	78%
1800-1829	62%	70%

*Table 3.14. Proportion of insanity and idiocy defences which were successful in response to capital crimes, northern England and southern Scotland 1760-1829.*

By the nineteenth century, a significant minority of British insanity and idiocy defences concerned non-capital offences (Table 3.15). The increase in numbers and proportion of non-capital offences indicates further that insanity and idiocy defences were not invented merely to mitigate the death-penalty. This can partly be explained by changes in statutory law. Both legal traditions carried seventeenth century statutes which established "child-murder" as a capital offence. These statutes directed courts to assume that those accused of child-murder were guilty until proven innocent, rather than *vice versa*.<sup>71</sup> Such instructions chafed against broader evidentiary principles. Stimulated by concerns regarding legal evidence and the severity of sentence, the child-murder statutes were repealed in 1803 for England and 1808 for Scotland.<sup>72</sup> Insanity or idiocy continued to be pled in response to accusations of child-murder through to 1829, despite this change. This also indicates that connections between insanity and the crime of child-murder were established firmly in provincial Britain by the early nineteenth century.

<sup>71</sup> For England, 21 Jac I c.24 (1624). For Scotland, 2 Chas II c21 (1690).

<sup>72</sup> Walker *Crime and Insanity* I p.126. Hoffer and Hull *Murdering Mothers* pp.85-90. Symonds "Reconstructing rural infanticide" p.1.

Dates	Northern England		Southern Scotland	
	Number of trials	Proportion of trials	Number of trials	Proportion of trials
1700-1799	12	29%	3	19%
1800-1829	21	36%	10	30%

*Table 3.15. Proportion of insanity and idiocy defences which were pled in response to non-capital crimes, northern England and southern Scotland 1760-1829.*

The success-rates of insanity and idiocy defences for non-capital crimes increased after 1800 (Table 3.16). This echoed broad changes in legal theory. The seventeenth century English jurist, Matthew Hale, argued that insanity or idiocy could only be accepted as a sound criminal defence where a “capital” offence had been committed.<sup>73</sup> Likewise, Mackenzie argued that such a plea was only fit for serious crimes such as murder. By the late eighteenth century, Blackstone reflected a more lenient attitude when he stated that mentally distracted persons were “incapable of committing *any* crime”, capital or otherwise.<sup>74</sup> Furiosity and fatuity defences were also accepted for non-capital crimes in Scotland by the early nineteenth century, such as James McAdam’s assault upon Janet Rogerson in 1804.<sup>75</sup> Mental unsoundness was received as a sound defence for a broader range of crimes both in practice and in theory by the late eighteenth century.

<sup>73</sup> Hale Pleas (1736).

<sup>74</sup> Blackstone Commentaries (1769) IV p.195, my emphasis.

<sup>75</sup> JC 12/24.

Date	Northern England	Southern Scotland
1700-1799	66%	33%
1800-1829	81%	60%

*Table 3.16. Proportion of insanity and idiocy defences which were successful in response to non-capital crimes northern England and southern Scotland 1760-1829.*

### *Conclusions*

There are difficulties in tracing insanity and idiocy defences, particularly those which failed in northern England before the 1790s. Still, some broad conclusions can be drawn. In relation to all criminal trials, few insanity and idiocy defences were entered at the provincial courts between 1660 and 1829. The irregularity of these types trial demonstrates that findings of insanity and idiocy were not reached indiscriminately at court. Such verdicts were not used regularly as alternative means of discretionary mitigation in the courtroom, but were employed to designate prisoners who were perceived to have suffered from pathologies which were only too real. Contemporaries were convinced that specific types of conduct, appearance and speech were indicative of troubled mental states. Most criminals did not display these signals.

Between 1660 and 1829, fewer insanity and idiocy defences were entered at England and Scotland's circuit criminal courts than at the contemporary Old Bailey, principally because provincial courts dealt with far less litigation. The lack of provincial court narratives before the 1770s hampers direct comparisons between the incidence of these defences at the Northern Assizes and the Old Bailey. Northern English records might mask failed defences of mental incompetence. Even without these "dormant" hearings, however, the incidence of insanity and idiocy defences as a proportion of all criminal hearings was higher at the Northern Assizes than at the Old Bailey, at least after 1760. The personnel who were central to the

processes of prosecution may have been more receptive to these forms of plea in the provinces. Perhaps most intriguingly, this pattern might indicate that London's mentally distracted transgressors more regularly avoided formal prosecution, either through pre-trial discretionary mitigation or summary incarceration. These hypotheses require further investigation of the pre-trial processes in Britain, in the specific context of mentally disturbed offenders.

The southern Scottish sample is small in relation to the English findings, but this research provides intriguing analysis. A greater share of southern Scottish criminal tribunals included an evaluation of the pannel's mental condition when compared with either the Northern Assizes or the Old Bailey. Scotland's different pattern can be explained by her adherence to independent legal principles, notably the "Rule of Proportions". The Justiciary Court obtained to distinctive legal practices, such as the regular involvement of legal representatives. Scotland's system of public prosecution may also have ensured that these types of offenders were officially assessed at court, rather than escaping formal accusation. This hypothesis is expanded later.

As at the Old Bailey, there was no simple, linear increase in the proportion of insanity defences that succeeded in provincial Britain. The source materials investigated preclude firm comparisons between the success-rates in provincial Britain and the Old Bailey. Amongst the English and Scottish circuit trials that were unearthed, defences of insanity and idiocy appear to have been more efficacious

than at the contemporary Old Bailey. Nigel Walker once contended that two-thirds of insanity defences failed in England, but this study suggests that prisoners were able to prove their mental distress in most northern English cases. Similarly, the minority of southern Scottish fatuity and furiosity defences failed between 1707 and 1829.

The broad patterns of success differed in southern Scotland and northern England, as befits legal circuits which could apply substantially different theoretical and practical frameworks. Joel Eigen discovered a marked increase in the success-rates of Old Bailey insanity defences entered for violent, personal offences after 1800. This pattern was not replicated in either northern England or southern Scotland. James Hadfield's trial in 1800 and the consequent statutory changes had less notable impacts upon either of the circuit courts than at the contemporary Old Bailey. Alternative explanations for trends in acquittal and incidence have been proposed. Insanity and idiocy defences were usually entered for capital crimes in Britain, although non-capital offences could be met also with pleas of mental incapacity. Defences entered for capital transgressions did not enjoy a greater success-rate than those used in response to non-capital crimes. Insanity and idiocy were not used recurrently as alternative means of circumventing the death penalty.

The behaviour of mentally disturbed persons was not associated universally with violent interpersonal crime. Property crimes proliferated amongst southern

Scottish and Old Bailey insanity and idiocy defences.<sup>76</sup> Despite such findings, there was a strong relationship between aggressive, interpersonal transgressions and mentally distracted prisoners in England. At both the Old Bailey and Northern Assizes, a higher proportion of the prosecutions brought against violent offenders involved insanity defences than in property felonies. This was not true of southern Scotland, which may have been anomalous in this respect. Subsequent chapters will demonstrate that Scotland's different patterns of incidence were related to the type of plea entered on behalf of the prisoner. Defences of fatuity and furiosity "in-bar-of-trial" (postponement of the hearing) certainly accounted for most of the southern Scottish property offences studied.

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<sup>76</sup> *Eigen Witnessing* pp.18-28.

## 4.

*The prisoner's social characteristics*

This chapter investigates how the prisoner's social characteristics impacted upon these types of hearing. The social and economic station of northern English and southern Scottish prisoners is compared, followed by an investigation of the prisoner's gender, age and marital status.

Interpretations of the social standing and gender of those who suffered from mental afflictions, in relation to those who validated and managed them, have spawned contentious debates. Scholars such as Thomas Szasz and Michel Foucault have suggested that the identification and authentication of mental disturbance were oppressive discourses rather than real pathologies.<sup>1</sup> These theories contend that mental afflictions were invented and wielded by male-dominated, property-owning elites to maintain their authority. Social subordinates, such as impoverished persons and females, who refused to conform to cultural expectations of conduct, were categorised as being mentally incompetent. Thomas Szasz has also argued that criminal defences of insanity were applied in instances where socially subordinate persons attacked their patriarchal superiors, such as Edward Arnold's assault upon Lord Onslow in 1723, or James Hadfield's shooting at George III in 1800.<sup>2</sup> To Szasz, the insanity defence was an elaborate means of camouflaging social fissures.

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<sup>1</sup> Szasz *Myth and Manufacture of Madness*. Foucault *Madness and Civilisation* p.23-28. For similar arguments, see Dörner *Madmen and the Bourgeoisie*. For a critical analysis of these theories, see Vatz and Weinburg "Rhetorical Paradigm", also Houston *Madness* and "Class, Gender and Madness".

<sup>2</sup> For an outline of these cases, see Eigen *Witnessing* pp.22, 40 and 49-54.

It is questioned whether verdicts of insanity and idiocy were only employed repressively against persons of inferior social and economic standing.

Detailed expositions of the prisoners' social characteristics, other than their gender, are hampered by the tachygraphic manner of formal legal documents.<sup>3</sup> The prisoner's social and occupational background was not recorded in almost one-third of English and around one-fifth of Scottish cases. This was particularly true of females, who were generally identified by their marital status or else the occupation of their husband or father.<sup>4</sup> Still, it is possible to reveal some aggregative patterns which help in our understanding of long eighteenth century insanity and idiocy defences. This section provides a springboard for the qualitative analyses which are presented in subsequent chapters. The construction that is employed here to characterise British society underestimates the level of social mobility within each strata. This construct also masks the internal divisions within each stratum, based upon wealth, occupation and gender.<sup>5</sup> This basic categorization is used because it provides clear, if generalised, analyses.

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<sup>3</sup> For a discussion of the "contingencies" which affect the statistical analysis of legal documents, see Houston *Madness* chapter 3 "Patterns of Madness" pp.91-17.

<sup>4</sup> Houston *Madness* p.35.

<sup>5</sup> Walker "Women, theft" p.81.

	Northern England		Southern Scotland	
	Number	%	Number	%
Elites <sup>6</sup>	5	4.8	2	5.7
Middling sorts <sup>7</sup>	13	12.5	5	14.3
“Labourers” <sup>8</sup>	52	50	21	60
Unknown <sup>9</sup>	34	32.7	7	20

*Table 4.1. Broad categories of the social station of northern English and southern Scottish prisoners during insanity and idiocy defences, 1660-1829.*

Most English and Scottish insanity and idiocy defences concerned impoverished prisoners of low social station (Table 4.1). This is unsurprising, because the majority of British criminal defendants belonged to the lower, landless ranks of society. Persons of elite status were subjected infrequently to formal criminal prosecution and this was reflected by their low proportion amongst insanity and idiocy defendants. Amongst the trials studied, the patterns relating to the prisoners' social stations therefore corresponded broadly to trends regarding the social

<sup>6</sup> Persons styled “gentleman” or “Esquire”, wealthy landowners, Justices of the Peace. In Scotland, this included landowning persons who were described as being “of” their place of residence, such as William Douglas of Luce. The same designation could be applied in England, particularly before the mid-eighteenth century, as in “Charles Jackson of Carleton” (see below).

<sup>7</sup> Persons styled “yeomen”, farmers (including tenants where they not described as being impoverished), wealthier tradesmen, merchants, craftsmen and artisans.

<sup>8</sup> Persons typically styled as belonging to “labouring”, impoverished households; also including the likes of miners, sailors, journeymen artisans, servants and vagrants.

<sup>9</sup> Includes occasions where females were recorded as being “single” but no occupation (household or individual) was supplied.

standing of all prosecuted criminals. Nevertheless, prisoners from all stations of English and Scottish society could be afflicted mentally, from Granville Medhurst Esquire, who was described as being a “gentleman of very large fortune”, through to the “vagabond”, Jean Stowrie.<sup>10</sup>

In northern England, rates of acquittal differed according to the prisoner’s social standing. Amongst the northern English cases studied, one-third of persons described as being “labourers” (or of similarly low, landless station) failed to prove that they were afflicted mentally. By comparison, upwards of eighty-five-percent of “middling” English prisoners were successful in their plea. All five northern English “gentlemen” proved their defences of insanity. These gentlemen had committed offences which carried sentence of either death or transportation, but this pattern did not reflect a conspiracy, whereby persons of high standing avoided harsh punishments by feigning or arguing their insanity deceptively.<sup>11</sup> Insanity defences involving elite persons could fail, such as earl Ferrers’ hearing at the House of Lords in 1760 for murder.<sup>12</sup> The location and public interest in Ferrers’ defence was atypical, but his fate illustrates that, to be a successful defence, mental incapacity had to be proven by observing contemporary evidential standards. Earl Ferrers’ case was organised poorly and he failed to provide persuasive proofs of his insanity.

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<sup>10</sup> Medhurst: ASSI 41/10, *Gentleman’s Magazine* 81 pt. II (August 1811) p.131. Stowrie: JC 12/4.

<sup>11</sup> Three committed murder (Jackson 1666, Medhurst 1800 and Maister 1803), one was arraigned for riot (Fothergill 1778) and one for spreading false news (Drake 1686).

<sup>12</sup> Walker *Crime and Insanity* I pp. 62-64. Eigen *Witnessing* pp.1-2 Andrews and Scull *Undertaker* pp.193-215.

This, combined with substantial evidence that he resorted regularly to violence, but did so in a rational, calculated fashion, confirmed the peer's guilt.<sup>13</sup>

	Northern England %	Southern Scotland %
Elites	100	n/a <sup>14</sup>
Middling sorts	84.7	73.1
Labourers	66.4	71.4

*Table 4.2. Success-rate of defences of insanity and idiocy by category of social standing, Northern Assizes and southern Justiciary Court, 1660-1829.*

Britain's criminal laws were not impartial or equitable to all litigants.<sup>15</sup> Prisoners of high social and economic status could be advantaged by their capability to employ counsel in large numbers and pay the expenses of witnesses who might prove their insanity, for instance. Yet successful insanity defences matched broadly-held perceptions of criminal responsibility and universal standards of legal proof.<sup>16</sup> The law of evidence was not merely dictated by social (or legal) elites.<sup>17</sup> Criminal trials were conducted in public and the criminal code was justified by the adherence to broadly assumed expectations of justice and criminal responsibility.<sup>18</sup> Witnesses, jurors, judges and spectators were convinced that

<sup>13</sup> Andrews and Scull *Undertaker* pp.193-215.

<sup>14</sup> Only two prisoners of high local standing entered defences of fatuity or furiosity in southern Scotland, Thomas Kirkpatrick of Fenton (Perjury, Dumfries 1755) and John Douglas of Luce (Murder, Dumfries 1795). The defence of the former failed, whilst the latter was acquitted by a plurality of the jurors' votes.

<sup>15</sup> See, for instance, Hay "Class Composition" *passim*. Green "Retrospective" pp. 384-395. King *Crime* p.353.

<sup>16</sup> Crawford "Emergence" pp. 9-11 and 93-100. Eigen *Witnessing passim*.

<sup>17</sup> Green "Retrospective" pp.393-395.

<sup>18</sup> *Idem*.

prisoners who suffered from mental disabilities could be distinguished from defendants who were sane or who dissimulated such conditions.

Southern Scotland's success-rates suggest that the prisoner's social standing had a less significant impact upon the outcome of their fatuity or furiosity defences than in England. Three-fifths of middling and lower order "pannels" were successful in southern Scotland. Scotland's pattern was informed by a close attention to evidential criteria, driven by the regular involvement of legal counsel for both litigating parties. The impact of regular participation of counsel is considered in a later chapter.<sup>19</sup>

Some historians have suggested that England's criminal law was utilised by property-owning persons of distinguished rank to control the behaviour of their social and economic subordinates.<sup>20</sup> After considerable debate, most historians now concur that the male "middling sorts" most regularly entered prosecutions at law, when compared to both the highest and lowest orders of society.<sup>21</sup> This study of British insanity and idiocy defences fortifies such recent research (Table 4.3). The majority of victims studied in both northern England and southern Scotland were "middle-ranking" persons. These persons could own real-estate and be involved in local administration, but they did not belong to the highest echelons of provincial

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<sup>19</sup> See Chapter 9.

<sup>20</sup> Thompson "Whigs and Hunters pp.258-269. Hay "Property, Authority" pp.58-59 and "War, Dearth and Theft" p.152. See also Porter Mind Forg'd Manacles p.9 and Scull "Museums of Madness Revisited" for synopses of this historiography.

<sup>21</sup> Peter King's study of eighteenth-century Essex suggests that the middling sorts (such as farmers and tradesmen) accounted for two-thirds of all property prosecutions. King Crime pp.35-37.

society. The lower orders of society could be the victims of crime and instigate formal prosecutions at law during the long eighteenth century. Almost one-quarter of English and Scottish victims were of impoverished and low standing, at least amongst the cases where their social identities were revealed (Table 4.3). Lower order persons were typically, but not uniformly, the victims of interpersonal and intra-household violence, particularly murder.<sup>22</sup> This indicates that a broad section of British society regarded such aggression to be unacceptable.

OCCUPATION / STATUS	NORTHERN ENGLISH VICTIMS (%)	SOUTHERN SCOTTISH VICTIMS (%)
Gentlemen, Esquires, major landowners, etc.	9	5
Farmers (Tenant and small-holders)	20	44
Tradesmen, Merchants, wealthy Artisans etc.	18	19
"Labourers" (Miners, servants, etc.)	24	23
Unknown	18	0

*Table 4.3. Social and economic status of the victims of prosecuted crime during insanity and idiocy defences. Northern England 1665-1829 and southern Scotland 1711-1829.*

<sup>22</sup> King has suggested that a high proportion of all lower-order victims had suffered violent, interpersonal transgressions, *Crime* p.26 and "Punishing Assault" p.55. See also Cockburn, "Patterns in violence" p.105 and Stone "Interpersonal Violence" pp.27-28.

It was not inevitable that criminal cases involved the prosecution of social and economic subordinates by their superiors. Besides cases of intra-household violence, victims of low standing could prosecute property transgressors who also belonged to the lower ranks of society.<sup>23</sup> At the Yorkshire Assizes in 1795, Thomas Musgrave alias Robert Johnstone was incapable mentally of standing trial for the theft of many articles, including clothing.<sup>24</sup> Musgrave was prosecuted by his fellow “servants” who worked at Mr Smith’s mill at Hunsingore.<sup>25</sup> Persons of different occupational and social strata could perceive the law in distinctive manners.<sup>26</sup> Musgrave’s case demonstrates, however, that persons of low social and economic standing perceived the criminal law to be a useful, effective and legitimate means of redressing criminal wrongs other than violent offences.

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<sup>23</sup> N. Garnham *The Courts, Crime and Criminal Law in Ireland 1692-1760*, (1996) pp.60-61 proposes a similar thesis for contemporary Irish property offenders and crime.

<sup>24</sup> ASSI 41/10.

<sup>25</sup> ASSI 45/38/3 nos. 8-14.

<sup>26</sup> King *Crime* pp.353-373.

*The prisoners' gender*

Scholars have claimed that insanity was perceived to be experienced by females, rather than males, during the eighteenth and nineteenth centuries.<sup>27</sup> These interpretations have also contended that the concept of “insanity” was invented and used oppressively by male, professional persons to label, curtail and control female behaviour which rebelled against customary, male-imposed norms. Such contentions have been challenged strongly by arguments that contemporary experiences and perceptions of insanity were not gendered so crudely.<sup>28</sup> It has also been suggested that contemporaries perceived that mental afflictions robbed persons of their ability to choose to act in the way that they did. Any “rebellion” by females was therefore implicit, rather than explicit in nature.<sup>29</sup>

Jurisdiction	Ratio of Prisoners	
	Male	: Female
Northern Assizes	3.7	: 1
Southern Justiciary Court	4.8	: 1

*Table 4.4. Gender of prisoners during insanity and idiocy defences, expressed by ratio. Northern England and southern Scotland, 1660-1829.*

Amongst provincial British prisoners, mental afflictions were most regularly experienced by males rather than females (Table 4.4). This reflects the fact that

<sup>27</sup> Chesler *Women and Madness* (1972). Showalter *Female Malady* (1987).

<sup>28</sup> MacDonald “Women and Madness”. Busfield “The Female Malady?” and *Men, Women and Madness* Tomes “Feminist Histories of Psychiatry”. Houston “Madness and Gender” and “Class, Gender and Madness”.

<sup>29</sup> Houston “Madness and Gender” p.325.

fewer females were prosecuted formally at the superior courts than males. In total, twenty-four of the northern English prisoners that were studied were female (just under one-quarter of the English sample). In northern England, the mental conditions of thirty-seven males were evaluated for every ten females.<sup>30</sup> Six of the thirty-five southern Scottish “pannels” were women, where the ratio stood at forty-eight males to ten females. This was not dissimilar to the sex-ratio of persons whose mental faculties were examined at the contemporary Scottish civil courts, where around forty-four male subjects appeared for every ten females.<sup>31</sup> Informative analysis can be offered, despite this low sample-base of women.

Records do not reveal the social and economic standing of around one-third of the British women who entered defences of insanity or idiocy. Where data can be retrieved, the vast majority of female insanity and idiocy defences involved women from poor, labouring households or who were servants. All but two of the women who pled fatuity or furiosity in southern Scotland were of impoverished backgrounds. To take one example, Susan Tinny had been dismissed from service “having quarrelled with her master”, Andrew McDowal.<sup>32</sup> Depositions reveal that Tinny remained unemployed and in a dire state of poverty, having “no Clothes of any consequence to spare, as her clothes had been arrested for Debt”. These criminal court records reveal priceless accounts of the experiences and perceptions

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<sup>30</sup> The sex-ratio for litigants at England’s civil courts between the 15<sup>th</sup> and 17<sup>th</sup> Centuries stood at around 5 males to 1 female, Neugebauer “Mental Handicap in Medieval and Early Modern England: Criteria, Measurement and Care”, in Bartlett and Wright (eds.), Outside the Walls of the Asylum – The History of Care in the Community, 1750-2000, (1999), p.27.

<sup>31</sup> Houston Madness p.124.

<sup>32</sup> AD 14/15/41.

of abnormality amongst lower-order females. On the other hand, these records reveal less about the experiences of higher status women.

The occupation or social standing of males could not be deduced in around one-fifth of all the cases studied. Where vocation and status were recorded, the majority of the males whose mental soundness was questioned also belonged to the impoverished, landless orders of society. Low-status occupations such as labourers, miners and journeymen predominated. In contrast to the women studied, one-quarter of males owned land and could be identified as belonging to either the wealthier "middling sorts" or the "elites" of society. Thus, provincial British cases included wealthy landowners such as William Douglas of Luce and Charles Jackson of Carleton who pled insanity.<sup>33</sup> Prisoners appeared such as the merchant, John Fairbairn, and the surgeon, James Towers, who were socially superior to the landless poor and subordinate to local lairds or gentry.<sup>34</sup> It was not just low status males who were formally prosecuted at the provincial criminal courts between 1660 and 1829.

British insanity and idiocy defences involved male subjects most frequently. This finding is significant because, conventionally, males were afforded greater legal, social and economic statuses than females. A verdict of mental incompetence therefore removed such antecedent distinctions from male prisoners.<sup>35</sup> Female mental incompetence was less likely to be established formally and publicly by

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<sup>33</sup> JC 12/22. ASSI 42/1 ff163b.

<sup>34</sup> JC 12/9. ASSI 41/12.

<sup>35</sup> Houston *Madness* p.125.

legal processes.<sup>36</sup> In the context of criminal hearings, it seems probable that the legal and social principles that subordinated women within society also sheltered them from prosecution and subsequent debates concerning their mental fitness. Women could thus avoid the social and legal corollaries which accompanied verdicts of insanity or idiocy, such as the stigma which was attached to mental infirmity or the prospect of indefinite incarceration on such grounds.

Victims and prosecuting officials could decide not to prosecute deranged persons. Thus, the offender's unsound mental state could inform pre-trial discretionary mitigation of both males and females in Britain.<sup>37</sup> In 1810, William Masterman was apprehended for "shooting and wounding" a corporal of the Suffolk militia, who was billeted in Carlisle.<sup>38</sup> Newspapers reported that the prosecution against Masterman was dropped before trial "on account of insanity". Six years later, Elizabeth Ward was found guilty of poisoning her sister at the Yorkshire Assizes. Petitions for Ward's pardon, grounded upon her "weak-mindedness", were entered subsequently.<sup>39</sup> It was noted amongst these pardoning-papers that "about a fortnight" before Elizabeth Ward had poisoned her sister (unwittingly), Elizabeth had stolen "a box of ribbands" from "the shop of one Mr. Effingham at Rothwell". Elizabeth then proceeded to distribute "the greater part of these ribbands on the same day and within twenty yards of the shop ... to women and children gratis".<sup>40</sup>

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<sup>36</sup> Of course, female insanity and idiocy could be announced by other means, such as by admission to madhouses or asylums.

<sup>37</sup> See King *Crime* for a recent investigation of pre-trial discretion in England regarding (sane) offenders against property.

<sup>38</sup> *Carlisle Journal*

<sup>39</sup> ASSI 41/12 and 45/49. *York Herald* July 27<sup>th</sup> and September 7<sup>th</sup> 1816. HO 13/29 and 47/55.

<sup>40</sup> HO 47/55/109-109, Viscount Lascelles to Lord Sidmouth, 31<sup>st</sup> August 1816.

Ward's activities signalled her imbecility. Elizabeth's distribution of the "ribbands" so close to the shop indicated that she did not understand that she had committed a crime, whilst her dispersal of the goods for free suggested that she had no comprehension of their financial worth. Ward's mental condition informed Mr. Effingham's discretionary decision not to prosecute, although Effingham's amicability was also influenced by Ward's impoverished father, who agreed to pay for the pilfered goods. Victims may have shown such discretion less readily towards poor prisoners who were unable to rely upon friends and family to provide suitable compensation.

Jurisdiction	Male		Female	
	No. of prisoners	% successful	No. of prisoners	% successful
Northern Assizes	81	79	23	69.6
Southern Justiciary Court	29	69	6	66.7

*Table 4.5. Proportion of defences where the prisoner's mental debility was proven successfully, expressed as a percentage 1660-1829.*

Women were not more successful than men in proving that they suffered from debilitating mental conditions during criminal trials (Table 4.5). Amongst the small southern Scottish sample, around two-thirds of both male and female fatuity and furiosity defences were proven at court. In northern England, a greater proportion of

male prisoners were acquitted than females during the long eighteenth century. If contemporaries did regard women to be more susceptible to mental infirmity, then such preconceptions were not reflected by the outcome of provincial insanity and idiocy defences. Eigen reached a similar conclusion in his study of gender and insanity defences at the Old Bailey, finding generally that acquittal-rates were unaffected by the prisoner's gender.<sup>41</sup>

In her study of contemporary literature, Elaine Showalter suggested that there was an explicit relationship between females and the transient condition of insanity.<sup>42</sup> By contrast, insanity was neither experienced nor perceived to be a "female malady" in Britain's criminal courts. Amongst *non compotes* who were insane, rather than idiotic, females were outnumbered by males at both the Northern Assizes and in southern Scotland (Table 4.6). Nor were women more liable to be acquitted when pleading insanity, as the success-rates for insanity alone followed the general patterns at the provincial criminal courts (Table 4.5).

Jurisdiction:	Male : Female
Northern Assizes	4.54 : 1
Southern Justiciary circuit	3 : 1

Table 4.6. Ratio of prisoners pleading insanity (not idiocy) in northern England and southern Scotland, 1660-1829.

<sup>41</sup> Eigen "Did gender matter?" pp.418-419.

<sup>42</sup> Showalter *Female Malady* pp.3-4.

A minority of the British prisoners who were investigated were found to be idiotic, as opposed to insane. A mere ten-percent of northern Assizes *non compotes* were considered to be idiotic or imbecilic, whereas over one-third of the southern Scottish prisoners studied were either fatuous or “weak-minded”. A larger proportion of Scottish defendants were proven to suffer from idiocy because of the “Rule of Proportions”, which stated that a partially debilitating form of imbecility could be presented as a sound legal defence in mitigation of sentence.

Overall, the lower proportion of “imbecility” defences may indicate that fewer British criminals suffered from idiocy than insanity, but it could also reflect contemporary ideas that idiocy was a less threatening (if incurable) form of mental affliction than insanity.<sup>43</sup> The behaviour of idiots was understood to be more predictable than manic forms of insanity. Imbecilic persons were also perceived to be totally incapable of forming criminal intent or planning crimes, but were susceptible to being duped into offending by nefarious crooks. This may suggest that persons afflicted by idiocy may have offended less frequently than insane persons, or that greater discretion was shown towards idiots who committed crimes.

Peter Rushton has found that idiocy more regularly afflicted males than females, at a ratio of three-to-one, within north-eastern English Quarter Session records.<sup>44</sup> The sex-ratio of idiocy defences at the Northern Assizes was more evenly balanced,

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<sup>43</sup> Andrews “Idiocy ... part I” p.66.

<sup>44</sup> Rushton “Idiocy” p.42.

at five males per three females, although more male than female prisoners suffered from idiocy at the Northern Assizes (Table 4.7). A greater proportion of women prisoners were afflicted by imbecility (Table 4.8). Of the northern English females whose mental faculties were examined in court, just over one-fifth of them were deemed to be idiotic or weak-minded, which contrasted with a mere five-percent of northern English males. This could reflect contemporary archetypes that women were more prone to being weak-minded or mentally deficient than males.<sup>45</sup>

Jurisdiction:	Male : Female
Northern Assizes	5 : 3
Southern Justiciary circuit	5 : 1

*Table 4.7. Ratio of prisoners pleading idiocy (not insanity) in northern England and southern Scotland, 1660-1829.*

On Scotland's southern circuit, male outnumbered female fatuity by a ratio of five-to-one (Table 4.7), including cases of imbecility or "weak-mindedness" which were pled in mitigation of punishment. The subjects of Scottish civil court "brieves" of fatuity were predominantly male, at a ratio of just over four men per woman assessed.<sup>46</sup> The proportion of southern Scottish males and females who were considered to be imbecilic or else "weak-minded" was very similar, however, accounting for about one-third of the cases for both sexes (Table 4.8). So, in

<sup>45</sup> Andrews "Idiocy ... part I" pp.81-82.

<sup>46</sup> Houston *Madness* pp.124-125. The sex-ratio amongst brieves of fatuity stood at 4.09:1.

contrast to northern England, idiotic forms of mental deficiency were not more likely to be associated with women than men during southern Scottish criminal defences.

Jurisdiction	Male		Female	
	No. of prisoners	% of prisoners	No. of prisoners	% of prisoners
Northern Assizes	6	7.4	5	21.7
Southern Justiciary Court	11	37.9	4	66.7

*Table 4.8. Proportion of northern English and southern Scottish male and female prisoners whose defence rested upon idiocy (as opposed to insanity), 1660-1829.*

The admission of mentally distressed persons to private madhouses and public asylums could depend upon their marital status in Britain and France.<sup>47</sup> The offender's marital status could also affect whether prisoners were prosecuted or their mental states were evaluated formally at court. The six Scottish women whose mental condition was evaluated at court were single, although three were widowed. Just over two-thirds of the English women studied were either "singlewomen" or widows. Marriage may well have shielded mentally disturbed women from formal prosecution, with husbands or household accepting responsibility for their

<sup>47</sup> Digby *Madness, Morality* p.175. Houston *Madness* pp.144-151 and "Madness and Gender" pp.314-317. Ripa *Women and Madness* p.55, although Ripa focuses upon the female experience of admission.

behaviour.<sup>48</sup> Single females lacked such shelter, especially those who had no living kin, or whose relatives refused obligations to supervise them. The widow Susan Tinny was one such unfortunate woman. Susan's dismissal from service was compounded by her father's refusal to accept his troublesome, mentally disturbed daughter back into his household.<sup>49</sup> Michael Tinny had ejected Susan from his house and refused to take responsibility for his daughter's criminal actions. Susan lacked kin who were willing or able to take responsibility for her. Such mentally troubled persons were perhaps at most risk of being prosecuted formally for their crimes.

This pattern was also true of males, especially those who were youthful, impoverished and unmarried. Where marital status is recorded, two-fifths of Scottish and one-third of English male prisoners were unmarried, excluding widowers. Just like women, socially isolated males, who lacked kin or whose families refused to take responsibility for them, were particularly exposed to formal prosecutions. In 1786, fourteen-year-old Samuel Pirrie, "Post-boy or Rider of the Mail betwixt Ballantrae and Stranraer", was prosecuted for the theft of moneys from the mail packet.<sup>50</sup> The jury deemed that Pirrie had not developed fully his use of reason and had been duped into committing the crime.<sup>51</sup> Samuel's father and his step-mother were suspected of instigating the offence, but both denied any involvement and they refused to be obliged formally for their son's actions. Just

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<sup>48</sup> Houston *Madness* p.151.

<sup>49</sup> AD 14/15/21.

<sup>50</sup> JC 12/19 and 26/240.

<sup>51</sup> *Idem*. *Scots Magazine* 48 (April 1787) p.206.

like women of a similarly subordinate social and economic station, the impoverished Samuel Pirrie was isolated and especially vulnerable to prosecution. Samuel was found guilty and sentenced to be hung, although the jury recommended mercy on account of his weak-mindedness. Accordingly, Pirrie's sentence was reduced to Transportation for seven years.

Offenders who were unfamiliar to the communities where they committed their crimes, such as foreigners and "vagrants", were also detached socially and hence prone to prosecution.<sup>52</sup> The lay community continued to be integral to the identification of mental afflictions. Purportedly mad or idiotic strangers were disadvantaged because local communities lacked the long term knowledge of their character, actions, appearance and speech which informed contemporary assessments of mental conditions. Jean Stowrie who "lived on the Country by sorning, oppression and begging" for "several years", was prosecuted in 1725 at the Jedburgh Assizes for child-murder.<sup>53</sup> The local population were suspicious of vagabonds and supported the prosecution against the unfamiliar Stowrie, whose insanity defence collapsed because she could not produce any "friends" who might have spoken to her mental condition. Likewise, when the Dutch smuggler James Rice murdered his friend and shipmate, Thomas Wastdell, at Staiths in 1775, he killed the only individual within the community who had a long term and intimate knowledge of him and his state of mind. Rice was truly a "foreigner" in Staiths.<sup>54</sup> Only a letter from an old employer in Holland, Helleman Van Eyeckelenberg,

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<sup>52</sup> King *Crime* p.28 and p.32. Shoemaker "Quarter Sessions records" p.153.

<sup>53</sup> JC 12/4.

<sup>54</sup> The term "forraigner" could be used to describe persons outwith the immediate locality.

indicated that Rice had a history of behaving “foolishly” like “one out of his Senses”.<sup>55</sup> Rice was vulnerable to prosecution and his defence of insanity failed in 1777 because he lacked friends and family to prove his history of mental debilitation and suffering.

### *Conclusions*

Mental maladies were experienced predominantly by men amongst the provincial criminal cases that were investigated. This adds further weight to the argument that insanity was not a “female malady” during the long eighteenth century, at least within the context of the Britain’s civil and criminal arenas.<sup>56</sup> The incidence of these types of defence follows the broader patterns of prosecution, whereby males predominated amongst the ranks of British prisoners between 1660 and 1829. Nor were women more successful at proving their mental incompetence at court. Notions that females were more susceptible to mental distress were not reflected by the incidence or success-rates of British insanity and idiocy defences.

In England, few prisoners were found to be idiotic. In Scotland, the “Rule of Proportions” allowed for partial degrees of fatuity (“weak-mindedness”) to be entered as a defence in mitigation of sentence. Upwards of one-third of southern Scottish defences therefore rested upon the prisoner’s imbecility rather than madness. At the Northern Assizes, a similarly small number of males and females

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<sup>55</sup> ASSI 45/32/2 no.140.

<sup>56</sup> Showalter *Female Malady* pp.3-4.

suffered from idiocy, but a greater proportion of female prisoners were understood to be thus afflicted. This reflected broader perceptions that females were more prone to being "weak-minded" than males. No such pattern emerges from the small southern Scottish sample, where around one-third of both males and females were found to be idiotic or imbecilic rather than insane. Future research is required in order to establish whether imbecility was less associated with females in Scottish society.

The occurrence and success-rates of insanity and idiocy defences cannot be explained by the prisoner's gender alone. Single persons were most vulnerable to being prosecuted for their crimes, even if they were considered to be mentally disturbed. These persons were isolated socially and economically, whilst they also lacked kin, family and household who were willing and able to take responsibility for them and their mental debilities. Such isolation left mentally disturbed persons most vulnerable to formal prosecution at law.

The vast majority of insanity and idiocy defences involved persons of low social and economic standing. Criminal prosecutions were not merely brought against persons hailing from the lower-orders, however. The local middling sorts and elites of British society could be prosecuted and found insane, which indicates that the criminal law was not merely wielded as a tool of social control by persons of high standing. On a different tack, this study also illustrates that persons from all social strata could suffer from mental afflictions.

At the Northern Assizes, the prisoner's social and economic standing could affect the success of their insanity or idiocy defence, although high-station persons were not guaranteed to be acquitted. Nor should it be assumed that elite prisoners argued their insanity fraudulently, but nevertheless effectively. Criminal trials were public events which drew upon broadly shared concepts of justice and proof as a means of legitimisation. No matter what a prisoner's social status, the defence had to be proven at law in order to be successful. Persons of high standing did not break evidential rules and employ insanity defences to avoid being found guilty. On the contrary, in each of the cases examined, strong proof of insanity was provided. Wealthy, high status prisoners may have been better able to produce persuasive evidence of their insanity or idiocy at court. Subsequent chapters will therefore evaluate what contemporaries considered to be convincing and credible evidence of mental afflictions. This jurisprudential study will be complemented by an investigation of how the various courtroom players interacted during the criminal theatre, within the context of defences of insanity and idiocy.

## 5.

***“He appeared to me, as if he was not capable of himself”.***  
***British lay testimony, 1660-1829***

Witness statements were imparted to the courtroom in most British insanity and idiocy defences between 1660 and 1829. Only five-percent of English and ten-percent of Scottish cases which were studied lacked any formal, oral, contribution from witnesses at court upon the day of the prisoner's hearing. In a small proportion of cases, only the defendant, bench or legally trained representatives spoke during a criminal trial, but in most instances, the prisoner's mental condition was authenticated by witnesses who presented *viva voce* testimony at court.

At court, witnesses were adduced to provide information pertaining to the crime, character and sanity of prisoners.<sup>1</sup> This was important because British jurors could lack first-hand knowledge of the crime or litigants, especially by the early nineteenth century.<sup>2</sup> Witnesses' recollections informed decision-making processes at court. Pre-trial statements could also be significant to the initiation and course of insanity and idiocy defences, for this was where observers might first recount how a person “fell into great Distractions” or possessed “a most wild and horrible look”.<sup>3</sup> Provincial criminal cases want courtroom narratives before the 1790s, so pre-trial declarations provide the only indication of the evidence that established the

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<sup>1</sup> Beattie “Scales” p.232. Crawford “Emergence” p.28. *Eigen Witnessing* pp.103-107. Landsman “Rise” p.514. Langbein “Trial Jury” pp.30-31. J.S Cockburn “Early modern assize records as historical evidence” *Journal of the Society of Archivists*, (1975) pp.215-231.

<sup>2</sup> Langbein “Law of Evidence” pp.1170-1171. J.M. Mitnick “From Neighbour-Witness to Judge of Proofs: The Transformation of the English Civil Juror”, *AJLH*, 32, 3, (1988), p.1202.

<sup>3</sup> ASSI 45/22/3 no.22. ASSI 45/43.

prisoner's criminal responsibility. In the few cases when no testimony was heard at court, pre-trial statements could also inform the assessment of the prisoner's mental capacities.

Scholars have debated whether the assessment of mental conditions was dominated by "lay" or "medical" persons, both within and without the courtroom. "Anti-psychiatrist" methodologies, most notably expressed by Thomas Szasz and Andrew Scull, have suggested that the "medical" and "psychiatric" professions were involved significantly in the identification, incarceration and supervision of persons who suffered from mental maladies.<sup>4</sup> Szasz argued that mental affliction was an illusory concept which was created and promulgated by such professionals. Such interpretations have been challenged, not least within the context of legal hearings.<sup>5</sup> The subsequent chapters consider the quantitative and qualitative impact of "lay" and "medical" testimony during northern English and southern Scottish criminal defences of insanity and idiocy. This thesis establishes what sort of witness and testimony authenticated mental afflictions.

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<sup>4</sup> Szasz Manufacture p.15 and Myth passim. See also Dörner Madmen and the Bourgeoisie. A similar thesis is presented in Foucault Madness and Civilisation p.23-28 and Scull Museums of Madness pp.14 and 124-129. For a critical analysis of these theories, see Vatz and Weinburg "Rhetorical Paradigm". Crammer "where Scull is wrong". Houston Madness. "Madness and Gender" and "Class, Gender".

<sup>5</sup> See for instance, MacDonald Mystical Bedlam and Eigen Witnessing in an English context. For Scotland, see M.A. Crowther and B. White Upon Soul and Conscience. The medical expert and crime. 150 years of forensic medicine in Glasgow, (1988). Houston Madness and "Courts".

Recent historiography has stressed that lay persons remained fundamental to the validation of mental afflictions within Britain's legal processes.<sup>6</sup> Lay witnesses continued to identify and endorse madness and imbecility at England's Old Bailey and Scotland's High Court of Justiciary during the eighteenth and early nineteenth centuries. Lay persons could also dominate qualitatively and quantitatively the assessment of prisoners' mental conditions on the northern English and southern Scottish circuits studied. The impact of lay testimony during provincial trials is compared with published studies. There were some important, correlative patterns to the appearance of lay testifiers in England and Scotland, influenced by broad perceptions of the value of lay testimony.

Late seventeenth and early eighteenth century court processes are examined to illustrate how evidential standards evolved in Britain between 1660 and 1829, driven by legal professionals.<sup>7</sup> Evidential modifications affected the type of witness and testimony which was sought out at law, as well as the merit accorded to lay statements. "Expert" testimony (such as that provided by doctors) became valued in certain situations at court, whilst the efficacy of second-hand, "hearsay" evidence was eroded. These, and other, key theoretical and practical changes are considered during this chapter to establish what sort of lay testimony was deemed to be

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<sup>6</sup> MacDonald Mystical Bedlam. Eigen Witnessing and "Intentionality". Houston Madness, "Madness and Gender" and "Courts".

<sup>7</sup> For England: Beattie "Scales" pp.232-233., Crawford "Legalizing" pp.93-96 and 114-115. Eigen "Intentionality" pp.34-49. Jackson "Understandings of imbecility" pp.31-363. Landsman "Rise" *passim*. Langbein "Law of Evidence" *passim*. Shapin Truth pp.42-60. Shapiro "Concept Fact" pp.2-26. Shapiro Culture of Fact pp.8-32. Weiner "Judges V. Jurors" pp.467-506. For Scotland: Crowther and White Soul and Conscience *passim*. Crowther "Crime" pp.225-236. Houston "Professions" pp.441-466. Important information may be gleaned from "An Introduction to Scottish Legal History" Stair Society (1958).

persuasive during insanity and idiocy defences, and why. It is explained how adaptations in testimonial values enhanced the courtroom impact of two specific types of witness: gaolers and legally trained persons.

The witness' social characteristics affected perceptions of the value of their testimony. The social station of British provincial witnesses is presented, allowing broader historical debates regarding crime and the criminal law to be engaged. Older histories emphasised how the criminal law could be employed by the elites of society to maintain their hegemony.<sup>8</sup> Current studies have provided a more sophisticated analysis, arguing that the lower and middling sorts of society could be heavily involved in the prosecution of crime, for instance, suggesting that such people perceived this type of formal, legal redress to be justified.<sup>9</sup> Persons below the highest ranks of society could obtain to distinct concepts of justice and criminality, but they could also legitimise the criminal law. The involvement of the lower orders of society as witnesses meant that they could impart their understandings of criminal responsibility and mental afflictions, thereby informing the assessment of the prisoner's mental condition.

A deponent's gender might affect the likelihood of their providing formal, oral evidence either before trial or at court itself. The qualitative value of a lay person's

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<sup>8</sup> Hay "Property, authority" pp.26-48. For an overview of this historiography see Innes and Styles "Crime wave".

<sup>9</sup> See, for instance, King Crime and "Punishing Assault".

testimony could also be affected by their gender.<sup>10</sup> It is investigated whether British lay women played a restricted role in the identification of mental afflictions between 1660 and 1829.<sup>11</sup> The participation of male and female testimony during provincial insanity defences is compared, alongside perceptions of their testimony's worth.

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<sup>10</sup> Houston Madness pp.45-47 and 232-3. Houston "Madness and Gender" pp.309-326. Foyster "Limits" pp.39-45. Eigen "Did Gender Matter?" pp.409-419.

<sup>11</sup> Chesler Women and Madness. See also Tomes "Feminist histories" pp.348-383 for a critique of such an approach.

*Defining lay witnesses and quantitative analysis*

For the purposes of this thesis, "lay witnesses" are identified as persons who provided evidence, but lacked formal medical or legal training and were not occupationally engaged in either of these professions.<sup>12</sup> Testimony from "medical" witnesses, including asylum keepers, is considered separately. Gaolers and legally trained attestants could be classed legitimately as "expert" witnesses, owing to the type of testimony which they imparted, known as "opinion". These types of deponent are here compared with lay persons, because they lacked formal medical training and qualifications.

Historians have compartmentalised witnesses into categories of "lay", "medical" and "legal" persons for ease of reference. However, it must be recognised that boundaries between these categories remained fluid during the long eighteenth century. The boundary between "professional" and "laity" became more distinct during the long eighteenth century, but these evolving professions did not monopolise the expertise, experience and understanding of medicine and the law.<sup>13</sup> Lay persons could possess a broad familiarity (if a different interpretation) of both medical and legal knowledge.<sup>14</sup>

Between 1660 and 1829, most testimonies were produced by "lay" persons during English and Scottish insanity and idiocy defences. Joel Eigen found that

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<sup>12</sup> Houston "Professions" p.442.

<sup>13</sup> Porter "Laymen, Doctors" pp.290-304. Prest "Lay Legal Knowledge" p.311.

<sup>14</sup> *Idem.*

around seventy-percent of the narratives concerning Old Bailey insanity trials involved lay testimony between 1760 and 1843, with only prisoners or medical witnesses speaking in the remainder.<sup>15</sup> Similarly, the majority of testimonies were imparted by lay persons during criminal cases at Scotland's High Court in Edinburgh between 1739 and 1815.<sup>16</sup>

In global terms, lay witnesses outnumbered medical and legal testifiers in provincial England and Scotland. The majority of provincial pre-trial depositions were produced by lay persons. Depositions are lacking for some trials, particularly in the seventeenth and early eighteenth centuries.<sup>17</sup> In England, lay persons emitted just under four-fifths of the depositions that survive for insanity and idiocy defences between 1660 and 1830 (table 5.1). The greater involvement of lawyers within Scotland's procedures ensured that greater numbers of witnesses were interviewed formally per case before the trials began. In southern Scotland, just over three-quarters of pre-trial statements were produced by lay persons.

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<sup>15</sup> Eigen *Witnessing* p.83.

<sup>16</sup> Houston *Madness* p.p.46-48 and "Courts, Doctors" pp.341-345.

<sup>17</sup> Depositions relating to nineteenth century trials at Lancaster have been water-damaged heavily. Some were too fragile to permit investigation. This sample therefore includes depositions for ten of Lancaster's insanity and idiocy defences between 1750 and 1829.

	Depositions / Precognitions		
	Total number of pre-trial statements	Number provided by lay persons	Proportion provided by lay persons
Northern England	454	360	79.7%
Southern Scotland	504	387	76.8%

*Table 5.1. Number and proportion of pre-trial witness statements produced by lay persons during insanity and idiocy defences, northern England and southern Scotland, 1660-1829.*

In most cases, the laity also provided the vast majority of testimonies on the day of the trial too. The Scottish sources provide reliable indications of the testimony that was imparted during Justiciary Court trials. Early eighteenth century Scottish minute books record the names and designations of witnesses, alongside the content of testimonies that were adduced at court. Details of circuit court hearings were also recorded in the local and national presses by the late eighteenth century. Using these sources combined, around three-quarters of courtroom testimonies were provided by lay persons during southern Scottish fatuity and furiosity defences (Table 5.2). This corresponds broadly with findings for the High Court at Edinburgh and England's Old Bailey.

	Courtroom testimonies		
	Total number of testimonies discovered	Number provided by lay persons	Proportion provided by lay persons
Northern England	251	189	75.2%
Southern Scotland	248	183	73.8%

*Table 5.2. Number and proportion of courtroom testimonies produced by lay persons during insanity and idiocy defences, northern England and southern Scotland, 1660-1829.*

Northern English sources are more problematic, with comprehensive narratives only being available from the 1790s, with the exception of two trials belonging to the 1770s.<sup>18</sup> 251 witness statements survive from the forty-nine northern English courtroom narratives that were investigated for the period 1776-1829. Lay persons provided 191 (just over three-quarters) of these testimonies. Only four of these printed reports lacked lay testimony concerning the prisoner's state of mind. Amongst trials where narratives were recorded, at least, similarly high proportions of testimonies were produced by lay persons in provincial England and Scotland. The shortage of comprehensive trial narratives for northern English hearings restricts quantitative comparisons with Joel Eigen's findings for the Old Bailey, particularly for the period before 1800. Eigen based his analysis upon a reliable and consecutive run of published accounts of Old Bailey criminal hearings, something

<sup>18</sup> *Trials...* (1775-7), hearings of James Rice (1776-1777) and John Sutcliffe (1776).

which the Northern Assizes lacked until the nineteenth century.<sup>19</sup> Nevertheless, some broad comparisons may be offered. It is evident that the majority of courtroom testimonies were provided by lay persons in both the provinces and the metropolis. Mental afflictions continued to be authenticated regularly by lay attestants through to 1829 in both England and Scotland.

The identities of southern Scottish testifiers can be gathered reliably through court minutes and, from the 1780s, printed narratives. Most testimonies were provided by lay persons in Scotland, but lay witnesses were absent from nearly one-third of the southern circuit cases studied. This contrasted with northern England, where lay persons were involved in around ninety-one-percent of cases where a detailed narrative exists, although firm comparisons are restricted by the reliance upon dissimilar types of source-materials and relatively low sample-base. The lack of lay testimony during some Scottish trials can be explained by Justiciary Court procedures. Following the Hunter "test-case" at the High Court in 1801, medical witnesses were promoted to the role of requisite advisors to the bench where the prisoner's mental capacity to stand trial was evaluated during Justiciary Court trials.<sup>20</sup> In practice, gaolers were also used to inform the judge's decision to postpone hearings, but evidence from the wider "lay" community ceased to be a prerequisite to the court's decision after 1801. Lay testimony could therefore be excluded from nineteenth century Scottish defences "in-bar-of-trial".

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<sup>19</sup> Langbein "Historical Foundations" *passim*.

<sup>20</sup> See pp.253-261.

Witnesses could also be absent from Justiciary Court hearings where prisoners confessed to their crimes. In such instances, the “panel” could profess guilt (often to a lesser offence than was charged) and thereby earn a mitigation of sentence.<sup>21</sup> This procedure allowed Scottish “panels” who suffered from partially debilitating mental afflictions to confess and benefit from ameliorated sentences. Such “plea-bargaining” contrasted with English Assize procedure, where “guilty” pleas were dissuaded actively.<sup>22</sup> Scotland’s public prosecutor could rest his proof with the confession, meaning that the court could pass sentence without *viva voce* testimony being adduced at court. A Scottish prisoner’s insanity or imbecility could therefore be assessed without any testimony being imparted at court.

This procedure occurred at Jedburgh in 1752, when James Blaikie petitioned to be banished after pleading guilty to house-breaking and theft. The prosecuting Advocate-Depute agreed to the petition, stating that Blaikie was “a poor creature of a very low degree of Understanding and that he was Instigate[d] to the committing of the Crimes whereof he is accused by another person.”<sup>23</sup> Imbecilic prisoners were incapable of planning crimes rationally, but it was also understood that their weak-mindedness rendered them vulnerable to being induced to commit transgressions.<sup>24</sup> Blaikie’s weak-mindedness and his mitigated sentence were decided upon without any courtroom testimony being delivered.

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<sup>21</sup> A.R. Ekirch, Bound For America. The Transportation of British Convicts to the Colonies, 1718-1775, (1987), p.24.

<sup>22</sup> Langbein “Plea Bargaining” p.261.

<sup>23</sup> JC 12/7, Jedburgh, September 1752.

<sup>24</sup> Andrews “Idiocy ... part I” p.66.

The Advocate-Depute's opinion of Blaikie's state of mind was informed by pre-trial examinations of witnesses. Decisions to accept plea bargains were based upon formal pre-trial precognitions (depositions), which included statements from lay persons. Lay testifiers could therefore influence the process of plea-bargaining, even if they did not appear subsequently at court. James Blaikie's weak-mindedness was emphasised by Mary Sclater, the very person suspected of instigating his offence. Sclater described Blaikie as "a deformed wretch and a fool" in her precognition, providing a rare instance where a deponent associated mental and physical abnormality.<sup>25</sup> Lay witnesses could inform assessments of Scottish prisoners' mental conditions, even when they were not adduced in court.

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<sup>25</sup> JC 26/147.

*Developments in the law of evidence*

Lay witnesses may have been numerically dominant at court or in a pre-trial capacity, but this did not guarantee that their testimony was authoritative. Evidential values could dictate the qualitative impact of lay witnesses and their testimony. The rules of evidence were broadly similar and evolved along analogous paths within the English and Scottish legal traditions. Comparable notions of the acceptability of evidence and what was deemed to be persuasive testimony existed. Both codes relied upon the “common-law” in this respect and such principles were reinforced by reference to Continental theorists.<sup>26</sup> The works of jurists and legal professionals which directly focused upon the “law of evidence” can guide this investigation, but must be placed also in the context of courtroom procedure.

Potential witnesses could be disqualified from bearing evidence, or their statements disregarded. England’s legal commentator, Geoffrey Gilbert, stated that “Deprivation or Defect of Reason” rendered a witness incompetent.<sup>27</sup> The mental condition of British witnesses, as well as of prisoners or victims, could be considered in court. Thomas Young, a “Labourer in Stevenson”, was barred from giving evidence at Ayr in 1813 because he was “so stupid [imbecilic] that he could not take the oath” required of witnesses.<sup>28</sup> The evidence of youths could be defective because their mental faculties had not matured. In 1773, two ten-year-old

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<sup>26</sup> Gordon “Roman law in England and Scotland” pp.135-143. Crawford “Emergence” pp.1-9. Shapiro “Concept Fact” pp.2-26. Shapiro *Culture of Fact* pp.2-42.

<sup>27</sup> Gilbert *Evidence* (4<sup>th</sup> ed. 1791-6) p.220.

<sup>28</sup> *Ayr Advertiser* September 16<sup>th</sup> 1813.

boys, called James Shilton and Donald McKie, claimed to have seen John McKnight arguing with and beating his wife, Sarah Daffady, with a walking stick.<sup>29</sup> Sarah's cadaver was later discovered, an inquest into her death was undertaken and McKnight was charged with murder. The public prosecutor's case rested upon the evidence of these two boys, which was uncorroborated by any adults. The adult community claimed that Sarah's death was explained by her history of sudden and violent "fits", which "deprived her of all sense and motion", not her husband's physical abuse. The bench allowed the jury to decide "how much credit" ought to be attached to the boys' testimony. McKnight's acquittal indicates that the jury were persuaded by the adults' testimony, rather than uncorroborated statements from the boys. These Scottish examples demonstrate that the witness' mental state could affect the value which was attached to their declarations, or even preclude them bearing testimony.

British testifiers delivered statements under oath during the eighteenth and nineteenth centuries. The pledge operated as a basic safeguard against fabricated evidence being presented at court. Before 1702 and in contrast to Scotland, however, English defence witnesses did take such oaths.<sup>30</sup> Seventeenth century defence testimony was therefore regarded in lower esteem than prosecution evidence.<sup>31</sup> In England, Stephan Landsman has suggested that the efficacy of

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<sup>29</sup> JC 12/14 and 26/202. Scottish women did not always adopt the surname of their spouses during the long eighteenth century.

<sup>30</sup> Baker *Introduction* p.583.

<sup>31</sup> Langbein "Shaping" pp.293-95.

statements delivered under oath eroded as “adversarial” practices developed.<sup>32</sup> By the late eighteenth century, it was recognised that sworn statements might be misleading and could be challenged in court.<sup>33</sup>

Sound proof, rather than absolute truth, was sought out during British criminal cases.<sup>34</sup> Criminal hearings could resemble character tribunals, where trial and sentencing was directed by the prisoner’s disposition. From the early eighteenth century, some English trials featured adversarial contests between conflicting factual statements.<sup>35</sup> Adversarial disputations of proof also occurred at Scotland’s Justiciary Court from the late seventeenth century onwards, although some aspects of these hearings also resembled Continental, Inquisitorial models of practice.<sup>36</sup> Adversarial processes propagated the concept of “proof beyond a reasonable doubt”.<sup>37</sup> This notion of proof had an important, but very different, bearing upon a trial when English and Scottish insanity and idiocy defences are compared. In Scotland, the prosecution were expected to prove that an act had been committed whilst the prisoner had been sane.<sup>38</sup> In contrast, the onus of proof was placed upon the criminal defence in England, because prisoners were “presumed to be of perfect mind and memory”.<sup>39</sup> English criminal defences were required to prove that transgressors were mentally imbalanced in court, or had been so when committing their crimes.

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<sup>32</sup> Landsman “Rise” p.597.

<sup>33</sup> Beattie “Scales” p.235.

<sup>34</sup> Shapin Truth pp. 42-66. Shapiro “Concept Fact” pp.2-26. Shapiro Culture of Fact, pp.2-32.

<sup>35</sup> Landsman “Rise” pp.400-402.

<sup>36</sup> Farmer “Criminal law” pp.33-38.

<sup>37</sup> Landsman “Rectitude” p.459.

<sup>38</sup> Mackenzie Matters Criminal (1678) p.58. Houston Madness pp.73-4.

<sup>39</sup> Brydall Non Compos Mentis (1700) p.66.

Different theoretical standards of proof existed in English and Scottish law. Persuasive evidence of guilt was required from at least two witnesses in Scotland, whilst a single testimony could condemn English prisoners.<sup>40</sup> In practice, the prisoner's mental state was rarely authenticated by the bare minimum of witnesses in either country. Multiple lay testimonies, which converged upon a communal identification of a person's mental condition, persisted to carry great authority during legal hearings.<sup>41</sup> Jurors found such consensus of evidence hard to ignore. In 1776, for instance, five neighbours and character-witnesses testified to John Sutcliffe's altered mental state. They converged upon John Sutcliffe's spiritual enthusiasm as both a cause and effect of his mental imbalance.<sup>42</sup> Sutcliffe had claimed to have spoken with both God and the Devil, whilst he had also described the murder of his wife and child as a "sacrifice to God, in return of a blessing". Sutcliffe had also woken his neighbours on the Sabbath, wearing "nothing on him but his shirt", proclaiming "I have found Jesus this morning". Testifiers noted that this religiosity marked a change in Sutcliffe's "behaviour and words". The onset of his insanity was connected to his recent attendance of the "methodist-meeting". Sutcliffe thereby conformed to stereotypical images that correlated evangelism (and particularly Methodism) with both public and mental disorder.<sup>43</sup> Such communal evidences were persuasive, for the jury acquitted Sutcliffe of murder on account of

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<sup>40</sup> Crowther and White "Medicine, Property" p.854. Crowther "Criminal record" p.83. Nelson Law of Evidence (1717) p.11. At least two witnesses were needed to prove treason.

<sup>41</sup> Houston Madness p.354.

<sup>42</sup> Trials ... Lammass Assizes (1776) pp.14-17.

<sup>43</sup> Hempton Religion pp.150-152. Andrews and Scull Undertaker pp.73-83. See also the Report of the Trial of Jonathan Martin (1829); Martin's religiosity and his association with Methodism were interpreted to have both informed and reflected his insanity.

his insanity. As Robert Houston as recently evinced for Scotland, the “prop” of shared lay or community judgement continued to be recognized as compelling evidence during English insanity and idiocy trials between 1660 and 1829.<sup>44</sup>

Lay witnesses could bolster their direct observation and interpretation of the prisoner’s mental condition by recounting the estimations of their neighbours, family and friends. In 1726, Mathew Dale was convinced that Richard Waddy had been insane when he attacked his mother and killed his father “with a piece of wood”.<sup>45</sup> Dale re-affirmed his judgment (and those of other witnesses) by reporting that the local community had “looked upon” Richard Waddy “to be out of order in his senses” for over a year. The reference to the community’s judgement legitimised Dale’s testimony and the jury’s verdict that Waddy had been insane.<sup>46</sup> Such evidence was accepted as a valid means of establishing whether the prisoner was responsible criminally. Allusions to community evaluations also served to reinforce and confirm the belief that Dale and other “sane” lay persons, including the jury, were able to distinguish between mentally sound and unsound behaviour.

Community assurances of a prisoner’s mental condition could be convincing, but it was also troublesome evidence. In theory, legal commentators suggested that lay persons were supposed to impart their own direct observations of a crime or the

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<sup>44</sup> Houston *Madness* p.354.

<sup>45</sup> ASSI 41/2 and 45/18/3 nos. 31-32C

<sup>46</sup> ASSI 41/2 (Yorkshire Assizes, 1726).

prisoner's character and mental state in court.<sup>47</sup> These first-hand experiences were presented as the "factual" evidence of a case. But when deponents related the comments, opinions and "facts" of another person or persons (which were outwith the testifier's own observation), this was "hearsay" testimony.<sup>48</sup> The acceptability and value of "hearsay" evidence were questioned from at least the early eighteenth century in Britain.<sup>49</sup> As Geoffrey Gilbert's Law of Evidence evinced, "The *Attestation* of the *Witness* must be to what he *knows*, and not that only which he has *heard*, for a *mere hearsay is no Evidence*".<sup>50</sup> Lay testimony could be unpersuasive if the attestants did not offer their own observations of the prisoner's speech, appearance and behaviour.

"Hearsay" might not form a credible proof by itself, but such evidence continued to be accepted inferior, corroboratory evidence.<sup>51</sup> A Moffat stocking-maker, Joseph Clark, stated in 1818 that it was "understood in the neighbourhood that John Halliday has been in an unsettled state of mind for above twelvemonth past".<sup>52</sup> Clark offered hearsay, but it was accepted and useful because it corroborated direct observations made by Clark, and other witnesses, that Halliday had been "in an unsettled state of mind for above twelvemonth past".<sup>53</sup> Hearsay was still admitted to verify direct evidential observations in both England and Scotland during the early nineteenth century.

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<sup>47</sup> Stephan Landsman has reflected upon how more suitable or persuasive evidence might be screened during the pre-trial phase and chosen for use in court. Landsman "Rise" p.593.

<sup>48</sup> Landsman "Rise" pp.545-6.

<sup>49</sup> Beattie "Scales" pp.232-3. Landsman "Rise" p.545. Langbein "Law of Evidence" pp.1175-6.

<sup>50</sup> Gilbert Evidence (4<sup>th</sup> ed. 1791-6) p.889. Emphasis in the original.

<sup>51</sup> *Ibid* p.891.

<sup>52</sup> AD 14/18/73.

<sup>53</sup> *Idem*.

The content of Joseph Clark's testimony would not have been alien to the Scottish courtroom during the reign of Queen Anne. It resembled evidence provided at Thomas Towart's trial in 1711, when John McKinlay revealed that the pannel "was considered by several of the neighbours as not very wise and distracted".<sup>54</sup> But different values were attached to such statements in the early eighteenth and early nineteenth centuries. In seventeenth and early eighteenth centuries, hearsay could be accepted as sufficient proof of a crime, or concerning a prisoner's state of mind, especially if "first-hand" evidence was lacking or not forthcoming.<sup>55</sup> Hearsay had not been eradicated from the British courtroom by 1829, but it was perceived to be less authoritative. Stricter "laws of evidence" dictated that direct observations of a person's state of mind were required from lay witnesses after the turn of the eighteenth century. Subsequent chapters will suggest that legally trained courtroom personnel (notably judges and counsel) made greater efforts to restrict the qualitative impact of "hearsay" testimony by the early nineteenth century.<sup>56</sup>

Distinctions between "lay" and "expert" testimony coalesced in Britain during the long eighteenth century.<sup>57</sup> Increasingly, lay persons were precluded from offering "opinion" or "expert" testimony. "Opinion" testimony was evidence provided by persons who owned specialist occupational experience or formal

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<sup>54</sup> JC 13/4, Ayr, May 1711.

<sup>55</sup> Landsman "Rise" pp.545-6.

<sup>56</sup> See pp.268-270 and 406-411.

<sup>57</sup> Eigen *Witnessing* pp.108-160. Ward "Observers" pp. 106-119. Houston "Courts" pp.339-354.

schooling, which distinguished them from lay persons.<sup>58</sup> Persons who were experienced or learned in identifying, caring or curing mental afflictions might be regarded as “expert” witnesses during insanity defences. “Expertise” was not restricted to medical professionals. Expert witnesses drew upon their general experiences and understandings regarding insanity and idiocy and applied them to the prisoner in court.<sup>59</sup> Gilbert’s Law of Evidence recognised that the line between “fact” and “opinion” could be thin, because testimony was based upon the “imperfections of Memory” which meant that lay witnesses were “apt to entertain opinions”.<sup>60</sup> This was especially true during insanity and idiocy defences, where witnesses were asked to interpret the prisoner’s mental state.

By the early nineteenth century, legal professionals made concerted efforts to ensure that lay witnesses did not impart opinion, as illustrated by the testimony of Alderman Smith Wilson at Appleby in 1822, during the trial of James Towers.<sup>61</sup> Wilson began by recounting direct observations of the prisoner’s distracted mental state. Towers was afflicted by a peculiar literary delusion, informed by Jonathan Swift’s Gulliver’s Travels.<sup>62</sup> Towers was convinced that “Lilliputians were puffing dust in his eyes”, that he could see them “running along the bell-wire” and was

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<sup>58</sup> Eigen Witnessing pp.110-115.

<sup>59</sup> *Idem*.

<sup>60</sup> Gilbert Law of Evidence (1796) p.6 and 301.

<sup>61</sup> Kendal Chronicle March 9<sup>th</sup> 1822. Lancaster Gazette March 16<sup>th</sup> 1822.

<sup>62</sup> Towers suffered from “delirium tremens”, brought on by excessive consumption of alcohol. John Monro’s 1760s case-notes noted a sufferer from “delirium tremens” who obtained to a similar delusion, also based upon Swift’s work (Andrews and Scull Customers and Patrons pp.60-62). According to specialist studies, Towers’ affliction matched the specific, as well as broad, characteristics of “delirium tremens”.

beset by imaginary “thieves, hobgoblins and blue devils”.<sup>63</sup> Towers’ failure to distinguish between reality and fantasy was indicative of mental impairment. Wilson’s testimony then lost focus as he stated “his own opinion” about Towers’ mental condition. Counsel and bench interrupted Wilson on three separate occasions, imploring the witness, “do give us the facts as they occurred, not your opinions”. Wilson persisted to offer his “opinion”, before the exasperated justice Holroyd declared, “I remarked to you before, sir, that long conversations with your neighbours could not be admitted in evidence, and are totally unnecessary on the present occasion – do communicate what came within your own knowledge respecting the prisoner, not your opinions”. Interestingly, Wilson ignored these instructions and proffered his “opinion” (despite further interruptions from bench and counsel) twice more before vacating the stand. Wilson did impart his opinion to the court, but the lawyers’ challenges reduced the impact of his testimony. Such efforts to constrain “hearsay” and “opinion” testimony from lay witnesses distinguished early nineteenth and early eighteenth century legal practice in Britain.

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<sup>63</sup> Kendal Chronicle March 9<sup>th</sup> 1823.

*"Gaolers" and "tolbooth-keepers"*

Professional "custodians", such as gaolers, tolbooth-keepers and "turnkeys", lacked formal medical or legal schooling and could therefore be classed as "lay" witnesses. Yet, from the 1750s onwards, these witnesses were encouraged to impart "expert opinion" during English and Scottish insanity defences. Joel Eigen's work has not focused specifically upon such "custodian" witnesses, but he has indicated that the gaol became an important location for the observation and authentication of insane prisoners after 1760 at the Old Bailey.<sup>64</sup> Robert Houston has suggested that "gaolers" formed a small proportion of testifiers at the High Court of Justiciary, but that their testimony could be prized.<sup>65</sup>

Amongst the narratives studied, "custodians" accounted for a tiny proportion of all witnesses in Britain. In both northern England and southern Scotland, custodians accounted for around three-percent of courtroom testifiers and appeared in one-sixth of the trials studied. Gaolers were more regularly involved when defences focused upon the prisoner's mental fitness to stand trial. In southern Scotland, the first recorded defence of this type occurred in 1747 and the "Gaoler of Jedburgh Tolbooth" bore evidence at court.<sup>66</sup> Between 1747 and 1829, custodians appeared in seventy-four percent of Scottish defences "in-bar-of-trial" (Table 5.3). By comparison, English gaolers and their staff were examined in seventy-percent of insanity defences which sought to postpone the prisoner's hearing between 1750

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<sup>64</sup> Eigen *Witnessing* pp.129-130.

<sup>65</sup> Houston "Courts" p.345.

<sup>66</sup> JC 12/5.

and 1829. By the early nineteenth century, custodians were established in both countries as regular witnesses where prisoner's mental fitness to plead and stand trial was questioned.

	% of "bar of trial" hearings which involved custodian testimony
Northern England	70
Southern Scotland	74

*Table 5.3. Proportion of trials involving custodians when the prisoner's mental fitness to stand trial was examined, northern England and southern Scotland 1749-1829.*

The nature of the custodian's testimony explains why they were used to validate the defendant's sanity at court. Prisoners could lie in gaol many months awaiting trial, especially in places such as Carlisle, where the Assizes only met once per annum before 1819. As a consequence of their professional function, gaoler testimony was valued because it offered long term and repetitive observations of the prisoner's mental condition. Custodians provided pertinent evidence which could authenticate the prisoner's mental ability to bear trial. William Forrest, the gaoler of Jedburgh tolbooth, recounted in 1747 how a prisoner called John Bertram had fallen "into a deep melancholy fitt, in which he has continued ever since". Forrest provided persuasive evidence of Bertram's insanity and the hearing was

postponed.<sup>67</sup> Some custodians reinforced their evidence with practical proficiency in observing prisoners, authenticating mental afflictions and delivering their evidence within a courtroom scenario. Mr Higgins, the keeper of the gaol at Lancaster Castle, yielded testimony concerning a prisoner's insanity twice between the years 1812 and 1814, for instance. Such experience and "forensic" skill could distinguish gaoler from "lay" testimony.

It was recognised that gaolers could be adept at identifying prisoners who feigned insanity or idiocy. In March 1814, Charles Taylor was arraigned for highway-robbery at the Lancaster Assizes. Upon taking the stand and being asked to plead, Taylor produced an indirect and incoherent answer which was eventually construed as a confession of his guilt.<sup>68</sup> Courtroom testimony was only provided by Mr Higgins, the keeper of Lancaster Castle, his son and a turnkey (gaol-officer) called Thomas Birch. This case therefore represents a rare occasion in which "custodian" testimony was elevated to the position of sole advisor to the court, in either England or Scotland. The Lancaster Gazette reported that the three custodians "severally proved, that up to the 22nd January the prisoner did not affect insanity, which they now believed him to do".<sup>69</sup> According to these custodians, Taylor was subject to bouts of insanity, but was lucid at his trial. The jury decided that Taylor was "counterfeiting insanity" and he was found guilty and sentenced to death.<sup>70</sup> This dissimulation had been authenticated purely by "custodian" testimony.

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<sup>67</sup> JC 12/5.

<sup>68</sup> Lancaster Gazette March 5<sup>th</sup> and March 19<sup>th</sup> 1814.

<sup>69</sup> *Ibid* March 14<sup>th</sup> 1814.

<sup>70</sup> *Ibid* March 4<sup>th</sup> and March 14<sup>th</sup> 1814.

*The testifier's social characteristics*

Besides the content of their testimony, a person's gender and social station affected the way in which their pre-trial and courtroom statements were received and perceived. A person's gender could dictate whether evidence was sought from them. During provincial English and Scottish insanity defences, males outnumbered females as both pre-trial and courtroom witnesses. Twenty-seven percent of all northern English and fifteen-percent of southern Scottish witnesses studied were female (Table 5.3). The low numbers of female deponents in southern Scotland was typical of Justiciary Court practice. In all types of criminal defences, around eighteen-percent of Scotland's High Court testifiers were women between 1650 and 1760.<sup>71</sup> Fewer women were employed as criminal witnesses in southern Scotland and Edinburgh than at England's Assizes. Female witnesses were more involved in Northern Assize defences of insanity and idiocy by the 1800s, whilst the reverse was true of southern Scotland (Table 5.4). We might expect females to form at least fifty-percent of the total population, so women were clearly under-represented as witnesses in both countries in this respect.<sup>72</sup>

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<sup>71</sup> Houston *Madness* pp.123-127.

<sup>72</sup> *Idem.*

Time period	% of deponents who were female	
	Northern England	Southern Scotland
Pre-1749 <sup>73</sup>	10	22
1750-1799	25	14
1800-1829	32	13
Overall	27	15

*Table 5.4. Proportional ratio of the gender of witnesses during insanity and idiocy defences in northern England and southern Scotland.*

The crime which the prisoner committed affected the likelihood of female testimony being utilised. Unlike in other crimes, female testimony could dominate numerically in cases of “infanticide” or “child-murder”. Female midwives could carry experience and expertise in establishing whether female prisoners had given birth or murdered their children.<sup>74</sup> Female witnesses also appeared as witnesses to the crime or the prisoner’s character. Females outnumbered males two-to-one amongst the deponents for Mary Thorp’s child-murder case in 1800.<sup>75</sup> Female neighbours and midwives provided persuasive testimony that Thorp had been sane and had planned to kill her illegitimate child. They substantiated that Thorp had indeed given birth to this dead infant, which had been healthy, but illegitimate issue. One keen-eyed deponent, Sarah Pinder, noted that the “tape” which had strangled the child had been torn from one of Thorp’s “shifts”.<sup>76</sup> A significantly greater number of northern English insanity or idiocy defences were pled by women

<sup>73</sup> England 1660-1749, Scotland 1708-1749.

<sup>74</sup> Increased numbers of female “expert” witnesses also appeared in these cases, such as women who were experienced mid-wives (although they did not necessarily receive any formal medical education or qualification).

<sup>75</sup> ASSI 45/40/2 nos. 240-241. Although six of these women were witnesses to the birth, only Anne Seddon was designated as a mid-wife amongst the depositions.

<sup>76</sup> ASSI 45/40/2 nos. 240-241.

in response to child murder than in Scotland, especially after 1750. Indeed, Scottish pleas were outnumbered by English defences in child-murder cases by a ratio of seven-to-one. Because of the unusually heavy involvement of women during these kinds of trial, the different incidence of child-murder cases amongst insanity and idiocy defences may explain the divergent involvement of female testifiers in England and Scotland, particularly after 1750.

Both the English and Scottish legal traditions preferred to rely upon evidences imparted by males in legal causes.<sup>77</sup> The Scots jurist, Viscount Stair, stated that women were “rejected from being witnesses in causes merely civil, except they be necessary witnesses”.<sup>78</sup> This assertion was transferred to Britain’s criminal codes; female deponents only became involved when their evidence was perceived to carry particular significance. Whilst male testimony was preferred in Britain’s courtrooms, it was not always privileged qualitatively above female evidence. Females may have been less apparent at court, but their testimony had to be valuable in order for them to be involved at all. Male testimony could be challenged successfully by female evidence within Britain’s legal processes. In 1743, William Cowper attacked and killed his mother with a knife at Burton in the West Riding of Yorkshire.<sup>79</sup> Jonathan Lockwood, a local “cord-winer”, had “discoursed” with William Cowper shortly before he attacked his mother and insisted that the accused had been “perfectly Senseable” at that time.<sup>80</sup> William’s sister, Ellen, was present at

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<sup>77</sup> Houston “Class, Gender” p.47.

<sup>78</sup> Stair Institutions (1681) p.999, cited in Houston Madness p.47.

<sup>79</sup> ASSI 41/3.

<sup>80</sup> ASSI 45/22/3/27.

the time of the murder and disputed Lockwood's statement. Ellen reported how William, "began to Discourse in Scripture and fell into great Distractions" before stabbing their mother in her throat.<sup>81</sup> Ellen also recounted that William "was in such distraction that four or five Men was forced to hold him and bind his hands and feet, and Still continues in a very bad Way and in Great disorder". The Yorkshire jury acquitted William Cowper of murder on account of his insanity.<sup>82</sup> Ellen provided credible indications that her brother suffered from an altered state of mind, which explained and excused his violent, unusual behaviour. Ellen Cowper was not a "disinterested" witness, but her testimony was persuasive because she had observed the prisoner committing the crime. Females were not barred universally from court, nor were female testimonies always perceived to be inferior qualitatively to male testimonies. Lay women could impart important proofs regarding a prisoner's insanity and idiocy.

Scholars have suggested that the authentication of mental afflictions was dominated by males within long eighteenth century society. It has been posited that the concept of insanity could be employed, by lay and medical men, as a means of labelling and restraining the behaviour of women who refused to conform to cultural norms.<sup>83</sup> These arguments can be rebuffed in the context of criminal defences. Contemporaries understood the behaviour of the mentally afflicted to be involuntary, rather than conscious rebellion against accepted conduct. It could be contended that these perceptions of normality were imposed by males upon

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<sup>81</sup> ASSI 45/22/3/22.

<sup>82</sup> ASSI 41/3.

<sup>83</sup> Chesler Women and Madness p.16..

females, but such a thesis cannot be soundly reinforced by the investigation of insanity and idiocy defences. The mental condition of English and Scottish females could be judged by persons of their own sex and social station. As Robert Houston has recently concluded, females who were deemed to be insane or idiotic had breached social mores that were accepted by both women and men.<sup>84</sup> Males did dominate quantitatively the validation of mental distraction during provincial British criminal trials. But, whilst fewer "lay" females were adduced as witnesses, British women played important qualitative roles in the assessment of the prisoner's mental state. Females could be involved in identifying mental abnormality in males and regularly outnumbered male witnesses in cases where women committed child-murder, at least.

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<sup>84</sup> Houston "Class, Gender" pp.49 and 58-59.

*The social standing of witnesses*

A witness' social standing could also affect the way in which their testimony was perceived at court. Courtroom participants could defer to the judgement of persons of high social standing and thereby afford significant value to their statements. In 1665, the gentleman Charles Jackson was prosecuted for murdering his servant, James Browne.<sup>85</sup> It was presented that Jackson suffered from "melancholy", whilst Jackson stated that "if he was not in [a "melancholy fit"], he was entring into itt".<sup>86</sup> According to the principal contemporary jurists, these statements were at best equivocal proofs of Jackson's insanity. Matthew Hale's Pleas suggested that "melancholy persons" were "not wholly destitute of the use of their reason".<sup>87</sup> It followed that this "partial degree" of insanity did not fully remove the ability to form intent and was therefore not a sound legal defence in England. The term "melancholy" could also denote the general species of insanity in the late seventeenth century, however, rather than "partial insanity" founded upon "excessive fears and griefs".<sup>88</sup> In this sense, the evidence concerning Jackson's state of mind could be interpreted as being sufficient to excuse his crime.

The second assertion, that Jackson "was entring into" a fit of madness was more troublesome. It was recognised that lunatics might enjoy lengthy spells of lucid rationality, but that they were responsible for their actions during these periods.

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<sup>85</sup> ASSI 42/1 ff.163b.

<sup>86</sup> ASSI 45/7/2 nos. 69-70.

<sup>87</sup> Hale Pleas pp.30-36. See also Walker Crime and Insanity 1 pp.35-38 and Eigen Witnessing pp.36-38.

<sup>88</sup> *Idem.*

Jackson was on the very cusp of a mad fit, but if he was lucid and capable of forming intent, then he ought to have been found guilty of murdering his servant. Charles Jackson was acquitted of his crime owing to insanity. So why was equivocal testimony, by late seventeenth century standards, accepted as sound evidence of insanity? No courtroom narratives exist for this late seventeenth century trial, so this interpretation is based upon pre-trial depositions. Perhaps the testimony entered at court was less ambiguous. It might also be suggested that the prisoner's high social and economic standing affected legal proceedings in a positive way. The jury may also have been convinced of the veracity and value of this testimony because of the witnesses' high social status. A guarantee of truthfulness was associated with genteel quality.<sup>89</sup> A congress of Justices of the Peace signed a petition which stated that Jackson was "non compos mentis", whilst two of the Justices entered "recognizances" of one-hundred pounds each for the prisoner to appear.<sup>90</sup> The jury may have deferred to the judgement of the Justices. Likewise, the bench may have accepted the authentication offered by persons of high rank, rather than challenging the legal ambiguities of their testimony. The statements of persons of high social standing could be respected and deemed persuasive within the courtroom.<sup>91</sup>

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<sup>89</sup> Shapin Truth p.43.

<sup>90</sup> ASSI 45/7/2.

<sup>91</sup> Shapin Truth pp.42-44.

Status of Deponent	% of Northern English Witnesses	% of Southern Scottish Witnesses
Elite	6	10
Middling	37	40
Lower	43	38
Unknown	14	12

*Table 5.5. Comparison of the social status of northern English and southern Scottish witnesses during insanity and idiocy defences, 1700-1829.*

Testimony from the social elites could be authoritative, but such witnesses imparted a small proportion of all evidences during provincial British insanity and idiocy defences. Persons who belonged to the lower and middling ranks of society far outweighed the elites amongst criminal testifiers in both southern Scotland and northern England (Table 5.5). "Elite" status deponents, such as Justices of the Peace, Sheriffs-Depute, Esquires and Gentlemen, produced six-percent of the English and ten-percent of the Scottish witness statements which were studied (Table 5.5).<sup>92</sup> This group of witnesses could include females of high standing, but just as it was rare for upper order women to be subjected to formal prosecution, so they seldom appeared at court as witnesses.<sup>93</sup> Insanity and idiocy were therefore most regularly identified by persons of low or middling status.

<sup>92</sup> This includes both pre-trial and courtroom statements.

<sup>93</sup> See pp.114-124.

This finding relates strongly to the broader historiography of crime and the courtroom. It could be argued that England's social, economic and political elites were able to utilise the criminal law to reaffirm and justify their elevated station within a society which was based upon an inequitable division of land and wealth.<sup>94</sup> More recently, historians have emphasised the regular involvement of the middling and lower orders of society and how they perceived the criminal law.<sup>95</sup> The "middling sorts" and the "laborious poor" of provincial Britain made strong quantitative and qualitative contributions towards the identification of mental afflictions within the criminal courtroom. The criminal law proceeded with reference to perceptions of justice and criminal responsibility from a broad cross-section of society. Persons belonging to the lower and middling orders could impart their understandings of mental afflictions to the court, thereby affirming their perceptions of who was or was not mentally unsound. The reference to and involvement of these types of witness legitimised the criminal law beyond the ranks of the social elites, whilst validating broadly held conceptions regarding criminal responsibility. This thesis therefore suggests that the criminal law could be both accepted and legitimised by a broad range of social ranks in both northern England and southern Scotland.

The social station of witnesses could be tied intimately to the status of both prisoners and victims. Family and household members were adduced regularly as

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<sup>94</sup> Hay "Property, authority" pp.26, 35 and 48.

<sup>95</sup> Langbein "Fatal flaws" pp.96-120. King "Decision-Makers" p.53 and *Crime passim*.

witnesses during British insanity and idiocy defences, because they could provide long term, intimate observations of the prisoner's sanity. Wealthy households could include persons of varying social status, from the master and mistress to housekeepers and servants. But lower-order households tended to include persons of broadly similar social standing, who could be called upon in cases where crimes were committed within the domestic setting. Also, a prisoner might share a similar social status to their friends and neighbours, who might be adduced as eye-witnesses to crimes and character-witnesses too. John Gibson, an impecunious nailor and discharged soldier, was accused of murdering his wife at Hawick in 1814.<sup>96</sup> Gibson's social interactions were clearly restricted by his occupational status. The key deponents were drawn from Gibson's neighbourhood and included the likes of impoverished journeymen and their wives.<sup>97</sup> In contrast, the insanity of the landed gentleman, Charles Jackson, was proven by Justices of the Peace, who were of similarly high social and economic station to the prisoner.<sup>98</sup> Indeed, these Justices of the Peace were acquainted personally with Jackson and were his social and political "friends".

This relationship between litigant and witness does not adequately explain why a greater proportion of elite status witnesses appeared in southern Scottish trials. Only around six-percent of prisoners and five-percent of victims belonged to the highest, landowning ranks of southern Scottish society before 1830.<sup>99</sup> Instead, the

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<sup>96</sup> JC 12/28.

<sup>97</sup> JC 16/366.

<sup>98</sup> ASSI 42/1 and 45/7/2 nos. 69-70

<sup>99</sup> See pp.112-120.

augmented appearance of wealthy, high station testifiers on the southern circuit was connected to their function within the criminal system. The likes of Scottish Justices of Peace, Sheriffs-Substitute and Sheriffs-Depute interviewed prisoners, victims and witnesses in criminal cases. Routinely, these supervising officials testified to the prisoner's state of mind during these interviews. Prisoners had to be of sound mind to produce credible legal statements, particularly when confessions were extracted. Officials and recording clerks evaluated whether the prisoner's declaration, "might be supposed to proceed from a weariness of life, or deprivation of judgement".<sup>100</sup> In 1759, John Fairbairn behaved "foolishly" when interrogated by demanding that the armed nature of his robbery be recorded on the formal accusation.<sup>101</sup> At Fairbairn's trial, Dr William Ormiston of Henderside, a Justice of Peace for Roxburghshire, was called to establish that Fairbairn had been of sound mind at his interrogation.<sup>102</sup> In Scotland, there was a determined, practical effort to ensure that a prisoner was sane at the time of providing a declaration or confession. High station witnesses therefore provided evidence in their capacities as supervising officials within the legal system. Such testimony was valued because these office-holders bore no close relationship to the litigants. Jurors might also display social deference towards such persons and endow their judgements with particular credence.

English JPs and coroners also performed interrogations between 1660 and 1829.

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<sup>100</sup> *Scots Magazine* 16 (1754), p.203. Trial of William Causland, Jedburgh.

<sup>101</sup> Armed transgressions exacerbated crimes and lessened chances of receiving a jury's recommendation for mercy.

<sup>102</sup> JC 12/9.

In contrast to Scotland, guilty pleas and prisoner confessions were less readily entertained or sought out before trial in England. Thus, high status English witnesses bore evidence infrequently in their official capacities as legal administrators. Northern English witnesses such as JPs were usually arraigned because of their intimate association to the prisoner or victim, not because of their detached nature or function within the legal process. High status Scottish witnesses could also be closely tied to litigants, but they appeared more often because of their official, legal role than in England. The Scottish practice of seeking disinterested testimony from "supervising" legal officials therefore explains why a greater proportion of southern Scottish witnesses were of high station when compared to northern England.

Legally experienced or trained witnesses played an enhanced role during Scottish hearings than their English counterparts (Table 5.6). John Waldie, a "Writer" (legal clerk) in Kelso, recorded William Ormiston's interview of John Fairbairn in 1759.<sup>103</sup> Waldie was also adduced to prove whether Fairbairn had been of "sound mind and sober senses" at the time of emitting his confession. Waldie was convinced that Fairbairn's declaration was sound legally, but he also mentioned that the prisoner "behaved Foolishly" during the interview. Waldie reinforced beliefs that Fairbairn was "weak-minded" and may have been instigated to commit the crime. Fairbairn was found guilty "art and part" of housebreaking and theft, but the jury recommended him to mercy on the ground of diminished responsibility. Waldie was presented at court because of his role within the legal process and he

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<sup>103</sup> JC 12/9.

was able to provide valuable, “disinterested” evidence regarding Fairbairn’s mental state. As a seasoned legal professional, Waldie would have been familiar with legal formularies and the concept of criminal responsibility. The regular use of persons such as Waldie within the Scottish criminal system explains why “legal witnesses” played an augmented role, from an earlier date, in Scotland than in England.

“Legal Witnesses”	1708-1749	1750-1799	1800-1829
Southern Scotland	10	21	21
Northern England	0	6	18

*Table 5.6. Proportion of all testifiers who were “legal witnesses” in northern England and southern Scotland, 1708-1829.*

### *Conclusions*

Between 1660 and 1829, lay persons provided the majority of evidences during northern English and southern Scottish insanity and idiocy defences. These broad quantitative testimonial patterns therefore mirrored contemporary insanity defences in London and Edinburgh. Whilst the bulk of Scottish testifiers were lay persons, these lay witnesses appeared in a smaller proportion of southern Scottish than northern English criminal hearings. This disparity can be explained by the divergent practical routines which were employed within these distinctive legal codes. The practice of plea-bargaining was encouraged at Scotland's Justiciary courts, but was dissuaded at England's Assize courts. Usually, no testimony was heard at court where Scottish "pannels" entered guilty-pleas. Thus, a lesser proportion of southern Scottish trials included "lay" testimony. Even so, pre-trial statements from lay persons could inform decisions to mitigate sentences on the grounds of diminished responsibility.

Greater pedagogic and practical attention was paid to evidential standards in Britain over the course of the long eighteenth century. Changes in testimonial principles affected the participation of lay deponents and the value of their testimonies. After 1700, lay testifiers were increasingly expected to impart information regarding the prisoner's speech, behaviour and appearance which they had observed directly. Direct observations were understood to be constructive and instructive forms of evidence as the concept of "proof beyond a reasonable doubt" became entrenched.

Conversely, British "lay testimony" became restricted in its scope and impact owing to some evidential developments. Indirect and "hearsay" testimony declined in value, although such testimony was not eradicated or perceived to be worthless by the early nineteenth century. Even in the 1820s, "hearsay" testimony could be accepted as secondary, corroboratory evidence, which might clinch the jury's decision regarding the prisoner's mental state. By the early nineteenth century, lawyers made greater efforts to restrict lay deponents from imparting "opinion". The margins between "fact" and "opinion" were perhaps never more shaded than in cases where the prisoner's criminal responsibility was questioned explicitly. Lay witnesses continued to offer their opinions (but not "expert opinion"), sometimes in strict defiance of instructions from legal professionals.

The important developments in testimonial principles were reflected in the enhanced quantitative and qualitative impact of "gaolers", and their testimony, at Britain's circuit courts. "Gaolers" and other persons who were professionally associated with prisons and "tolbooths" were more prominent as witnesses after 1750 in both northern England and southern Scotland. "Gaolers" were especially involved where the prisoner's mental ability to stand trial needed to be assessed. Their custodial roles allowed these testifiers to provide direct observations of the prisoner's behaviour, speech and appearance. "Custodians" typically lacked any formal medical or legal training, but they could be treated as "expert" witnesses who imparted *a posteriori* opinion, based upon their personal experiences of

identifying mentally disturbed prisoners. "Gaolers" were not purely "impartial" witnesses, but it was recognised that they could offer less partial testimony. The "gaoler's" experience, detachment and ability to offer opinion marked them apart from most "lay" witnesses.

This thesis has focused upon some of the key theoretical and practical developments which altered the nature and impact of lay testimony. But in some senses, perceptions of persuasive evidence did not alter significantly in Britain between 1660 and 1829. The interpretations of the local "lay" community or "neighbourhood" played an enduring role in the authentication of mental afflictions. Multiple lay testimonies, which converged upon a common elucidation of the prisoner's mental soundness, continued to convincing proofs (beyond a reasonable doubt) of whether the prisoner was "mad" or "bad". The English Assize courts persisted to relying upon community consensus for the assessment of a defendant's mental faculties. Lay testimony was restricted in Scottish defences "in-bar-of-trial", but the Justiciary courts continued to depend on lay estimations where the prisoner's mental state was questioned at or around the time of the crime itself. In cases where lay testimony was imparted alone during the 1820s, the way in which the prisoner's mental condition was evaluated at law would not have been alien to the courtrooms of the late seventeenth century.

The witness' gender could prescribe whether they appeared as deponents. The vast majority of witnesses were male in both England and Scotland, but women

could outnumber men in some trials, most notably cases where females were accused of child-murder. Both traditions preferred male to female testimony, yet female testimony was not always perceived to carry inferior qualitative value when compared to male testimony. Females could challenge successfully male testimony at the provincial courts during the eighteenth and nineteenth centuries. Too few cases were studied to provide solid conclusions regarding the seventeenth century in this respect, but future research could establish whether such patterns existed before 1700. The identification of mental abnormality was not a male preserve during this era. Women could be involved in the authentication insanity and idiocy amongst both male and female prisoners. Female witnesses could convey their understandings of unusual and typical behaviour to the courtroom, which converged with male perceptions. Female prisoners could therefore be judged by standards of "normality" which were imparted by testifiers of their own sex.

Deference could be shown to witnesses of high social and economic standing. The observations of persons such as Justices of the Peace and Sheriff-Substitutes could be highly respected and rather equivocal testimony regarding a prisoner's mental condition could therefore be accepted as sound evidence, rather than being challenged. Yet "elite" persons provided a small minority of testimonies, especially in England. The social standing of the deponent and prisoner was related, as friends and neighbours were drawn to court to act as "character witnesses" as well as "eye-witnesses" to the crime. Persons from the "middling" and "lower" sorts in society were involved heavily as witnesses, as well as litigants, throughout the period

studied. Criminal trials proceeded with reference to conceptions of justice, criminal responsibility and mental abnormality which were imparted by attestants of middling and lower status. The involvement of these sorts of people reinforces recent research which has emphasised that Britain's criminal laws were not merely tools of social control, which were wielded by society's elites alone. Persons of inferior status could perceive the criminal courts to be a worthwhile and legitimate means of redressing anti-social behaviour.

Scottish criminal trials involved a greater proportion of "elite" witnesses than their English counterparts. Scotland's independent legal practices explain this phenomenon. Scotland's Justiciary court made regular use of legally trained and experienced persons, who had interviewed the prisoner before trial, in order to establish whether the "pannels" were of "sound mind and sober senses". Persons of high social standing, such as Sheriffs-Depute and Sheriffs-Substitute, were adduced to give evidence during Scottish defences of fatuity and furiosity. Less distinguished legal personnel, such as writers, were employed similarly to provide "detached" observations of the prisoner. Legally trained and experienced persons did examine prisoners and record pre-trial depositions in England, but they were adduced at court less regularly than in Scotland. Whilst the Scottish system referred to testimony from interviewers as a matter of course, no such procedure existed during English criminal trials.

Lay persons continued to be provide persuasive, powerful forms of proof where the prisoner's state of mind was evaluated in both countries. Neighbours and friends were adept at providing long and short-term observations of the prisoner's mental soundness. Lay testimony was especially useful in authenticating the prisoner's mental condition at the time when the crime was committed. The subsequent chapter will compare this qualitative analysis to that of expert, medical "opinion". Only once "expert" testimony has been evaluated, can solid conclusions be drawn about the value which was afforded to lay evidence within the contemporary courtrooms of England and Scotland.

## 6.

*Medical witnesses and the authentication of mental afflictions in northern England and southern Scotland, 1660-1829*

The previous chapter argued that some important differences evolved between lay and “expert” testimony during the long eighteenth century. This thesis is here expanded by investigating the role which one prominent group of “experts”, who can be broadly described as being “medical witnesses”, played during provincial insanity and idiocy defences. John Haslam, sometime apothecary to London’s Bedlam and author of the first treatise on medical evidence regarding insanity, revealed what might be expected of medical witnesses in an early nineteenth century court, “The physician should not come into court to merely give his opinion – he should be prepared to explain it, and be able to afford the reasons which influenced his decision”.<sup>1</sup> Did Haslam’s understanding of medical testimony reflect common practice amongst his contemporaries, and if so, how did the activity of expert, medical attestants evolve between 1660 and 1829?

The relationship of medical “professionals” to mental affliction before 1830 has been debated by scholars.<sup>2</sup> Thomas Szasz has suggested that mental maladies were not real pathologies, but were invented to control the behaviour of persons who failed to conform to cultural norms.<sup>3</sup> Szasz also contended that medical

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<sup>1</sup> Haslam *Medical Jurisprudence* (1817) p.4.

<sup>2</sup> See pp.13-14.

<sup>3</sup> Szasz *Manufacture* p.15. *Myth passim*.

professionals propagated and sustained this deceptive concept of mental affliction, by dominating processes of identifying and incarcerating persons who were deemed to be abnormal mentally. This latter theory was modified by Andrew Scull, who argued that England's "mad-doctors" came to govern the certification of insanity and idiocy after the mid eighteenth century.<sup>4</sup> Recent research into British legal hearings has challenged such assumptions. Joel Eigen and Robert Houston have studied the testifiers and testimony that appeared during insanity defences at the Old Bailey and Scotland's High Court, respectively.<sup>5</sup> They have concluded independently that neither the infant "psychiatric" profession, nor the broader medical community, dominated the courtroom identification of madness and idiocy during the eighteenth and early nineteenth centuries. Their findings correlate with the wider historiography, whereby medical professionals played restricted roles in Britain's legal arenas, especially compared with their Continental counterparts.<sup>6</sup>

This chapter engages with these broader debates, by establishing the impact of "generic" medical and "alienist" testimony during provincial English and Scottish insanity and idiocy hearings between 1660 and 1829. The proportion of all provincial English and Scottish witnesses who had medical training is compared, alongside the proportion of trials which included medical testimony. Key trends which underpinned the appearance of medical testifiers are identified and explained. Joel Eigen has found a specific relationship between crimes of interpersonal violence and the appearance of medical witnesses during Old Bailey insanity

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<sup>4</sup> Scull *Museums of Madness* pp.14 and 124-129.

<sup>5</sup> Eigen *Witnessing* and "Intentionality". Houston *Madness* and "Courts".

<sup>6</sup> Crawford "Emergence" pp.2-20.

defences.<sup>7</sup> It is questioned whether this thesis can be extended to northern English and southern Scottish criminal defences of madness and idiocy. Mental affliction or debilitation could be argued as a defence either to postpone a hearing or to exculpate a crime. It is suggested that medical persons were involved most regularly in defences where the prisoner's immediate mental state threatened to suspend hearings. The reasons for this pattern are elucidated.

Quantitative analyses are enhanced by qualitative assessments of medical, "expert" evidence within Britain's legal arenas. It is investigated how the fruition of stricter evidential standards enhanced the value of medical testimony at court. By the late eighteenth century, the concept of "proof beyond a reasonable doubt" was applied decisively during criminal trials. Such testimonial principles affected the testimony which was expected of, and delivered by, medical professionals during the long eighteenth century. It is examined how desires for "impartial" and sound proofs, propagated by legal professionals, shaped the qualitative and quantitative impact of medical professionals during provincial British insanity and idiocy defences. Besides references to laws of proof, it is discovered how medical testimony was employed during criminal hearings. It is questioned whether lay estimations of the prisoner's mental condition was challenged or dominated by medical testimony. Published work has suggested that medical testimony was utilised most frequently to legitimise or reinforce lay evidences of a prisoner's mental condition.<sup>8</sup> This thesis demands to be tested for provincial trials. The final

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<sup>7</sup> Eigen *Witnessing* pp.24-30.

<sup>8</sup> Houston *Madness* pp.46-49.

section of the chapter considers witnesses who specialised in the identification and management of mentally troubled persons. The reasons why such “experts” or “specialists” appeared at court, as well as the type of evidence which they imparted, are investigated.

### *Defining “medical” witnesses*

Within the context of British criminal hearings, “medical” witnesses were distinguished from “lay” attestants by their formal medical training or education.<sup>9</sup> Their schooling and vocational skills meant that medical professionals could be classed as “expert” witnesses, who could offer “opinion” testimony. During insanity defences, expert “opinion” could be validated by the witness’ occupational experience and abstract knowledge of mental afflictions. Experts were allowed to opine whether the prisoner’s conduct, speech or appearance matched those associated with general cases of insanity or idiocy. Medical witnesses could therefore provide different proofs to lay testifiers, who were restricted increasingly to relating the “facts as they occurred” to the court.

Most medical testifiers were “general practitioners”, who did not claim any special expertise in identifying or treating mental afflictions. Statements from English and Scottish physicians, surgeons, apothecaries and “druggists”, alongside

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<sup>9</sup> Houston *Madness* pp.48-52.

medical students and apprentices, are therefore considered here.<sup>10</sup> Medicine became more “professionalised” during the long eighteenth century, but the boundary between the “laity” and medical occupations remained fluid.<sup>11</sup> Distinctions between professional medics and lay persons were blurred by the endurance of “empirics”, or experienced practitioners who belonged to no formal trade structure.<sup>12</sup> The most substantially represented kind of “experiential” witnesses were female midwives, who appeared regularly during child-murder cases. Generally, women midwives received no formal medical education, but were practiced in delivering infants.<sup>13</sup> The evolving medical professions did not monopolize medical experience and understanding, for lay persons could share a broad familiarity with such knowledge.<sup>14</sup> Historians have isolated “lay” from “medical” persons, but such dichotomies are limited intrinsically.

Britain’s medical occupations were stratified in terms of wealth, social status, experience and expertise.<sup>15</sup> Typically, historians have associated a tripartite, hierarchical structure with Britain’s medical professions, but regional medics were not categorised neatly into physicians, surgeons and apothecaries.<sup>16</sup> Provincial

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<sup>10</sup> By the 1820s, the term “apothecary” had been replaced by “druggist” in some northern English depositions.

<sup>11</sup> *Ibid* p.290.

<sup>12</sup> *Ibid* p.304.

<sup>13</sup> L. Rosner, Medical Education in the Age of Improvement. Edinburgh Students and Apprentices, 1760-1826. (1991), pp.54-55.

<sup>14</sup> Porter “Laymen, Doctors” p.304.

<sup>15</sup> I. Loudon “The Nature of Provincial medical practice in Eighteenth-Century England” MH, 29, 3, (2002), p.7. J. Lane, “Medical practitioners of Provincial England,” MH, 28, (1984), pp.353-371.

*Ibid*, “A Provincial Surgeon and his obstetric practice: Thomas W Jones of Henly-in-Arden, 1764-1846”, MH, 31, p.355. *Ibid*, “Provincial Medical Apprentices and their Masters in Early Modern England”, ECL, 12, 2, (1988), p.14. Porter “Introduction” *passim*.

<sup>16</sup> Loudon “Provincial medical” p.7. Porter Disease, Medicine and Society in England (1993) pp.34-35. Rosner Medical Education pp.18-19.

medical practice was dictated by commercial opportunity, competition and economic necessity.<sup>17</sup> Medical professionals could be forced into generalised practice by the diverse needs of local communities, especially in isolated rural areas. Thus, the “Surgeon-Apothecary”, who transcended boundaries of practice within the medical occupations, proliferated in northern England.<sup>18</sup> Owing to this fluidity of practice, medical designations were not adhered to rigidly. For instance, George Ellerton was presented as being both a “Surgeon” and “Surgeon-Apothecary” at court in 1800.<sup>19</sup>

Scholarship has also considered the importance of persons who specialized in the authentication, supervision and treatment of mentally disturbed people. These “specialists” (“mad-doctors”, “alienists”, “asylum-” and “madhouse-keepers”) highlight the problems of imposing delineated categories of “lay” and “medical” upon long eighteenth century witnesses. “Specialists” sometimes lacked formal adjuvant training, but their occupational expertise focused upon the identification of mental afflictions.<sup>20</sup> Both “specialist” and “medical” testifiers could be classed as “expert” witnesses, capable of imparting “opinion” testimony, because of their occupational training and experience.

The vast majority of British “generic” medical and “specialist” witnesses were

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<sup>17</sup> Loudon “Provincial medical” pp.7-8.

<sup>18</sup> Holmes Augustan England p.167. Holmes argues that the general medical practitioners can therefore be traced back to at least 1680, challenging the importance of the 1815 “Apothecaries Act”.

<sup>19</sup> ASSI 45/40/2 and York Herald August 2<sup>nd</sup> 1800.

<sup>20</sup> Houston Madness p.119.

male during the long eighteenth century. Men produced ninety-percent of all medical testimony which was imparted during provincial insanity and idiocy defences. Formal, medical training remained strongly a male preserve in Britain.<sup>21</sup> Women usually appeared as midwives, although Margaret Dalton, who had managed "Catesby Lunatic Asylum" in Northumberland for twenty-six years, testified as an expert during Jonathan Martin's trial in 1829.<sup>22</sup> Females could operate as medical practitioners in provincial England and Scotland, but the overwhelming majority of apothecaries, surgeons and physicians were men. The male dominance of medical testimony therefore reflects broader trends within the evolving medical professions themselves.

Testimony from female "empirics" illustrates that the line between lay "fact" and expert "opinion" could be thin. Female midwives testified regularly during British child-murder cases.<sup>23</sup> Typically, these women had practical expertise in delivering children, but had not received formal medical schooling.<sup>24</sup> British courts drew upon the midwife's expertise in identifying signs of pregnancy and their ability to distinguish between still-birth, accidental death and the murder of infants. During insanity defences, midwives were not adduced because of their experience in

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<sup>21</sup> Lane "Provincial surgeon" p.337. Porter Patients and Practitioners. Rosner Medical Education p.10. A.L. Wyman, "The Surgeoness. The Female Practitioner of Surgery, 1400-1900", MH, 28, (1984), pp.24 and 37-38.

<sup>22</sup> London Morning Herald April 2<sup>nd</sup> 1829.

<sup>23</sup> L. Abrams "From Demon to Victim: the Infanticidal Mother in Shetland, 1699-1899", in Brown and Ferguson (eds.) Twisted Sisters, (2002), pp.186-198. Beck, "Of Two Minds About the Death Penalty: Hippel's Account of a Case of Infanticide", Studies in Eighteenth Century Culture. American Society for Eighteenth Century Culture, 18, (1988). Hoffer and Hull, Murdering Mothers. Jackson "Suspicious infant deaths" pp.64-82. Kilday "Maternal Monsters" pp.156-184. King "Gender, Crime" pp.55-57. R.W. Malcolmson, "Infanticide in the Eighteenth Century", in Cockburn (ed.) Crime in England, 1550-1800, (1977). Symonds, Weep Not for Me. Symonds, "Reconstructing Rural Infanticide". Wessling, "Infanticide trials".

<sup>24</sup> Larner Medical Education p.55.

authenticating mental disorders and therefore ought to have related factual observations rather than opinions. But the division between fact and opinion was blurred where the prisoner's mental state was evaluated. Witnesses were asked to interpret the prisoner's conduct by comparing it with common preconceptions of normal and abnormal behaviour. At Ayr in 1761, for instance, a septuagenarian midwife called Janet Muir reported how Janet Thompson, "appeared ... to be a weak Silly thing".<sup>25</sup> Muir's statement reinforced "lay" evidence that Thompson suffered from a partially debilitating form of imbecility. Muir had to base her interpretation of Thompson's mental faculties upon broadly accepted indicators of sanity and mental imbalance. Evidence from midwives and lay persons was not reinforced by occupational specialism or theoretical learning, but their testimonies could resemble expert "opinion" because they applied general understandings of mental afflictions and criminal responsibility to the specific case, or prisoner.

Female testimony was utilised reluctantly in Britain's legal codes, but women could testify and provide persuasive evidence.<sup>26</sup> Women deponents were most readily adduced when they offered "facts" which males could not have observed. At the Cumberland Assizes of March 1825, the "gaol-matron" of Carlisle prison, Anne Routledge, provided distinctive evidence regarding Hannah Wells' insanity.<sup>27</sup> Routledge had observed Hannah daily for two months. This "gaol-matron's" testimony was therefore similar to other "expert" witnesses (most notably medics and gaolers) who had monitored prisoners repeatedly whilst they lay in gaol.

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<sup>25</sup> JC 12/10.

<sup>26</sup> See pp.146-154.

<sup>27</sup> Cumberland Pacquet August 16<sup>th</sup> 1825.

Routledge recounted how Wells provided “indirect answers” to questions and was “at times insane”. Wells could not always remember whether she had taken breakfast, for instance. Routledge also averred that Wells “often tells me in the morning that she has washed herself when she has not”. This final observation signifies that female prisoners at Carlisle, even those who suffered from mental afflictions, were expected to cleanse themselves daily and that washing facilities were available in the prison. Male witnesses, such as gaolers, would not have imparted such an illustration of Wells’ mental incapacity. Social decorum dictated that males should not observe female ablutions, where intimate regions of the female body were exposed. Routledge therefore communicated a fact which only women ought to have witnessed. Routledge’s role as “gaol-matron” allowed her repetitive, intimate observations of the female prisoner. It is explained why such testimony was perceived to carry particular value at court.

*Quantative analysis*

Robert Houston and Joel Eigen have demonstrated that medical witnesses, including “general practitioners” and insanity specialists, provided a minority of courtroom testimonies during insanity trials at Edinburgh and the Old Bailey.<sup>28</sup> These findings challenge arguments that medically trained personnel dominated quantitatively the testimony which authenticated prisoners’ mental conditions.<sup>29</sup> It is suggested that medical professionals and insanity experts also continued to provide a small proportion of depositions and courtroom testimonies in northern England and southern Scotland between 1660 and 1829. This reinforces arguments that Britain’s criminal courtrooms were not “medicalized” before 1830; lay persons remained central to the validation of the defendant’s mental state.

The proportion of insanity and idiocy trials which included at least one medical witness (either amongst depositions or narratives) provides a basic indication of their quantative impact. Whilst lay attestants appeared in the majority of provincial British insanity and idiocy defences, most cases did not include evidence from a medical witness.<sup>30</sup> Amongst the northern English trial narratives, only forty-three percent of them included any medical testimony (Table 6.1). In southern Scotland, minutes and narratives indicate that medical witnesses were involved in just thirty-seven-percent of furiosity and fatuity defences. Both lay and medical witnesses

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<sup>28</sup> Houston *Madness* pp.46-49 and “Courts” pp.341-345. Eigen “Opinion” pp.169-172 and *Witnessing* pp.108-132.

<sup>29</sup> Scull *Museums of Madness* pp.14 and 124-129.

<sup>30</sup> See pp.139-140.

were involved in fewer trials in southern Scotland than northern England. Once again, this phenomenon can be explained partly by Scotland's practice of "plea-bargaining", whereby the prisoner could plead guilty and be sentenced without any testimony being heard at court.

Regional Circuit Court:	No. of Trials	% of trials which included "lay" witnesses	% of trials which included "medical" Witnesses
Northern England	142	83.8	43
Southern Scotland	35	65.7	37.1

*Table 6.1. Witness appearance by category, expressed as a proportion of all insanity and idiocy hearings in northern England and southern Scotland, 1660-1829.*

Medical opinion was not always sought to clarify the prisoner's mental condition, even when medical witnesses did appear in court. Fully one-quarter of both Scottish and English medical deponents neither volunteered, nor were asked to convey, such opinions during provincial hearings. These medics were engaged initially to speak about the cause and nature of wounds and their testimony focused upon this task alone. This indicates that medical testimony was not perceived to be necessary to the authentication of troublesome mental afflictions during criminal trials.

In the absence of courtroom narratives, it is impossible to ascertain accurately

whether medics were adduced at court in northern England before the late-1770s. It seems likely that they were, but that they appeared irregularly. According to the pre-trial depositions, at least, no medical witness appeared during a Northern Assize insanity or idiocy defence before 1726.<sup>31</sup>

	1700-1749	1750-1799	1800-1829
Northern England	11	31	48
Southern Scotland	20	10	55

*Table 6.2. Proportion of northern English and southern Scottish insanity and idiocy defences which involved depositions or testimonies from at least one medical witness, 1700-1829*

Witness Type:	1700-1749		1750-1799		1800-1829	
	% Medical	% Lay	% Medical	% Lay	% Medical	% Lay
Northern England:	6	94	13	87	18	82
Southern Scotland:	8	92	6	94	17	83

*Table 6.3. Involvement of lay and medical witnesses, expressed as a percentage of all deponents in northern English and southern Scottish insanity and idiocy trials, 1700-1829.*

<sup>31</sup> Richard Waddy's case, Yorkshire 1726. ASSI 45/18/3 no.32A.

At the Old Bailey, the participation of medical witnesses during insanity defences rose from the mid eighteenth century onwards.<sup>32</sup> Similar patterns were evident at the Northern Assizes (Table 6.3). Medical participation is unclear until the period 1800 to 1829, when almost fifty-percent of the northern English insanity and idiocy hearings involved medical evidence. Medical witnesses also increased as a proportion of northern England's pre-trial deponents and courtroom testifiers from the 1770s onwards. Whilst medical persons formed a mere eight-percent of pre-trial deponents before 1750, this figure rose to thirteen-percent between 1750 and 1799. Medical witnesses produced close to one-fifth of all surviving depositions between 1800 and 1829. The increase in narratives after the 1770s allows a tentative survey of medical testimonies at court, too. Amongst the forty-eight detailed reports that were studied for the period 1776-1829, medical witnesses also provided one-fifth of testimonies at court.

In southern Scotland, meanwhile, medical witnesses had a minimal impact upon eighteenth century fatuity and furiosity trials. Medical testifiers participated at the seventeenth century High Court, but no medical testimony was delivered during southern circuit furiosity and fatuity hearings before 1747.<sup>33</sup> The prisoner's mental condition was only evaluated directly during five cases in southern Scotland before 1750. This low sample-base precludes firm quantitative conclusions. In contrast to insanity defences at England's Northern Assizes and Old Bailey, medical witnesses

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<sup>32</sup> *Eigen Witnessing* pp.108-160.

<sup>33</sup> See the trial of Philip Standsfield, 1688, JC2/17.

did not become more prominent during Scottish furiosity defences between 1750 and 1799. Only one of the eleven southern circuit trials between 1750 and 1799 included medical testimony concerning the prisoner's state of mind, that of William Douglas at Dumfries in 1795.<sup>34</sup> Indeed, medical professionals did not become involved regularly during southern Scottish fatuity and furiosity hearings until the period 1800 to 1829, when medical professionals accounted for seventeen-percent of all testifiers. Perhaps more significantly, medical testimony was included in more than half of the early nineteenth century hearings in southern Scotland. Medical witnesses were involved in a greater proportion of cases than lay witnesses after 1800. This pattern stood in stark contrast to contemporary hearings in England, France and parts of Germany.<sup>35</sup>

There were progressive, yet divergent, trends to the involvement of medical testifiers during northern English and southern Scottish insanity and idiocy defences. Medical testifiers were more prominent during early nineteenth century than late seventeenth century British criminal hearings. This enhanced quantitative impact was related strongly to evolutions in evidentiary standards. From at least the late eighteenth century, the "opinion" of expert witnesses was sought out increasingly because such testimony was perceived to be a constructive means of establishing "proof beyond a reasonable doubt". The unusually high participation of medical witnesses in Scotland after 1801 was directed by formal changes to

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<sup>34</sup> JC 12/22 Dumfries, September 1795.

<sup>35</sup> Crawford "Legalising" pp.89-109 and "Emergence" *passim*. *Eigen Witnessing* pp.108-132. Forbes *Surgeons passim*. Landsman "Rectitude" pp.463-469. J. Goldstein, *Console and Classify. The French Psychiatric Profession in the Nineteenth Century*, (1997), pp.162-169. Kaufmann "Boundary Disputes" pp.276-285. Wessling "Infanticide" p.118.

Justiciary Court practice, which were informed by changing evidential values.

Medical witnesses may have become more prominent at court over the course of the long eighteenth century, but they could be absent from early nineteenth century hearings. The mental conditions of Richard Routledge (Cumberland, 1824) and James Russel (Ayr, 1826) were authenticated without reference to medical testimony, for instance.<sup>36</sup> Within the context of legal hearings, Michael MacDonald has suggested that insanity and idiocy was defined by legal and medical “experts”, but that lay persons verified mental afflictions in practice.<sup>37</sup> Between 1660 and 1829, medically trained professionals did not regularly dictate the identification of mental afflictions, at least within the context of British criminal hearings. In England, evidence from individuals with prescribed, medical schooling and expertise was never a prerequisite to the authentication of a prisoner’s mental condition before 1830. In Scotland, medical testimony was required to determine the prisoner’s mental fitness to stand trial after 1801, but was not necessary to establish the prisoner’s mental condition at the time of committing a crime.

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<sup>36</sup> Carlisle Journal August 28<sup>th</sup> 1824. Ayr Advertiser April 13<sup>th</sup> 1826.

<sup>37</sup> MacDonald Mystical Bedlam p.113.

*Forensic skills and the augmented appearance of medical testifiers*

The chapter upon “lay witnesses” has established contemporary distinctions which were drawn between medical or expert “opinion” and lay testimony during the long eighteenth century. This section aims to investigate what sort of impact the development of medical “forensic” skills, or the application of medical knowledge and opinion in court, had upon medical testimonies during insanity and idiocy defences before 1830. Perceptions of the testimonial value of medical “opinion” certainly altered between 1660 and 1830. Catherine Crawford has presented a cohesive and persuasive analysis of the interrelated evolution of jurisprudential theories and forensic proficiency in Britain during this era.<sup>38</sup> This thesis builds upon Crawford’s suggestion that evidential evolutions had a significant impact upon the qualitative and quantitative impact of medical testimony upon insanity and idiocy defences, at least from the mid eighteenth century onwards.<sup>39</sup>

Two principal areas of jurisprudence and forensic science are investigated. Following Joel Eigen’s argument that medical witnesses most regularly appeared during Old Bailey insanity defences where the prisoner had committed interpersonal violence, the growth in anatomical skills and schooling amongst medical professionals is evaluated.<sup>40</sup> It is examined whether provincial medical deponents were also involved heavily in response to violent crimes, rather than offences

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<sup>38</sup> Crawford “Emergence” *passim*.

<sup>39</sup> *Ibid* p.25.

<sup>40</sup> Eigen *Witnessing* pp.23-25.

against property. Before engaging with these broader historiographical matters, medico-legal interest in criminal responsibility and mental afflictions are assessed.

Medical practitioners could lack abstract knowledge and practical experience regarding the treatment or authentication of mental afflictions. A clear example of this occurred in 1823, when the Lancashire physician, Dr St-Clare, felt compelled to qualify his uncertain diagnosis of Andrew Ryding's mental state with the admission that, "The diseases of the mind are in some places become a separate department [of expertise]: I have not studied it a great deal".<sup>41</sup> Dr St-Clare had been adduced to impart his opinion of the probable cause and severity of the victim's wounds, which he had observed and dressed shortly after the crime. St-Clare was comfortable in this anatomical function, but he was ill-prepared to answer questions about Ryding's sanity and provided equivocal, unpersuasive testimony in this regard.<sup>42</sup> Yet the very fact that medical persons were asked to comment upon the prisoner's mental condition in such cases is significant. All medical witnesses could offer opinions and hence, in a broad sense, all medical professionals held the potential to be "expert" witnesses during insanity and idiocy defences.

By the eighteenth century, medical professionals could turn to diversity of published practical and theoretical expositions regarding mental afflictions.<sup>43</sup> By the early nineteenth century, public lectures were delivered on the subject in Edinburgh

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<sup>41</sup> *Lancaster Gazette* August 21<sup>st</sup> 1823.

<sup>42</sup> *Idem*

<sup>43</sup> *Eigen Witnessing* p.110-122.

and London.<sup>44</sup> Medical guidebooks and theories upon mental disturbance were published from the late sixteenth century onwards.<sup>45</sup> Published works expanded with titles such as George Cheyne's English Malady (London, 1733). Debates between two of London's premier "alienists", Drs William Battie and John Monro, were published in 1758. Monro vilified Battie's suggestion that madness was "*deluded imagination*", for instance, declaring "I should rather define madness to be a *vitiated judgment*".<sup>46</sup> The disagreement between Battie and Monro indicates that distinctive theories regarding mental afflictions could exist concomitantly.

Written discourses also evolved concerning the forensic application of medical knowledge in the courtroom. British authorship upon medical jurisprudence lagged behind its Continental counterparts, although European texts were available in Britain from at least the mid eighteenth century.<sup>47</sup> The publication of Samuel Farr's Elements of Medical Jurisprudence (London, 1788) illustrates that British interest had been sparked by the late eighteenth century. Formal education in forensic skills developed in Britain (especially in Edinburgh) from the late eighteenth century, although such training was established in some Continental countries before the mid eighteenth century.<sup>48</sup>

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<sup>44</sup> Porter "Laymen, Doctors" pp.285-286.

<sup>45</sup> Bright, A Treatise of Melancholie, (1586).

<sup>46</sup> Battie Treatise on Madness (1758) and Monro Remarks on Dr Battie's Treatise on Madness (1758). Andrews and Scull Undertaker pp.52-72 interprets the roots and (hidden) intentions of this debate.

<sup>47</sup> Crawford "Emergence" p.3. Eigen Witnessing pp.110-122.

<sup>48</sup> Crawford "Emergence" p.3. Larner Medical Education pp.46-55.

The developing field of medical jurisprudence had an important effect upon the role of medical witnesses and their testimony during insanity and idiocy trials.<sup>49</sup> Jurisprudential works highlighted the potential use of medical opinion during legal cases, but medical testimony during insanity and idiocy defences had emerged as a secessive branch of interest by the 1820s.<sup>50</sup> John Haslam's Medical Jurisprudence as it relates to Insanity (1817) was the first text to be published by a British author on this topic.<sup>51</sup> Public lectures were also delivered on the subject in London and Edinburgh during the early nineteenth century.<sup>52</sup> The influence of such disquisitions should not be overstated, for they were sparsely attended by contemporary standards. But they did provide specific guidelines for medical witnesses to follow when imparting testimony and what might be expected of them in court. This development both reflected and informed the changes which were apparent within some medical testimonies by the 1820s.

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<sup>49</sup> Ward "Observers" pp.106-119.

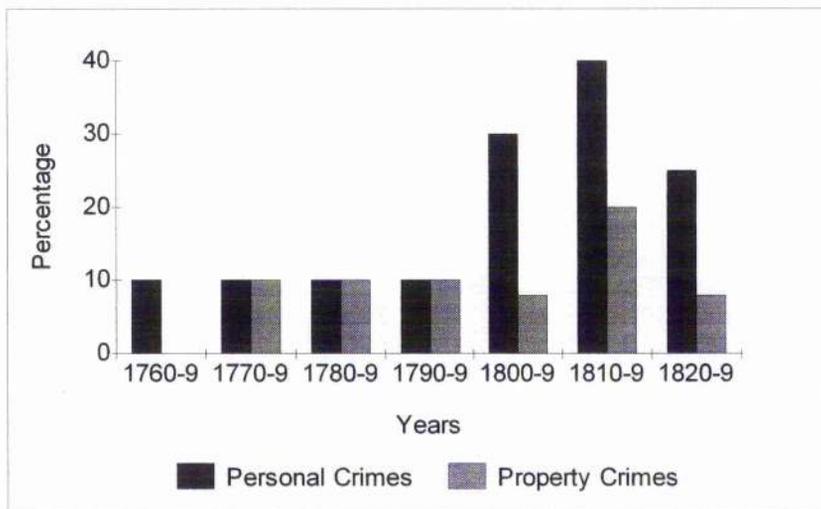
<sup>50</sup> Crawford "Emergence" pp.2-20. See also Forbes Surgeons p.40.

<sup>51</sup> Eigen Witnessing p.115.

<sup>52</sup> Porter Disease, Medicine pp.32-45.

*The relationship between forensic skills, anatomical schooling and the appearance of medical witnesses during provincial British insanity and idiocy defences.*

Joel Eigen has demonstrated that the kind of offence which a prisoner committed impinged upon the appearance of medical witnesses during criminal trials in London and Middlesex.<sup>53</sup> Eigen separated Old Bailey hearings into those incited by violent, inter-personal crimes (such as murder and assault) and those undertaken in response to property offences (such as theft and arson). Eigen located a strong link between medical participation and cases of inter-personal violence, at least after the trial of James Hadfield in 1800 (see Figure 6.1).<sup>54</sup> From around the mid eighteenth century onwards, similar patterns were evident in northern English and southern Scottish insanity and idiocy defences.



*Figure 6.1. Simplified results taken from Eigen, p.25, fig. 1.3. Rates of medical participation by crime type, Old Bailey 1760-1829.*

<sup>53</sup> Eigen *Witnessing* pp.23-28 and 120-122.

<sup>54</sup> *Ibid* pp.24-26.

A minority of fatuity and furiosity defences were pled in response to offences of inter-personal violence in southern Scotland.<sup>55</sup> Nevertheless, medical participation increased over the long eighteenth century in relation to such offences. There was a sharper augmentation of medical involvement during personal offences at the southern Justiciary circuit than at the Old Bailey (Table 6.4). The involvement of medical witnesses in Scotland was therefore related to the prisoner's transgression.

	1700-1749	1750-1799	1800-1829
Northern England	15	28	42
Southern Scotland	0	25	75

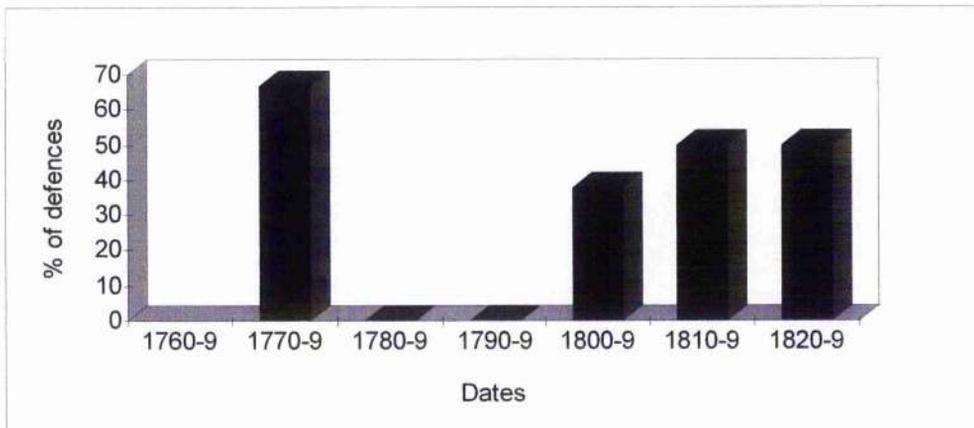
*Table 6.4. Participation of medical witnesses during insanity defences pled in response to crimes of inter-personal violence, expressed as a percentage. Northern England and southern Scotland compared, 1700-1829.*

There was also a clear relationship between the appearance of medical witnesses and crimes of inter-personal violence at the Northern Assizes. The victim had been wounded in four-fifths of insanity and idiocy defences where medical testimony was adduced.<sup>56</sup> According to courtroom narratives unearthed for the period 1800-1830, medical opinion was heard in forty-two-percent of northern English insanity

<sup>55</sup> See p.85.

<sup>56</sup> The remaining 1/5<sup>th</sup> were therefore called in relation to property offences which involved no physical attack upon a victim. We shall see that medical witnesses could be involved in these cases because of the type of plea entered by the prisoner (pp.200-207).

defences pled in response to inter-personal crimes. This finding is broadly comparable to Eigen's analysis of the printed reports for the Old Bailey, where medics appeared in between twenty-five and forty-percent of insanity defences for violent crimes between 1800 and 1830. The relationship between personal offences and medical participation was as compelling at the Northern Assizes as at the Old Bailey.



*Figure 6.2. Northern English Insanity and idiocy defences 1760-1829. Proportion of trials for personal offences which included medical testimony about the prisoner's state of mind.<sup>57</sup>*

There was no simple, linear progression by decade to medical participation during personal crimes in northern England (Figure 6.2). The sharp fluctuations between 1760 and 1799 were affected by the vagaries of eighteenth century source materials. Whilst courtroom narratives exist for the trials of personal offences between 1775 and 1778, few survive for the 1780s or 1790s.<sup>58</sup> None of the medical witnesses' depositions directly address the issue of a prisoner's mental condition

<sup>57</sup> Depositions or trial narratives only survive for one insanity defences involving personal offences between 1760 and 1769, that of Sir Thomas Gerard of Warrington, at Lancaster in 1767.

<sup>58</sup> *Trials ... (1775-1778)*.

between 1780 and 1799, but it is uncertain whether these persons testified at court, or whether their testimony was so vacant. The eighteenth century figures in Figure 6.2 underestimate the appearance of medical witnesses during personal offences, especially for the 1780s and 1790s.

Depositions and trial narratives exist in greater numbers for early nineteenth century provincial trials, allowing firmer comparisons with the Old Bailey. Medical persons were involved in a markedly greater proportion of personal offences at the Old Bailey after 1800, a trend which was mirrored at the Northern Assizes.<sup>59</sup> Northern English medical participation levelled off at around fifty-percent of these cases in the 1820s, which contrasted with the sharp decline that occurred at the Old Bailey between 1820 and 1829.<sup>60</sup> Crimes of inter-personal violence continued to predominate amongst northern English insanity and idiocy defences through to 1829.<sup>61</sup> Because of this, medical testimony was involved in a greater proportion of Northern Assize insanity defences after 1820.

The broadly progressive pattern in medical appearance during inter-personal crimes was not peculiar to insanity defences. By the late eighteenth century, medical testimony was utilised more regularly within English criminal processes to explain wounds and death, whilst “lay” testimony became less imperative to

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<sup>59</sup> *Eigen Witnessing* p.25.

<sup>60</sup> *Ibid* pp.24-28 esp. figs. 1.3 and 1.4.

<sup>61</sup> See p.87.

establishing such matters.<sup>62</sup> As evidential principles evolved, medical testimony became an important means of proving, beyond a reasonable level of doubt, who and what had caused wounding or death.<sup>63</sup> The developing relationship between medical testimony concerning a prisoner's state of mind and personal crimes was therefore related to broader developments in British legal procedure.

This enhanced involvement of medical opinion in trials for violent crimes was both a product of, and reinforced by, expansion in forensic and anatomical education.<sup>64</sup> Surgery and anatomy formed popular and integral components of the private and public schooling of British physicians, surgeons and medical apprentices by the late eighteenth century.<sup>65</sup> Private schooling in surgery was available in London from the 1740s, whilst Continental manuals and textbooks were also available from at least the mid eighteenth century.<sup>66</sup> Formal anatomical training became more widespread from the late 1780s onwards in Britain.<sup>67</sup> In 1788, inaugural public medical lectures upon anatomy were delivered in Edinburgh, the hub of Georgian anatomical tuition.<sup>68</sup> These developments mirrored and reinforced the amplified role of medical opinion in cases concerning wounding or death.

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<sup>62</sup> Crawford "Legalizing" p.107 and "Emergence" pp.207-296 .Forbes Surgeons p.98. Landsman "Rectitude" pp.451-454.

<sup>63</sup> Crawford "Emergence" pp.207-296. Landsman "Rectitude" pp.445-454. Shapiro Culture of Fact pp.2-32.

<sup>64</sup> Crawford "Emergence" pp.3-4.

<sup>65</sup> Lerner Medical Education pp.46-67 and 141-175.

<sup>66</sup> Lane "Provincial" p.338 cites texts which were advertised within the Medical Register, although such adverts were also printed in newspapers and subscription periodicals such as the Gentleman's Magazine. Medical persons could also receive a European schooling in such technical expertise.

<sup>67</sup> Andrew Marshall, an attendant surgeon at London's Bethlem, dissected cadavers of deceased inmates between 1789 and 1794. Marshall's anatomical studies and comments upon the roots of insanity were published posthumously in 1815. Andrews and Scull Undertaker p.34.

<sup>68</sup> Crawford "Emergence" p.20, fn.57. Crowther and White Soul and Conscience p.3. Lerner Medical Education pp.46-59.

Medical knowledge evolved to match desires for proof "beyond a reasonable doubt" at law.

The maturation of anatomical knowledge amongst medical persons, as well as the increased reliance upon medical opinion in cases of physical injury, had a significant subsidiary effect upon insanity and idiocy defences. Medical witnesses could be engaged initially to testify to the cause of the victim's wounds, rather than to substantiate the prisoner's mental condition. Fully one-fifth of northern English medical witnesses who were either interviewed before trial or adduced at court (or both) had been called initially to attend wounds or establish cause of death. By comparison, around one-quarter of southern Scottish medical opinions concerning the pannel's fatuity or furiosity came from medical people who were engaged originally to supply anatomical evidence. Courtroom participants, especially the legally trained judges and counsellors, could take advantage of the presence of medical persons and ask them to authenticate the prisoner's state of mind alongside the nature of the victim's wounds.

A prisoner's insanity might not become apparent until the hearing itself. In such cases, medical witnesses could then be asked to impart their opinion of the prisoner's sanity, as well as the nature of the victim's physical wounds. This was illustrated by the divergent content of Thomas Rigg's pre-trial deposition and courtroom testimony at Carlisle in 1810. In June 1810, Jackson Reay killed his wife, Elizabeth, by striking her head with an "iron wedge" at their farmhouse near

Wigton in Cumberland. Reay fled for Carlisle by foot, where he was apprehended and arraigned for trial.<sup>69</sup> Thomas Rigg, a surgeon at Aspatria, was called to attend Elizabeth Reay's wounds, but she died before the surgeon arrived at the scene of the crime. At the subsequent coroner's inquest, Rigg reported how he had discovered "three large wounds" upon Elizabeth Reay's head, "one of which had fractured her Skull very Much so as [he] could introduce a probe into her Brain".<sup>70</sup> Rigg passed no comment about the murderer's state of mind in his deposition, but he provided key evidence of Reay's insanity in his courtroom testimony, stating that, "He considered the prisoner as insane, and was applied to by the family for medical advice, and they did not chuse that severe remedies should be resorted to, which in the prisoner's case [Rigg] thought were indispensable".<sup>71</sup> Surgeon Rigg was arraigned originally to prove the cause of Elizabeth's death, but this witness' function altered radically once evidence of Jackson Reay's insanity emerged at court. Thomas Rigg became both an "expert" and a character witness, providing persuasive evidence that Jackson Reay was afflicted by delusions which rendered him both violent and confused.

The association between the appearance of medical witnesses and crimes where the victim was physically injured provides an explanation for the predominance of surgeons and surgeon-apothecaries amongst provincial British medical deponents. In contrast to insanity defences at the Old Bailey, where physicians accounted for

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<sup>69</sup> Cumberland Pacquet June 12<sup>th</sup> 1810 (report of the crime). Carlisle Journal September 8<sup>th</sup> 1810 (report of the trial).

<sup>70</sup> ASSI 45/45.

<sup>71</sup> Cumberland Pacquet June 12<sup>th</sup> 1810.

around half of all medical testimony after 1760, surgeons dominated the ranks of provincial British medical witnesses, both amongst depositions and trial testimonies (Table 6.5).<sup>72</sup> Over the course of the long eighteenth century, physicians declined as a proportion of all medical witnesses in both northern England and southern Scotland. Physicians could possess surgical skills, but surgeons became more firmly associated with anatomical processes by the nineteenth century, at least within the context of the criminal law.<sup>73</sup> In northern England, surgeons were involved regularly as medical attendants at coroners' inquests into suspicious deaths from at least the 1750s.<sup>74</sup> Amongst medical professionals, surgeons were most regularly adduced in order to establish the cause and nature of a victim's wounds in both England and Scotland (Figures 6.3 and 6.4).<sup>75</sup> Surgeons were also most frequently asked to impart their opinion of the prisoner's mental state after speaking about the victim's wounds.

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<sup>72</sup> Eigen "Intentionality" p.42. Stephan Landsman considered all Old Bailey criminal hearings and found that surgeons also predominated as witnesses (Landsman "Rectitude" p.453). There was a greater supply of physicians in the metropolis than in many provincial areas, but their testimony may have been sought out specifically during Old Bailey insanity defences, possibly because of their superior social and professional station or because physicians were perceived to specialise in "internal" afflictions. Old Bailey trials were also published from the late seventeenth century onwards, in contrast to provincial trials. Physicians may have testified to advertise their skills.

<sup>73</sup> Larner *Medical Education* p.67.

<sup>74</sup> Lane "Provincial surgeon" p.337 suggests that younger, less experienced surgeons used inquests to expand their anatomical skills and knowledge.

<sup>75</sup> Landsman "Rectitude" pp.452-453. Houston *Madness* pp.46-49.

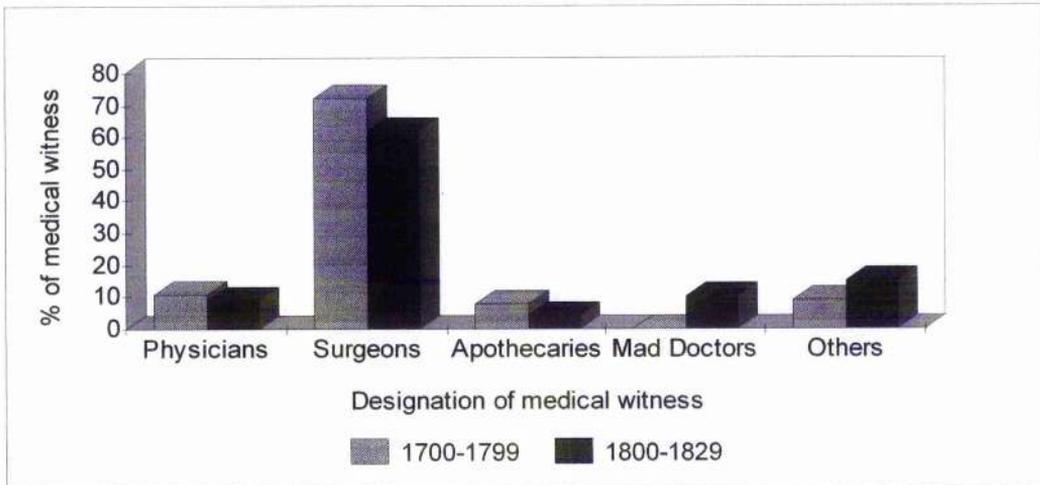


Figure 6.3. Designation of northern English medical witnesses (depositions and trial narratives combined), expressed as percentage of all medical testifiers, 1700-1799 and 1800-1829.<sup>76</sup>

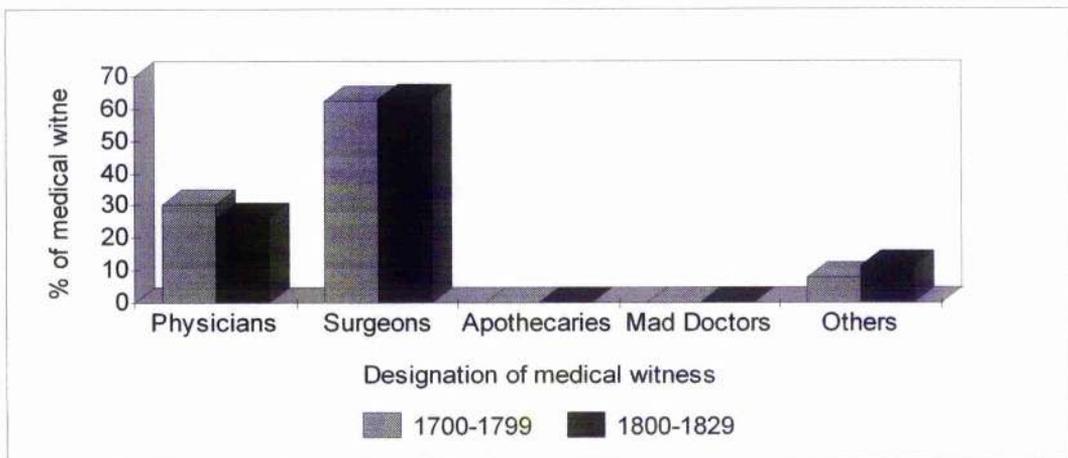


Figure 6.4. Designation of southern Scottish medical witnesses (precognitions and trial narratives combined), expressed as percentage of all medical testifiers, 1708-1799 and 1800-1829.<sup>77</sup>

<sup>76</sup> "Surgeons" includes "Surgeon-Apothecaries". "Mad Doctors" refers to persons who were professionally engaged in supervision, care and cure of the mentally disturbed. "Others" includes undesignated medical witnesses, male and female midwives, medical students and apprentices.

<sup>77</sup> See previous footnote.

The contrasting impact of surgeons at the Old Bailey and the circuit courts also reflects the different structure of provincial and metropolitan medical professions. The Medical Registers of the late-1770s suggest that four-fifths of northern English medical professionals were either surgeons or surgeon-apothecaries.<sup>78</sup> The Registers provide incomplete pictures of the remedial occupations, but they suggest that the elite strata of physicians and lower-station apothecaries formed minorities amongst practicing provincial medics. Undoubtedly, there would have been a greater demand for the medical services of physicians in the densely populated conurbations and hinterlands of London, Edinburgh and places such as York and Lancaster. Less populated rural regions supported fewer medical professionals than urban areas. The scarcely populated county of Westmoreland supported few physicians. This may explain why only one physician was recorded amongst the depositions and narratives pertaining to Appleby insanity defences before 1830.<sup>79</sup>

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<sup>78</sup> Cited by Lane "Practitioners" p.355. This figure includes entries for Cumberland, Durham, Lancashire, Northumberland, Westmoreland and Yorkshire.

<sup>79</sup> Trial of James Towers, Westmoreland, 1822.

*Medical witnesses and the "species" of insanity defence entered*

The "species" of insanity or idiocy defence which was undertaken by or entered for the prisoner had an important bearing upon the appearance of medical witnesses. There were distinct ways in which the prisoner's mental distraction could affect criminal hearings.<sup>80</sup> This section will focus upon insanity and idiocy defences which sought to postpone the prisoner's trial, rather than exculpate their crime. Medical professionals could play significant roles in the authentication of the prisoner's mental state during the weeks preceding court hearings and during courtroom tribunals.

In Scotland, there was a strong association between medical participation and defences of furiosity "in-bar-of-trial". On the southern circuit of Justiciary, ten of eleven defences "in-stop-of-trial" involved medical testimony between 1707 and 1829. By contrast, during this same era, medical witnesses only appeared in four of the twenty-four trials where the prisoner stood trial but their mental state at the crime was investigated (Table 6.5).<sup>81</sup> The robust relationship between defences "in-bar-of-trial" and medical witnesses also provides a strong explanation for the meteoric rise in medical participation in southern Scotland after 1800. Ten of the nineteen furiosity and fatuity cases between 1800 and 1829 concerned the prisoner's mental fitness at court; nine of these trials included medical testimony. Fully four-of-five of pleas "in-stop-of-trial" involved property offences in this

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<sup>80</sup> See pp.37-48.

<sup>81</sup> Courtroom testimony is lacking for three trials of this type and for one other "in bar-of-trial".

jurisdiction. This species of defence also explains why Scottish medical opinion was sought out in relation to so many property, rather than personal, offences.

	1700-1799			1800-1829		
	No. of defences	No. of Defences Including Medical Testifiers	% of Defences Including Medical Testifiers	No. of defences	No. of Defences Including Medical Testifiers	% of Defences Including Medical Testifiers
<i>Non compos mentis</i> at trial	1	1	100	10	9	90
<i>Non Compos mentis</i> at crime	15	2	13.3	9	2	22.2

*Table 6.5. Comparison of the number and proportion of insanity defences pled to postpone trial and exculpate sentence in southern Scotland, 1700-1799 and 1800-1829.*

	1700-1799			1800-1829		
	No. of defences	No. of Defences Including Medical Testifiers	% of Defences Including Medical Testifiers	No. of defences	No. of Defences Including Medical Testifiers	% of Defences Including Medical Testifiers
<i>Non compos mentis</i> at trial	33	5	15.1	29	12	41.4
<i>Non compos mentis</i> at crime	29	5	17.2	50	12	24

*Table 6.6. Comparison of the number and proportion of insanity defences pled to postpone trial and exculpate sentence in northern England, 1700-1799 and 1800-1829*

The enhanced participation of “expert” witnesses, like medics and gaolers, during defences “in-bar-of-trial” at the Justiciary Court was regularised by protocolic changes in 1801. The mechanics of who should assess the prisoner’s mental ability to stand trial were discussed during David Hunter’s High Court “test-case” between 1799 and 1801.<sup>82</sup> After prolonged, politicised legal debate (considered elsewhere in this thesis), it was concluded that the bench ought to decide upon the “panel’s” mental fitness to plead. It was resolved also that expert opinion, based upon observations of the “panel” in gaol, ought to advise the bench’s estimations. Local Sheriff’s offices arranged for experts to visit prisoners and report their observations in court. After 1801, therefore, testimony from medics was required by law to establish the prisoner’s fitness to plead, although gaoler-testimony was also adduced regularly in such cases through to 1829. At the Dumfries circuit of 1829, for example, both the jailor of Dumfries and a local surgeon testified to the mental fitness of Peter Higginson.<sup>83</sup> Lay testimony could be heard, but it was not a prerequisite to the affirmation of the prisoner’s mental capacity to stand trial.

The reliance upon “expert” witnesses heightened the quantitative and qualitative impact of medical witnesses during Scottish “bar-of-trial” defences. The number of medical deponents who appeared at court could match or even exceed that of lay witnesses, which was unusual in British legal practice. At the Spring circuit for Dumfries in 1827, for instance, only medical testifiers were called to inform the

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<sup>82</sup> JC 8/1. Houston “Courts” pp.348-152

<sup>83</sup> JC 12/40.

bench's decision to postpone the hearings of both John Smith and Duncan McDonald.<sup>84</sup> Dr Laing or Lane, a Dumfries physician, provided the only testimony at Smith's trial. Suspiciously, Smith's mental unsoundness surfaced on the morning of his trial; Laing had only had a matter of hours to examine the pannel and merely testified that he "was by no means satisfied that [Smith] was insane". It was recognised that Laing's testimony was flawed, by both the bench and the testifier himself. Laing had not been given the opportunity to form an opinion through long term or repeated observation, which reinforced the efficacy of expert testimony. The testimonies of at least two witnesses were required to form persuasive proof in Scotland, a luxury not afforded in Smith's case. In light of evidential shortcomings, judge Meadowbank returned Smith to custody and referred the case to the High Court in Edinburgh for further consideration. The judge also ordered that Smith "be regularly visited by Medical Men, in order that they may be prepared, if necessary, when the case comes to be tried at Edinburgh, to give their opinion, upon oath, as to the real state of the Pannel's mind".<sup>85</sup>

At England's Assizes, in contrast to Scotland's Justiciary Court after 1801, the prisoner's fitness to plead was assessed by jurors and "expert" testifiers were not established as the sole advisors to the court. On very rare occasions at the Northern Assizes, "expert" medical and gaoler witnesses provided the only authentication of

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<sup>84</sup> JC 12/38.

<sup>85</sup> It was proven at Edinburgh that Smith was mentally unsound (JC 8/21). After his original hearing in April, three medical persons observed Smith whilst he was incarcerated in both Dumfries and Edinburgh. On further observation, Laing concurred with the opinions of other physicians and Dumfries' gaol staff that Smith was idiotic. There are detailed medical notes attached to the precognitions in AD 14/27/2.

a prisoner's rational ability to stand trial. At Lancaster in 1812, for instance, only the gaoler and surgeon Baxendale gave evidence regarding the "disordered state" of Patrick Davis' mind.<sup>86</sup> In such cases, English medical professionals (and gaolers) could be instructed to assess the defendant's mental condition during the weeks preceding Assize meetings, just as in contemporary Scotland. In contrast to Scottish defences "in bar-of-trial", English insanity defences seldom beheld a quantitative dominance of "expert" witnesses. Regular reference was made to lay evidences from employers, friends, family, household and members of the prisoner's community, who provided factual information concerning the defendant's character and mental history. In all species of English insanity and idiocy defences, expert opinion continued to reinforce the perceptions and "facts" presented by lay persons.

Compared with southern Scotland, a less emphatic relationship existed in northern England between the appearance of medical deponents and the assessment of the prisoner's mental fitness to plead. Only one-seventh of northern English pleas to postpone or delay a trial on the grounds of extant insanity or idiocy included medical opinions between 1750 and 1799. Medical participation rose thereafter, so that one-third of these kinds of hearing included medical opinion between 1800 and 1829. The correlation was not as strong as in contemporary Scotland, but medical witnesses became involved more regularly, after 1800, on occasions where the prisoner's mental ability to stand trial was evaluated. This pattern provides an important, but partial, explanation for the rise in medical participation at the Northern Assizes after 1800.

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<sup>86</sup> Lancaster Gazette April 18<sup>th</sup> 1812.

This particular pattern of enhanced medical participation reflected the increased involvement of medical persons within British institutions like gaols, tolbooths and houses of correction by the late eighteenth century. This trend was not restricted to the provinces. The “gaol interview” became the principle means by which a medical witness met the prisoner at the Old Bailey after 1760, whilst medically trained gaol attendants became more frequently engaged in trials at Scotland’s High Court in Edinburgh from the late eighteenth century onwards.<sup>87</sup> These medics did not necessarily reside at these establishments, but arrangements were made for certain medical professionals and their apprentices to inspect and attend to prisoners.<sup>88</sup> Thus, Mr William Stillingfleet was described as “the surgeon attending the gaol” at York Castle in 1776.<sup>89</sup> Because of their capacity as medical attendants, these types of witness were able to provide persuasive testimony concerning a prisoner’s mental condition as they awaited trial. Their evidence could be persuasive because their observations were based upon frequent visits which, in many cases, could span many months. In 1776, gaol surgeon Stillingfleet declared to have observed the prisoner James Rice up to three times a day, for at least eight months.<sup>90</sup>

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<sup>87</sup> *Eigen Witnessing* pp.130-131.

<sup>88</sup> Hospital attendance could be important to the career progression of a medical professional, and this may well have been true of gaol and house of correction posts, especially amongst surgeons whose vocational paths were somewhat different to physicians. See W. F. Bynum “Physicians, Hospitals, and Career Structures in Eighteenth Century London” in Bynum and Porter (eds.) *William Hunter and the Eighteenth Century Medical World* (1985).

<sup>89</sup> ASSI 41/7.

<sup>90</sup> *Trials ... Lammas Assizes* (1776) pp.3-4.

In both England and Scotland, testimony from institutional medical attendants was employed to expose prisoners who dissimulated mental distraction at court.<sup>91</sup> In Rice's case, Stillingfleet stated specifically that he had undertaken such a regimented observational routine "to observe any thing of feigned insanity" in the prisoner.<sup>92</sup> From the late eighteenth century onwards, the likes of gaol surgeons and matrons were deemed to be particularly valuable to the process of validating the prisoners' fitness to stand trial and direct their defences. These experts were not asked to infer *a priori* opinions from purely theoretical standpoints. Expert witnesses were perceived to be useful because their testimonies were based upon direct, personal examinations of individual defendants. These observations could be reinforced by experience and expertise in the field of insanity, but this was not requisite. Experts produced *a posteriori* evidence. Before 1830, in both England and Scotland, an "expert" witness was not expected to take the stand and authenticate a defendant's madness or sanity without having met and studied the prisoner.

This was never more evident than during the shambolic trial of Susan Tinny, at Ayr, in 1815. Tinny entered the court with "her bosom bare" and flung her shoes at spectators whilst alternately singing, laughing and crying.<sup>93</sup> The pannel's counsel, James Campbell, declared that such odd behaviour was conclusive evidence of mental distraction, but only adduced the "Jailor of Wigton" as a witness to Tinny's recent state of mind. The public prosecutor, Andrew Clephane, noted that a single

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<sup>91</sup> *Eigen Witnessing* pp.129-132. Houston *Madness* p.56 and pp.262-265.

<sup>92</sup> *Trials ... Lammas Assizes* (1776) pp.3-4.

<sup>93</sup> *Ayr Advertiser* September 21<sup>st</sup> 1815. JC 12/29. AD 3/1.

testimony formed insufficient proof at law and argued that lay witnesses could prove that Tinny's madness was feigned. Clephane could produce no expert opinion to inform the bench's assessment of Tinny's mind (as required after 1801) and the defence's case was flimsy. In bemused desperation, the presiding judge, Lord Gillies, "requested a Medical Gentleman who happened to be in Court [as a spectator] to give his opinion upon the Pannel". This medical professional was unprepared for his sudden change of role and "declined giving any decided opinion on the subject", forcing Gillies to remit Tinny's case to Edinburgh for further consideration. It was significant that Lord Gillies turned to a medically trained spectator in the hope of establishing Tinny's mental condition. This illustrates that medical opinion was afforded superior value during Scottish defences "in bar-of-trial", at least after 1801.

*The qualitative impact of medical testimony*

Within the context of the evolving adversarial courtroom processes, the augmented use and appearance of medically trained witnesses suggests that greater value became attached to their testimony. This next section will therefore investigate how and why medical testifiers and their testimony could make such an enhanced qualitative impression in Britain by the early nineteenth century. This will begin with a simple comparison of the success-rates of defences which included medical opinion about the prisoner's state of mind in England and Scotland.

Between 1660 and 1829 in northern England and southern Scotland, the global "success-rates" of insanity and idiocy defences stood at sixty-eight and sixty-two-percent respectively (Table 6.7). Insanity and idiocy defences stood an even greater chance of success if medical testimony was involved and opined that the prisoners did suffer from mental maladies. Around three-quarters of northern English and seven-tenths of southern Scottish defences involving such medical testimony were proven (Table 6.7). This conclusion must be treated cautiously, because medical testimony was rarely the only evidence imparted at court. Even in Scottish defences "in-bar-of-trial" after 1801, gaolers advised the bench alongside medics. This analysis is also incomplete; most English trials lack narratives before 1800, whilst the Scottish sample-base is small relatively. Both depositions and published reports could filter out medical testimony which was deemed to be unpersuasive, uninteresting or to have little impact upon the final verdict. Future research needs to focus upon the prosecution of insanity defences to ascertain whether victims and

prosecuting lawyers were also more successful when they employed medical witnesses, especially when defendants lacked such proofs. Nevertheless, the guarded analysis of the “success-rates” insanity defences which included medical testimony does provide a broad base from which to investigate the qualitative impact of medical witnesses at court.

	Overall rate of success	Success-rate of defences which included medical opinion
Northern England	68%	76.9%
Southern Scotland	62%	71.4%

*Table 6.7. Comparison of the overall success-rates of insanity defences to those involving medical opinion about the prisoner's mental state. Northern England and southern Scotland, 1660-1829.*

There were statutory guarantees that medical testimony would appear during long eighteenth century criminal hearings in some Continental countries, such as France and Italy, which adopted and amended principles from the “Carolina Code”.<sup>94</sup> Medical testimony remained marginalised in some Continental traditions; even in the 1820s, insanity defences in Württemberg could proceed without reference to medical opinion, which was not afforded superior evidential value.<sup>95</sup> Nevertheless,

<sup>94</sup> Crawford “Emergence” p.25 and “Legalising” p.90. Forbes *Surgeons* p.40. Smith *Trial by Medicine passim*. Ward “Observers” p.105. Eigen *Witnessing* pp.108-160. A Russian statute of 1717 also established the regular participation of medical witnesses during violent criminal offences which resulted in injury or death, for instance. Becker “Judicial Reform” p.7 fn.17.

<sup>95</sup> Wessling “Infanticide” pp.117-138.

medical witnesses were venerated within certain Continental systems and were arraigned specifically to advise the court on issues like the cause of death and sanity of the prisoner. Formal medico-legal positions were sought out by Continental medics.<sup>96</sup> Forensic work was distributed venally and was rewarding financially, whilst medics who refused to appear at court were reprimanded for failing to comply with statutory law. In specific Continental legal systems, therefore, medical witnesses were established figures whose testimony carried elevated value thanks to criminal procedures.

In England and Scotland, by contrast, there was no statutory guarantee that medical testimony would appear in court. The criminal traditions of England and Scotland, especially, borrowed evidential principles from Continental "Civilian" codes. But in England, forensic testimony from medically experienced witnesses was never a condition for a criminal trial to proceed before 1830.<sup>97</sup> The same was true of Scottish trials, except regarding defences of mental unsoundness "in-bar-of-trial" after 1801, when expert opinion was required to advise the bench's appraisal of the prisoner's mental state. After 1801, Justiciary Court procedure "in-bar-of-trial" resembled strongly the practice of contemporary, Continental criminal hearings in places such as Russia.

In contrast to their Continental cousins, British medical professionals were reluctant to become entangled in lengthy legal processes. "Expert" witnesses were

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<sup>96</sup> Crawford "Legalising" pp.92-100.

<sup>97</sup> Shapiro Culture of Fact pp.28-32.

discouraged from testifying by ineffective and irregular remuneration by comparison with France, for instance.<sup>98</sup> Scottish guidelines were similarly vague regarding the payment of witnesses for the public prosecution, although (as in England) wealthy litigants could lure medical deponents to court by paying their expenses.<sup>99</sup> Medical professionals could seek to avoid participating in British criminal trials and were not castigated officially for such inertia. When Margaret Paisley killed her infant at Milnthorpe workhouse in 1828, the local surgeon, Robert Hancock, dispatched his apprentice to examine the corpse in his stead.<sup>100</sup> Apprentices could be trained in anatomy, but the most experienced local doctor was excused from attending the coroner's inquest into Paisley's crime and her subsequent trial at the Cumberland Assizes.<sup>101</sup> Thus, British medical professionals could avoid bearing testimony at the circuit courts.

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<sup>98</sup> Crawford "Legalizing" p.91. Medical professionals could be paid for appearing at a coroner's inquest, however.

<sup>99</sup> Crowther and White *Soul and Conscience* pp.2-3.

<sup>100</sup> ASSI 45/60. *Carlisle Patriot* March 8<sup>th</sup> 1828. Crawford "Legalizing" p.91 notes that surgeons in London and Middlesex similar means of avoiding bearing testimony at the Old Bailey during the eighteenth century.

<sup>101</sup> Rosner *Medical Education passim*.

*Changes in evidentiary standards and medical testimony in Britain.*

With the exception of Scottish “bar-of-trial” defences after 1801, British medical persons were not involved in criminal hearings because of statutory or procedural requirements. In the provinces, medical participation became heightened after the mid eighteenth century because their testimony promised to be persuasive within the context of more stringent standards of proof. As greater theoretical and practical attention was paid to evidential principles, it was recognised that the opinion of expert witnesses (of whom, medical professionals formed a significant sub-category) could be distinguished from lay testimony. The adoption of stricter evidentiary principles eroded the efficacy of “hearsay” evidence and lay testifiers were increasingly restricted to reporting their direct observations in court. “Expert opinion” was also based upon a witness’ direct observations, but this evidence was reinforced by the testifier’s personal experience and technical knowledge.<sup>102</sup> Thus, a medical witness’ interpretation of a prisoner’s sanity could be coloured by their theoretical and practical familiarity with distracted mental conditions, which was garnered through occupational training and experience. Medical persons were not the only expert witnesses who could deliver “opinion” during criminal hearings, however. As testimony from witnesses with specialist skills obtained greater value in court, so experts were used in a wider variety of cases. For instance, calligraphers could be called to court in an effort to substantiate whether a forgery had taken place.<sup>103</sup>

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<sup>102</sup> Ward “Observers” pp.106-113.

<sup>103</sup> Eigen *Witnessing* p.111. Ward “Observers” p.105.

The value of testimony from “disinterested” or less partial witnesses rose as evidential standards changed. This resulted in the enhanced involvement of “lay” witnesses such as gaolers and those with legal training and experience within the British criminal systems. The enhanced quantitative and qualitative impact of medical testifiers in the provinces, after the mid eighteenth century, was also related to heightened desires for impartial testimony within Britain’s courtrooms.

Medical witnesses could be adduced or subpoenaed on the litigants’ behalf, but they could assume objective stances at court and thereby produce “impartial” evidence.<sup>104</sup> Stephan Landsman has argued that impartiality was expected from, and delivered by, medical deponents at the Old Bailey and that inequitable medical testimony was very poorly received by judges and jurors.<sup>105</sup> This was also true of provincial England and Scotland, as exemplified by William Stillingfleet’s testimony during James Rice’s case, at York between July 1776 and July 1777.<sup>106</sup> Stillingfleet provided unprejudiced opinion concerning Rice’s mental stability throughout this extended case. In July 1776, Stillingfleet’s evidence had been crucial in establishing Rice’s inability to stand trial due to insanity.<sup>107</sup> In July 1777, as the sole defence witness, Stillingfleet reiterated that Rice had been insane in 1776 but also volunteered that, after recovering from “gaol fever” in March 1777, the prisoner’s “senses came to him, and have continued so ever since”.<sup>108</sup>

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<sup>104</sup> Shapiro “Concept Fact” p.6. Landsman *Rectitude* esp. p.451 and p.489. Houston “Courts, Doctors” p.340.

<sup>105</sup> Landsman *Rectitude* pp.451 and 489.

<sup>106</sup> ASSI 42/9 and 41/7. *Trials ... (1776-1777)*. Rice’s condition postponed his trial on three occasions before he was found guilty in July 1777.

<sup>107</sup> *Trials ... Lent Assizes (1777)*, p.23.

<sup>108</sup> *Trials ... Lammas Assizes (1776)* p.10.

Stillingfleet could not be expected to perjure himself by providing false information which favoured the defendant in 1777, but he adopted an objective stance which reinforced the prosecutor's case. Northern English medical witnesses could be detached witnesses and provide impartial testimony from at least the late eighteenth century. Provincial English and Old Bailey medical deponents could therefore play similar, detached roles at court.

Legal professionals and jurors could expect medical testifiers to offer impartial evidence, but desires for objective medical testimony were also promoted by medical professionals, themselves, during the eighteenth century.<sup>109</sup> Jan Goldstein has suggested that early nineteenth century French medical witnesses sought to present themselves as educated, "enlightened" characters.<sup>110</sup> They facilitated this identity by promoting themselves as detached, objective deponents who could transport useful empirical, as well as theoretical, scientific knowledge to the courtroom. Goldstein's insightful analysis can be transplanted productively to the British criminal courtrooms. As Catherine Crawford has proposed, the objectivity which was demonstrated by English surgeons and physicians at court reflected wider efforts to reform the practice and identity of the medical professions by placing them upon a firmer, scientific footing.<sup>111</sup> Medical persons approached forensic issues objectively from at least the late eighteenth century. Such reforms may have been most evident in the 1820s, but this development was rooted in eighteenth century medical testimonies.

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<sup>109</sup> Crawford "Legalising" p.92.

<sup>110</sup> Goldstein *Console and Classify* pp.164-5.

<sup>111</sup> Crawford "Emergence" p.278 and "Legalising" pp.108-9.

Despite evidential developments, medical and lay testimonies could be indistinguishable in provincial Britain before 1830. Typically, medical witnesses had personal knowledge of the prisoner or case at hand and were not pure, “detached” testifiers.<sup>112</sup> To take an English example, “surgeon-apothecary” George Ellerton played a vital role in proving that Granville Medhurst, gentleman, had been insane at the time of killing his wife, Sarah, in 1800.<sup>113</sup> Ellerton was a long standing client of the wealthy Medhurst household and had attended both Granville and Sarah in a remedial capacity. Ellerton observed that, about two weeks before the murder, Granville Medhurst became low-spirited and melancholy, possibly owing to financial misfortunes.<sup>114</sup> Ellerton believed that Medhurst’s insanity was revealed by a sudden “change in countenance”. Ellerton claimed no expertise in identifying mental afflictions and he was not an objective deponent. The surgeon’s testimony was persuasive because of his social and professional familiarity with Medhurst, which allowed the testifier to compare Medhurst’s normal conduct with his atypical behaviour during the weeks preceding the crime. During insanity defences, lay testimony was based upon similar long term observations from persons who were related intimately to the prisoner. Throughout the long eighteenth century, “medical” and “lay” persons could produce comparable testimonies.

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<sup>112</sup> *Eigen Witnessing* pp.123-130. Crawford “Emergence” pp.28-35.

<sup>113</sup> ASSI 41/10.

<sup>114</sup> *York Herald* August 2<sup>nd</sup> 1800.

The content of medical and lay testimonies could also be indistinguishable. Both types of witness authenticated mental afflictions by evaluating the context of the prisoner's speech, appearance and behaviour. George Ellerton was convinced that Granville Medhurst's verbal interactions betrayed the prisoner's disturbed thought processes. The surgeon recounted that Medhurst conceived falsely that his bread and brandy had been poisoned by both his wife and Ellerton. Medhurst's (lay) servants related identical inferences of their master's unusual conduct. Both medical and lay testifiers noted that Medhurst's conduct had altered; he was low-spirited and lost interest in leisurely riding, a gentlemanly pursuit he had previously enjoyed. Both Ellerton and the servants noted the prisoner's "wild and agitated look", which contrasted to his normal calm, collected and well-presented appearance. Witnesses were shocked to observe that Medhurst's hair was "half-shaved", for the insane were depicted conventionally with shaven heads, alongside disorderly elements of the lower orders of society.<sup>115</sup> Lay and medical testifiers concurred that Medhurst's gentlemanly status and identity had been removed by his mental affliction. Ellerton was a "medical witness", but the content and basis of his testimony mirrored those provided by lay servants.

During Medhurst's trial, surgeon Ellerton reinforced, rather than directly challenged, "lay" perceptions of the prisoner's mental condition. Despite the evidential modifications, it was rare that medical witnesses challenged directly the ability of lay persons to identify mental abnormality in Britain's courts before 1830. Cases which lacked lay, community consensus and relied upon medical testimony

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<sup>115</sup> Houston "Face" pp.52-53.

alone were prone to spectacular collapse, as illustrated by John Gibson's failed defence of furiousity at Jedburgh in 1814.<sup>116</sup> Gibson confessed to killing his wife, Janet Renwick, at their abode in Hawick, but claimed to have done so whilst mentally distracted.<sup>117</sup> The public prosecutor employed seven lay and two medical witnesses to prove that Gibson had been sane and had behaved in his usual (violent) manner prior to the crime. This was a powerful case. It was bedded upon the community of Hawick's belief that Gibson had been bad, not mad, and was buttressed by the "expert" opinions of two respectable medical professionals. These medical witnesses both reflected and reinforced the consensus held by the local community; that Gibson's violent behaviour was not reflective of an altered mental state because he acted regularly and willingly in such an unacceptably aggressive manner towards the victim.

A solitary witness, surgeon John Wilson, was called to prove that Gibson suffered from insanity. Wilson had observed Gibson in gaol at the behest of the Sheriff-Substitute of Roxburgh and produced a detailed written report that Gibson was melancholic, "upon one subject exclusively, with the consequences that may be supposed to arrive out of it".<sup>118</sup> Wilson added that Gibson suffered from "confusion in the head", revealed by unsubstantiated beliefs that his wife had poisoned his food and committed adultery (with a handsome, captive French officer from the Napoleonic wars, no less). Days after submitting this report, the surgeon changed his mind and entered a forthright admission that Gibson fabricated his madness

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<sup>116</sup> JC 12/28.

<sup>117</sup> JC 26/366.

<sup>118</sup> *Idem*.

“with a purpose to deceive, and to alleviate the crime”. Following further investigation, Wilson suggested that there was now “too much evidence” to suggest that Gibson was “a violent and irritable” man. Wilson acknowledged that Gibson was sane and that his initial evaluation therefore carried “no weight and falls to the ground”.

John Wilson’s expert testimony was equivocal and therefore unpersuasive. Wilson’s opinion was also disregarded because, originally, it had contradicted the consensus of other medical and lay witnesses, who deemed that the pannel was sane. Gibson’s woefully inadequate defence therefore disintegrated; he was found guilty and gained subsequent notoriety by becoming the only criminal to be hung at Hawick.<sup>119</sup> Gibson’s case clearly underlines Tony Ward’s recent argument and extends it to Scotland: that the most convincing medical opinions of insanity and idiocy did not challenge lay assumptions about mental defects, but were firmly based upon a “cultural consensus” of opinion regarding the prisoner’s mental state.<sup>120</sup>

At the Old Bailey, Joel Eigen has suggested that medical witnesses began to claim the courtroom authentication of mental distress as their own “cognitive territory” after 1820.<sup>121</sup> From the 1790s, expert witnesses reinforced their opinion of

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<sup>119</sup> A.F. Young *Encyclopaedia of Scottish Executions, 1750-1963*, (1998) pp.30 and 176.

<sup>120</sup> Ward “Observers” p.117.

<sup>121</sup> Eigen *Witnessing* pp.113-120.

the prisoner's mental condition with metoposcopic and physiognomic references.<sup>122</sup> At Susan Tinny's trial in 1815 a spectating "medical gentleman" was asked to proffer his opinion of the prisoner's mental state. He declined to provide a "decided opinion" because he lacked prior observation of the prisoner, but "did not think from her Eye that she was deranged".<sup>123</sup> Lay persons could also deem that a person's character and mental state was reflected by their facial expressions, including the eyes, but medical witnesses imparted such observations more regularly.<sup>124</sup> Physiognomy and metoposcopy were most compelling when offered alongside other observations of a prisoner's insanity or idiocy. Thus, at Lancaster in 1823, Andrew Ryding's facial "features" were described as being "particularly expressive" of insanity. But this remark was qualified by well-established traits of madness, such as his "peculiarly animated ... at times violent" gestures and the fact that he ate apples "voraciously".<sup>125</sup>

By the late-1820s, a handful of provincial British medical testimonies disproved lay consensuses and thereby challenged assumptions that mental afflictions could be identified correctly by lay persons. In 1828, a flax-dresser and sailor called John Smith stole a "Black Gig Mare" from an inn at Ringford, in the parish of Tongland in south-western Scotland.<sup>126</sup> Smith was apprehended by members of the local community, who were convinced that Smith was of sound mind, "smelt much of

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<sup>122</sup> J. Cule "The Enigma of Facial Expression: Medical Interest in Metoposcopy", *JHMAS*, 48, (1993), p.308. Houston "Face" pp.49-50. Andrews and Scull *Customers and Patrons* p.77.

<sup>123</sup> JC 12/29.

<sup>124</sup> Houston "Face" pp.57-66.

<sup>125</sup> *Cumberland Pacquet* August 25<sup>th</sup> 1823.

<sup>126</sup> JC 12/38. AD 14/27/2. Smith admitted to being drunk at the time and it was noted by some witnesses that he was intoxicated upon arrest, but did not suffer from a permanently incapacitating mental affliction.

drink” and “pretended to act the Idiot”. It was also recounted that a man called John Lees (who was “rather tipsy at the time”) visited Smith in custody and told him “to pretend to be an idiot and he would get off”. Witnesses from the community of Ringford were convinced that Smith dissimulated mental incompetence, knew right from wrong and was responsible for his crime.

By order of the Sheriff-Substitute of Dumfriesshire, Smith’s mental state was scrutinized by three medical professionals and the gaol-keeper as he lay in Dumfries tolbooth, awaiting trial.<sup>127</sup> After several observational visits, these “experts” concurred that Smith was fatuous. This consensus of “opinion” was endorsed by the gaoler’s wife, who observed secretly as Smith spread his own “excrement on a piece of bread, which he immediately put into his mouth and eat”. Expert opinion prevailed at court; Smith was found to be idiotic and incapable of standing trial. Smith’s case illustrates that, by the 1820s, “expert” witnesses could proffer a consensus of “opinion” which confronted directly “lay” or community evaluations of a prisoner’s mental capacities. This may have stemmed from perceptions, held by at least some medical and legal professionals by the early nineteenth century, that mental affliction needed to be authenticated by “experts”.<sup>128</sup> By the 1820s, greater attention was paid to the possibility that “lay” persons might diagnose incorrectly prisoners, although juries continued to regard such community consensus as an important means of verifying the prisoner’s state of mind.

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<sup>127</sup> These were physician William Maxwell, physician John Laing and surgeon James Spalding, all residing in Dumfries. All these medical witnesses were therefore removed from the community in Ringford, which may have facilitated the clash between expert and lay consensus in Smith’s case.

<sup>128</sup> *Eigen Witnessing* pp.110-122.

Such abrasions between medical and lay testimony were rare in provincial England and Scotland before 1830. Medical proofs were employed most regularly to legitimise lay testimony and community analysis of the prisoner's mental condition.<sup>129</sup> In 1726, the observations of Montague Giles, an Apothecary from Hemsley in Yorkshire, were used to reinforce the local community's perception that Richard Waddy had been insane when he murdered his father.<sup>130</sup> Giles buttressed and replicated lay testimony by submitting simply that Richard had "been disordered in his senses this year or two by past". Likewise, during John Burton's hearing at Jedburgh in 1747, the physician William Douglas did no more than recount lay informants by stating that he had "been credibly informed that the prisoner has sometimes before been seized with fitts of melancholy". These affirmations persuaded Douglas, two other medical witnesses and the court that Burton was mentally unfit for trial. Community or lay identification remained strong and regular means of authenticating the prisoner's mental state in long eighteenth century Britain.

Even in the 1820s, British medical witnesses continued to be most confident and hence most persuasive when reinforcing lay testimony. Dr St-Clare, a Preston physician, was the sole medical testifier who appeared at Andrew Ryding's hearing which took place at Lancaster in 1823.<sup>131</sup> The prosecution adduced St-Clare to provide the final, clinching, evidence that Ryding had inflicted severe wounds upon

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<sup>129</sup> Houston *Madness* pp.46-53.

<sup>130</sup> ASSI 41/2 and 45/18/3 nos. 31-32C.

<sup>131</sup> *Lancaster Gazette* August 21<sup>st</sup> 1823.

Mr Horrocks, who had been assaulted with a blunt cleaver after leaving a Preston church.<sup>132</sup> It was established that Ryding had planned the assault and then fled the scene of the crime, "facts" which were strongly suggestive of Ryding's sanity. When examined, St Clare merely produced the evasive statement that, "[T]he diseases of the mind are in some places become a separate department: I have not studied it a great deal".

As the prosecution rested, Andrew Ryding embarked upon a rambling defence monologue which was suggestive of mental confusion. Ryding's parents also provided positive indications that their son had suffered from mental distractions for many years and had behaved bizarrely before committing the crime. As the trial drew to a close, Dr. St-Clare was recalled to the stand and asked to clarify whether Ryding was insane. For a man who had claimed initially to have no expertise in the field of insanity, St-Clare now provided a detailed exposition,

"A person may be deranged as to some points, and be very acute as to others, in his opinion. On the Monday after the committal of the deed, [Ryding] seemed to labour under great mental excitement. There seemed to be a complete apathy, as to any moral feeling, which appeared to me to be real and not pretended. Cases of delusion and delirium are distinct cases; they border on each other; there may be a considerable degree of delusion when there is no delirium. I thought his manner, on the 22nd July, when he was in the Dispensary, was rather strange. On the Friday, he appeared to be a little better".<sup>133</sup>

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<sup>132</sup> See pp.422-424.

<sup>133</sup> Lancaster Gazette August 16<sup>th</sup> 1823.

St-Clare's opinion was better informed second time around, but he also drew confidence from the preceding proofs of Ryding's mental instability. St-Clare's divergent testimonies indicate that, in both cases, the lone physician was wary of providing an opinion which was not grounded in lay "fact". British medical witnesses continued to fortify and legitimise lay testimony in the 1820s, at least within the context of insanity and idiocy defences.

*Mad-doctors, expertise and the authentication of mental distraction*

Having examined the quantitative and qualitative roles of the broad category of “medical” witnesses during insanity and idiocy defences, attentions must now be turned towards the courtroom impact of “mad-doctors”. Nascent “alienist” occupations had emerged in Britain by the nineteenth century, but they were not coherent “psychiatric” professions, as some scholars have implied.<sup>134</sup> Recent research has suggested that such “specialists” could have an important, if quantitatively restricted, impact upon some English insanity defences during the late eighteenth and early nineteenth centuries. It has been suggested that Earl Ferrers’ hearing at the House of Lords, in 1760, was the first English criminal trial to involve testimony from a professional whose expertise was grounded in the identification and care of insane persons.<sup>135</sup> This evidence was imparted by the famous “mad doctor” and physician, John Monro, whose family formed a dynastic association with London’s Bethlem asylum during the eighteenth century.<sup>136</sup> After the 1760s, persons who were professionally confederated to London’s madhouses and asylums were “well presented” amongst Old Bailey witnesses during insanity defences.<sup>137</sup> This section investigates the appearance and impact of “alienists” at England’s Northern Assizes and Scotland’s southern circuit of Justiciary after 1660.

For England’s Northern Assize circuit, no “mad-doctors” were recorded

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<sup>134</sup> Szasz *Manufacture* p.15. Scull *Museums of Madness* p.14 and 125-129.

<sup>135</sup> Eigen *Witnessing* pp120-121. Andrews and Scull *Undertaker* pp.193-215.

<sup>136</sup> *Idem.*

<sup>137</sup> Eigen *Witnessing* p.127.

amongst depositions or printed reports until 1803, when John Willis (1751-1835)<sup>138</sup> and Alexander Hunter (1729-1809)<sup>139</sup> testified during Philip Maister's hearing at York Castle.<sup>140</sup> Before 1800, "alienist" participation during Assize trials may be obscured by the sources examined. "Specialist" witnesses might not be asked to provide pre-trial declarations, only to appear subsequently at court as expert witnesses. Neither Willis nor Hunter was interviewed by the coroner or the JPs who collated the pre-trial declarations for Philip Maister's case, for instance. After 1800, northern English testimonies were recorded more faithfully amongst printed accounts. Of Northern Assize insanity defences between 1800 and 1829, twelve-percent of medical witnesses claimed expertise in identifying mental maladies (Table 6.8). Even in the early nineteenth century, "specialist" medical witnesses formed a small minority of depositions and testimonies. The observations of persons experienced in the identification of mental afflictions were not prerequisite to findings of insanity and idiocy at the Northern Assizes before 1830.

In southern Scotland, meanwhile, no recognised "alienists" or "mad-doctors" appeared before 1830. After 1800, eight-percent of southern Scotland's medical witnesses did reinforce their testimonies by claiming experience in authenticating mental afflictions, however. Persons with professional experience in treating and

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<sup>138</sup> John Willis belonged to a famous "alienist" family based in Lincolnshire. John and his father, Francis, treated King George III successfully for his malady during 1788. John Willis was employed treated the King again during 1801. Parry-Jones *Trade in Lunacy* p.76.

<sup>139</sup> Scots-born and Edinburgh-educated Alexander Hunter sought a professional career in Yorkshire shortly after completing his MD. He was involved in the foundation of York Lunatic Asylum between 1772 and its opening in 1777. He was confederated to York Lunatic Asylum as its physician from 1777 through to 1809. *DNB* XXVIII pp.283-284.

<sup>140</sup> Rede *York Castle* pp.209-210. The lack of courtroom narratives may hide the impact of such "experts" between 1760 and 1800. Willis and Hunter, for instance, made no pre-trial depositions, but were arraigned for the case itself. Their testimony is considered below, pp.598-600.

authenticating mental disturbance therefore provided small proportions of the testimonies and depositions produced for southern Scottish and northern English insanity and idiocy defences. Such “experts” were involved beyond their proportional representation within society as a whole, but they remained marginal, rather than firmly established, figures during early nineteenth century provincial criminal tribunals. This simple quantitative analysis challenges assumptions that “alienist” experts generated the concept of mental disorder and then dominated the authentication of such afflictions, at least in the context of British criminal trials. Michael MacDonald has argued that mental distraction could be defined by experts, but its discovery was dominated by lay persons within England’s legal processes.<sup>141</sup> This was certainly true of the northern English and southern Scottish superior criminal courts through to 1829.

% of all Medical Witnesses 1800-1829	Northern England	Southern Scotland
“Insanity Experts”	12	8
Other Medical Witnesses	88	92

*Table 6.8. Proportion of medical witnesses who had, or claimed to have, experience in identifying mental afflictions between 1800 and 1829, northern England and southern Scotland compared.*

<sup>141</sup> MacDonald *Mystical Bedlam* p.113.

According to available evidence, “insanity experts” made a belated and less dramatic impact upon provincial British insanity defences than at the Old Bailey.<sup>142</sup> The lesser participation of “alienists” in the provinces, when compared with London, can be explained partially by the regional concentration of asylums and madhouses during this era. By the 1760s, two public asylums and a number of private (licensed) madhouses were established within London and its environs.<sup>143</sup> By contrast, public asylums were not erected within some regions of northern England and southern Scotland before 1830. Both Cumberland and Westmoreland lacked licensed private “madhouses” or public asylums before 1830, although mentally disturbed persons from these regions were admitted to Newcastle Lunatic Asylum from at least 1824, once pauper lunatics were accepted there.<sup>144</sup> Unlicensed private “madhouses” may have operated in these areas, but these tended to be small establishments which were reserved for a wealthy clientele. There was no guarantee that impoverished or criminal lunatics would be accepted by private proprietors.<sup>145</sup>

The lack of “alienist” witnesses who appeared in some provincial jurisdictions might be explained by their inability to travel to the seat of court. John Halliday, for instance, had been admitted to and released from Glasgow Asylum before he

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<sup>142</sup> Eigen *Witnessing* pp.120-121.

<sup>143</sup> Parry-Jones *Trade in Lunacy* pp.34-35. Andrews and Scull *Undertaker* pp.143-171.

<sup>144</sup> Parry-Jones *Trade in Lunacy* pp.34-35 (Table 3) and 61-62. Hannah Wells’ two trials (Cumberland, 1825 and 1827) had been restrained at Whitehaven’s House of Correction before being transferred to Newcastle Lunatic Asylum by her kin. *Carlisle Patriot* 13<sup>th</sup> August 1825. *Cumberland Pacquet* 16<sup>th</sup> August 1825. In 1846, Cumberland and Westmoreland magistrates formally arranged for pauper lunatics to be confined at Dunston Lodge, near Gateshead in north-eastern England, rather than within their own counties.

<sup>145</sup> Parry-Jones *Trade in Lunacy* pp.74-95.

threatened his family and attempted to burn down his rented farmhouse in Rivox.<sup>146</sup> No professional affiliated to Glasgow Asylum gave evidence at Halliday's trial in Dumfries, during 1818. Perhaps the time and expense of travel from Glasgow precluded their appearance, but this explanation is less persuasive for places like York and its hinterlands. By the turn of the nineteenth century, York and parts of Yorkshire were provisioned by a public asylum, the Quaker "Retreat" and numerous private madhouses.<sup>147</sup> It must therefore be questioned why the likes of Alexander Hunter, the first physician to York Asylum (opened in 1777), was not recorded as participating at the local Assize courts before 1803. The relative lack of eighteenth century narratives may provide one answer for northern England. This does not hold true of all Scottish trials, however, where testimonies were recorded faithfully in Minute Books. Dynamics other than the source materials ought to be considered.

"Alienists" may have wished to avoid becoming embroiled in time-consuming and costly legal processes. Insanity experts, just like generic "medical witnesses", were not guaranteed to be remunerated for their courtroom appearances.<sup>148</sup> It is therefore unsurprising that the participation of "mad-doctors", alongside other professional associates to asylums and madhouses, was related strongly to the social and economic status of the prisoner, or their kin. The superior wealth and station of Philip Samuel Maister Esquire ensured that both Drs Alexander Hunter and John

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<sup>146</sup> JC 12/31-32.

<sup>147</sup> J.A.R. Bickford and M.E. Bickford "Private Lunatic Asylums of the East Riding", East Riding Local History Society, (1976). Digby, "Changes in the Asylum" and Madness, Morality and Medicine.

<sup>148</sup> Crawford "Emergence" pp.151-156.

Willis testified at his Yorkshire hearing for murder.<sup>149</sup> Before the crime, Maister's household had borne the costs of their melancholic master travelling to London to consult and remain under the supervision of John Willis for two weeks.<sup>150</sup> Hunter and Willis were present at Maister's hearing because the defendant's household was able to pay their expenses.<sup>151</sup> The criminal process may have restricted the remuneration of witnesses, but a wealthy prisoner was more able to financially compensate deponents for their expenditure (as well as the loss of time and income) incurred by attending a geographically distant criminal trial.

Just like Willis and Hunter at Maister's trial, "specialist" deponents were employed typically at court because they had managed and treated the prisoner in a professional capacity some time before the crime had been committed.<sup>152</sup> Some "experts" had no pre-crime association with the prisoner, such as Drs. Williams and Wade who provided persuasive evidence that Jonathan Martin was insane in 1829.<sup>153</sup> But even Williams and Wade had formulated their opinions after observing Martin as he lay in gaol, awaiting trial. Just like medical witnesses in general, it was rare that "specialists" presented opinions which were based upon deductive reasoning from general principles alone. These experts presented *a posteriori* testimony, which was derived from their personal observations of the prisoner, rather than pure *a priori* evidence. In 1829, Margaret Dalton opined that the arsonist

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<sup>149</sup> Medland and Weobly Remarkable and Interesting Criminal Trials (1803) pp.158-160. Rede York Castle pp.209-210.

<sup>150</sup> *Idem.*

<sup>151</sup> The Willis dynasty was rooted in Lincolnshire, but John had commitments in London and may have travelled from the capital on this occasion.

<sup>152</sup> Eigen Witnessing pp.21-22 presents a similar pattern for the "specialists" who appeared at the Old Bailey after 1760.

<sup>153</sup> London Morning Herald April 2<sup>nd</sup> 1829.

Jonathan Martin was “a really insane person”.<sup>154</sup> Dalton had managed Martin as keeper of “Catesby Lunatic Asylum” during the early 1820s, and she based her opinion upon the express knowledge of Martin’s behaviour, speech and appearance whilst he had been under her supervision. Like other witnesses, Dalton was convinced that Martin’s extreme religiosity and purposeless fasting were indicative of a disturbed mental state. Margaret Dalton was not introduced as a detached, impartial expert who might inform the court of the general principles regarding mental afflictions. Instead, Dalton was selected as a witness because of her knowledge of Jonathan Martin and his specific mental condition, validated by her occupational expertise. Professional “specialist” opinion was not grounded in abstract reasoning alone, but was founded upon personal observations of, and interactions with, the prisoners who stood at the bar.

In England, evidences from both lay persons and non-specialist medical professionals were adduced routinely alongside proofs from “insanity experts”. At Philip Maister’s hearing in 1803, for instance, the mad-doctors John Willis and Alexander Hunter were complimented by two general practitioners and three lay witnesses. Willis and Hunter were not employed to introduce or conclude the proof of Maister’s insanity; they appeared after the lay witnesses had taken to the stand and were sandwiched between the generic practitioners, surgeon Fielding and physician Alderson. Evidences from “insanity experts” were not necessarily recognised as being sufficient proofs of the prisoner’s mental state by themselves. To be persuasive at court, the opinions of “mad-doctors” had to reflect or reinforce

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<sup>154</sup> *Idem.*

the interpretations offered by lay persons, as well as the broader medical community. Testimony from a “specialist” was not therefore accorded automatically a higher qualitative value than the evidences which were presented by other types of witness. This was also true of southern Scotland; even in defences to “bar” trials after 1801, gaolers and generic medics advised the bench, not “alienists” or mad-house keepers.

There was no prescribed obligation that “expert” testimony should be involved in the authentication of insanity and idiocy in England before 1830. This was also true of Scotland, excepting pleas “in-bar-of-trial” after 1801. The opinions of “mad-doctors” were not mechanically accepted or accorded superior value at court. As Joel Eigen has demonstrated for the Old Bailey, these witnesses could be subjected to stringent cross-examination and faced public humiliation if they did not provide persuasive, objective testimony.<sup>155</sup> Although “specialists” such as John Monro were high status individuals who developed socially exclusive clienteles, their characters and occupation were also subjected to a variety of publicised ridicule.<sup>156</sup> Perhaps the pertinent question is why “alienists” and “insanity specialists” should appear at court at all, rather than why so few were engaged in the provinces. It has already been suggested that the prisoner’s wealth and social station might influence the appearance of “mad-doctors” at court, but there are some other plausible explanations which must be considered, too.

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<sup>155</sup> Eigen *Witnessing* p.137.

<sup>156</sup> Andrews and Scull *Undertaker* pp.3-13, 43-52, 143-179.

Alienists could demonstrate their occupational skills and curative regimes by appearing in high-profile, publicised court cases. Newspapers transcribed criminal cases in detail by the nineteenth century, especially in cases that excited public interest, such as Jonathan Martin's tribunal for his audacious arson attack upon York Minster in 1829.<sup>157</sup> Accounts of Martin's life, crime and trial appeared in "national" newspapers like the London Morning Chronicle and the local presses. Five "specialists" testified at this hearing and their opinions received particular exposure. Three were affiliated to asylums and madhouses which were situated in north-eastern England, testimony to the expansion of that region's "trade in lunacy". The other two were physicians from York, who were experienced in ministering to the mentally afflicted. Reputations could also be shattered through ill-considered or ill-received testimony. In 1829, madhouse-keeper Richard Nicholson was forced to defend his opinion that Jonathan Martin had "never" been insane, even when under Nicholson's supervision.<sup>158</sup> Nicholson was also obliged explain why he had released Martin back into society in 1818, only for Martin to be certified as insane and admitted into a different madhouse months later. Nicholson's professional proficiency and expert opinion were confronted directly by other "expert" and lay deponents, who persuaded the jury that Martin had been afflicted by a mental affliction which rendered him a menace to society from 1816 onwards. For Nicholson, the publicity of bearing testimony was a double-edged sword.

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<sup>157</sup> Martin originally appeared at the Assizes for the City of York, but the case was transferred to York Castle and the Yorkshire Assizes for fear that he would not receive a fair trial. London Morning Herald April 2<sup>nd</sup> 1829. Report of the trial of Jonathan Martin (1829).

<sup>158</sup> *Idem*.

Alienists were in competition for trade and this was reflected in the accusations and confrontations which imbued their opinion-testimonies. The open discord between “specialists” contrasted to generic medics, who rarely contradicted or challenged one-another in the provincial courts. Philip Maister’s hearing, at Yorkshire in 1803, was notable because of the alternative opinions proffered by alienists and general medical practitioners regarding insanity and criminal responsibility. The disagreements which arose during this case demonstrate that there was no monolithic conception of mental distraction, even amongst experts in the field.

Philip Maister’s melancholy had been treated independently by the alienists, Drs Willis and Hunter. These two specialists testified at Maister’s hearing and concurred with generic medical and lay testimony that the prisoner suffered from a lowness of spirits, otherwise termed “melancholy” or (a species of) “partial insanity”.<sup>159</sup> But Willis and Hunter disagreed as to the effects of Maister’s condition. Willis stated, from his experience, that Maister’s insanity rendered him “liable to sudden fits of phrenzy, in which fits he might commit any act of violence on himself or others”.<sup>160</sup> Hunter concurred that suicidal tendencies were common amongst melancholics, but opined that he “had never known anyone, in a similar

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<sup>159</sup> Willis appeared to provide alternative diagnoses of Maister’s mental condition, suggesting that the prisoner suffered from “sudden fits of phrenzy” as well as being permanently insane upon one discourse or “train of thinking”. Further research is required to assess whether Willis’ conceived that Maister suffered from both forms of “partial” insanity (according to Hale’s conception, at least). Of course, Willis may also have been reluctant to provide definitive testimony, especially as Hunter was due to follow him into the witness’ box.

<sup>160</sup> Medland and Weobly Criminal Trials (1803) pp.158-160. Rede York Castle pp.209-210.

situation, commit violence on others".<sup>161</sup> If accepted, Hunter's opinion could have undermined Maister's defence, which rested upon the prisoner having been "melancholic" at the time of murdering his children and hence could not be held responsible for his actions. The disagreement between Hunter and Willis represented a rare instance where "expert" witnesses disputed the typical characteristics of insanity in either northern England or southern Scotland before 1830. Indeed, these witnesses presented alternative *a priori* and *a posteriori* grounds for their opinions.

The jury conceived that Maister was melancholic and that this removed his criminal responsibility. Hunter's opinion that melancholics did not "commit violence on others" was challenged implicitly by this verdict. The jury followed Willis' belief that Maister's affliction could explain his attack upon his children. Willis' opinion was reinforced by the final testimony in Maister's case, provided by the Hull physician Dr. Alderson, which recounted instances where melancholics had killed their children.<sup>162</sup> Alderson's statement was also fortified by the case-history at the Yorkshire Assizes. The melancholics, John Swift (1785) and Granville Medhurst (1800), had been acquitted owing to insanity, thanks to proof that they had been devoid of criminal intent at the time of killing family members.<sup>163</sup> Willis and Hunter had embarked upon a public confrontation of professional experience, expertise and opinion. To the embarrassment of the Scots-

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<sup>161</sup> *Idem.*

<sup>162</sup> *Idem.*

<sup>163</sup> Swift: ASSI 41/8, 41/9 and 45/34/4/196. Medhurst: ASSI 41/10 and 45/40/2/160-161, also York Herald August 2<sup>nd</sup> 1800.

born Hunter, his conception of the typical affects of melancholy had been rejected at court. Hunter's only appearance as an "expert witness" in his adopted home-town of York ended in abject failure. Willis, a commercial and professional rival, had successfully advertised superior knowledge and forensic competence in Hunter's own back-yard.

### *Conclusions*

Medical witnesses and their "expert" testimony did not dictate the identification of insanity and idiocy within England's criminal courtrooms between 1660 and 1829. Procedural changes, driven by legal rather than medical professionals, afforded expert opinion authoritative status at Scotland's Court of Justiciary during defences "in-bar-of-trial" after 1801. Experts remained irregular contributors to the authentication of the prisoner's mental state at the time of the crime. "Specialists" who owned occupational experience in the treatment of mentally disturbed persons were marginalised figures within both traditions before 1830. "Anti-psychiatric" theories cannot be applied within the context of British long eighteenth century hearings. In all English and most Scottish criminal cases, the identification and incarceration of mentally disturbed prisoners could proceed without reference to "alienist" or generic "medical" testimony.

Medical testimony was most regularly employed to supplement and legitimise lay evidences regarding the prisoner's mental condition. Within the context of evolving standards of proof, litigants could use medical testimony to their advantage as clinching forms of proof. Statements from medical persons were therefore utilised similarly at the Northern Assizes, the Old Bailey and, with the exception of defences "in-bar-of-trial" after 1801, at Scotland's Court of Justiciary. To be most persuasive, medical opinion had to be grounded in a consensus of lay estimations concerning the prisoner's mental state and criminal responsibility.<sup>164</sup> Few medical opinions contested directly the lay or communal consensus in court. Some medics did disprove lay perceptions of the prisoner's mental state during the 1820s and thereby challenged implicitly the lay person's ability to diagnose correctly mental maladies. These cases represented an emergent acknowledgement that experts were required to identify and authenticate mental distress in the court of law. This was a far cry, indeed, from typical seventeenth and early eighteenth century trials which lacked reference to medical testimony.

The quantitative and qualitative impact of medical testimony altered between the mid eighteenth and early nineteenth centuries in Britain. On both circuits studied, medical professionals provided an increasing proportion of depositions as the long eighteenth century progressed. It seems likely that medical witnesses were also involved in an enhanced proportion of British criminal hearings by the early nineteenth century, particularly in response to crimes of inter-personal violence. The greater involvement of medical witnesses during provincial trials reflected

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<sup>164</sup> Ward "Observers" p.117.

broader changes in testimonial values and attitudes towards expertise in both countries. Nevertheless, there was no simple, progressive acceptance of the superiority of medical testimony at court, especially where the authentication of mental maladies was concerned. Even during the 1820s, medical opinion which clashed with the "lay consensus" continued to be discredited.

Developments in medical training and knowledge affected the evidence which was both expected of, and delivered by, medical professionals at court. Medical testifiers could be expected to offer persuasive evidence regarding the prisoner's mental state owing to expansions in medical forensic skills and knowledge of mental afflictions.<sup>165</sup> From the mid eighteenth century onwards, medical witnesses were better prepared to meet the evolving standards of proof at law, including the submission of opinion testimony regarding the prisoner's state of mind. Refinements in anatomical schooling enhanced the participation of medical professionals during criminal hearings, as medics were increasingly engaged to comment upon wounds. Similar to the Old Bailey, the majority of insanity defences which included medical testimony also involved crimes of interpersonal violence.<sup>166</sup> In these cases, medics could be arraigned to speak about wounds and be asked subsequently their opinion of the prisoner's mental soundness.

The desire for medical testimony reflected broader changes in evidential standards in Britain. By the late eighteenth century, it was acknowledged that

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<sup>165</sup> Crawford "Emergence" *passim*.

<sup>166</sup> Eigen *Witnessing* pp.23-28.

medical witnesses could provide a form of legal evidence (expert opinion) which was useful to the establishment of proof “beyond a reasonable doubt”. This was related to broader efforts to restrict lay “hearsay” testimony, although such reform was by no means complete by 1830. The value of medical opinion was enhanced by emerging perceptions that these “experts” could provide “detached” objective observations. As in France, the desire for objectivity formed a strong basis of identity for medical persons within Britain’s legal realms and distinguished the evidence which they offered.<sup>167</sup>

During insanity defences, objective medical opinion was founded upon repeated and direct observations of the afflicted person, especially where the prisoner’s mental ability to stand trial was assessed. Indeed, “expert” testimony (from gaolers, as well as medical attendants) was most regularly used to inform decisions about the prisoner’s mental fitness to stand trial and to expose dissimulators. In such cases, medical witnesses could be employed to observe the prisoner in the weeks leading up to the trial. These “expert” observers typically had no prior knowledge of the prisoner, so they could also be understood to be “impartial” or “detached” witnesses. As at the Old Bailey, the gaol marked an increasingly important setting in which the “expert” witness observed and interacted with the prisoner.<sup>168</sup> After 1801 in Scotland, experts advised the bench whether the “pannel” should be tried or not. There was no contemporaneous procedural change in England, but after 1800,

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<sup>167</sup> Goldstein *Console and Classify* pp.162-166.

<sup>168</sup> Eigen *Witnessing* pp.129-130.

medical witnesses also became more regularly adduced to inform the Northern Assize jury's appraisal of the prisoner's mental state in court.

The qualitative value which was attached to medical testimony was enhanced over the course of the long eighteenth century, but the type and scope of the evidence offered by medical professionals remained similar in some respects. Medical witnesses continued to be called to court because they had intimate, personal knowledge of the prisoners as well as their states of mind. Thus, surgeon-apothecary Ellerton's testimony during Granville Medhurst's trial in 1800 was that of a character witness who was also medically trained, rather than expert, impartial opinion. Like Ellerton, many medical witnesses continued to be acquainted with the prisoner in a private or professional capacity through to 1830.<sup>169</sup> Despite evidential evolutions, medical and lay testimony could remain indistinguishable in both England and Scotland.<sup>170</sup>

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<sup>169</sup> Eigen *Witnessing* pp.122-130.

<sup>170</sup> *Ibid* pp.82-160. Houston *Madness* pp.91-265 and 331-336.

## 7.

***Judicial influence during English and Scottish defences of insanity and idiocy, 1660-1829***

*“A Judge ought to have nothing to do,  
but sit like an Oracle and propound the law”<sup>1</sup>*

The function of the criminal court judge was debated during the long eighteenth century. Judges who sought to dominate courtrooms and dictate the outcome of trials were criticised fiercely in some quarters. Advocates James Boswell and Henry Cockburn, for instance, argued that the Scottish bench ought to act as a “pedagogue or instructor” of legal matters to jurors, but should not infringe upon the sovereignty of the jury’s verdict.<sup>2</sup> This chapter explicates the theoretical and practical remit of Britain’s judiciaries during criminal trials. It compares how judges operated during defences of insanity and idiocy in northern England and southern Scotland, alongside how their remit altered between 1660 and 1829.

Interpretations of the judiciary’s function during long eighteenth century criminal trials has generated historiographic controversy. In the context of England’s Assize and Old Bailey courtrooms, academics such as James Cockburn, Douglas Hay and Thomas Green have portrayed an ascendant, assertive bench that

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<sup>1</sup> Anon. (Henry Cockburn), Observations on the mode of Choosing Juries in Scotland, (Edinburgh, 1822), p.3.

<sup>2</sup> Anon. (James Boswell), A Letter to a Jury-man. In which the powers, privileges and duties of Juries are examined and explained, (Edinburgh, 1785) p.10. For an English example see J. Hawles, The Englishman’s Right: A Dialogue between a Barrister at Law and a Juryman Plainly Setting Forth the Antiquity, the excellent designed use and the office, and the just privileges, of Juries. By the Law of England, (1681-1796, 8 editions).

subjugated criminal tribunals.<sup>3</sup> They contend that judges could manipulate trials and force verdicts upon submissive jurors. Scholarship which has emphasised judicial dominance has been criticised heavily, however. John Langbein has argued that trial juries could reach verdicts autonomously and played an important mitigating role at court, thereby tempering the judge's influence.<sup>4</sup> Peter King and Martin Weiner have demonstrated that victims, prosecuting officials and jurors wielded discretionary measures which inhibited the bench's preeminence over legal processes.<sup>5</sup> Insanity and idiocy defences were entered sporadically, but these hearings disclose how judges acted and allow a broader consideration of courtroom interactions.

Published studies of English and Scottish insanity defences have followed these expansive historiographical trends and produced distinctive interpretations of the benches' remit and impact. Joel Eigen proposed that English judges governed the evaluation of the prisoner's mental condition at the Old Bailey between 1760 and 1843.<sup>6</sup> Eigen presented a courtroom dynamic similar to that provided by Cockburn, Hay and Green. Martin Weiner has suggested that the judiciary was not always ascendant during nineteenth century insanity defences, however. By comparison, Robert Houston argued that Scotland's judiciary was less assertive at the High

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<sup>3</sup> J.S. Cockburn, "Twelve Silly Men? The Trial Jury at Assizes, 1560-1670", in J.S. Cockburn and T.A. Green (eds.), Twelve Good Men and True. The Criminal Trial Jury in England, 1200-1800, (1988) pp.176-181. Hay "Property, Authority" pp.19-63. T.A. Green Verdict According to Conscience, (1985), pp.152 and 369. Green subsequently re-assessed his interpretations, allowing greater dynamism to the trial jury, see "Retrospective" pp.375-6.

<sup>4</sup> Langbein "Fatal Flaws" pp.105-6. Langbein "Trial jury" pp.35-37.

<sup>5</sup> King "Decision-Makers" pp.26-27. King Crime pp.43, 227-235 and 243-256. Weiner "Judges V. Jurors" pp.472-474.

<sup>6</sup> Eigen "Intentionality" pp.34-39. Eigen Witnessing pp.14, 33-34, 40-48 and 52-55.

Court in Edinburgh than its English counterpart. Houston suggested that Scottish judges could lead jurors towards conclusions, but that that the bench did not dictate the outcome of fatuity and furiosity defences. England's historiography should not be relocated imprudently to Scotland, but Houston's analysis of courtroom processes reflected the astute critiques offered by King and Langbein. This chapter evaluates these broad debates within a provincial context, questioning whether verdicts of insanity or idiocy were truly dictated by the activity of the circuit bench in England and Scotland.

The activity of British and European judges are also compared. The judiciary were the principal decision-makers within archetypical, Continental, "Inquisitorial" legal traditions, which lacked trial by jury.<sup>7</sup> "Inquisitorial" benches considered evidences and led cross-examinations at court, before passing judgement upon prisoners. As Henry Cockburn opined, European judges could dominate legal processes "at every step, from the suspicion against the criminal, down to the infliction of sentence".<sup>8</sup> Historians have questioned whether all European traditions were so "Inquisitorial". Nevertheless, British perceptions that the "Civilian" bench acted arbitrarily were important, even if Continental judges did not perform dictatorially.<sup>9</sup> Contemporary arguments about the role of British judges must be understood in the context of the perceived contrasts to European benches. Scottish lawyers recognised that their law was imbued with Continental influences, more so

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<sup>7</sup> Crawford "Emergence" pp161-2. Farmer "Criminal Law" pp.33-39. Houston "Court" pp.343-344.

<sup>8</sup> Cockburn *Observations* (1822) p.3.

<sup>9</sup> Crawford "Emergence" pp161-2. Farmer "Criminal Law" pp.33-39. López-Lózaró "No Deceit Safe" pp.465 and 471.

than England's Common Law.<sup>10</sup> It is suggested how European "Inquisitorial" concepts of judgeship impressed upon the function and outlook of Scotland's Lords of Justiciary.

The courtroom contributions of Britain's judiciaries were defined by legal frameworks, which evolved between 1660 and 1829. Stephan Landsman has detected the roots of "adversarial" legal practice in the eighteenth century England.<sup>11</sup> Landsman suggested that, from around 1730 onwards, judges assumed less inquisitive roles as litigants (and counsel) began to bear greater responsibility for the production and demonstration of proofs at court. Judges did not become "passive umpires", however.<sup>12</sup> Evidentiary principles received enhanced attention from seventeenth century in England. Consequently, judges became involved more frequently as the adjudicators and clarifiers of legal ambiguities.<sup>13</sup> Legal quandaries, such as theories of criminal responsibility and standards of evidence, were raised regularly during insanity and idiocy defences. It is examined whether English and Scottish judges were particularly vociferous during insanity and idiocy defences because they were expected to expound and elucidate the law. This may explain why Eigen found that judges were garrulous during Old Bailey insanity defences.

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<sup>10</sup> Cairns "Civil Law Tradition" pp.191-209. Cairns "Importing our Lawyers" pp.138-152. Gordon "Influence of Roman Law" pp.135-143.

<sup>11</sup> Landsman "Rise" pp.500-502.

<sup>12</sup> *Ibid* pp.513-519.

<sup>13</sup> Beattie "Scales" p.222. Landsman "Rise" pp.513-9.

*The basis of judicial authority*

Procedural guidelines underpinned judicial authority at court, allowing them to comment upon legal points and scrutinize testimony. Britain's judges also passed sentence or released prisoners according to the jury's verdict. In long eighteenth century British courtrooms, influence and power-relationships were regulated by social rank and wealth, as well as professional knowledge and standing. The social and professional relationships between judges and other courtroom participants had an important bearing upon courtroom dynamics and reinforced the bench's authority.

British judges were of high social standing.<sup>14</sup> Younger sons of aristocratic families were prominent amongst Britain's judiciaries until the 1750s, although the numbers of aristocratic-born judges waned thereafter, particularly in Scotland.<sup>15</sup> Britain's legal bars and benches became more inclusive socially as the costs of the legal education became less prohibitive.<sup>16</sup> Even so, promotion to the bench effected both social elevation and economic reward upon successful candidates. Britain's judiciaries belonged to the wealthy, property-owning minority of British citizens. Judges could be socially revered whilst riding the circuit, with "hanging towns" holding festivities in honour of the travelling bench. Judges were superordinate to most prisoners, witnesses and jurors (with the English "Grand" and Scottish

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<sup>14</sup> Hay "Property, Authority" pp.58-61. Langbein "Fatal Flaws" pp.108-9.

<sup>15</sup> Cairns "Alfenus Varus" pp.208-209. Duman "English Bar" p.93. Duman *Judicial Bench* pp.34-36.

<sup>16</sup> *Ibid* pp.206-208.

“Special” jurors being the most common exception). The judiciaries’ authority represented an extension of deferential social relationships.<sup>17</sup> The judge’s elevated social standing reinforced the prerogative of the bench’s advice, rulings and decisions at court.

The judiciary’s authority was also grounded in their legal expertise and experience. Judges were situated at the apexes of the Scottish and English legal hierarchies and promotion to the bench marked the pinnacle of an accomplished legal career.<sup>18</sup> Elevation to the bench could be determined by professional and “party” politics.<sup>19</sup> By the mid eighteenth century, it was usual that Britain’s judiciaries had enjoyed lengthy spells as legal counsellors.<sup>20</sup> During the eighteenth century, most English judges had practiced law for between twenty and thirty years before elevation to the bench.<sup>21</sup> Of the Scottish judges who dealt with furious defences upon the southern circuit, most had “passed advocate” between twelve and thirty years before being elevated to the judiciary.<sup>22</sup> Judicial authority was therefore reinforced by technical, legal expertise.

Scotland’s High Court bench comprised sixteen Ordinary Lords of Session from the inception of the Court of Justiciary in 1672. At any given time, seven of these

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<sup>17</sup> Hay “Property, Authority” pp.58-61.

<sup>18</sup> Duman *Judicial Bench* p.14.

<sup>19</sup> Duman “English Bar” p.95. Prest “English Bar” p.71. Murdoch “Advocates” p.148. Phillipson “Scottish Whigs” p.25. Phillipson explains how Tory candidates were preferred consistently to Whigs in Scotland between 1785 and 1811.

<sup>20</sup> Duman “English Bar” p.98.

<sup>21</sup> *Idem*.

<sup>22</sup> Lords Meadowbank and Pitmilley took twelve years to reach the bench, whilst Lords Cullen and MacQueen took around thirty years. *DNB* III pp.278-9 and *DNB* XII pp.718-9.

judges were entitled to try criminal cases at the supreme courts in their capacity as Lords of Justiciary.<sup>23</sup> By comparison, England's judicial establishment consisted of seventeen judges from the early eighteenth century.<sup>24</sup> At "Assize time", twelve of England's judges held temporary commissions of "gaol delivery" (the authority to clear prisoners from gaol) and "oyer and terminer" (the authority to try criminal cases) at the provincial courts.<sup>25</sup> In both England and Scotland, it was regular practice that two judges were assigned in tandem to deal with each circuit's legal business. Senior judges could avoid riding the circuits studied, but leading justices were to be found in both northern England and southern Scotland by the late eighteenth century.<sup>26</sup>

At English Assize meetings, it was common for one circuit judge to deal with criminal hearings whilst the other attended to "*Nisi Prius*" (civil court) trials. In some instances, provincial English criminal trials may have been chaired jointly by two judges, particularly if "*Nisi Prius*" business had been completed. Thus, at the Northumberland Assizes of 1736, Justices Lee and Fortescue cooperated during the insanity defence of Anne Vardy.<sup>27</sup> The vague style of northern England's Minute Books preclude quantitative conclusions in this respect. Minutes recorded which judges were present at the Assizes, but did not always indicate which one presided over criminal affairs. Printed reports suggest that it was usual for a single member

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<sup>23</sup> Murdoch, "Advocates", p.148.

<sup>24</sup> Duman, *Judicial Bench*, p.17.

<sup>25</sup> *Ibid* p.23.

<sup>26</sup> Cockburn "Northern Assize Circuit" p.122.

<sup>27</sup> ASSI 41/3.

of the judiciary to preside over criminal hearings. By the 1770s at the latest, it was rare that both circuit judges presided over northern English insanity and idiocy defences.

In contrast to northern England, a "*quorum*" of three to six judges officiated over criminal trials at Scotland's supreme High Court of Justiciary in Edinburgh.<sup>28</sup> The mental condition of Susan Tinny was considered by a "*quorum*" of three Lords of Justiciary in March 1816.<sup>29</sup> Procedure on the Justiciary circuits differed from the High Court regarding the numbers of presiding benchers. The two Scottish circuit judges could cooperate during provincial Justiciary Court hearings, but a single judge officiated in four-fifths of southern Scottish furiosity and fatuity defences. Scottish circuit judges were most likely to operate concurrently during cases that contained challenging legal issues, such as conceptions of criminal responsibility. Scotland's circuit judges could officiate jointly to confer upon the legal issues raised by the prisoner's mental affliction.

Where solitary judges presided over British provincial cases, they did not necessarily act alone. There was scope for informal collaboration between the circuit judiciary outside of the courtroom. Circuit judges could discuss legal issues whilst they travelled and lodged together. After Yorkshire's summer Assizes had concluded in 1816, Justice Bayley conferred with Baron Wood before granting a

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<sup>28</sup> Mackenzie used the term "*quorum*" to describe the four judges (three during the "Vacance") who sat together during criminal trials at the High Court from the 1680s; Mackenzie, Institutions of the Law of Scotland, (Edinburgh, 1684), p.25.

<sup>29</sup> JC 8/11.

respite to prisoner Elizabeth Ward, on the grounds of her mental infirmity.<sup>30</sup> English cases that were delayed owing to the prisoner's insanity could re-appear at subsequent Assizes before a different judge. Cornelius Linney was found insane and unfit to stand trial before four separate judges between 1748 and his discharge in 1752.<sup>31</sup> Assize cases could also be removed to the Court of King's Bench in London for further review, as happened when Sir Thomas Gerard of Warrington pled insanity at Lancaster in 1767.<sup>32</sup>

In southern Scotland, postponed cases could be remitted to the High Court in Edinburgh, especially when the prisoner's mental fitness to plead was not established satisfactorily. When insufficient proof of Susan Tinny's mental distraction was provided at Ayr in 1815, Lord Gillies remitted the case to the High Court.<sup>33</sup> At Edinburgh in 1816, Gillies again presided over Tinny's deferred case, but this time he was joined by Lords Boyle and Succoth.<sup>34</sup> The judgements and decisions of a solitary judge could be informed by their fellow benchers. The estimations of more than one judge could be involved in the assessment of a prisoner's mental condition.

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<sup>30</sup> HO 47/55/86.

<sup>31</sup> ASSI 41/4, ASSI 42/3, Yorkshire, July 1748 to 1752.

<sup>32</sup> PL 28/3. Rabin "Committing Crimes" pp.110-111.

<sup>33</sup> JC 12/29, September 1815.

<sup>34</sup> JC 8/7, March 1816.

*The postponement of trials owing to the prisoner's mental incapacity*

Most frequently, insanity and idiocy defences argued that prisoners had been mentally incompetent at the time of committing their crimes (Table 7.1). In all defences of this type, the assessment of the prisoner's criminal responsibility was undertaken by a jury panel in both England and Scotland. Also, Britain's criminal laws held that persons could not be tried whilst they laboured under insanity or idiocy.<sup>35</sup> Whilst the legal philosophies of England and Scotland were analogous in this respect, the practical means of assessing whether a prisoner was fit to stand trial could be distinctive. English and Scottish judges could obtain to dissimilar functions where the prisoner's capability to stand trial was gauged. This type of hearing will be considered separately from defences which claimed that prisoners were mentally incompetent when committing crimes.

Region	Prisoner's mental incompetence argued to:	
	Postpone trial	Exculpate crime
Northern England	40.1 %	59.9%
Southern Scotland	31.4 %	68.6%

*Table 7.1. Proportion of insanity and idiocy defences argued to postpone trials compared to those argued to exculpate crimes, northern England and southern Scotland, 1660-1829.*

<sup>35</sup> See pp.37-48.

Between 1708 and 1829, fifty-seven criminal hearings (involving thirty prisoners) were postponed owing to the defendant's madness or idiocy at England's Northern Assizes. In each of these cases, the jury decided whether the prisoner was fit mentally to stand trial. Eleven defences of either furiosity or fatuity "in-bar-of-trial" were entered at Scotland's southern circuit between 1708 and 1829 (Table 7.1). In stark contrast to English Assize practice, all of these defences were considered by a judge, without reference to a jury panel. Instead, Scotland's circuit bench decided whether to postpone the hearing, based upon the evidence and legal argumentation that were entered at court. Such tribunals were therefore akin to Scottish (civil court) "Commissary" and "Court of Session" procedure, where no jury panel was utilised.<sup>36</sup> In almost one-quarter of all species of furiosity and fatuity defences, southern Scottish "pannels" had their mental conditions judged without consultation of an "assize". The English and Scottish circuit courts obtained to different procedures to evaluate the prisoner's mental ability to bear trial.

The predominant role played by Scotland's bench during hearings "in-bar-of-trial" was reminiscent of formulaic "Inquisitorial" Continental models of legal procedure.<sup>37</sup> Contemporary Prussian and Russian judiciaries managed the examination, judgement and sentencing of criminals without reference to a jury panel.<sup>38</sup> The lack of a criminal jury during these Justiciary Court hearings signifies that Scottish procedure could resemble Continental, rather than English "Common

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<sup>36</sup> Houston *Madness* p.42.

<sup>37</sup> Farmer "Criminal Law" p.33.

<sup>38</sup> *Idem.* Becker "Judicial Reform" pp.1-8.

Law” practices. This reflects the broader influences of Continental “Civilian” and “Roman” Law traditions upon Scots Law in general.<sup>39</sup> How and why Scottish and English judges acted divergently are examined next. Justiciary and Assize court procedure is compared, alongside the theoretical frameworks which governed the practical remit of Britain’s judiciaries. Particular attention is paid to contemporary perceptions, both abstract and applied, concerning the difference between points of “fact” and “law”. Whilst the latter could be firmly situated within the judiciary’s realm, the issue of who should decide upon matters of “fact” and “law” was a contentious topic.

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<sup>39</sup> Gordon “Roman Law” pp.135-143.

*The remit of the British judiciaries in questions of "Fact" and "Law"*

An imperative courtroom function of English and Scottish judiciaries was to comment and arbitrate upon legal principles when they arose. During British insanity and idiocy defences of all types, presiding judges were expected to explain the criteria for proving mental distraction, as dictated by legal writings and case-precedents. The bench provided the legal guidelines which informed and underpinned the jury's considerations. The jury's prime function was to deliver judgment upon the factual evidence which was presented at court. It was recognised that the spheres of "fact" and "law" were not always distinguishable.<sup>40</sup> Issues of criminal responsibility sat at an uncomfortable point where "fact" and "law" overlapped. Jurors contemplated implicitly points of law during insanity and idiocy defences, because they considered whether factual evidence met legal and evidentiary criteria. Insanity and idiocy defences therefore aroused broader debates concerning the respective courtroom functions of judge and jury.

At the northern English Assizes, only the petty jury could reach a formal decision regarding the prisoner's mental condition. Petty, not Grand, jurors assessed the prisoner's state of mind. The Grand Jury was not able to delay, abort or reject a criminal hearing on the basis of a prisoner's insanity or idiocy. Nor did English judges postpone trials after considering both facts and law, as the Scottish

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<sup>40</sup> See, for instance, Hawles, *The Englishman's Right*, (1680) p.9. Anon. (William Smellie), *An Address to the People of Scotland, &c., on the nature and privileges of Juries. By a Juryman*, (Edinburgh, 1784), p.13.

bench could do. In contrast to some Scottish and European, "Inquisitorial" hearings, England's petit jury therefore decided whether the "plea of insanity was affectation" or not in every case.<sup>41</sup>

The absence of Scottish juries from the assessment of the prisoner's fitness to plead can be explained by Justiciary Court procedure. No "Grand Jury" was involved in the Scottish criminal process, except after 1707 when English legal form was adopted in "high treason" cases.<sup>42</sup> Instead, Justiciary Court hearings commenced with a discussion of the "relevancy", or points of law which were applicable to each case. Counsel and judiciary debated legal issues during this phase of proceedings, such as whether indictments had been entered correctly. Where furiosity or fatuity was presented as a defence, lawyers contested the evidential criteria which were required to prove mental disability and, according to Scots Law, to what "degree" the person was afflicted.<sup>43</sup> Because the "relevancy" focused upon the law, judges were expected to engage with and inform these discussions. The bench could rule on points of law at this stage. Importantly, these cogitations about the "relevancy" took place before the "assize" was empanelled formally. This reflected perceptions that jurors ought not to consider legal points, except where issues of "law" and "fact" were inseparable.<sup>44</sup> Once the "relevancy"

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<sup>41</sup> York Herald, 9th August 1823. Christopher Bew's trial, Yorkshire, July 1823.

<sup>42</sup> 7 Anne c.21. Willock "Origins" p.147. None of the southern circuit furiosity or fatuity cases involved treason.

<sup>43</sup> See pp.55-63.

<sup>44</sup> Willock "Origins" pp.191-192.

debates were complete, the jury was then empanelled to consider the factual evidence and might contemplate the legal issues which were raised.

So, in contrast to the English system, decisions regarding legal criteria could be taken by Scotland's judiciary without the assize being formally empanelled to try the case. This explains why Scottish judges could resolve to "bar" criminal hearings owing to the prisoner's mental distraction or incompetence. On the southern circuit, a prisoner's mental fitness to plead was considered to be a point of law which could be raised and resolved during the "relevancy". At this opening stage of trials, the criminal assize was not yet empanelled and presiding judges decided upon the law, including whether the prisoner's trial ought to be postponed. This was dissimilar to English Assize procedure, where legal issues were debated in the presence of trial jurors.

Defences "in-bar-of-trial" followed a uniform pattern of practice in southern Scotland, but the Court of Justiciary did not adhere to a regimented procedural form in such hearings before 1801. Outside of the southern circuit, jurors could assess the prisoner's mental fitness to plead during the eighteenth century. James Taylor's mental ability to bear trial was evaluated by an Inverness "assize" in 1766, for instance.<sup>45</sup> It was not until the conclusion of the David Hunter "test-case", at Edinburgh in 1801, that Justiciary Court procedure was standardised for these types

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<sup>45</sup> JC 10/13.

of defence.<sup>46</sup> The arguments and decisions presented in Hunter's case therefore deserve clarification.<sup>47</sup>

David Hunter was first arraigned at the High Court in December 1799, for murder, when his insanity rendered him incapable of standing trial.<sup>48</sup> The trial and Hunter's fate were not concluded until March 1801. Hunter's hearing was protracted by heated discussions, involving opposing advocates and the presiding "quorum" of judges, regarding the proper procedure for defences "in-bar-of-trial". The hearing was arraigned repeatedly whilst advocates prepared arguments and judges considered relevant precedents. The debates at Hunter's trial were driven by genuine and broadly shared aspirations to set a viable, practical precedent. But prosecution and defence advocates argued for different forms of procedure to be adopted (or regularised) in such instances.<sup>49</sup> At the heart of these incompatible contentions lay the issue of whether the prisoner's mental fitness to plead ought to be assessed by "assize" or bench. Hunter's case marked the culmination of legal debates concerning the apposite role of judge and jury, which had been deliberated in Britain over the previous two-hundred years.

Discussions about the judiciary's courtroom remit were charged by political debates in Britain, especially during the late eighteenth and early nineteenth

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<sup>46</sup> JC 8/1. See also Houston "Courts" pp.345-350.

<sup>47</sup> *Idem*.

<sup>48</sup> JC 8/1.

<sup>49</sup> Debate also centred upon the perceived utility of "expert" witnesses in the courtroom verification of mental distraction and incompetence, an aspect which will be discussed in Chapter 10.

centuries. During Hunter's case, the clash of opinions regarding the bench's role was infused and informed by broad political ideologies and allegiances. The government-appointed lawyers, Solicitor-General Robert Blair<sup>50</sup> and Lord Advocate Robert Dundas of Arniston,<sup>51</sup> led the public prosecution against Hunter. These characters held the pre-eminent posts within the contemporary Scottish legal professions and they owed their promotions to Tory patronage. During the late eighteenth and early nineteenth centuries, leading Tories endorsed the need for a strong, experienced bench within the courtroom, which held extensive powers to influence proceedings and take key decisions.<sup>52</sup> The conservative proclivities of Blair and Dundas were illustrated by their argument that the judiciary, informed by "expert" witnesses, ought to be sole adjudicators of the prisoner's mental fitness to plead, during the "relevancy". Blair and Dundas argued that the prisoner's mental ability to stand trial was a point of "law" and therefore fell into the judges' realm.

"Tory" convictions that the courtroom needed to be closely managed, if not dominated, by the bench were intensified by the European political climate of the 1780s and 1790s. The violent excesses of the French Revolutionaries were perceived to represent the dangers of popular, "mob" rule.<sup>53</sup> Impressions of the Revolution served to polarise British politics. Some erstwhile "Whigs" were so disgusted and disappointed by the chaos in France that they altered their political

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<sup>50</sup> Robert Blair of Avontoun *DNB* II p.27.

<sup>51</sup> Robert Dundas of Arniston was the nephew of the Tory grandee Henry Dundas; Phillipson, "Scottish Whigs", p.19.

<sup>52</sup> Houston "Courts" p.347.

<sup>53</sup> A. Padoa-Schioppa, "Introduction", in A. Padoa-Schioppa (ed.) *The Trial Jury in England, France and Germany 1700-1900*, (1987), pp.7-9.

stance and sided with the Tory-dominated government. The criminal jury was arguably the most socially inclusive aspect of formal trial procedure. Uncompromising Tories associated an unrestricted, "popular" jury with the potential for social anarchy. Such fears were reinforced by the adoption of trial by jury within Revolutionary France during the 1790s.<sup>54</sup> During the Hunter "test-case", these perceptions instructed the public prosecutors' arguments that judges, not juries, ought to assess the criminal's state of mind at court.

The notoriously politicised Scottish sedition trials of the 1790s added further controversial piquancy to the prosecutors' line of reasoning during Hunter's case. In these sedition hearings, pannels were prosecuted for "radical dissent" against the Crown and Tory-dominated administration.<sup>55</sup> Whiggish critics suggested that the presiding bench was overbearing and partisan during these trials, by favouring the prosecution and rendering the (Whig) defence counsellors ineffective. Promotion to the bench could be determined by political allegiance and judges who had gained from Tory patronage, such as Lord Braxfield, were criticised for favouring the Tory-led prosecutions. Advocates Blair and Dundas had prosecuted sedition cases in their capacities as legal representatives of Scotland's Tory regime.<sup>56</sup> To return to Hunter's case, the prosecution's desire for a dominant judge justified their own involvement in the infamous sedition tribunals, alongside the actions of judges such

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<sup>54</sup> *Idem.*

<sup>55</sup> JC 7/21.

<sup>56</sup> See pp.389-393.

as Lord Braxfield. They sought to vindicate a criminal system where the key decisions lay with the bench.

The Whiggish advocate, John Peter Grant, directed David Hunter's defence. Grant had declared his opposition to Dundas' Tory-dominated government in Scotland by defending prisoners during the sedition trials. Grant's political and legal philosophies fuelled his argument that the "assize" should decide whether the prisoner was mentally unfit to plead.<sup>57</sup> Grant proposed that the assessment of a prisoner's mental condition fell into the realm of "fact" and therefore ought to be determined by the jury, not the judge. Like Grant, many contemporary Whigs believed strongly in the ethical superiority and justness of trial by jury.<sup>58</sup> From such a perspective, Revolutionary France's adoption of a jury-system in the early 1790s marked a significant progression, especially as it replaced an "Inquisitorial" organism which was perceived to be corrupt, inequitable and dominated by the judiciary.<sup>59</sup> Grant believed that the jury's autonomy should not be challenged during criminal trials. The sedition hearings of the 1790s therefore formed a painful example of how judicial dominance led to an oppressive legal system. Grant later criticized publicly the uncensored autonomy of Scotland's civil court judges.<sup>60</sup>

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<sup>57</sup> Houston "Courts" pp. 345-350 also considers Grant's political background and role in Hunter's case.

<sup>58</sup> For a radical Scottish Whig's assertion of the jury's powers, see Anon. (Smellie) Address (1784) *passim*.

<sup>59</sup> Padoa Schioppa "Introduction" pp.7-9.

<sup>60</sup> Grant, Some observations on the constitution and forms of proceeding of the Court of Session in Scotland: with remarks upon the Bill now depending in the House of Lords for its reform. (1807). Houston "Courts" pp. 345-350.

Hunter's defence team prepared a list of the nine bar-of-trial "Decisions" made in the Justiciary Court between 1737 and 1799 to illustrate that eighteenth century practice had been haphazard. Grant moulded carefully the information in this list to support his contention that the jury should decide upon Hunter's ability to stand trial. Prudently, Grant dismissed decisions made by the bench alone as being erroneous and presented a suitable precedent, at Edinburgh in 1770, where the "assize" had decided to postpone the hearing of William Harris. Grant's efforts indicate that, by the nineteenth century, legal precedent was perceived to be binding in Scotland.<sup>61</sup>

On inspection, Grant's list of "Decisions" did not include the case of John Burton which was postponed at Jedburgh in 1747 and remitted to the High Court in Edinburgh.<sup>62</sup> Burton's case may simply have been overlooked, or ignored because the prisoner and his accomplices were never re-tried at Edinburgh and therefore set no conclusive precedent. John Peter Grant may have omitted Burton's case purposefully, however. Minus the Burton case, his list included more decisions to "bar" trial which were made with reference to a jury than without.<sup>63</sup> The inclusion of Burton's southern circuit case would have damaged Grant's desire to promote assessment by jury rather than judge.

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<sup>61</sup> For a discussion of this in an English context see Weiner, "Judges V. Jurors: Courtroom Tension in Murder Trials and the Law of Criminal Responsibility in 19th Century England", *LHR*, 17, 3, (1999), p.472.

<sup>62</sup> JC 12/5.

<sup>63</sup> Grant's list included four cases where the judge decided the issue alone and five where the question was remitted to an assize.

Despite Grant's arguments, the High Court judges ruled that the prosecution's view prevailed. From 1801, in contrast to English Assize practice, Scotland's judiciary were certified as the sole judges of insanity and idiocy "in-bar-of-trial".<sup>64</sup> This was a bitter political blow to Whigs, who were challenging desperately the Tory supremacy at the turn of the nineteenth century.<sup>65</sup> Hunter's "test-case" demonstrates how political alliances, leanings and sympathies directed the evolution of the Scottish legal system.

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<sup>64</sup> This practice was adhered to on Scotland's southern circuit at least, where all decisions "in bar of trial" were taken by the judge alone between 1801 and 1829.

<sup>65</sup> Phillipson "Scottish Whigs" pp.16-30.

*Questions of law, the "relevancy" and furiosity or fatuity in exculpation of punishment in Scotland*

Besides deciding supplications "in-bar-of-trial", other forms of furiosity or fatuity defence could be settled during the "relevancy" in Scotland. During the seventeenth and early eighteenth centuries, the Scottish bench could assess proofs which argued that prisoners had been mentally incompetent when committing their crimes. Until at least 1725, judges could consider written precognitions and reject defences outright before the assize was empanelled. The bench thereby removed the consideration of the prisoner's mental state from the jurors' deliberations.

Elizabeth Lockhart appeared at Dumfries, in October 1711, charged with the capital offence of "beating and curseing" her mother.<sup>66</sup> During the "relevancy", Lockhart's counsel contended that she had been insane at the time of committing the transgression.<sup>67</sup> In response, the public prosecutor maintained that there was insufficient evidence of Lockhart's madness in the precognitions. The presiding judge, Lord Grange, considered both of these arguments and read the precognitions before repelling "the Defence of madness as proponed" for Lockhart.<sup>68</sup> Grange found the charges relevant to "infer an arbitrary punishment", however, which meant that Lockhart could not be hung for her crime. The trial went before the assize, which found the indictment proven and Lockhart was banished "to any of her Majesty's American Plantations never again to return to Scotland".<sup>69</sup> Lord

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<sup>66</sup> JC 12/2.

<sup>67</sup> *Idem*.

<sup>68</sup> James Erksine, Lord Grange (1679-1754).

<sup>69</sup> JC 12/2

Grange had assessed the Scottish law of the insanity and had evaluated implicitly the factual evidence of Lockhart's madness. There was no recorded criticism that Grange had overstepped his mark. Lockhart's purported insanity was not considered by the "assyzers", who were directed by the judge's decision upon the relevancy of the prisoner's defence.

Two years later, at Ayr in 1713, Thomas Towart's furiosity defence for murder was accepted by the circuit bench during the relevancy.<sup>70</sup> The presiding judge on this occasion was Lord Pancaitland, who sustained the "Defence that the pannel was Furious at the time of Committing the Crime" and allowed the assize to evaluate the proofs. The bench's resolution was again founded upon arguments presented by counsel and the written precognitions of the case, which included two independent accounts of Towart's mental distraction. Towart's defence thereby met the minimum standard of proof required in Scotland.<sup>71</sup> In 1711, Lockhart's defence counsel had failed to provide such proof. Towart and Lockhart's hearings indicate that the bench did consider both fact and law during the relevancy, at least in the course of furiosity defences. Importantly, Scottish judges only rejected defences of fatuity or furiosity which lacked evidential prerequisites.

On the southern circuit, judges had ceased to "repell" defences of furiosity and fatuity during the "relevancy" by the late-1740s. From at least 1749 through to 1829, the bench allowed the assize to consider all defences, even cases which

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<sup>70</sup> JC 13/4. Towart was accused of murder.

<sup>71</sup> Towart's defence failed and he was sentenced to be hung. JC 13/7 and 17/4.

lacked sufficient proofs of the prisoner's mental incapacity. By the late-1740s, the Scottish judiciary was willing to allow the jury to decide whether defences could be proven, rather than determining such issues themselves. This challenges broad interpretations that, during the eighteenth century, there was an enhanced tendency for Scottish judges to dominate the key decision-making phases of criminal trials.<sup>72</sup> Plainly, Scotland's judiciary relinquished the ability to reject furiosity defences during the "relevancy".

The judge's remit during the relevancy phase of fatuity and furiosity defences changed between 1725 and the late-1740s. Why such practical modification occurred is less transparent. A particular judge's personal preference, or the individual's legal philosophy regarding the roles of judge and jury, might explain this change in judicial function. Developments after 1725 may have reflected wider efforts to clarify the relationship between bench and assize. It was argued that the jury ought to assess the facts of a case and the judiciary's remit was restricted to clear issues of law. This reforming drive was focused by broader changes to legal practice, wrought by the "Heritable Jurisdictions (Scotland) Act" of 1747.<sup>73</sup>

The altered role of judges during the "relevancy" at the Justiciary Court marked an evolution away from Continental practices towards an "adversarial" courtroom, as described in an English context by Stephan Landsman.<sup>74</sup> Scotland's judiciary

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<sup>72</sup> Chorus "Judge's role" pp.33-39. Houston "Courts" p.340.

<sup>73</sup> 20 Geo II c43.

<sup>74</sup> Landsman "Rise" pp.500-502.

ceased to be active “testers” of whether prisoners had been of sound mind when they committed crimes. By the late-1740s, the southern circuit bench ceased to consider “facts” and whether they met the necessary evidential standards. Instead, from at least 1749, the assize always resolved whether prisoners were responsible for their actions. The centrality of trial and verdict by jury represented another essential “adversarial” routine. The early eighteenth century judiciary had taken it upon themselves to clarify the “grey area” between “fact” and “law” when issues of criminal responsibility arose. Judges still advised upon such agendas after 1725, but the jury was permitted to consider these issues for themselves, even where difficult points of law surfaced.

*Judicial activity during the presentation of proofs to the jury*

Prisoners who were insane or idiotic at the time of committing their offences were acquitted because they lacked criminal intent. In both England and Scotland, juries assessed the prisoner's criminal responsibility when mental incompetence was argued in exculpation of crime. Jurors evaluated the evidence and arguments presented at court before supplying their verdict. This section focuses upon how the opinions and actions of British judges impinged upon the jury's decision-making processes in the provinces. Notions that judges reigned supreme within England's Assize courtrooms have been challenged by recent scholarship.<sup>75</sup> English judges did not adjudicate passively during criminal hearings, however.<sup>76</sup> This section focuses upon the vocal input of Britain's benches during hearings, although judges did not have to be vocal to indicate where their sympathies lay. The Scottish lawyer, James Boswell, was convinced that a judge's "looks and shrugs" could be persuasive.<sup>77</sup>

During northern English insanity defences, judges could guide the jury's verdict by outlining legal criteria and provoking evidence which addressed the principles of criminal responsibility. Such oral influences upon proceedings were confined by evolving "adversarial" courtroom practices after 1660. As litigating parties became more responsible for the production of proofs and greater recourse was taken to

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<sup>75</sup> See, for instance, Landsman "Rise" pp.513 and 591-603. Langbein, "Fatal Flaws", p.109. Langbein "Law of Evidence" pp.1170-1172.

<sup>76</sup> This point has been made in the context of regular trials too: see Landsman "Rise" p.513.

<sup>77</sup> Boswell Letter to Lord Braxfield (1780) pp.14-15.

representative legal counsel, the role of the English judge altered significantly.<sup>78</sup> As evidential rules developed and were employed more frequently at court, the judge was required to settle such matters. Scottish judges could also be self-informing, but were less vocal than their English counterparts during the examination of witnesses. As Robert Houston has recently suggested, Scottish judges led rather than dominated trials after the relevancy stage had ended and before any summary was heard.<sup>79</sup> Scottish trials had incorporated adversarial contests between legal counsel from at least the late seventeenth century. The English and Scottish benches therefore operated in subtly different ways during the examination of witnesses and production of evidences at court.

In both England and Scotland, the judiciary ensured that evidentiary rules were adhered to correctly.<sup>80</sup> Before the nineteenth century, the British legal traditions lacked statutory and juristic guides to standards of proof when compared with contemporary Continental codes.<sup>81</sup> But evidentiary criteria were not ignored in Britain, either in terms of practice or theory. From at least the seventeenth century, British legal traditions imported Continental authorities and principles of proof, whilst British jurists expounded upon the law of evidence within their legal treatises.<sup>82</sup> Maija Jansson has identified recently a manuscript which was penned by Matthew Hale, circa 1688, which declared that it was the judge's responsibility to

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<sup>78</sup> Landsman "Rise" pp.501 and 524-532.

<sup>79</sup> Houston "Courts" pp.339-340.

<sup>80</sup> Landsman "Rectitude" p.408. Langbein "Law of Evidence" pp.1172 and 1177-1202. Houston "Courts" pp.339-340.

<sup>81</sup> Crawford "Legalising Medicine" p.101.

<sup>82</sup> Crawford "Emergence" pp.1-20. Shapiro "Concept Fact" pp.2-26. Cairns "Importing our lawyers" p.146.

ensure that verdicts were informed by suitable standards of proof.<sup>83</sup> Handbooks dedicated to the subject of legal proof were published in Britain from the early eighteenth century onwards. William Nelson's Law of Evidence (1717) provided categorical guidelines for the admissibility of witnesses and the standards of proof during English criminal trials, for example.<sup>84</sup> Nelson's work was supplemented and eventually superseded in 1751 by Sir Geoffrey Gilbert's manual, also known as the Law of Evidence.<sup>85</sup> These texts both reflected and informed broader desires amongst both English and Scottish lawyers to rationalise and categorise the rules regarding evidence.

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<sup>83</sup> Jansson "Matthew Hale" p.207.

<sup>84</sup> Nelson, The Law of Evidence: wherein all the cases that have yet been printed ... are collected and methodically digested under their proper heads, (1717).

<sup>85</sup> Anon., (Sir Geoffrey Gilbert), The Law of Evidence. By a Late Learned Judge, (1751), 4 vols. The appetite for such works was suggested by the production of other titles during the eighteenth century relating to the law of evidence, perhaps most notably Henry Bathurst's anonymously written The Theory of Evidence, (1761). A fourth edition of Gilbert's treatise appeared between 1791 and 1796 under the title of The Law of Evidence, by Lord Chief Baron Gilbert. Considerably enlarged by Capel Lofft, Barrister at Law.

*English judges at the Northern Assizes.*

Greater practical attention was paid to the evolving laws of evidence within England's Assize courtrooms as the long eighteenth century progressed.<sup>86</sup> In the context of Northern Assize insanity defences, Minute Books and newspapers report that judges adjudicated upon evidential matters from at least the mid 1770s. To take one example, the proofs presented at court were fundamental to the petty jury's decision to find James Rice insane and unable to stand trial in July 1776.<sup>87</sup> The prosecution sought to establish that Rice had been sane at the time of murdering Thomas Westell and adduced witnesses to prove this. A skilled defence counsellor argued that the evidence presented by the prosecution was irrelevant, because the bench had instructed the jury to discover whether or not Rice was insane at his trial, not at the crime itself. The presiding judge, Justice Gould, arbitrated that the prosecutor's evidence was indeed immaterial. In his concluding address, Gould clarified the legal debate, declaring that the jurors were "... not now trying the prisoner for the murder, but the only question for the consideration of the jury [is] whether Rice is now insane or not ... if you think he really is [insane] at present, according to the laws of this country, he cannot be tried". The jury concurred with Gould's elucidation of the defence counsellor's argument and decided that Rice was suffering from mental distraction. Rice's trial was postponed until the next Assizes.<sup>88</sup>

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<sup>86</sup> Beattie "Scales" p.222. Landsman "Rise" pp.513 and 564-572. Landsman "Rectitude" p.456-462. Langbein "Law of Evidence" pp.1171-1202.

<sup>87</sup> *Trials ... Lamma Assizes (1776)*, pp.6-7.

<sup>88</sup> *Idem.*

Similar evidential developments occurred at the Old Bailey and the Northern Assizes between 1660 and 1829. England's judiciary endeavoured increasingly to restrict lay witnesses from imparting "hearsay" and "opinion" testimony.<sup>89</sup> During James Towers' trial at the Westmoreland Assizes in 1822, the presiding judge, Sir George Sowerby Holroyd, censured repeatedly Smith Wilson's testimony before losing patience with the witness and declaring, "I remarked to you before, sir, that long conversations with your neighbours could not be admitted in evidence, and are totally unnecessary on the present occasion - do communicate what came within your own knowledge respecting the prisoner, not your opinions".<sup>90</sup> By the 1820s, lay persons such as Smith Wilson were expected to report their direct observations of persons or events to the courtroom; only "expert" witnesses were regularly permitted to impart "opinion-testimony" at law.<sup>91</sup> Holroyd's denunciation of Wilson's statement echoed a section of Gilbert's Law of Evidence, which classed hearsay as "Secondary Testimony". Gilbert's work stated that, "the *Attestation* of the [lay] *Witness* must be what he *knows*, and not to that only which he has *heard*, for a *mere hearsay is no Evidence*".<sup>92</sup> The lack of courtroom narratives hampers comparisons with the period before the 1770s, but it would be rash to conclude that the English judiciary suddenly began to clarify evidence in the late eighteenth century. After all, seventeenth century jurists affirmed that England's judiciary

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<sup>89</sup> Langbein "Law of Evidence" p.1172. Eigen Witnessing p.15.

<sup>90</sup> Kendal Chronicle, March 9th 1822. Smith Wilson appeared as a witness during the trial of James Towers.

<sup>91</sup> See Chapters 6, 7 and 8.

<sup>92</sup> Gilbert (ed. Lofft) Law of Evidence (1791-6) II p.889 (emphases in the original).

ought to clarify any legal ambiguities which arose during hearings.<sup>93</sup> It would therefore seem likely that English judges acted in such a manner throughout the long eighteenth century. With the advent of counsel and changes in standards of proof, perhaps judges were more involved in the elucidation of evidential criteria from the late eighteenth century onwards.

English Assize judges could question witnesses during insanity defences between 1660 and 1829.<sup>94</sup> John Sutcliffe's trial in 1776 was affected notably by the judge, Sir William Henry Asshurst. Only Asshurst cross-examined the six witnesses who were adduced in this case.<sup>95</sup> Asshurst probed for information concerning Sutcliffe's insanity by asking direct questions such as, "What opinion did you form of his state of mind?" to Reverend Joseph Atkinson.<sup>96</sup> Towards the middle of the trial, Isabel Leeming described how Sutcliffe had made peculiar noises, appeared in an unusual state of undress and had made bizarre gesticulations. Asshurst considered these facts to be indicative of insanity and prompted Leeming to answer the succinct question, "Do you not think this kind of behaviour very extraordinary?". Leeming responded with, "I thought he was not in his senses as he should have been". Leeming considered Sutcliffe's appearance and behaviour to be indicative of mental distress. Throughout Sutcliffe's trial, judge Asshurst's questions both induced and reinforced testimony pertaining to the prisoner's insanity. As late as 1829, at the Westmoreland Assizes, baron Hullock also led the

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<sup>93</sup> Jansson "Matthew Hale on Judges and Judging", *JLH*, 9, 1, (1988), pp.201-209.

<sup>94</sup> Landsman "Rise" p.505.

<sup>95</sup> ASSI 41/7. *Trials ... Lammas Assizes* (1776) pp.14-17.

<sup>96</sup> *Trials ... Lammas Assizes* (1776) p.15.

questioning of the principal witnesses to William Luss' state of mind.<sup>97</sup> England's bench sought proactively to compel succinct proofs of the prisoner's mental condition from deponents.

Despite such probing, the English judiciary were restricted by the testimony induced at court. During Northern Assizes insanity defences, judges did not attempt to subvert the jury into producing a verdict against the main thrust of evidence.<sup>98</sup> Still, the bench could induce persuasive testimony at court. The jury's deliberations could be influenced by the judge's explicit questioning of witnesses. Through to 1829, English judges continued to operate as proactive "testers" during insanity and idiocy defences. English judges therefore acted similarly to Continental, "Inquisitorial" judges who could lead the production of proofs.<sup>99</sup> The courtroom activities of English and Continental judges were not as different as was once thought.<sup>100</sup>

The increasing involvement of legal counsel at the Northern Assizes illustrated that "adversarial" legal processes had emerged in England by the late eighteenth century. The different levels of participation allowed to legal counsel within the English and Scottish criminal systems created distinctive roles for the respective judiciaries. Scottish advocates appeared regularly for both prosecutor and prisoner

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<sup>97</sup> Carlisle Patriot March 7th 1829.

<sup>98</sup> Langbein "Fatal Flaws" p.109.

<sup>99</sup> Farmer "Criminal Law" p.33.

<sup>100</sup> See Gorla and Moccia "Revisiting" for a reassessment of the differences between English and Continental legal codes and practices.

from at least the late seventeenth century at the Justiciary Court.<sup>101</sup> In contrast, prosecution lawyers were only involved in English trials from the early eighteenth century and even by the 1820s defence counsel was present in a minority of cases tried at the Northern Assizes.<sup>102</sup> Counsel for the prisoner appeared at the discretion of the English bench before 1836, although judges rarely refused to allow defence counsel to deal with points of law (such as insanity) as they arose at court.<sup>103</sup> Theoretically, English Assize judges could limit the participation of defence counsel during insanity defences.

The English judge's role altered where trials were imbalanced by only one litigant employing legally trained counsel. In such cases, the bench's actions could ensure that the trial ensued equitably and that counsel did not dominate proceedings.<sup>104</sup> The judiciary could therefore act in the interest of prosecutors and defendants who lacked counsel. As a result, English judges could be perceived to act as "Counsel for the prisoner", as advocate James Boswell once noted.<sup>105</sup> In northern English insanity and idiocy defences, the circuit bench was certainly active on behalf of prisoners who lacked counsel and faced prosecution by barristers. Baron Hullock's interventions aided Hannah Wells' defence for burglary

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<sup>101</sup> See JC 12/1 to JC 12/3 for this development. Prisoners may have been more regularly represented by legal counsel before the 1720s, but the Minute Books (as in England) may have failed to mention them.

<sup>102</sup> D. Lemmings Professors of the Law. Barristers and the English legal culture in the eighteenth century, (2000) p.278. Landsman "Rise" pp.505-506.

<sup>103</sup> Post "Defence Counsel" p.29. Walker Crime and Insanity I p.56.

<sup>104</sup> Beattie "Scales" p.253.

<sup>105</sup> Boswell Letter to Lord Braxfield (1780) p.14.

at the Cumberland Assizes in 1827.<sup>106</sup> In this case, a servant called Elizabeth Stamford had discovered Wells early one morning in the cellar of a house in Moresby. It was purported that Wells had been “quite tipsy” and a “bottle of wine and some mead” were missing from the cellar’s stocks.<sup>107</sup> Miss Rebecca Woodvile lodged a formal accusation of burglary against the prisoner and a barrister, Mr Aglionby, was employed to prosecute at court. The prisoner employed no legal representative at court and had been afflicted by insanity until a few weeks prior to the Assizes.

Aglionby contended successfully that Wells was fit to stand trial, but thereafter the prosecution stumbled into legal difficulties. Baron Hullock had to clarify for the jury that a theft technically could occur, even when the property stolen was not removed from the owner’s premises.<sup>108</sup> Subsequently, however, Hullock grilled prosecution witnesses and poured scorn over the case against Wells. Proof was required that Wells had perpetrated her offence at night to fulfil a statutory charge of burglary. Hullock questioned witnesses and established that that Wells had been discovered “in broad daylight”, prompting the disdainful remark, “Come now, that’s your burglary disposed of” from the bench. Elizabeth Stamford then described how coffee, ginger wine and mead were “missed” from the cellar. But Hullock once again intervened and identified eruditely that the coffee did not belong to Miss Woodvile and that there was “no ginger on the indictment”. Such

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<sup>106</sup> Wells had been arraigned originally in 1825 for the same offence, but she was adjudged to be insane and her trial was postponed until March 1827.

<sup>107</sup> Carlisle Patriot, March 13<sup>th</sup> 1827.

<sup>108</sup> *Idem*.

errors damaged the prosecution's case because Wells could only be tried for offences which were entered formally (and correctly) upon the indictment.

During Wells' hearing, Baron Hullock acted like contemporary English defence counsellors. The judge protected the prisoner by ensuring that the proper legal form was followed, engaging with the legal niceties of the case and challenging the relevance of the prosecution's evidence. The prosecution against Wells collapsed under constant pressure from the judge, the jury acquitted her and she was dismissed, but not before exclaiming thankfully, "God Almighty always protects the innocent!".<sup>109</sup> The English judge could act as a counter-balance to overtly aggressive or unscrupulous indictments, especially those which were conducted by lawyers against prisoners who lacked legal counsel.<sup>110</sup>

Judges could also become embroiled in English trials when counsel appeared for both sides. There was perhaps no clearer indication that the English judiciary did not automatically "act as Counsel for the prisoner" in every situation.<sup>111</sup> Judicial intercession could harm a prisoner's insanity defence. At James Rice's final trial in July 1776, witnesses were cross-examined by the judge and legal counsellors for both the prosecution and the prisoner.<sup>112</sup> Questions from the bench elicited affirmative testimony that Rice had been "in his sound senses" and had feigned insanity upon arrest, evidence that served to hang the prisoner.

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<sup>109</sup> Carlisle Patriot March 13th 1827.

<sup>110</sup> Beattie "Scales" p.253.

<sup>111</sup> Boswell Letter to Lord Braxfield (1780) p.14.

<sup>112</sup> Trials ... Lammas Assizes (1776) pp.3-6. ASSI 42/9. Knipe Criminal chronology p.90.

Judicial intervention was not only motivated by the appearance of legal counsel. Judges guided vague lay witness testimony towards uncluttered legal definitions of insanity. At Elizabeth Ward's trial for poisoning in 1816, for example, Baron Bayley did not cross-examine methodically all witnesses on the prisoner's behalf.<sup>113</sup> Yet when Ward's sister, Charlotte, mentioned that Elizabeth "was not altogether *steady*, or right, in her mind", Bayley interposed and asked whether the witness believed that Elizabeth knew the difference between "right and wrong".<sup>114</sup> Ward's sister replied that she thought Elizabeth fully capable of determining such a distinction. In this case, the bench was not acting to the exclusive benefit of the prisoner, but was seeking to prompt testimony which addressed directly a common legal criterion regarding insanity: the ability to distinguish between good and evil, which jurists related to criminal intent. Following Bayley's intervention, Charlotte Ward's testimony shifted from an indistinct to a succinct statement about Elizabeth's state of mind. Whilst interjecting such questions, the English judiciary was not necessarily predisposed as counsel for or against the prisoner. Instead, they acted as legal pedagogues and sought to induce clear evidence concerning the prisoner's criminal responsibility.

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<sup>113</sup> Rede York Castle in the nineteenth century (1831) pp.393-401.

<sup>114</sup> York Herald July 27th 1816.

*The role of Scotland's Lords of Justiciary once the "assize" was empanelled.*

From at least the late seventeenth century, Scottish judges also interceded to clarify evidence at the Justiciary Court.<sup>115</sup> Proof could be debated as a matter of law in Scotland, so the bench could deal with such matters during the "relevancy" stage of trials. In contrast to English Assize practice, evidential debates at the Justiciary Court could therefore take place before witnesses even took to the stand. At Dumfries in 1774, for instance, Lords Barskimming and Coalston presided jointly over the trial of John McKnaight and allowed two ten-year old boys to give evidence.<sup>116</sup> During the "relevancy", defence counsel cited the jurist Mackenzie in support of their objection to the witnesses, on the grounds of the boys' immature "weakness of understanding". The judges accepted the Advocate-Depute's reply that, "Many objections mentioned by Sir George McKenzie as relevant against evidence, are exploded in modern practice, and the very passage referred to shows objections were then seriously attended to, which no man of business could set his face to now of days without being laughed at".<sup>117</sup> This legal debate illustrates how Scotland's laws of evidence altered between the late seventeenth century and the late eighteenth century. In McKnaight's trial, the bench deemed that the jury could decide the qualitative weight of the boys' testimonies. In contrast to England, this judicial decision was taken during the relevancy phase of the trial, before the witnesses actually took to the stand.

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<sup>115</sup> JC 2 series.

<sup>116</sup> JC 12/14, Dumfries, May 1774.

<sup>117</sup> JC 12/24. The Advocate Depute was Robert Sinclair. John Crosbie, for the defence, had cited "McKenzies Criminals B.2 Tit.26 SS5" in objection to the boy-witnesses.

Perhaps it was no accident that the Lords Barskimming and Coalston favoured the Advocate-Depute's claims during McKnight's trial. James Boswell believed that the regular appearance of defence counsel in Scotland meant that the judiciary favoured public prosecutors, at least where capital offences were concerned.<sup>118</sup> Boswell criticised a system where, "... because much more is thought to be allowable in those who are saving a man's life than in those who are taking it away ... the [Scottish] judges have supposed some of their weight was necessary for the other side of the bar, to keep the balance as it should be".<sup>119</sup> Boswell's censure must be considered carefully. He was an embittered lawyer, starved of the political and legal patronage which he so craved. Boswell's allegations of collusion between Scottish judge and prosecutor may reflect his resentment at not being promoted to such elevated positions himself, rather than a reliable critique of legal practice.<sup>120</sup> Contemporary manuscript and published sources indicate that judges were not biased consistently towards the prosecutor.

Like English judges, Scotland's Lords of Justiciary could influence legal proceedings by cross-examining witnesses and interjecting comments upon legal matters. Both Lord Hermand and Lord Meadowbank presided over James Connacher's hearing at Ayr in 1823.<sup>121</sup> Connacher was eventually deemed to have

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<sup>118</sup> (Boswell) Letter to Lord Braxfield (1780) pp.13-14.

<sup>119</sup> *Idem.*

<sup>120</sup> See Winsatt and Pottle (eds.) Boswell for the Defence pp.364-369 for details of Boswell's background.

<sup>121</sup> JC 12/35 and 26/441. Ayr Advertiser April 17<sup>th</sup> 1823.

been insane whilst murdering his infant son, but the second witness to appear, the writer John Jurie, provided equivocal evidence about the prisoner's mental abilities. Under examination from counsel, Jurie suggested initially that Connacher was "rather imbecile, and did not seem to know on the whole fairly and properly what he was doing", but then added that the prisoner did "know right from wrong". The "Court" examined Jurie before he left the witness stand and induced the pregnant statement that Connacher was "silly but not a natural fool". The bench clarified Jurie's testimony, producing evidence that Connacher's mental incapacity was partially debilitating and was therefore worthy of a mitigation of sentence, rather than full exculpation, according to Scotland's "Rule of Proportions". Scotland's criminal bench clarified evidential and legal matters during defences of fatuity and furiosity. This resembled closely the activity of contemporary English judges.

The Scottish circuit bench could direct legal hearings through the interjection of questions and comments, besides non-verbal indications of their opinions. Whilst witnesses were cross-examined extensively by English judges in some trials, Scotland's judiciary was less forceful in this respect. Robert Houston has suggested that the Scottish judiciary led, rather than dictated, High Court cases at Edinburgh and the same was true of southern Justiciary courts.<sup>122</sup> The Scottish bench preferred to allow legal counsel to examine witnesses and raise the legal points during furiosity and fatuity defences.<sup>123</sup> Whereas the English bench might be the only legal

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<sup>122</sup> Houston *Madness* pp.50-51 and pp.79-80. Houston "Courts" pp.340-341.

<sup>123</sup> T.H. Ford "Brougham as Barrister; Courtroom Dilemmas of a Notorious Radical", *JHL*, 3, (1984), p.109.

expert to be involved vocally in an Assize trial, adversary counsel participated regularly in Scottish Justiciary Court hearings. In most cases, the Scottish judiciary was not required to protect the interests of litigants who lacked counsel. Advocates scrutinized evidences and presented legal arguments on behalf of their clients, although Scottish judges continued to engage with and adjudicate such matters.

In contrast to England's circuit judiciary, Scottish judges preferred to seek out counsel to represent the prisoner in court rather than undertake the examination of witnesses themselves and on the pannel's behalf. Thus, when the Scottish prisoner James Blaikie lacked counsel at his trial in 1752, judge Minto immediately recommended that "Mr James Montgomery" act as "Advocate for Councill".<sup>124</sup> Lord Minto also postponed the "dyet" until later in the day to allow Mr. Montgomery time to organise an improvised defence. Minto avoided engaging himself at court on behalf of the prisoner. This "detached" stance was an important aspect of judicial activity within the Justiciary courtroom, marking a long term development away from an active self-interest in the outcome of trials.

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<sup>124</sup> JC 12/7.

*The judiciary's concluding summary*

British judges could interject whilst witnesses were examined, thereby informing the jury's interpretation of testimonies. Additionally, British judges could deliver conclusive oral summaries of cases. This judicial summary, which took place immediately before the jury considered its decision, has been interpreted as a key element of the English judge's ability to influence a verdict.<sup>125</sup> These synopses recapitulated legal issues such as criminal responsibility, as well as salient testimonies. Judges could indicate whether they were convinced of the prisoner's insanity or idiocy.<sup>126</sup> These synopses reveal how evidential standards had changed during the long eighteenth century.<sup>127</sup> Judges provided clear indications of the legal "criteria" which were deemed necessary to prove madness. The very words which the judge used in his instructions to the jury indicate the extent to which formal, medical vocabulary was used in Britain's courtrooms to describe and explain mental derangement. In Scotland, opposing advocates were allowed to summarise their cases, followed by the bench's *précis*. The judge's summation took on an important complexion in England, however, as legal counsel were not always allowed to review their case to the jury.

British judges could voice their personal estimations of the prisoner's mental state and criminal responsibility during their summaries. Baron Graham was convinced by Granville Medhurst's insanity defence at the Yorkshire Assizes in

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<sup>125</sup> *Eigen Witnessing* p.33.

<sup>126</sup> Langbein "Law of Evidence" p.1188

1800.<sup>128</sup> The hearing was halted prematurely by the judge after the fourth witness had testified to Medhurst's mental distress. In conclusion, Graham summarised the law of insanity and recounted the "leading facts" of the case to the jury, which indicated that Medhurst had been insane at the time of killing his wife.<sup>129</sup> The judicial summary fortified proofs of Medhurst's madness and signalled that legal criteria of insanity were satisfied. The York Herald reported that, following the judge's intervention and summary, "the Jury hesitated not a minute, but returned a Verdict of Not Guilty in consequence of insanity".<sup>130</sup> Graham conveyed clearly his opinions, but he did not force a verdict against the main thrust of evidence. Nor did Graham's conclusion contradict widely-held perceptions of the prisoner's criminal responsibility, including the jury's collective estimations. Graham's views were informed and constrained by the evidence supplied at court. British judges guided and legitimised verdicts during insanity and idiocy defences, rather than imposing conceptions of criminal responsibility upon the courtroom.

Surviving British summaries suggest that judges were not automatically indisposed or sceptical towards pleas of insanity.<sup>131</sup> English judges were critical of insanity defences which lacked sufficient proofs, however. Richard Routledge caused pandemonium at the Carlisle Assizes in 1824 by acting incoherently at

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<sup>127</sup> Eigen Witnessing p.34.

<sup>128</sup> ASSI 41/10.

<sup>129</sup> York Herald, August 2<sup>nd</sup> 1800.

<sup>130</sup> *Idem*. During the same year, the celebrated Hadfield trial took place at the Old Bailey, where Kenyon, the presiding judge, similarly brought the case to a halt and instructed the jury to find the prisoner not guilty owing to his delusional insanity.

<sup>131</sup> Eigen Witnessing p.55.

court.<sup>132</sup> As the “Jury turned to deliberate ... the prisoner evinced much anxiety to bring up his other witnesses, and conducted himself in this business not at all like a mad man”.<sup>133</sup> Justice Bayley remarked promptly to the jury, “I think if you look into the dock, gentlemen, you will see enough to determine the question”.<sup>134</sup> Bayley echoed broad perceptions that persons who were purportedly insane at their trial, such as Routledge, were understood to be incapable of organising their cases in rational, systematic manners. The jury concurred with such estimations, finding that Routledge had feigned insanity and was guilty of sheepstealing.

When judges summarised insanity defences, they outlined the legal criteria which were required to prove that prisoners lacked criminal intent.<sup>135</sup> Detailed legal instructions were recorded rarely for southern Scotland, but an analysis of English summaries provides a unique perspective upon the shifting understandings of criminal responsibility and mental afflictions. From the 1760s, English judges referred rarely to the juristic convention that only “a total idiocy, or absolute insanity, excuses from guilt, and of course from punishment, of any criminal action committed under ... deprivation of senses”.<sup>136</sup> Nigel Walker claimed that “absolute” madness had crystallised into a rigid test of insanity amongst English jurists and legal commentators by the 1700.<sup>137</sup> Northern Assize judges did not apply such strict definitions in their summaries from the 1770s onwards.

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<sup>132</sup> Carlisle Journal August 28th 1824.

<sup>133</sup> *Idem.*

<sup>134</sup> *Idem.*

<sup>135</sup> Eigen Witnessing p.47.

<sup>136</sup> Blackstone Commentaries (1769) IV p.25. Eigen Witnessing p.56.

<sup>137</sup> Walker Crime and Insanity I p.38.

William Luss's trial at Appleby in 1829 provided the clearest indication that both judge and jury were prepared to find a prisoner insane even where absolute proof of complete mental incapacitation was lacking. In his concluding address, Baron Hullock recounted a local surgeon's statement that he did not "know whether [Luss] be insane, or otherwise". Significantly, Hullock advised that such uncertain testimony "would warrant a verdict of insanity, because you ought to be sure before you return any other".<sup>138</sup> Hullock's guidance contradicted England's juristic tradition which assumed that prisoners were sane until proven otherwise.<sup>139</sup> Hullock suggested that the jury ought to assume that Luss was insane, rather than sane. This provides an example of how judges could both initiate and legitimise discretionary mitigation within the courtroom. Again, the jury's verdict of insanity was underpinned by the evidence provided at court and concurred with the judicial review.

British commentators understood that insanity could be a transient condition. Blackstone, for instance, drew upon Hale's work and insisted that "if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he has no deficiency".<sup>140</sup> This juristic supposition was not followed regimentally within early nineteenth century judicial summaries. During 1822, at James Towers' hearing for the murder of his wife, judge Holroyd summarised, "It

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<sup>138</sup> Carlisle Patriot March 7th 1829.

<sup>139</sup> See, for instance, Brydall Non Compos Mentis (1700) p.66: "Every person is presumed to be of perfect mind and memory, unless the contrary is proved".

<sup>140</sup> Blackstone Commentaries (1769) IV p.25.

is ... important in point of law, to consider whether a man, who has been insane, may not have lucid intervals, and yet during those lucid intervals, the phrenzy may be lurking in his mind".<sup>141</sup> Holroyd suggested that even if Towers appeared to enjoy a lucid spell when he shot his wife, the prisoner's insanity was actually in place permanently. Witnesses, jury and judge concurred that James Towers suffered from delusional insanity, which indicates that such a concept was accepted as a sound legal defence during the 1820s.<sup>142</sup> Medical and lay witnesses recounted how Towers was beset by imaginary "thieves, hobgoblins and blue devils".<sup>143</sup> Towers misapplied reason consistently and therefore could not be responsible for killing his wife because he was incapable of forming intent. Holroyd's exposition of delusion challenged juristic notions that insanity could be transient and that sufferers from such afflictions could act rationally and be guilty of crimes during "lucid spells". By doing so, the judge did not foist his opinions upon an acquiescent courtroom, for witnesses and jurors concurred that Towers was delusional and lacked intent. The next chapter demonstrates that the judge's summary could actually reinforce and legitimise broader understandings of criminality, justice and mental afflictions which were held by jurors, as well as the local communities to which they belonged. Broader perceptions of insanity could also be distinct from juristic principles.<sup>144</sup>

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<sup>141</sup> Kendal Chronicle March 9th 1822.

<sup>142</sup> *Idem.*

<sup>143</sup> *Idem.* Lancaster Gazette March 16<sup>th</sup> 1822.

<sup>144</sup> Chapter 7 esp. pp.286-287 and 313-318.

A person's ability to distinguish between right and wrong, and hence form intent, remained central to British theories of criminal responsibility.<sup>145</sup> Concluding judicial addresses referred readily to these juristic conventions, asserting that "if a person had any knowledge of the difference between right and wrong, he must be accountable for his actions".<sup>146</sup> Those who "could not distinguish right from wrong" were considered incapable of "forming a just judgment of [their] own actions, or those of others" and were therefore "not answerable" for their conduct.<sup>147</sup> Judge Ashurst drew upon centuries of jurisprudence when, in 1776, he declared that "In order to constitute a crime, a will must go a long with the act; a man out of his senses, cannot be said to have a will".<sup>148</sup> Just as at the Old Bailey, Northern Assize judges drew upon a strong tradition of legal comment during the insanity defences, especially concerning the nature of criminal responsibility.<sup>149</sup>

It is significant that most English judges employed legal, rather than medical, terminology and criteria regarding insanity during their summaries. Only during the 1820s were medical terms included in a Northern Assize judge's concluding remarks, although concrete conclusions in this respect are precluded by the historical material extant. Abridged or condensed reports incorporated the judge's reference to the legal criteria for insanity, but usually lacked medical terms. This indicates that medical vocabulary and understandings regarding insanity and idiocy

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<sup>145</sup> Eigen Witnessing p.40.

<sup>146</sup> Lancaster Gazette September 12th 1812. Trial of Thomas Kirnan and Henry and Joseph McGleade.

<sup>147</sup> Kendal Chronicle March 9th 1822.

<sup>148</sup> Trials ... Lammas Assizes (1776) p.17. This was a resumé of Ashurst's summary.

<sup>149</sup> Eigen Witnessing pp.182-189.

were not regularly included by judges in their summaries. It may also suggest that legal definitions were perceived to be more important and perhaps more understandable to the intended audience of the published trial narratives.

Judges sought to clarify testimony which imparted unfamiliar concepts to lay juries. Jurors were confronted rarely by complex medical theories of mental distraction within Britain's provincial courts. In 1822, surgeon Thomas Harrison testified that James Towers' delusions were symptomatic of "delirium tremens", a form of insanity induced by alcoholic addiction.<sup>150</sup> Judge Holroyd referred to Harrison's testimony in his summary to the jury, "if you think that [Towers] was labouring under *delirium tremens*, which has been described to you; if you suppose that he could not distinguish right from wrong, and that when he fired the pistols, he was unconscious of what he was doing, - then he is entitled to the benefit of the law, that is to your acquittal, on the ground of insanity". Holroyd referred to "delirium tremens" because Harrison's testimony was persuasive of Towers' insanity, but the judge qualified this explanation with a legal definition of insanity which was used and understood widely in society: the ability to "distinguish right from wrong". It was expected that jurors should understand the legal conception of Harrison's testimony, if not the medical context. Legal, rather than medical, definitions were paramount to the identification of insanity within Britain's provincial courtrooms before 1830.<sup>151</sup> This suggests that broader understandings

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<sup>150</sup> Kendal Chronicle March 9th 1822.

<sup>151</sup> Eigen Witnessing pp.52.

and vocabularies were influenced strongly by legal conceptions of insanity and idiocy

### *Conclusions*

English Assize and Scottish Justiciary Court judges could operate differently during criminal trials. The bench was less vociferous in Scotland than in England, at least once the "assize" had been empanelled. Scottish judges could pose questions and inform themselves within the courtroom environment, but the regular involvement of counsel meant that the Justiciary Court bench was involved less in the cross-examination of witnesses. The Scottish "assize" was allowed a greater role in decision-making after the early eighteenth century. By the late-1740s, Scotland's circuit judiciary had ceased to reject defences of furiosity or fatuity in exculpation or mitigation of a crime during the "relevancy". Instead, judges sanctioned lawyers to debate and jurors to decide whether "pannels" were fully responsible for their transgressions. The establishment of the assize as the key decision-maker in such criminal hearings contrasted sharply with eighteenth century trends at Scotland's civil courts, where the judge was instituted as the principal courtroom evaluator.<sup>152</sup>

Conversely, Scotland's criminal judges were established as the formal assessors of a prisoner's ability to stand trial by 1830. This contrasted with English Assize procedure, where the jury gauged the prisoner's mental fitness to plead. Justiciary

Court practice was irregular during the eighteenth century, but judges were confirmed as the “decision-takers” during defences “in-bar-of-trial” upon the conclusion of Hunter’s test-case in 1801. It was decided that the bench could postpone a trial because this was a question of “relevancy” (the law) and thus fell under the judge’s remit. Debates about Justiciary procedure, aired at Hunter’s trial, were infused by professional and “party” politics. In broader terms, this practical development illustrates that there was no simple development towards “Adversarial” procedures in Scotland. Nor did Scottish procedure evolve inevitably to mimic English practice during the long eighteenth century. Where the bench assessed the prisoner’s state of mind (with special reference to expert witnesses), the Lords of Justiciary were invested with an activity which was akin to Continental “Inquisitorial” models of practice.

English and Scottish circuit judges acted in some analogous ways, despite the persistence of different legal traditions and procedures. Britain’s circuit benches could be proactive and informative during insanity and idiocy defences. In some instances, British judges continued to act as the “testers” of criminal hearings, leading cross-examinations and summarising cases. Judges could also limit the impact of legal counsel. English judges sought to counter-balance cases which were presented by counsel, especially when only one of the litigants employed representatives. Such judicial activity indicates that “adversarial” court practices had not evolved fully in either code before 1830.<sup>153</sup> The practical remit of British

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<sup>152</sup> Chorus “Judge’s role” pp.33-39.

<sup>153</sup> Landsman “Rise” pp.500-502 and pp.513-4.

and European judges could be similar, although jurors assessed the prisoner's mental state in all English and most Scottish hearings.<sup>154</sup>

Eigen has concluded that judges coerced jury assessments of criminal responsibility at the Old Bailey.<sup>155</sup> Northern Assize insanity and idiocy defences were not directed so forcefully by the bench. Scotland's Lords of Justiciary also guided, rather than dictated, defences of fatuity and furiosity at the High Court and on the southern circuit.<sup>156</sup> British judges did not impose alien understandings of criminal responsibility upon trial jurors. The bench did not dictate verdicts, but legitimised the jury's decision by ensuring that legal principles were understood and adhered to. Judges guided jurors towards conclusions which corresponded to the proofs supplied at court; the bench was therefore constrained by the testimony imparted. Judges could induce sound proofs through cross-examination, but such endeavours were constricted by the bench's formal, practical remit. Typically, Britain's judiciary sought to clarify testimonies by probing for evidence which addressed directly the legal criteria for insanity and idiocy. This was an extension of the judge's role as the paraclete of legal principles. As stricter evidential standards evolved in Britain, so the bench solicited persuasive proofs from witnesses which could inform the jurors' deliberations. Judges sought to eradicate equivocal testimony and establish the prisoner's mental condition "beyond a reasonable doubt". This activity could guide jurors, but did not dictate the final verdict.

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<sup>154</sup> Gorla and Moccia "Revisiting" p.146. Gordon "Roman Law" pp.142-143.

<sup>155</sup> Eigen "Intentionality" pp.34-49. Eigen *Witnessing* pp.14, 33-34, 40-48 and 52-55.

<sup>156</sup> Houston *Madness* pp.50-51 and 79-80. Houston "Professions" p.2. Houston "Courts" pp.340-341.

With the exception of Scottish pleas “in-bar-of-trial”, provincial British insanity and idiocy hearings reflect broader historical interpretations of legal processes, whereby criminal cases were not directed inexorably by the presiding bench. This analysis of judicial influence must be contextualised by an examination of the interactions between the principal actors during criminal cases.<sup>157</sup> The next chapter investigates how the jury acted proactively and reached its conclusions independent from the judge’s instructions. Verdicts could represent a concurrence of jury and judge estimations, rather than the imposition of judicial opinions upon a malleable jury panel. During insanity and idiocy defences, judges did not order juries to find verdicts which contravened broadly held perceptions of justice, criminal responsibility and mental afflictions.

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<sup>157</sup> King “Decision-makers” pp.26-27. King *Crime* esp. pp.43, 227, 231-35 and 243-256. Langbein “Fatal Flaws” pp.108-109. Langbein “Trial jury” pp.35-37.

## 8.

***British criminal trial juries and the evaluation of prisoners' mental conditions, 1660-1829***

*"Alas, good men! they mean no harm:  
they do but follow the directions of the Court"*<sup>1</sup>

Sir John Hawles rhetorical statement correlates Joel Eigen's argument that the judicial bench directed the petty jury's verdict and hence the evaluation of the prisoner's mental condition, as least during Old Bailey criminal hearings.<sup>2</sup> This chapter extends the alternative thesis that judges did not force juries to their conclusions in northern England and southern Scotland. The jury could be proactive during the examination of prisoners and, in some cases, reach conclusions independent from the promptings of legal professionals or the proofs provided at court.

Robert Houston has resolved that Scottish High Court verdicts of fatuity and furiosity reflected concurrence between bench and "assize", rather than a domineering judiciary.<sup>3</sup> This provides an important contrast to the English historiography, but the relationship between judge and jury could be less harmonious during southern Scottish hearings. In both countries, bench and jurors could produce divergent assessments of the prisoner's mental capacities and criminal responsibility. Martin Weiner's suggestion that English judges and juries

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<sup>1</sup> Hawles *Englishman's Right* (1680, 8<sup>th</sup> edition 1793), p.19.

<sup>2</sup> Eigen *Witnessing* pp.33-34.

<sup>3</sup> Houston *Madness* pp.50-52.

could contest concepts of criminal responsibility during the nineteenth century can be extended to provincial English and Scottish trials of the late eighteenth century, at least.<sup>4</sup>

Contemporary commentators and historians alike have debated the courtroom function of Britain's criminal trial juries. These discussions have focused upon whether jurors could or should take decisions unfettered by the promptings of legal professionals, most notably the bench. Insanity and idiocy defences raised and accentuated this politicised legal issue. To understand how the jury operated, contemporary legal debates and the broader historiography of courtroom interactions must be engaged.

The social standing and outlook of England's criminal jurors has propagated vehement debate amongst historians.<sup>5</sup> Older contentions that petty jurors could be characterised as being the local "elites" of society has been criticised.<sup>6</sup> More recently, historians have agreed that trial jurors were of "middling status" and did not necessarily identify with or belong to the local and national elites. It is suggested that this analysis can be extended to northern English jury panels too. Less research has been published regarding the Scottish "assize", but it should not be assumed that Scotland's jury was indistinguishable from its English counterpart.<sup>7</sup>

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<sup>4</sup> Weiner "Judges V Jurors" pp.468-470.

<sup>5</sup> Most famously, see Hay "Property, Authority", Langbein's criticism in "Fatal Flaws" and Hay's reponse in "Class Composition".

<sup>6</sup> For an overview of these debates see Innes and Styles "crime-wave" pp.382-409 and Green "Retrospective" pp.384-399.

<sup>7</sup> M. Crowther and B. White, "Medicine, Property and the Law in Britain 1800-1914", *HJ*, 31, 4 (1988) p.854. Willock, "Origins" *passim*.

Published work concerning Scottish "assizes" is thin by comparison with English research. This thesis is therefore a springboard for future comparative research into Britain's criminal juries. English and Scottish guidelines for jury service are compared, alongside a broad analysis of the social standing and occupational designations of jurors who were involved in fatuity and furiosity hearings. This comparison suggests that most Scottish jurors were also of "middling" status, but that persons of higher and lower status than English petty jurors were empanelled regularly upon southern Scottish "assizes".

Sophisticated historical analyses indicate that the jurors' role in the decision-making processes of the criminal law cannot be explained by their social characteristics alone.<sup>8</sup> It is questioned whether "middle-ranking" jurors always deferred to socially superior or legally experienced courtroom participants, particularly by the late eighteenth century. Thomas Green urged historians to consider what he termed the "constraints" that informed or directed the jury's deliberations. It is therefore assessed how British verdicts of insanity could be stimulated by the jurors' independent perceptions of justice, criminal responsibility and mental disturbance.

The salient role of British criminal juries was to return verdicts which were based increasingly, although not exclusively, upon the proofs delivered at court. Scotland's sovereign legal traditions, particularly the "Rule of Proportions", meant

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<sup>8</sup> Green "Retrospective" pp.386-387. Hay "Class composition" pp.352-355. King "Decision-Makers" p.26 and Crime pp.257-294.

that a wider array of verdicts were available to her “assyzers”. English and Scottish jurists maintained divergent theoretical approaches to partial “degrees” (or less than fully debilitating forms) of insanity and idiocy.<sup>9</sup> In practice, Scottish jurors could find prisoners to be afflicted by partially debilitating mental conditions, which deserved a proportional reduction, but not exculpation, of sentence. English theory, by contrast, held that “partial” degrees of insanity or idiocy earned no formal mitigation of sentence. By the late eighteenth century, however, the partially afflicted were acquitted fully of their crimes in England.<sup>10</sup> It is explained how criminals who suffered from less debilitating mental conditions could benefit from mitigation which was prescribed by law (mandatory) and which circumvented legal principles (discretionary).

Recent research has demonstrated how petty jurors mitigated England’s harshest criminal sanctions through their verdicts.<sup>11</sup> It is clarified how findings of insanity and idiocy could be extensions of either mandatory or discretionary alleviation within Britain’s criminal processes. Joel Eigen has located a close relationship between “partial verdicts” or “pious perjury” which mitigated sentences and English insanity defences.<sup>12</sup> “Partial verdicts” and insanity defences could be informed by similar theoretical and practical legal imperatives in northern England, but it is contended that they represented different types of mitigative practice. Historians of crime and the courtroom have illustrated how the jury’s conclusions

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<sup>9</sup> See Chapter 3.

<sup>10</sup> Eigen *Witnessing* pp.55-57.

<sup>11</sup> See, for instance, Beattie “London’s Juries”, Green “Retrospective”, Hay “Class Composition”, King “Illiterate Plebeians” and King *Crime*.

<sup>12</sup> Eigen *Witnessing* pp.15-16 and 28.

influenced post-trial clemency in England and Scotland, through recommendations to mercy. Nigel Walker has evaluated English and Scottish applications to royal clemency in the context of mental afflictions.<sup>13</sup> Recent investigations of British insanity and idiocy defences have not focused upon this further dimension of formal mitigation, however.<sup>14</sup> This chapter redresses this imbalance by comparing how mental disturbance might lead to post-trial mercy in these two countries.

Historical interest has focused upon the jury's verdict, but jurors could also contribute towards the establishment of proofs by questioning witnesses. Historians such as John Langbein and Stephan Landsman have proposed that jurors evolved into passive recipients and evaluators of evidence as "adversarial" criminal practices developed over the long eighteenth century.<sup>15</sup> During provincial English and Scottish insanity and idiocy defences, however, juries could be self-informing bodies. It is argued that such proactivity exemplifies how jurors could produce verdicts independent from coercion and according to their own understanding of evidential principles and legal dogmas.

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<sup>13</sup> *Ibid* pp.196-204.

<sup>14</sup> *Eigen Witnessing*, Houston *Madness*.

<sup>15</sup> Landsman "Rise" p.501. Langbein "Trial Jury" pp.34-38.

*English and Scottish criminal trial juries*

Jurors assessed the prisoner's mental state in all English and the majority of Scottish criminal hearings. The criminal trial jury at the English Assizes was known as the "petit" or "petty" jury and consisted regularly of twelve men by the 1660s.<sup>16</sup> The petty jury assessed the mental state of prisoners after considering the facts and opinions supplied by witnesses. The function of England's "grand jury" is also considered here and compared with Scottish practice. In contrast to English practice, fifteen jurors were empanelled upon Scottish Justiciary Court "assizes" (juries) by the early eighteenth century.<sup>17</sup> On the southern circuit, the prisoner's mental fitness to plead was evaluated by the bench rather than the "assize", but jurors always assessed evidence regarding the prisoner's mental state at the crime. Juries were empanelled in twenty of the thirty-five southern Scottish furiosity and fatuity defences between 1707 and 1829.

The format of criminal trial by jury distinguished Britain from contemporary Continental procedures. Criminal hearings in Prussia, Russia, Spain and Württemberg proceeded without reference to a jury panel before the mid nineteenth century.<sup>18</sup> These were "Inquisitorial" judicial systems, where the judiciary investigated evidences alongside passing verdicts and sentences.<sup>19</sup> The "Inquisitorial" bench also assessed the mental condition of prisoners, informed by

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<sup>16</sup> Baker "Criminal Courts" p.22. Cockburn "North Riding Justices" p.490.

<sup>17</sup> Willock "Origins" p.152.

<sup>18</sup> Becker "Judicial Reform" pp4-13. Farmer "Criminal Law" pp.34-39. Lopez-Lozaro, "No Deceit Safe" p.465. Criminal trials in Ancien Regime France lacked jury panels, although Revolutionary France adopted the English concept of a petit jury, Padoa-Schioppa "Introduction" pp.7-9.

<sup>19</sup> See pp.242-244.

“expert” and “lay” evidences. British trials where prisoners’ mental capacities were evaluated by panels of lay jurors were distinctive within this wider European context.

English and Scottish superior criminal court juries shared some common characteristics. Jury service began at twenty-one in both England and Scotland, which was regarded as the age of majority for males.<sup>20</sup> The ceiling for jury service differed however, being sixty-years-of-age in Scotland and seventy in England.<sup>21</sup> British jurors selected older members of their panel to act as the “foreman” or “chancellor” of the jury.<sup>22</sup> The “foreman” chaired deliberations amongst jurors and announced the jury’s verdict to the courtroom. Jurors may have deferred to such individuals owing to their age, jury experience, high social and economic station as well as local administrative standing.<sup>23</sup> The internal dynamic of the jury’s decision-making process can be veiled from the historian’s gaze, but the “foreman” was an important figure at court, delivering verdicts and asking questions of witnesses.

British criminal juries were also male bodies universally, for females were prohibited from jury service. During insanity or idiocy defences for child-murder, a “jury of matrons” examined the body of female prisoners, but such inquests took

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<sup>20</sup> Langbein “Trial Jury” p.24. Bell Dictionary (1826) II pp.134-143. Anon. Readings on the Statute Law (1723-1725) IV p.79.

<sup>21</sup> *Idem*.

<sup>22</sup> King Crime pp.244-246. K.S. Murphy, “Judge, Jury, Magistrate and Soldier: Rethinking Law and Authority in Late-Eighteenth-Century Ireland”, AJLH, xlvii, 3, (2000), pp.236-7.

<sup>23</sup> Future research is needed to clarify whether “kinship” played an important role, especially in areas where such social relationships were still strong in the early eighteenth century.

place privately before the trial.<sup>24</sup> At court, "Matrons" were restricted to factual assessments of whether the prisoner displayed signs of pregnancy or child-birth. "Matrons" provided evidence regarding the prisoner's sanity or guilt, but they did not decide the criminal verdict. It could be suggested that the jurors viewed criminality and their courtroom role from the perspective of property-owning males. This prognosis is simplistic, however. As Douglas Hay and Thomas Green have suggested for England, the jurors' behaviour cannot be explained by their social station and gender alone.<sup>25</sup>

Scottish and English jurors shared common occupational characteristics. From at least the early eighteenth century, professional medical persons were exempted by statute from serving upon Britain's criminal juries.<sup>26</sup> Medical practitioners testified at court, but they never assessed the mental condition of northern English and southern Scottish prisoners as jurors. By comparison, medical men appeared rarely as Scottish civil court and High Court criminal jurors between 1660 and 1829.<sup>27</sup> One juror was a "chirurgion" (surgeon) during Philip Standsfield's trial, at Edinburgh in 1688, for the murder of his father.<sup>28</sup> Jurors could receive medical training without pursuing a career in that vocation, but provincial jury panels lacked the presence of formal, medical professionals. "Experts" could inform the jury's

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<sup>24</sup> J.C. Oldham, "On Pleading the Belly: A History of the Jury of Matrons", *CJH*, 6 (1985), pp.1-64.

<sup>25</sup> Green "Retrospective" pp.386-387. Hay "Class composition" pp.352-355.

<sup>26</sup> Crawford "Emergence" p.161. Landsman "Rise" p.501. Willock "Origins" p.167-168.

<sup>27</sup> 3% of Edinburgh civil jurors were medical men: Houston *Madness* p.49 and "Courts" p.341.

<sup>28</sup> *JC* 2/17.

verdict, but as Michael MacDonald has suggested, mental conditions were assessed by panels of lay persons at court.<sup>29</sup>

*Qualifications for and social structure of British juries*

Jury participation was restricted by statutory guidelines regarding property and wealth in both England and Scotland.<sup>30</sup> These real estate and income prerequisites were designed to guard against corruption, ensure that British jurors were economically self-sufficient and therefore capable of autonomous assessment.<sup>31</sup> These statutory prerequisites excluded the majority of Britain's populace from jury service. Independent guidelines for jury service existed in England and Scotland, although some of these rules were analogous. Southern Scottish jury panels retained alternative social structures and internal dynamics than their English equivalents. Owing to less restrictive jury-qualifications at the Justiciary Court, persons of higher and lower station than England's petty jurors were empanelled regularly as "assizers" in southern Scotland.

During the long eighteenth century, the statutory guidelines were amended for jury service at England's "County Assizes", such as Cumberland and Westmoreland. From 1692, the statutory threshold rose from the ownership of land

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<sup>29</sup> M. MacDonald, *Mystical Bedlam – Madness, Anxiety and Healing in Seventeenth Century England*, (1981) p.113.

<sup>30</sup> Langbein "Trial Jury" pp.24-27. King *Crime* p.244. Willock "Origins" pp.179-182. Houston "Crime, Courts" p.341. For a perspective on Irish prerequisites, see Murphy "Judge, Jury" p.235.

<sup>31</sup> Houston "Crime, Courts" p.341.

valued at least £2 per annum to £10 and over.<sup>32</sup> This new guideline was not adopted immediately or universally, however. The anonymous Readings on the Statute Law (1723-1725) adhered to the older forty-shillings (£2) property requirement.<sup>33</sup> The author may have been mistaken, but this reference may indicate that jury qualifications in England were applied flexibly, rather than rigidly, before the late 1720s. If so, a broader proportion of property-owning men were eligible for jury service at the Assizes than has previously been assumed during the early eighteenth century. By the mid eighteenth century, however, the £10 prerequisite was adopted regularly.<sup>34</sup>

Regional and jurisdictional variations in jury stipulations persisted in England throughout the long eighteenth century. Old Bailey petty jurors were householders in Middlesex and London who owned £100 worth of real estate or personal possessions.<sup>35</sup> London's jurors could be wealthier and of higher standing than their provincial counterparts.<sup>36</sup> The Old Bailey's prerequisite set its petty jurors on a par with one-third of Essex's grand jurors during the late eighteenth century, for instance.<sup>37</sup> It might be argued that Old Bailey's criminal jurors were closer in social perspective to courtroom participants of high status, such as judges, than most Northern Assize petty jurors.

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<sup>32</sup> 4 & 5 W&M c24. Hay "Class Composition" p.312. King "Illiterate" pp.258-265. King Crime p.244. Langbein "Trial Jury" p.24. The prerequisite was raised in 1664 to £20 (16 & 17 Chas II c3), but Oldham and Hay concur that practice reverted to the £2 guideline by 1667 (Hay "Class Composition" p.312, Oldham "Special Jury" pp.145-146)

<sup>33</sup> Anon., Readings on the Statute Law, (1723-1725), IV, pp.80-81.

<sup>34</sup> Blackstone Commentaries (1769) IV p.342. Langbein "Trial Jury" p.24. King Crime p.244.

<sup>35</sup> Hay "Class Composition" p.312. Hay cites the statute 3 Geo II c25 s19, which changed the Old Bailey requisites from 100 marks to £100. Anon., Readings on the Statute Law (1723-25), IV, p.81.

<sup>36</sup> Beattie "London's Juries" p.233.

<sup>37</sup> King "Illiterate" p. 274.

Qualifications could vary upon the Northern Assizes, too. Jury service at "County" Assizes, such as Northumberland and Yorkshire, was based upon land ownership. By contrast, the "Town Corporation" Assizes for Newcastle and York could select jurors who owned moveable goods worth £40 or more, rather than real estate.<sup>38</sup> These statutory guidelines for moveable property were considerably lower than London's £100 precondition. The English petty jury was not an homogeneous social entity during the long eighteenth century. Juries varied by epoch and region. Perhaps such variations have amplified the historical debates regarding the wealth and social structure of English petty juries.

After 1692, the prerequisites for jury service at Scotland's Court of Justiciary were lower than England's. The statute which raised jury qualifications to £10 was not applicable in Scots Law. In 1797, advocate David Hume cited a 1746 statute which maintained Scottish requirements at the, "possession of lands or tenements of the yearly value of 40s [shillings sterling] or valued in the tax-rolls as 30s ... whether the possession be as owner or liferenter".<sup>39</sup> Women could not be jurors, but men whose wives were "infest" of £5 per year could also be empanelled in Scotland.<sup>40</sup> The Scottish prerequisites were amended by statute in 1825, but remained lower than in England.<sup>41</sup> After 1692, a broader section of society was qualified for and represented upon Scottish "assizes" than English petty juries. If

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<sup>38</sup> Jacob, *Statute Law Common-Placed* (1719) p.138. Anon, *Readings on the Statute Law* (1723-1725) IV p.81.

<sup>39</sup> Hume *Commentaries* (1797) II p.453. Statute 19 Geo II c.9. Hume's figures referred to sterling rather than Scots currency, which was worth roughly one-twelfth of sterling.

<sup>40</sup> Hume *Commentaries* (1797) II p.453.

<sup>41</sup> 6 Geo IV c.22. Bell *Law Dictionary* (1826) II pp.134-143.

the petty jury was regarded as one of the most inclusive, "popular" institutions in England, then Scotland's assize was surely more so.<sup>42</sup>

In contrast to England's "County" Assizes, the ownership of property was not paramount in Scottish jury qualifications. Throughout the long eighteenth century, wealthy individuals who did not own significant real estate were named as jurors. As Hume stated, "liferenters" (persons who held long term property leases, usually of ninety-nine years) qualified for "assize" service.<sup>43</sup> From the mid-1820s, individuals who owned £200 sterling of "moveable property" also qualified.<sup>44</sup> English tenants who held long term leases on land valued at least £20 could act as jurors, but it was impractical to trace such leaseholders and they were ignored on official jury lists.<sup>45</sup> In England, wealthy tenant farmers who lacked the necessary landed assets were excluded from juries.<sup>46</sup> In contrast, Scottish tenants of suitable income acted regularly as "assyzers" (Table 8.1).

After considerable debate, historians now concur that at least two-thirds of England's population was prohibited from jury service.<sup>47</sup> The theoretical premises for jury service were followed regularly in practice. "Makeweight" jurors (or

<sup>42</sup> Hay "Class Composition" p.349.

<sup>43</sup> Hume *Commentaries* (1797) II p.453.

<sup>44</sup> Bell *Law Dictionary* (1826) II pp.134-143.

<sup>45</sup> Hay "Class Composition" pp. 312 and 321. Life-rent (usually set at 99 years) and 500 year leases were accepted by statute 3 Geo II c25 s18 (1730).

<sup>46</sup> Green "Retrospective" p.297 and King "Illiterate Plebeians" p.268 both argue that wealthy tenant farmers were excluded from jury service, whilst less wealthy individuals who owned £10 worth of property were included.

<sup>47</sup> Green "Retrospective" p.379. Hay "Class Composition" p.327. King "Illiterate" p.277. Langbein's dissection of Hay's work ("Fatal Flaws" pp.96-118) ought to be treated cautiously. According to Langbein, Hay failed to distinguish between uppermost ruling "classes" and "middling ranking" petty jurors. Hay's original thesis may have been confused, but he later clarified that such a distinction existed. See Hay "Class Composition" pp.351-152, fn. 134.

“talesmen”) who did not meet statutory stipulations appeared infrequently during British criminal trials.<sup>48</sup> As at the Old Bailey, “talesmen” were not employed during northern English and southern Scottish insanity defences.<sup>49</sup> During southern Scottish fatuity and furiosity defences, all three-hundred jurors were named upon the relevant “Great Assize”, or general list of persons eligible for jury service. Impoverished persons did not assess the mental condition of prisoners at either of the British circuit courts which were examined. Trial juries were of superior status to the majority of English and Scottish criminals whose mental competence was questioned.

	<i>Number of jurors</i>	<i>% of all jurors</i>	<i>Juries where represented</i>	<i>% of juries where represented</i>
<b>Residenters<sup>50</sup></b>	89	29.7	17	85
<b>Landowners</b>	86	28.7	17	85
<b>Tenant Farmers</b>	27	9	12	60
<b>Merchants</b>	26	8.6	12	60
<b>Tenants</b>	24	8	5	25
<b>Writers<sup>51</sup></b>	18	6	12	60
<b>Tradesmen</b>	18	6	11	55
<b>Portioners</b>	9	3	5	25
<b>Other<sup>52</sup></b>	3	1	3	15
<b>Total</b>	<b>300</b>	<b>100</b>	<b>20</b>	<b>n/a</b>

*Table 8.1. Composition of southern Scottish assizes, by designation, during furiosity and fatuity defences, 1711-1829.*

<sup>48</sup> Green “Retrospective” p.379. Hay “Class Composition” p.327. King “Illiterate” p.277. Such persons might be empanelled by judges in the absence of sufficient, qualified jurors for instance. Hay points out that some “talesmen” were, in fact, qualified persons who had not been selected for service at that particular Assizes, see “Class Composition” p.327. Willock, “Origins” p.149 and Green, “Retrospective” p.379 both referred such makeweights as “talesmen”, but Blackstone used this term to describe the individuals who were chosen and sworn in as the petit jury for trials, see Blackstone *Commentaries* (1769) III p.365.

<sup>49</sup> Eigen *Witnessing* pp.12-13.

<sup>50</sup> Designated by name and then the idiom “in” or “indweller”.

<sup>51</sup> Legal clerks.

<sup>52</sup> Including designations of “Baillie” and “factor” to earls.

Historians now concur broadly about the social composition of English, eighteenth century juries.<sup>53</sup> John Langbein has criticised Douglas Hay's early work for suggesting that England's petty jurors were drawn from, and shared common interests with, society's elites.<sup>54</sup> Hay has defended the subtlety of his thesis and clarified that petty jurors were distinguished from the uppermost strata of local society.<sup>55</sup> In his later work, at least, Hay argued that the petty jury was dominated by "middle-ranking" tradesmen, artisans and farmers, rather than the local "gentry".<sup>56</sup> Social and legal historians now agree that the petty juries were most regularly staffed by "the middling sorts" of property-owners, who were of inferior political, social and economic status to the "gentry" and "aristocracy".<sup>57</sup> Yorkshire's petty juries usually consisted of farmers and artisans who therefore belonged to this "middling rank". With recent research upon various regions in mind, and in the absence of detailed studies for jurisdictions such as Cumberland and Westmoreland, it seems reasonable to suggest that this was true generally of the Northern Assizes. This middling tier of landowners was not socially, economically or occupationally homogenous, but they were excluded from the highest strata of society.<sup>58</sup>

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<sup>53</sup> For an overview, see Green "Retrospective" pp.384-395 and King *Crime* pp.3-17.

<sup>54</sup> Langbein "Fatal Flaws" pp.96-118.

<sup>55</sup> Hay "Class Composition" pp.351-152 fn.134. Hay might still be taken to task over his employment of the term "class" to describe these social strata. Class consciousness certainly evolved during the eighteenth century, but whether broad, horizontal "class" awareness and movements were established has been a subject of considerable debate.

<sup>56</sup> Hay "Class Composition" p.330.

<sup>57</sup> King "Illiterate Plebeians" suggests that the "gentry" formed around 2% of Essex petty jurors, but were disproportionately represented amongst foremen. Comparable research for northern England should be possible, but deserves an independent thesis. See also Cannon "British Nobility" p.55.

<sup>58</sup> King "Decision-Makers" pp.55-56.

Scottish Justiciary Court juries were dominated similarly by a broad spectrum of “middle-ranking” males such as tradesmen, craftsmen, merchants and land-owning farmers (Table 8.1). Trade and craftsmen were empanelled also upon criminal “assizes” at Edinburgh during fatuity and furiosity defences.<sup>59</sup> So the juries which assessed prisoners’ mental conditions in southern Scotland, Edinburgh and northern England contained similar social elements. In contrast to English Assize practice, tenants and tenant-farmers were empanelled regularly on Scottish “assizes”. These categories of juror accounted for around fifteen-percent of “assyzers” during southern Scottish fatuity and furiosity defences between 1711 and 1829 (Table 8.1). The inclusion of tenants and less stringent property qualifications meant that Scotland’s “assizes” could include persons of lower social standing than England’s petty juries.

Persons belonging to the highest strata of England’s local and national social, economic and political elites sat rarely upon criminal juries. The English and Scottish peerages avoided jury service, although their interests could be represented by tenants, clients and legal “factors”. England’s “gentry”, who were of elevated social station but ranked below the aristocracy, were also absent from English petty juries.<sup>60</sup> Instead, local land magnates such as “Esquires”, “Baronets” and “Viscounts” were installed upon the “Grand Jury”.<sup>61</sup> Grand Juries scrutinized cases before they were put to the petty jury and could reject prosecutions that were

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<sup>59</sup> Houston *Madness* pp.50-52.

<sup>60</sup> J. Cannon, “The British Nobility”, in H.M. Scott (ed.) *The European Nobilities in the Seventeenth and Eighteenth Centuries. Volume One: Western Europe*, (1995), p.55.

<sup>61</sup> Viscount was an honorary title, usually given to younger sons of peers. I would like to thank Hamish Scott for valuable advice regarding Britain’s “nobility” and “gentry”.

malicious or ill-founded. Lancaster's Grand Jury rejected around eleven-percent of two-thousand formal accusations between 1730 and 1815, for instance.<sup>62</sup> This important process is obscured from the historian's gaze, but it seems likely that Grand Juries did reject prosecutions on the grounds of the prisoner's mental incompetence during the long-eighteenth century. It is impossible to quantify such activity. Nevertheless, the highest ranks of northern England's elites (who were of broadly similar status to the judge) acted as "Grand" rather than "Petty" jurors. This means that these types of person were not involved in the evaluation of the prisoner's mental condition in the capacity of trial jurors. "Special juries", consisting exclusively of high-station persons could be employed in England, but no such jury was called during insanity and idiocy defences.<sup>63</sup>

Conversely, southern Scottish "assizes" did include local landowning elites on a regular basis (Table 8.1). Court of Justiciary hearings lacked Grand Juries in all cases except treason after 1707, but persons designated "Esquire" or "Baronet" appeared as trial jurors and therefore evaluated prisoners' mental conditions.<sup>64</sup> Thus, Sir Thomas Gibson Carmichael, Baronet, was named as "chancellor" of the Jedburgh assize that recommended Andrew Watherstone to mercy on account of his weak-mindedness in 1809.<sup>65</sup> The Scottish statutory reforms of 1825 regularised the participation of such socially elevated persons, who were styled "special jurors".<sup>66</sup>

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<sup>62</sup> PL 28/1-12 contains records of "no bills" alongside formal prosecutions.

<sup>63</sup> Hay "Class Composition" p.330.

<sup>64</sup> Willock "Origins" p.147.

<sup>65</sup> JC 12/26. Of the trials studied, "special" jurors (and their eighteenth century equivalents) appeared on seventeen juries between 1711 and 1829; a special juror was named as chancellor on fifteen of these juries.

<sup>66</sup> Bell *Dictionary* (1826) II pp.134-143.

During southern Scottish fatuity and furiosity defences, the mode and median number of such jurors stood at four per assize. "Common" jurors may have deferred to such high-ranking individuals. The internal social dynamics of southern Scottish criminal juries were more complex than their northern English equivalents.

The consistent presence of major landowners upon southern Scottish juries contrasted with contemporary High Court practice, at least regarding furiosity and fatuity defences. Between 1730 and 1815 the mental states of thirteen prisoners were assessed by jury at Edinburgh, but only one of these "assizes" included major landowners.<sup>67</sup> It might be expected that landowners would be represented extensively on provincial rather than Edinburgh juries, because the circuit jurisdiction covered a large rural area.<sup>68</sup> The social standing of the prisoner affected the social composition Justiciary Court juries, at least from the 1790s onwards. The only Edinburgh "assize" to include major landholders was empanelled to try Archibald Gordon Kinloch, Baronet. "Special" jurors numerically dominated assizes twice in southern Scotland, in 1795 and 1818.<sup>69</sup> On both occasions, the prisoner was of elevated social and economic standing locally. In these three Scottish cases, jury composition was manipulated to ensure that high status prisoners were tried by panels of their social peers.

The majority of British jurors were property-owners, but most of these persons did not belong to the uppermost political, social and economic strata of society.

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<sup>67</sup> Houston *Madness* p.49.

<sup>68</sup> Houston "Courts" p.343.

<sup>69</sup> John Douglas of Luce, JC 12/22. John Halliday, JC 12/31-32.

Jurors did not necessarily share broad outlooks concerning crime and criminality with persons of superior social status, such as the judiciary or England's Grand Jury. The interests of judge and trial jury could diverge or converge, depending upon the character of offender and offence.<sup>70</sup> Jurors did not always act deferentially to socially superior courtroom participants. Malcolm Gaskill has detected a cohesive, assertive identity amongst English petty jurors, from at least the 1720s, as the mediators between poverty and wealth at law.<sup>71</sup> British jurors did not merely identify or concur with those of a similar or greater social status, for they had ties of responsibility to those beneath them.<sup>72</sup> Jurors recognised the need to comply with the expectations of the lower orders of society, regarding the law, justice and mercy, in order to legitimise and propagate England's criminal code.<sup>73</sup> These jurors could be involved in the daily administration of local law and order.<sup>74</sup> The local priority of settling disputes in relatively peaceful and mutually satisfactory manners could clash with the bench's purpose of riding out from London or Edinburgh to dispense "Royal Justice".<sup>75</sup> Criminal trial jurors could therefore carry independent obligations and principles into court.<sup>76</sup>

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<sup>70</sup> King "Decision-Makers" p.54.

<sup>71</sup> Gaskill "Providence" p.353

<sup>72</sup> Green "Retrospective" p.390.

<sup>73</sup> *Ibid* pp.389-390.

<sup>74</sup> *Ibid* p.384. King "Illiterate" p.276.

<sup>75</sup> Hay "Class Composition" p.352.

<sup>76</sup> Weiner "Judges V Jurors" p.472.

*Experienced jurors and familiarity with the law*

Legal "Counsellors, Attornies, Clerks and other Ministers of the King's Courts" were exempted statutorily from jury service in England.<sup>77</sup> Northern English petty juries were therefore devoid of legal professionals, although some jurors may have received legal training. Scottish advocates, Writers to the Signet and court officers were similarly barred from "assize" duty, but writers (legal clerks of inferior professional status) could be empanelled as jurors.<sup>78</sup> Writers did not appear upon Edinburgh "assizes" during fatuity and furiosity defences, but they were sworn upon southern Scottish juries (Table 8.1).<sup>79</sup> Writers were empanelled irregularly during insanity and idiocy defences before the 1780s, but at least one writer was named upon every "assize" between 1785 and 1829. When they participated, writers usually named as the assize "clerk" and recorded the verdict. These writers had a practical familiarity with the law and could act as pleaders at the inferior Scottish courts. They were competent at framing verdicts in legal forms and terms, whilst they may have been able to explain legal concepts to their fellow-jurors. Unlike England's petty jury, therefore, Scotland's "assize" could include legal professionals. As with the regular involvement of legally trained counsel, the involvement of "writers" as clerks to the assize illustrates how legal frameworks were pervaded by legal professionals to a greater extent in Scotland than in

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<sup>77</sup> Anon. *Readings on the Statute Law (1723-1725)* IV p.92.

<sup>78</sup> Willock "Origins" pp.168-169. R.A. Houston, "Writers to the Signet: Estimates of Adult Mortality in Scotland from the Sixteenth to the Nineteenth Century", *SHM*, 8, 1, (1995), p.39.

<sup>79</sup> Houston *Madness* pp.50-52.

England.<sup>80</sup> Even in the nineteenth century, English judges and administrative staff might be the only individuals with legal training or experience at court.

Jurors with criminal jury experience could be familiar with legal processes and principles. Eligible persons might act as jurors at other forms of legal hearing, such as civil, Quarter Sessions and Sheriffs court tribunals. Until all these jurisdictions are examined in detail, it is impossible to state accurately how “experienced” provincial jurors were. A restricted overview of Yorkshire’s petty jurors between 1758 and 1772 provides a springboard for further research (Table 8.2). Persons were limited, by statute, to appearing once every seven years as jurors for the Yorkshire Assizes. In insanity trials, around ninety-one-percent of Yorkshire’s jurors lacked prior experience at the Assizes.<sup>81</sup> None of the “veteran” minority of Yorkshire’s jurors appeared in more than one insanity or idiocy defence. Essex jurors were similarly “unseasoned” as Assize jurors before the 1780s, but such trends contrast with London’s juries where upwards of one-third of jurors carried experience.<sup>82</sup> In sharp contrast to contemporary Yorkshire, almost a quarter of southern Scotland’s “assyzers” who evaluated prisoners’ mental conditions had previous jury experience. Most of these jurors only appeared during one fatuity or

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<sup>80</sup> Crowther “Crime” p.82.

<sup>81</sup> Of the 650 Yorkshire petty jurors used between 1758 and 1772, 60 of them (9.2%) had appeared on jury panels between 1750 and 1772.

<sup>82</sup> Beattie “London’s Juries” p.234. Essex jurors rarely appeared on criminal Assize juries more than once before 1784; after 1784, a system of tri-annual rotation was employed, King “Illiterate” p.284.

furiosity defence, however.<sup>83</sup> British circuit jurors had little practical experience of evaluating mental conditions at court.

	% of jurors with prior criminal jury experience at the superior courts:
Southern Scotland <sup>84</sup>	28
Yorkshire <sup>85</sup>	9

*Table 8.2. Proportion of jurors who had previous experience of jury service at the superior courts, Yorkshire 1750-1780 and southern Scotland 1711-1829.*

Legal knowledge was not restricted to legal professionals.<sup>86</sup> Theories of criminal responsibility were understood broadly by a wide cross-section of Britain's population, including inexperienced jurors.<sup>87</sup> Recent research has demonstrated how separate English mining communities conceived strong associations with their interpretations of law and justice from at least the sixteenth century.<sup>88</sup> Scottish society also possessed a pervasive legal culture. Legal principles could inform and reinforce occupational, community and individual identities. By the late eighteenth

<sup>83</sup> Exceptions occurred at Ayr in April 1823, where six trials separated the mental evaluation of James Connacher and Robert Currie. Seven jurors considered the mental condition of both the prisoners. See JC 12/35.

<sup>84</sup> Including "assizes" for Ayr, Dumfries and Jedburgh.

<sup>85</sup> Including all criminal petty juries 1750-1780. Only ten jurors (1.5%) appeared at three or more Assizes. This may have been affected by the statute, 7&8 W&M 3 c32 ss6 (1696), which restricted eligible jurors to being called upon once every four years in Yorkshire.

<sup>86</sup> Sharpe "People and the Law". Prest "Lay Legal Knowledge" pp.312-313.

<sup>87</sup> Prest "Lay Legal Knowledge" pp.312-315.

<sup>88</sup> Fox "Free Miners and their Law" p.250. A. Wood *Politics of Social Conflict. The Peak Country, 1520-1750*, (1999), pp.135-148.

century, greater familiarity with legal practices and principles was engendered by detailed published reports of crimes and trials (including insanity defences). Legal erudition was not restricted to literate, educated persons either, for such principles could be disseminated orally.<sup>89</sup> It is likely that most lay persons could distinguish between “lunatics” and “idiots”, whilst the next section demonstrates that jurors could grapple with the finer complexities of “partial insanity”.<sup>90</sup> Legal professionals could better manipulate theoretical principles, but British “lay” jurors could bring legal understandings and knowledge to court with them.<sup>91</sup> Rather than having legal criteria dictated to them, jurors could concur with directions from legal professionals, or rely upon their own experiences of the law and social-cultural perceptions of mental distress to inform their verdicts.

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<sup>89</sup> Prest “Lay Legal Knowledge” p.313.

<sup>90</sup> Andrews “Idiocy ... part I” pp.65-67.

<sup>91</sup> Green “Retrospective” p.389.

*The jury's courtroom role*

The composition and function of the English criminal jury had evolved from its mediaeval roots by 1660.<sup>92</sup> Petty juries ceased to be panels of self-informing "neighbour-witnesses", who were chosen because they had prior knowledge of the crime, prisoner or prosecutor.<sup>93</sup> A similar development occurred in Scotland.<sup>94</sup> However, as Nelson's Law of Evidence (1717) observed, jurors continued to be informed by "their own Personal Knowledge" of crimes and litigants, at least through to the early eighteenth century.<sup>95</sup> "Personal Knowledge" allowed jurors to validate and supplement the proofs provided at court, but should not have been the sole basis of their verdicts.<sup>96</sup> In contrast to mediaeval practice, long eighteenth century British criminal jurors were expected to evaluate the evidences provided at court, rather than pass verdicts based purely upon their personal observations.

The evolution of the jury's composition and function was driven by the establishment of "adversarial" legal principles.<sup>97</sup> "Truth" and "justice" could be determined by the resolution of opposing proofs and the need for an objective jury panel was emphasised in this legal environment.<sup>98</sup> Such perceptions and practices had hardened by the nineteenth century. During Abraham Bairstow's insanity

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<sup>92</sup> Landsman "Rise" p.504. Gaskill "Providence" p.352. Mitnick "Neighbour witness" p.202. Langbein "Law of Evidence" p.1170-1171. Beattie "London's Juries" pp.214-215. Crawford "Legalising" p.93.

<sup>93</sup> Mitnick "Neighbour witness" p.202. Gaskill "Providence" p.352. Langbein "Law of Evidence" pp.1170-1171. Landsman "Rise" p.504.

<sup>94</sup> Smith "Selected Justiciary Cases" p.xlv.

<sup>95</sup> Nelson Law of Evidence (1717) p.2.

<sup>96</sup> *Idem.*

<sup>97</sup> Landsman "Rise" pp.502-504.

<sup>98</sup> *Idem.*, Shapiro "Fact" p.4. Beattie "London's Jurors" pp.214-5. Gaskill "Providence" p.352.

defence in 1824, a recalcitrant juror insisted to be removed from the petty jury because he was “acquainted” with the prisoner.<sup>99</sup> The presiding judge noted that there was “no law” prescribing such action, but granted the juror’s wish nevertheless. By the 1820s, in contrast to Nelson’s early eighteenth century commentary, a juror’s “Personal Knowledge” was perceived to be detrimental to legal proceedings. Juries were expected to be independent of criminal and crime, even if this was not specified by law. The evolution of the jury’s structure and function therefore reflects how perceptions of justice in the legal courts had altered amongst lay persons and legal professionals.

Despite such changes, jurors continued to carry “Personal Knowledge” of offences or litigants into court. Private knowledge was informed by publicly distributed second-hand information, such as word-of-mouth or newspaper reports. On May 31<sup>st</sup> 1798, the York Herald reported that James Russell had been incarcerated in gaol after confessing to murdering his infant son at Hull. The report stated boldly that, “As it is impossible to conceive there could exist any motive for the horrid deed, it may be supposed to have been perpetrated in a paroxism of insanity”.<sup>100</sup> Russell was not tried until July 1798, when a jury acquitted him on account of insanity.<sup>101</sup> The newspaper both informed and reflected cultural beliefs of the close association between insanity and the crime of infanticide. This could have predisposed jurors to Russell’s defence of madness. Printed media informed

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<sup>99</sup> York Chronicle August 4<sup>th</sup> 1826. This juror may have used a valid excuse to avoid a duty he perceived to be time-consuming or unpleasant.

<sup>100</sup> York Herald, May 31<sup>st</sup> 1798.

<sup>101</sup> Yorkshire, July 1798. ASS1 41/9 and ASS1 41/10.

broader knowledge and perceptions of insanity and criminal responsibility, too. Although late eighteenth century juries were not dominated by “neighbour-witnesses”, verdicts were not always based purely upon the evidence presented at court.

Historians have also suggested that juries ceased to act “inquisitively”, but were instead informed passively of the evidence in court.<sup>102</sup> This was not always true of provincial British insanity and idiocy defences, however. Jurors continued to question witnesses through to the 1820s, although not as regularly as judges or counsel. During insanity defences at both Lancaster and Ayr in 1823, jurors clarified equivocal testimony by questioning testifiers.<sup>103</sup> These cases suggest that vestiges of the jury’s mediaeval, inquisitive function evolved and persisted into the early nineteenth century.

The Lancaster jury questioned the prosecution witness, Mr. Heald, thereby establishing that the prisoner, Andrew Ryding, had “run away” after striking Mr Horrocks repeatedly with “a blunt cleaver”. Ryding’s flight could have been construed as a signal that he understood the consequences of his actions (that he would be apprehended, tried and punished), which indicated that he was sane and responsible for his crime because he could distinguish “right from wrong”. This

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<sup>102</sup> Crawford “Legalising” p.93. Gaskill “Providence” p.352. Landsman “Rise” p.500. Langbein “Trial Jury” p.34.

<sup>103</sup> Lancaster Gazette August 21<sup>st</sup> 1823 (Andrew Ryding). Ayr Advertiser April 17<sup>th</sup> 1823 (James Connacher). Both prisoners were insane at the time of committing their offences, although evidences to the contrary were also entered. Newspapers did not always record directly the questions posed by judges, counsel, jurors or prisoners, yet the content of the witnesses’ replies indicate the substance of these queries.

signifies that jurors could understand and engage with the legal criteria for insanity, with all its theoretical and practical complexities. Petty jurors could be dynamic examiners and were clearly not restricted to a passive, silent role during nineteenth century insanity defences. By posing questions, jurors could inform their own verdict and contribute to the proofs which authenticated the prisoner's state of mind.

The interjection of "D.H. Blair, a Juryman" at James Connacher's hearing for murder in Ayr during 1823, suggests that Scottish jurors comprehended fully theories of diminished responsibility.<sup>104</sup> David Hunter Blair of Brownhill, Baronet, acted as chancellor and spokesperson for the criminal "assize" on this occasion.<sup>105</sup> Connacher had "choked" his infant child to death, although it was proven that his actions stemmed from deluded fears that he could not bear the "expence of rearing it".<sup>106</sup> Attention focused upon the testimony of Elizabeth Clerk or Tough, a midwife who had examined the child's body. Clerk was also a key character witness, having "known the prisoner for 36 years".<sup>107</sup> According to Clerk, Connacher understood that "putting the child to death was a crime" (which indicated that he was sane), but that he failed to recognise the consequences of his actions (which was a typical criterion for madness).<sup>108</sup> Clerk's testimony may seem equivocal, but her conceptions actually corresponded with David Hume's treatment of "delusional" insanity in his Commentaries, which was into its second edition by

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<sup>104</sup> Ayr Advertiser April 17<sup>th</sup> 1823.

<sup>105</sup> JC 12/35 and AD 14/23/7.

<sup>106</sup> AD 14/23/7. Witnesses testified that Connacher was wealthy and able to bear such expenses.

<sup>107</sup> Ayr Advertiser April 17<sup>th</sup> 1823.

<sup>108</sup> *Idem*.

1823.<sup>109</sup> In cases of murder, Hume argued that prisoners could comprehend the general principle that criminal actions were morally and legally wrong, but fail to recognise that they were committing a crime by killing someone, because their reason was perverted.<sup>110</sup> Clerk's testimony was accepted as evidence of delusional insanity, rather than a confused and contradictory set of evaluations. Clerk's evidence suggests that changing legal conceptions of insanity, including "delusion", were embraced by the laity.

"Chancellor" Blair sidestepped any conundrum presented by Clerk's testimony and instead asked how Connacher's mental condition was perceived in his local community. Clerk replied that Connacher "was looked on in the neighbourhood to which he belonged as *not right*".<sup>111</sup> Blair prompted Clerk to clarify her testimony regarding Connacher's mental condition by referring to second-hand, community evaluations. "Hearsay" could be reduced to a corroboratory testimonial form in the nineteenth century, but Blair's question suggests that jurors continued to rely upon second-hand, neighbourhood judgments to inform their appraisal of the prisoner's mental state.<sup>112</sup> Like England's petty jury, the Scottish "assize" was not always passive at court.

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<sup>109</sup> Hume Commentaries (1819, 2<sup>nd</sup> ed.).

<sup>110</sup> Hume Commentaries (1797) I pp.23-25.

<sup>111</sup> Ayr Advertiser April 17<sup>th</sup> 1823.

<sup>112</sup> Houston Madness p.354.

*Verdicts*

Having considered the jury's role during the examination of proofs, we shall now contemplate how jurors reached verdicts and what "constraints" influenced their decision. Published work has suggested that England's judiciary could influence strongly the petty jury's verdict during insanity and idiocy defences.<sup>113</sup> Douglas Hay reported a case, at the Chelmsford Assizes in 1754, where a judge forced the jury to alter its assessment of a prisoner's mental state, so that the defendant was found guilty, rather than insane.<sup>114</sup> Particularly forceful and vociferous judges, such as Justices Ryder and Mansfield, were known to "persuade" juries at court.

By contrast, the Scottish sources studied indicate that the bench never forced southern circuit jurors to alter their assessment of the prisoner's mental condition. Likewise, amongst the trial narratives that are available from 1776 onwards, northern English judges never forced the petty jury to reconsider its findings during insanity and idiocy defences. The Minute and Goal Delivery books do not reveal whether such activity occurred before the 1770s at the Northern Assizes. British circuit judges could order jurors to rephrase its verdict to meet the correct legal style or formula, but this did not alter the substance of the jurors' conclusions. In 1825, for instance, Justice Holroyd asked that the jurors found John Gibson "not

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<sup>113</sup> *Eigen Witnessing* pp.15-34.

<sup>114</sup> Hay "Property, Authority" p.29.

guilty” rather than “guilty but not by felony” owing to his mental confusion.<sup>115</sup> Holroyd did not question the jurors’ supposition that Gibson was mentally troubled and hence lacked intent.

British judges could disagree with the jury, but they were restricted formally from coercing verdicts from the late seventeenth century onwards. Corporeal and financial punishments were not employed against either English or Scottish juries during trials studied, although such activity might be obscured by the materials studied.<sup>116</sup> The “Bushel case” of 1670 produced a ruling that forbade English judges from employing physical chastisement, such as imprisonment, to compel a jury’s decision.<sup>117</sup> English juries could be kept in a room, without food, water or light, until they agreed unanimously, yet neither English nor Scottish juries could be fined for bringing in a verdict against “the direction of the court”.<sup>118</sup> The Scotsman William Smellie was an extreme advocate of the criminal jury’s rights, but he surmised that juries could only be penalised financially for producing verdicts which were influenced illegally by persons (such as the judge) outside of the empanelled jury.<sup>119</sup>

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<sup>115</sup> *York Herald* March 26<sup>th</sup> 1825.

<sup>116</sup> Green “Criminal Trial Jury” p.49. Green *Verdict* p.369. Beattie “London’s Juries” p.45. Like judicial torture, punishment of jurors may be “hidden” from the historian’s gaze, see Langbein *Torture and the Law of Proof. Europe and England in the Ancien Regime*, (1977), *passim*.

<sup>117</sup> Green “Criminal Trial Jury” p.49. Green *Verdict* p.369. Beattie “London’s Juries” p.45.

<sup>118</sup> (Smellie), *Address*, (1784), p.8.

<sup>119</sup> *Idem*.

*The "sanctioning" of mentally disturbed prisoners in Britain*

England and Scotland's criminal codes were "sanction-specific", meaning that punishment was specified by the offence committed. The jury's verdict therefore directed and constricted sentences imposed upon prisoners by judges.<sup>120</sup> Insane and idiotic prisoners were not sentenced for their crimes, but they could be sanctioned because their condition rendered them prone to troublesome, unruly conduct. It was understood that mental disturbance removed the culprit's responsibility for a crime, but these persons represented a dangerous and disorderly threat to society which demanded to be controlled. The Criminal Lunatics Act of 1800 was the first British statute to deal specifically with the sanctioning of mentally perturbed prisoners, ordering that they those lacking sureties should be detained "at His Majesty's pleasure". It is investigated how this statutory change impinged upon insane and idiotic criminals in provincial England and Scotland.

During the seventeenth and eighteenth centuries, Britain's courts imposed temporary sanctions upon defendants who were unable to stand trial because of their mental incompetence. In England, typically, such prisoners were returned to gaol to await a further appraisal of their mental state at the subsequent circuit meeting. Bail was produced and granted rarely during this period, so it is unsurprising that none of these insane prisoners were released on condition that they returned to the Assizes be tried. To take an example, Cornelius Linney was deemed to have been insane and therefore unable to be tried for theft at eight

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<sup>120</sup> Langbein "Trial Jury" p.36. Chitnis Scottish Enlightenment p.32.

separate Yorkshire Assizes between July 1748 and March 1752, when he recovered his senses, stood trial and was acquitted.<sup>121</sup> Scottish prisoners whose trials were postponed were also returned to the tolbooth, but their case might be remitted to the High Court at Edinburgh rather than being re-tried at the circuit court. Thus, in 1747, John Bertram's alternation between "melancholy fitts" and "Frenzie" led to his case being abandoned at Jedburgh and remitted to Edinburgh.<sup>122</sup> The Criminal Lunatics Act reinforced such activity in both countries. After 1800, English prisoners who were insane at court were incarcerated until they recovered their senses, rather than undergoing an evaluation of their mental state at each subsequent Assize meeting. At Carlisle in 1825, it was decided that Hannah Wells' insanity rendered her unable to stand trial for burglary. Wells remained in Carlisle gaol until 1827, when it was deemed that she was capable of being tried; at court, the accusation against Wells failed and she was discharged.<sup>123</sup>

British criminal courts could also order that prisoners who were insane at the time of their crimes be incarcerated indefinitely in gaol, or until further order of the court (which could amount to the same thing during this era). As the English judge, John Bayley, stated in 1816, internment of such prisoners rendered it "difficult for the same individual again to make a similar [criminal] Attempt".<sup>124</sup> Where kin or friends were either absent or unwilling or unable to take responsibility for mentally disturbed criminals, the prisoners could remain in gaol for many years, sometimes

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<sup>121</sup> ASSI 41/4.

<sup>122</sup> JC 12/5.

<sup>123</sup> Carlisle Patriot August 13<sup>th</sup> 1825. Cumberland Pacquet August 16<sup>th</sup> 1825 and March 13<sup>th</sup> 1827.

<sup>124</sup> HO 47/55/94.

until their death. Ellen Bayston was found insane and unable to receive punishment at the Yorkshire Assizes of 1785. Ellen had killed her husband by mixing “white mercury” into “the milk he eat with his breakfast”; there were aspersions that Ellen had been unfaithful and, seemingly, she was devoid of kin or friends to take responsibility for her.<sup>125</sup> Ellen languished in York Castle until her death over twenty years later. A sad demise amidst unsanitary gaol conditions was a fate shared by other insane prisoners. In 1750, a “Lunatick” named Robert Wareing was interned at Lancaster Castle until he recovered his senses, having been arraigned at the Lancaster Assizes for the murder of a fellow-inmate of Brindle Poor House “by striking her with a piece of wood”. In 1756, it was recorded that Wareing had died “a Natural Death” in gaol, having been “Long afflicted with a Visitation of Sickness and other Bodily Disorders”.<sup>126</sup>

The Criminal Lunatics Act regularised this indefinite incarceration of insane and idiotic prisoners in English and Scottish gaols. Such sanctioning therefore occurred regularly in both countries throughout the long eighteenth century. From at least the 1770s, the practice of detaining insane criminals in gaols was lambasted publicly by commentators such as John Howard and Thomas Neild.<sup>127</sup> The latter argued in 1812 that “Beings of this most pitiable description” disturbed sane detainees and required “medical aid ... [and] suitable treatment” in specialist

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<sup>125</sup> ASSI 44/35/2 nos. 13-15

<sup>126</sup> PL 28/2 ff.85-87.

<sup>127</sup> J. Howard, *The State of the Prisons*, (London 1788). T. Neild, *The State of the Prisons*, (London 1812). See also W.J. Forsythe (ed.) *The State of the Prisons in Britain, 1775-1805*, 8 vols. (2000).

remedial institutions.<sup>128</sup> Also in 1812, Dr James Paterson published a report upon Ayr prison that criticised the detainment of “lunatics” in gaol, reasoning that “they are never regularly attended by medical people, and are therefore deprived of their chance of recovery from proper treatment”.<sup>129</sup> Paterson hoped that, in future, Ayr’s mentally distracted inmates would be accepted at the recently constructed Glasgow Asylum. Despite such reforming ideals, Britain’s superior courts had no regular powers to remit mentally disturbed criminals to the supervision of institutions outside of the gaol, such as asylums, madhouses or hospitals. The gaol remained the most regular locus for the supervision of Britain’s insane criminals before 1830. Criminal lunatics and idiots might be released upon petition (normally with sureties) and entered into asylums or madhouses by kin or friends. In July 1729 at the Yorkshire Assizes, a medical man called John Salvo agreed to act as custodian for an insane murderer named Joshua Marshall. It is unknown whether Salvo acted through professional motives or whether he was a friend or relation of the prisoner. Significantly, this case did not establish a pattern of medical care, through criminal procedures, for mentally afflicted criminals.

Between the 1750s and the 1790s, Northern Assize courts also ordered that insane prisoners should be supervised by the parish authorities of their last place of legal settlement. In August 1779, for example, a Northumberland Assize deemed that George Davison had been insane at the time of stabbing Reverend Ralph Brocklebank. The court commanded that Davison be delivered “to the Overseers of

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<sup>128</sup> Neild Prisons (1812) p.329.

<sup>129</sup> J. Paterson, Report on the Prison of Ayr and Situation of the Prisoners, 14<sup>th</sup> April 1812, (Edinburgh? 1812), p.5.

the Poor of the Parish of Hexham ... to be taken Care of and Provided for by the said Overseers".<sup>130</sup> Such sanction was based upon England's legislative Poor Laws, particularly the Vagrancy Acts of 1714 and 1744, which allowed for the detainment and management of "dangerous lunatics" by parish Overseers for the Poor.<sup>131</sup> In at least some areas, Overseers and JPs placed these insane criminals in local Houses of Correction or Workhouses.<sup>132</sup> That such activity was only recorded in northern England after 1755 may suggest that this particular legislation was not enforced immediately at a local level. This practice had waned by the 1790s and the Criminal Lunatics Act standardised the alternative sanction of indefinite incarceration in the county or town gaol from 1800 onwards.

These formal methods of detaining and constraining insane criminals would seem to reinforce Michel Foucault's argument that mentally perturbed persons were segregated and incarcerated alongside other social "deviants" by the late seventeenth century.<sup>133</sup> Foucault argued that this process of isolation was driven through formal administrative and governmental mechanisms, such as sanctions passed by the criminal courts. Yet Britain's circuit court apparatuses could also release prisoners, rather than institutionalise them. In both countries, insane and imbecilic prisoners could be discharged if kin or friends agreed to bear responsibility for them and produced suitable financial sureties to reinforce such a pledge. In 1665, for instance, the gentleman Charles Jackson was acquitted of

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<sup>130</sup> ASSI 41/7.

<sup>131</sup> Bartlett *Poor Law of Lunacy* pp.34-37.

<sup>132</sup> *Idem.* See also A. Digby, *Pauper Houses*, (1978).

<sup>133</sup> Foucault *Madness and Civilisation* pp.45-46.

murder owing to insanity and released after friends produced sureties of two-hundred pounds in total.<sup>134</sup> Even after 1800, British criminal lunatics were not processed blindly and committed to “His Majesty’s Pleasure” if sureties were realised. In 1808, the Mathew Bailie travelled down from Tranent, near Edinburgh, to Jedburgh and entered a petition to keep his mentally deranged daughter, Agnes, “in such confinement that she may not commit outrageous or farther Crimes in time coming”. Bailie provided “three hundred merks Scots” as surety that he would superintend Agnes.<sup>135</sup> Guarantors could decide to supervise their charges domestically, but could also utilise the services of madhouses or asylums. The Crown became responsible for mentally troubled prisoners and placed them in gaol where alternatives failed. Gaol was resorted to most regularly when prisoners lacked kin, were from impoverished families or were geographically and socially disconnected from relatives and friends. These prisoners were most likely to lack guarantors who were willing and able to accommodate the social and financial obligations of supervising mentally distracted offenders.

In southern Scotland, fatuous or furious “pannels” were never released without surety or a certificate proving that they had recovered senses. In northern England, however, insane and idiotic prisoners could be acquitted and “discharged by proclamation” in cases where it was proven that their mental affliction robbed them of their intent to commit crimes. At the Yorkshire Assizes of July 1776, John Sutcliffe was acquitted and discharged of murdering his wife and “favourite

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<sup>134</sup> ASSI 45/7/2.

<sup>135</sup> JC 12/26.

child".<sup>136</sup> There was no doubt that Sutcliffe had killed the victims. He had confessed and witnesses explained how Sutcliffe had professed to extreme and misguided religious beliefs, possibly fostered by his attendance at local Methodist meetings. Sutcliffe had killed his spouse and son both as a "sacrifice to God, in return of a blessing" and also to ensure the salvation of their souls. No formal sanctions were recorded for John Sutcliffe, despite his violence (including an attempted suicide whilst in gaol), suggestions that he was unfit mentally to stand trial and a verdict of insanity.

It may be that Sutcliffe's case represents the failure to record the provision of sureties amongst formal court records, such as the minute and gaol-delivery books. Yet the York Chronicle listed Sutcliffe as having been "discharged by proclamation", with no reference to petition, sureties or sanction. Sutcliffe's case therefore seems to illustrate that some mentally disturbed prisoners were freed (without sureties) as if they had committed no offence at all, which was true from a technical, legal perspective. This suggests that England's directives to detain dangerous lunatics, as suggested in the Vagrancy Acts, were not followed rigidly during the eighteenth century. Even after 1800, some insane criminals who committed lesser offences were released unconditionally, rather than being interned in gaol as the strict letter of the law demanded. At Yorkshire in 1825, for example, John Gibson was acquitted on account of his weak-mindedness for the shooting and wounding a linen weaver called Matthew Simpson. Gibson was released with just

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<sup>136</sup> ASSI 41/7. Trials (Lammas 1776) pp.14-17. York Courant July 30<sup>th</sup> 1776. York Chronicle August 2<sup>nd</sup> 1776.

the judge's admonishment, "Mind you never interfere with firearms again, or perhaps you life may be in danger", ringing in his ears. Foucault's overarching theory of the incarceration of the mad and idiotic is challenged by the existence of these mentally distracted criminals, who were acquitted and discharged back into society by the criminal courts. The process of detaining mentally disturbed criminals was not applied indiscriminately in Britain before the 1830s.

*Scottish verdicts of furiosity and fatuity*

Scotland's Justiciary Court employed an odd number of jurors because, in contrast to England, "majority" or "plurality" verdicts were essential elements of Scotland's criminal process.<sup>137</sup> The assize which was empanelled for William Douglas' trial in 1795, for example, was able to return a decision on his culpability "By a great Majority of voices".<sup>138</sup> Disunited, "plurality" verdicts signified that the prosecution was not proven straightforwardly. Scottish jurors were therefore afforded a greater variety of verdicts than their English counterparts.

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<sup>137</sup> Willock "Origins" pp.218-219.

<sup>138</sup> JC 12/22, Dumfries, September 1795.

From at least the 1650s, Justiciary Court verdicts addressed directly the information recorded upon formal criminal indictments.<sup>139</sup> Indictments were complex and standardised by the early eighteenth century and were divided into three distinct segments. Firstly, the “major premise” was entered, naming the crime that the prisoner was accused of committing, alongside the punishment which the transgression carried at law.<sup>140</sup> The second part, the “minor premise”, asserted that the prisoner named was guilty and included the principal evidence to prove this. The concluding section maintained that, if the accused was convicted of the offence, he or she must receive punishment accordingly.

Scotland’s “assize” could return general verdicts of “guilty” and “not guilty” in response to the indictment. “Not guilty” verdicts indicated that there was insufficient evidence to support the formal accusation, whilst “guilty” verdicts designated that all of the indictment’s premises were proven beyond a reasonable doubt. At Ayr in 1823, an “assize” found James Connacher “guilty of the Homicide libelled but he was at the time of committing the said crime, and previously, of unsound mind and incapable of judging his actions”.<sup>141</sup> In this case, the charge that Connacher had killed his child was proven, but so was his defence of madness, which exculpated him of his crime. The verdict upon Connacher resembled the

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<sup>139</sup> Smith “Criminal Procedure” pp.442-443. *Stair Memorial Encyclopedia* 17 pp.188-189.

<sup>140</sup> The maximum punishment might be reduced by the public prosecutor to “ane arbitrary punishment” at the outset of the trial, which effectively removed the possibility of the prisoner receiving the most severe penalties, most notably the death sentence. *Idem*.

<sup>141</sup> JC 12/35.

irregular “guilty but insane” conclusions entered in England.<sup>142</sup> This style of verdict was also unusual in southern Scotland, for it was only entered in Connacher’s case.

Scottish “assizes” were also permitted to return verdicts of “proven” or “not proven”, which were distinct from English practice. Contemporary commentators and legal historians have disputed what such “proven” verdicts meant, particularly during the late eighteenth and early nineteenth centuries, when legal and political debates raged concerning the remit of judge and jury.<sup>143</sup> “Proven” and “guilty” verdicts were not always alternative expressions of the same conclusion. The words “lybil fully proven” could carry the same meaning and sentence as a “guilty” verdict.<sup>144</sup> But “Proven” verdicts could also specify that, whilst there was persuasive evidence that the prisoner had transgressed, there was insufficient evidence to prove that the prisoner was guilty of all the crimes which were recorded upon the formal indictment. Thus, at Dumfries in April 1785, three counts of cow-theft were “proven” against the servant Janet Connel, but the “lybil” claiming that she was “habite and repute” a thief remained unproven.<sup>145</sup> The jury deemed a “guilty” verdict improper in such cases, because the indictment had not been verified entirely.

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<sup>142</sup> See p.343-344.

<sup>143</sup> Willock “Origins” pp.218-223. Smith “Criminal Procedure” pp.442.

<sup>144</sup> See JC 12/20. Jedburgh, April 1789: Tweedie, Agnew and McKay were indicted for the theft, including stealing books from Kelso library. The Minutes record that the “lybel” was “fully proven” against all of them. The former two were sentenced to transportation, the latter to execution.

<sup>145</sup> JC 12/19.

Juries entered “proven” verdicts during southern Scottish fatuity and furiosity defences. At Dumfries in 1818, the “assize” for William Halliday pronounced that, “... it [was] proven that the Pannel did at the time libelled attempt to set fire to the House mentioned in the Indictment. But find it proven that at that time he was insane and deprived of his reason”.<sup>146</sup> In Halliday’s case, the jury were convinced both that the pannel had committed the offence of which he stood accused and that the special defence of furiosity had been verified. This meant that Halliday was not accountable for his actions and that the indictment’s “minor premise” (that Halliday was responsible for his crime) could not be substantiated. In Scottish furiosity defences, jurors avoided “not guilty” verdicts because this style of conclusion indicated that prisoners had not committed the offences charged. “Proven” verdicts allowed greater flexibility and addressed indictments directly. They established that the prisoner had committed an offence and was hence a disorderly threat to society, but also indicated that the prisoner was mentally disturbed and hence was not responsible by law. Strictly speaking, mentally afflicted prisoners were not “guilty” of committing offences because they lacked “dole” (criminal intent).

Some late eighteenth century observers interpreted “proven” verdicts differently. In 1785, for instance, the anonymously written A Letter to a Jury-Man proposed that “proven” verdicts were “limited to the bare consideration of the facts”.<sup>147</sup> This conception of “proven” verdicts suggested that “assyzers” could be unsure whether the evidence matched sufficiently the legal criteria which directed

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<sup>146</sup> Dumfries, September 1818, JC 12/31 and JC12/32.

<sup>147</sup> (Boswell), A Letter to a Jury-Man, (1785), p.10. This was a reply to Smellie’s Address (1784). DNB XVII p.401.

whether a pannel's furiosity had been proven, for instance. This proposal was connected to broader, British, legal and political debates concerning the courtroom roles of judge and jury.<sup>148</sup> These polemics focused upon whether panels of predominantly "lay" jurors ought to contemplate matters of law or legal theory in their deliberations, besides considering the factual proofs at court.

The jurors who delivered "proven" verdicts in furiosity and fatuity defences must have considered both fact and law. British legal commentators recognised that the divide between "fact" and "law" was blurred in practice. "Assizes" could not assess evidence regarding a prisoner's mental condition without considering the legal criteria for criminal responsibility. Furthermore, southern Scottish Minute Books recorded when "proven" verdicts were restricted to the "facts libelled" alone. These factual, "proven" verdicts only appeared during politically sensitive trials on the southern circuit, such as John Andrews' hearing for sedition at Ayr in 1800.<sup>149</sup> Whilst southern Scottish furiosity and fatuity defences could also feature politically charged debate, jurors never entered verdicts which considered only the "facts libelled" during such trials.

The broader legal and political debates regarding the jury's courtroom remit lend particular significance to the verdict produced during Robert Coalston's trial,

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<sup>148</sup> For a published, English dimension to such debates, see Hawles Englishman's Right (1680, reprinted and edited 1731, 1752, 1763, 1764, 1770, 1774 and 1793). Towers Observations on the Rights and Duty of Juries in Trials for Libel (London, 1784). Thomas Erskine (ed. Blanchard) The Rights of Juries vindicated (London, 1784).

<sup>149</sup> JC 12/22 Ayr, September 1800: in this case, the "facts libelled" against Andrews were "not proven".

at Jedburgh in 1785.<sup>150</sup> Defence counsel David Hume argued successfully that Coalston was prone to “sudden and temporary madness”, which utterly robbed him of his senses, as a consequence of being struck by lightning some years previous.<sup>151</sup> Unilaterally, the “assize” found, “it proved that [Coalston] killed the youngest child of the said William Penman, named Mary, as also grossly assaulted and attacked the said William Penman’s wife and maltreated and abused his eldest child in the way and manner mentioned in the indictment”.<sup>152</sup> It was also incontrovertibly “proven” that Coalston “was insane, furious and deprived of his reason” when he committed these offences. The jurors added the curious rejoinder that they, “therefore find him not guilty of the murder ... nor the other Crimes charged against him”. This addition was unusual because other “proven” verdicts, such as the Halliday decision of 1818, never included direct reference to the prisoner’s guilt. Coalston’s trial coincided with an upsurge in the published debate upon the function of Scotland’s criminal jury.<sup>153</sup> These broader, politicised discussions affected the style of verdict delivered Coalston’s case. By adding that Coalston was “not guilty”, the Jedburgh jurors addressed unequivocally the legal principles of criminal responsibility, whereby the “furious” were “not accounted moral agents” and were “incapable ... of committing crimes, since malicious

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<sup>150</sup> JC 12/18 (Jedburgh, April 1785). JC 26/366.

<sup>151</sup> Hume expounds upon Coalston’s case within his Commentaries (1797) I pp.31-32.

<sup>152</sup> The verdict slip was worded identically, see JC 26/366.

<sup>153</sup> In Edinburgh, the anonymously written Address (1784) and Letter to a Jury-man (1785) fanned the flames of this politicised issue. Similar pamphlets concerning the English “special” verdicts were also circulated and sold within Scotland. In 1784, Thomas Erskine (who later defended James Hadfield) challenged an English Assize judge’s faulty and illegal charge at the Court of King’s Bench. William Blanchard’s shorthand notes of this celebrated trial were expanded and published later that year under the title, The Rights of Juries, whilst Joseph Towers’s Observations was also published in 1784. The following year, an anonymous “Gentleman of the Inner Temple” published a controversial reponse to those advocating the jury’s power in An Examination into the Rights and Duties of Jurors, (1785).

intention” was lacking in their actions.<sup>154</sup> This was a clear declaration that the jury could consider both fact and law in their deliberations.

Political discussions about the jury’s role also debated the meaning of “proven” verdicts. The additional statement that Coalston was “not guilty” may have been prompted by those comments in the Letter (1785) that “proven” verdicts were “limited to the bare consideration of the facts”.<sup>155</sup> Coalston’s “assize” added the “not guilty” clause so that their verdict was not mistaken as a “factual” verdict, which left the consideration of the law to the judge. This decision did not induce or reflect a conflict between bench and jury in Coalston’s case. The presiding bench, Lords Henderland and Braxfield, did not ask the jury to reconsider their verdict, or ask that the style be changed to meet regular practice. Bench and “assize” agreed tacitly that jurors could consider both fact and law during furiosity defences. The unusual reference to Coalston being “not guilty” clarified the jury’s findings in light of contemporary doubts about the meaning of “proven” verdicts and the jury’s courtroom remit.

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<sup>154</sup> Erskine Institute ( 1773) I p.4 and IV, p.753. Incidentally, Erskine of Carnock’s work also suggested that jurors could judge law alongside fact, something which Smellie quoted in his Address (1784), pp.12-13. It is probably not a coincidence that the second posthumous edition of Erskine’s work was published in Edinburgh during 1785.

<sup>155</sup> (Boswell) Letter to a Jury-man p.10.

*"Diminished responsibility", Scottish verdicts and recommendations for mercy*

In contrast English theory, Scottish jurists held steadfastly to the principle of diminished responsibility. Justiciary Court "assizes" could find that "pannels" suffered from mental afflictions which were less than fully debilitating. The "Rule of Proportions" meant that such verdicts reduced the prisoners' sentences, because it was recognised that the offenders were less than fully responsible for their actions. Scottish verdicts could include a formal evaluation of the degree to which the prisoner's mental distraction affected their criminal responsibility.

Such mandatory jury mitigation was evident within verdicts that found prisoners to be "Guilty Art and Part" (guilty of being accessory or accomplice) of crimes. As William Smellie observed in 1784, Scottish jurors could use this style of verdict in the belief that it reduced the prisoner's responsibility and thereby ameliorated their sentences.<sup>156</sup> In 1759, a Jedburgh assize declared unanimously that John Fairbairn was "Guilty Art and Part" of housebreaking and theft.<sup>157</sup> The jurors were convinced that the prisoner was implicated in the crimes charged, but the "Art and Part" verdict indicated doubts that he acted alone. The jury also recommended Fairbairn to mercy on account of his "weak-mindedness" (an incompletely incapacitating form of fatuity), which intimated that he was incapable of planning crimes. Counsel described Fairbairn as "a young foolish Boy who was at times deprived of his Judgement" and was vulnerable to nefarious manipulation. It was suspected

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<sup>156</sup> (Smellie) *Address* pp.21-22.

<sup>157</sup> JC 12/9.

strongly that Fairbairn had been instigated to steal, by either his mother or George Ker, a Kelso barber, who had stashed the stolen goods.<sup>158</sup> By producing an “Art and Part” verdict and combining it with a recommendation to mercy, the assize sought to diminish the prisoner’s culpability by multiple means.

As Fairbairn’s case specifies, Scotland’s “Rule of Proportions” meant that “assizes” could recommend prisoners for mercy on the basis of less than completely debilitating mental conditions. “Assyzers” could therefore find “pannels” guilty of the crimes libelled, but urge that the prisoners receive ameliorated sentences owing to their “partial degree” of insanity or idiocy. At Ayr in 1786, Samuel Pirrie, the “Post Boy or Rider of the Mail betwixt Ballantrae and Stranraer”, was guilty of the theft and resett of bills of exchange from a mailbag.<sup>159</sup> The assize added a recommendation of mercy on account of Pirrie’s “apparent weakness of understanding” owing to his “tender age, being under a little or above fourteen years”. Pirrie’s case illustrates vividly that the criteria for fatuity were connected to the common understanding of a fourteen-year-old youth in Scotland. In contrast to English criminal theory, partially encumbering forms of insanity and idiocy were sound bases for a post-trial reduction of sentence by Scots Law.

Of the thirty-five southern Scottish verdicts studied between 1708 and 1829, seven (one-fifth of cases studied) included recommendations of mercy on account

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<sup>158</sup> *Idem.*

<sup>159</sup> Ayr, April 1786. JC 12/19. See also JC 26/240 for details of the crime and the pre-trial witness statements.

of diminished responsibility (Table 8.3).<sup>160</sup> This contrasted sharply to northern English practice, where juries entered rarely such requests for clemency on account of the prisoner's mental disability. All of the southern Scottish recommendations for mercy involved "capital" property offences and only John Brown, in 1828, had also committed a violent, interpersonal transgression.<sup>161</sup> Three of these recommendations indicated that the prisoner suffered from a form of madness which diminished their accountability. In 1749, an Ayr jury proposed that Anne Millar was guilty of theft, but recommended the prisoner to mercy owing to her "ingenuous confession", which reflected Millar's "disordered ... Judgement".<sup>162</sup> The remaining four appeals to clemency proposed that the prisoners were worthy of mitigation owing to "weak-mindedness", as in Pirrie's case discussed above. Scottish jurors conceived that both furiosity and fatuity could partially impede the prisoner's understanding. These recommendations also indicate that Scottish jurors recognised the differences between insanity and idiocy.<sup>163</sup> Scottish verdicts could therefore involve specific and sophisticated assessments of the prisoner's mental state.

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<sup>160</sup> At Ayr in 1826, James Russel's counsel argued that he ought to receive a reduced sentence on grounds of diminished responsibility, but this was rejected at court. JC 12/37 and Ayr Advertiser April 13<sup>th</sup> 1826.

<sup>161</sup> JC 12/39.

<sup>162</sup> JC 12/6.

<sup>163</sup> Andrews "Idiocy ... part I" pp.65-67 makes a similar general note about English society.

	Total verdicts	% of verdicts
Recommendation For Mercy	7	20
Fully Exculpated Or Guilty of Crime	28	80

*Table 8.3. Number and percentage of verdicts which included a recommendation for mercy on account of a prisoner's "diminished responsibility" in southern Scotland, 1708-1829.*

Scotland's assizes could initiate formal processes of post-trial mitigation through these recommendations for mercy. Commendations for clemency followed two distinct paths at the Justiciary Court. The Scots lawyer David Hume argued that, "As to the inferior degrees of derangement, or natural weakness of intellect, which do not amount to madness, and for which there can be no rule in law; the relief of these must be sought either in the discretion of the prosecutor ... or in the course of application to the King for mercy".<sup>164</sup> Hume explained that, in capital sentences, the public prosecutor could propose that the maximum sentence be reduced to an "arbitrary" punishment, decided upon by the judge.<sup>165</sup> The public prosecutor could also instigate mitigation and seek to establish that prisoners were less than fully responsible for their crimes.

Where the Advocate-Depute did not deem such mitigation worthy from the outset of the trial, prisoners could still earn a moderated sanction via royal

<sup>164</sup> Hume *Commentaries* (1797) I p.36.

<sup>165</sup> See JC 12/4, trial of Jean Stowrie, Jedburgh May 1725. After much discussion during the relevancy, the Advocate-Depute reduced the maximum sentence to "an arbitrary punishment", which meant that Stowrie did not face the death penalty for the death of her child.

clemency. At Jedburgh in 1809, the Advocate-Depute proved successfully that Andrew Watherston was guilty of sheep theft, but the assize recommended him unanimously for royal mercy on account of his "weak and silly state of mind".<sup>166</sup> Watherston's execution was delayed pending the application for clemency. On June 7<sup>th</sup> 1810, the prisoner received a full "Remission" (pardon) on condition that sureties were provided for his future behaviour until 1817.<sup>167</sup> Broad conclusions based upon seven cases which span nearly eighty years must be treated cautiously, but there does seem to have been a pattern to such recommendations to royal clemency. In cases of diminished responsibility, at least, royal mercy was used to commute sentences of death alone, rather than lesser punishments such as banishment.

The Secretary of State for Home Affairs became increasingly involved in the process of dispensing royal clemency in Scotland after 1782, but the King (and counsellors other than the Home Secretary) continued to play an important role in such matters into the early nineteenth century.<sup>168</sup> Nigel Walker has argued that decisions upon Scottish remissions were only passed officially to the Home Secretary in 1837.<sup>169</sup> The notes and endorsements from the presiding bench could direct the outcome of such post-trial alleviations of sentence.<sup>170</sup> Scottish "assizes" might recommend royal mercy, but the chances of success were reduced if the judiciary did not concur with the jurors' sentiments.

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<sup>166</sup> JC 12/26. *Scots Magazine*, 17, September 1809, p.714.

<sup>167</sup> C3/23/61.

<sup>168</sup> Crowther "Crime" p.233.

<sup>169</sup> Walker *Crime and Insanity* I p.204.

<sup>170</sup> *Ibid* pp.200-201.

In some cases, Scottish jurors returned verdicts which entreated the bench to extend mercy at the circuit court, without formal application to the Crown. Despite Hume's argument against such practice, judges continued to extend mercy at court through to the 1820s.<sup>171</sup> At Ayr in 1823, Robert Currie was guilty of housebreaking and theft, but the jury also recommended him "to the Mercy of the Court" owing to his "silly disposition and weak intellect".<sup>172</sup> Judges Meadowbank and Hermand did not refer this case to royal mercy, but instead passed a reduced sentence of "Transportation for seven years". By comparison, John Clark was also guilty of housebreaking and theft at the same circuit meeting. No recommendation to mercy accompanied the verdict and Clark was sentenced to Transportation for fourteen years. The bench therefore reduced Currie's sentence by seven years owing to his diminished responsibility. The bench only seems to have acted in such a discretionary manner in non-capital felonies, or capital cases where the prosecutor removed the possibility of a death sentence by restricting the maximum penalty to "an arbitrary punishment", which was decided upon by the bench.<sup>173</sup> Circuit judges only held the power to commute sentences other than death.

Disagreements between Scotland's bench and assize were evident where prisoners had been recommended to courtroom, judicial mercy. An instructive case

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<sup>171</sup> Hume *Commentaries* (1797) I p.36.

<sup>172</sup> Ayr, April 1823. JC 12/35. Currie was arraigned for housebreaking and theft. In the other two cases where the judge dispensed mitigation at the circuit court itself, the assize recommended the prisoners to the mercy of "your Lordship" (the judge) and "the judges" respectively. Anne Millar, Ayr, May 1749 (JC 12/6) and William Dun, Dumfries April 1782 (JC 12/17).

<sup>173</sup> These restrictions were regularly entered during the relevancy and essentially removed the death penalty from capital offences, typically replacing the hangman's noose with a sentence of transportation for seven or fourteen years.

occurred at Dumfries in April 1782, involving a servant called William Dun.<sup>174</sup> Dun was guilty of two out of three charges of housebreaking and theft, but the assize acted unusually by introducing the issue of the prisoner's mental condition into proceedings. The assize produced a letter to the judge stating that they had "some apprehension" that Dun's "intellects may not be entirely sound".<sup>175</sup> This recommendation was truly a "verdict according to conscience" because no evidence concerning Dun's mental condition was heard at court. The "assize" thought that Dun's lesser degree of insanity made him worthy of receiving the judge's (restricted) mercy.

The presiding judge, Lord Braxfield, was unimpressed by either the proof of Dun's insanity or the jury's unusual intervention.<sup>176</sup> He ignored the jury's recommendation and sentenced Dun to be "whipt thro' the streets of Dumfries by the hands of the Common Executioner" in addition to being "Banished for Life".<sup>177</sup> Braxfield believed that Dun was not worthy of mitigation by the "Rule of Proportions". In 1784, Rodger McLean was also found guilty of housebreaking and theft at Dumfries; on this occasion the prisoner was "Banished for Life", but was not punished corporally.<sup>178</sup> Dun's eventual punishment was increased rather than reduced by Braxfield. Dun's additional whipping might be explained by Braxfield's

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<sup>174</sup> JC 12/17.

<sup>175</sup> *Idem.* JC 26/226.

<sup>176</sup> Willock "Origins" p.214 suggests that the juries which proposed such mitigations of sentence were overstepping their formal remit.

<sup>177</sup> JC 12/17.

<sup>178</sup> Dumfries, September 1784. JC 12/18. The presiding judge was Lord Glenlee (Thomas Miller).

reputation as a harsh and uncompassionate enforcer of the law.<sup>179</sup> But perhaps Braxfield believed that Dun had feigned his insanity at court and thus duped the “assize”. The added corporal punishment may therefore have been designed as a public deterrent against prisoners who dissimulated insanity at court. Scottish judges were not bound to follow a jury’s recommendation that they mitigate sentences at court on grounds of “partial” mental incompetence. The bench could disagree with the jury’s assessment of the prisoner’s state of mind in such instances.

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<sup>179</sup> Cockburn Memorials (1856, 1946 edition), pp.81-82. Osborne, Braxfield the hanging judge? The Life and Times of Lord Justice-Clerk Robert McQueen of Braxfield, (1997) questions the poor historical reputation of Braxfield.

*English verdicts c.1660 to 1829*

English petty juries were compelled to produce unanimous decisions by the late seventeenth century, as “majority” verdicts had fallen into disuse.<sup>180</sup> From at least the 1660s in northern England, prisoners who committed crimes whilst disturbed in mind were acquitted of their offences and received “not guilty” verdicts. English verdicts did not always indicate expressly where prisoners were exculpated owing to insanity or idiocy. In 1665, John Burrowes was found “*non cul.*” (shorthand legal Latin for “not guilty”) of murdering his neighbour, John Jones, in Rotherham.<sup>181</sup> It was Burrowes’ insanity, rather than his innocence, that earned such a verdict, for Burrowes confessed that he “did cutt or harke” Jones’ throat with a “Watchbill or broome hooke”. Burrowes’ madness was proven by testimony from his community and was epitomised by his sincere belief that he had “slaine a Monster”.<sup>182</sup> Simple “not guilty” verdicts could mask successful insanity defences in England.<sup>183</sup>

In contrast to regular practice, verdicts such as “Guilty but Insane” or “did it but not by felony” were recorded in four particular Northern Assizes cases between 1759 and 1786.<sup>184</sup> By returning “guilty but insane” verdicts, it is unclear whether the jurors ignored legal guidance from legal professionals. The recently-promoted judge, Francis Buller, may have guided three of the atypical verdicts in northern

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<sup>180</sup> Cockburn “English Assizes” p.35.

<sup>181</sup> ASSI 42/1 ff156b.

<sup>182</sup> ASSI 45/7/2.

<sup>183</sup> *Eigen Witnessing* p.21.

<sup>184</sup> James Shackleton, Yorkshire, March 1759 (ASSI 41/4 and 42/7). George Davison, Northumberland 1779 (ASSI 41/7). John Swift, Yorkshire, July 1783 (ASSI 41/9). Thomas Waters, Lancashire, August 1786 (PL 28/3 ff150b).

England between 1779 and 1786, if indeed he did preside over these trials.<sup>185</sup> In 1783, for instance, a Yorkshire jury ruled that John Swift was “Guilty of killing Mary Swift [his daughter] when ... in a State of Insanity”.<sup>186</sup> The unusual verdict did not alter the sanctioning of Swift. Pursuant to the 1744 statute, it was ordered that Swift be “locked up in some secure place in the parish or place of his last legal settlement”, just like contemporary prisoners who were found to have been “Not Guilty” but insane.<sup>187</sup> “Guilty but insane” verdicts should not be dismissed as clerical inaccuracies. Jurors may have chosen to specify that prisoners had committed an offence, but that they were insane and therefore not responsible for their actions. In 1783, the verdict indicated that Swift’s insanity had been proven, alongside persuasive proof that he had killed his daughter.<sup>188</sup> The “guilt” in the verdict referred to the commission of the act, rather than the prisoner’s responsibility for it. These atypical verdicts may have represented desires to distinguish insanity defences from cases where prisoners had committed no offence. At the very least, these verdicts demonstrate that there was no codified pattern for insanity verdicts in England during the late eighteenth century.

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<sup>185</sup> Francis Buller (1746-1800). Buller was promoted to the bench at the exceptionally young age of 32 (in 1778), owing to close professional, political and kinship links with Lord Chancellor Bathurst and Lord Mansfield, Chief Justice of the King’s Bench. Foss *Biographical Dictionary* pp.137-138. The minutes do not state expressly which circuit judge presided over criminal business, although Buller may have managed these cases because he was the junior partner on the bench.

<sup>186</sup> ASSI 41/9. The *York Chronicle* reported a more complicated pronouncement where Swift was “Not Guilty of Murder, but guilty of killing his daughter in a State of Insanity”.

<sup>187</sup> 17 Geo II c5. Bartlett *Poor law of Lunacy* pp.35-36.

<sup>188</sup> ASSI 45/34/4 no.196.

Nigel Walker has argued that English verdicts regarding mentally troubled prisoners were not codified until the "Criminal Lunatics Act" of 1800.<sup>189</sup> This act regularised the most common verdict style of the eighteenth century, by insisting that mentally disturbed prisoners should be found "not guilty". No northern English verdicts stated that a prisoner was both guilty of an offence and insane after 1800. At John Gibson's hearing at Yorkshire in 1825, the jury concluded initially that the prisoner was guilty of firing a loaded gun, "but not with any malicious intention", owing to his mental confusion, but Justice Holroyd did not allow this verdict to stand. Defendants could not be both guilty and lacking in criminal intent, so the verdict was altered to read "not guilty".

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<sup>189</sup> Walker Crime and Insanity I pp.77-80. Bartlett Poor law of Lunacy p.60. 39 and 40 Geo III c94.

*English Partial Verdicts*

English criminal procedures were permeated by mitigation, from the reporting and apprehension of criminals through to the application of royal clemency after sentence had been passed.<sup>190</sup> In England's "sanction-specific" legal environment, the offender's sentence was directed by the verdict. Jurors could employ discretionary mitigation and restrict the prisoner's sentence by returning "partial verdicts".<sup>191</sup> This was where jurors found prisoners guilty, but of lesser offences than had been entered upon the prosecution indictment. In such instances, prisoners were held responsible for criminal transgressions which carried less severe penalties. Such activity was labelled "pious perjury" by Blackstone, because jurors sometimes returned such verdicts against the evidence presented at court. Because "pious perjury" circumvented strict legal dogmas, it contrasted with Scottish verdicts of "diminished responsibility" that addressed key tenets of Scots Law.

By 1800, around two-hundred independent offences carried the death sentence in England, whilst sanctions such as transportation, which might entail seven or fourteen years of indentured labour, could also be regarded as being severe.<sup>192</sup> "Partial verdicts" therefore allowed strict sentences to be circumvented and nullified.<sup>193</sup> Moral and legal justifications for such mitigation were informed by

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<sup>190</sup> See Beattie "London's Juries", Green "Retrospective", Hay "Class Composition", King *Crime*.

<sup>191</sup> *Eigen Witnessing* p.15. Green "Criminal Trial Jury" p.51. King *Crime* p.233. Langbein "Shaping" p.53 and "Trial Jury" p.36. Oldham "Truth-Telling" p.105 calls such activity "jury nullification".

<sup>192</sup> *Eigen Witnessing* pp.15-17.

<sup>193</sup> *Idem*. Green "Criminal Trial Jury" p.72.

contemporary perceptions regarding the purpose behind the sanctioning of criminals. Blackstone and Bentham's writings upon criminal penalties, for instance, were heavily influenced by Cesar Beccaria's argument that punishments ought to relate to the severity of the offence.<sup>194</sup> Within such a theoretical climate, the harshest penalties were reserved as exemplary deterrents against crimes which were perceived to be most heinous, such as murder or highway robbery. "Partial verdicts" enabled sentences to be applied proportionally, to match broad perceptions concerning the magnitude of the offence, as well as the character of the offender.<sup>195</sup>

"Partial verdicts" could be returned in cases of inter-personal violence, but most "partial verdicts" were returned in response to property offences which carried capital punishment.<sup>196</sup> Richard Snailham's hearing at Lancaster, during 1755, illustrates such practice. Snailham, whose mental state was never questioned, was accused of stealing spoons, a salt shaker and two silver tankards, with a combined worth of nine pounds and thirty shillings.<sup>197</sup> The prisoner was therefore prosecuted for "grand larceny", an offence which was regulated by statute as the theft of chattels worth more than thirty shillings sterling and carried the death sentence. Despite proofs that Snailham did steal the items, the petty jury found him guilty of

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<sup>194</sup> Draper "Beccaria's influence" pp.178-194.

<sup>195</sup> *Eigen Witnessing* pp.28-30. *Green Verdict* p.373. *King Crime* p.234.

<sup>196</sup> King found that 10% of property offences tried in Essex resulted in a partial verdict. King "Illiterate" p.254-5. *King Crime* p.233. See also Green "English Criminal Trial Jury" p.72. Langbein "Shaping" p.53 adds the rejoinder that the theft of livestock and highway robbery rarely met with a partial verdict. R.A.E. Wells, "Sheep Rustling in Yorkshire", *NH*, xx, (1984), pp.128-144 suggests that mitigation might be shown in times of severe economic hardship.

<sup>197</sup> PL 28/2.

“petty larceny”, or the theft of goods worth less than thirty shillings.<sup>198</sup> This was Snailham’s first (recorded) transgression, so guilt in “petty larceny” entitled him to formal mitigation through the “Benefit of Clergy”<sup>199</sup> and his punishment was reduced to branding upon the hand.<sup>200</sup> The jury undervalued the property which Snailham had stolen, which reduced his offence and sentence. Snailham therefore avoided a grisly meeting with the hangman’s noose. King has argued that such “pious perjury” declined after the late eighteenth century in property cases, partly because distinctions between “grand” and “petty” larceny became blurred.<sup>201</sup> Northern English jurors continued to return “partial verdicts” through to 1830, however. These verdicts reflected beliefs that some offenders did not deserve execution, which in turn represented a different conception of law, justice and criminality than the strict “bloody” rigours of England’s legal code. Partial verdicts were therefore discretionary forms of mitigation, rather than mandated by law.

A prisoner’s character and demeanour continued to inform the jury’s decision to produce discretionary “partial verdicts”. “Pious perjury” was stimulated most regularly in cases which involved young, impoverished persons and first-time offenders.<sup>202</sup> Property offenders received partial verdicts during times of widespread economic hardship, where material prices were high or food was

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<sup>198</sup> PL 28/2.

<sup>199</sup> Baker *Introduction* pp.586-589. From 1718, first time offenders were branded and discharged, although transportation might still be meted out to repeat offenders or for serious crimes. By the late 1770s, fines and whippings had replaced branding. “Benefit of Clergy” was abolished in 1827. For broader discussions, see Eigen *Witnessing* p.15. King *Crime* p.233. Langbein “Shaping” p.53 and “Trial Jury” pp.34-39.

<sup>200</sup> Snailham was not released because he faced further charges in Derbyshire. PL 28/2.

<sup>201</sup> King *Crime* p.233.

<sup>202</sup> *Ibid* pp.233-244.

scarce.<sup>203</sup> Destitute, youthful mothers with numerous children were also favoured, particularly in circumstances where theft was deemed to be motivated by a desire to survive or provide for the family. “Pious perjury” was inspired by beliefs that human behaviour could be constrained by social determinants.<sup>204</sup> In other words, “partial verdicts” recognised that a prisoner’s culpability could be diminished by extenuating circumstances such as youth or poverty, which constricted human choice of action.

Joel Eigen has taken these arguments a step further by connecting motivations for “pious perjury” with criteria for criminal responsibility.<sup>205</sup> Eigen suggests that “partial verdicts” could signal perceptions that the prisoner’s ability to reason correctly, and hence form intent, was impeded by social determinants such as youth and poverty.<sup>206</sup> He therefore proposes that insanity “emerged as a further – not necessarily a novel – “constraint” for the jury to consider” at the Old Bailey.<sup>207</sup> Contemporary legal commentators certainly recognised that youthful felons might not have developed the capacity to reason like a normally learned adult and hence lack criminal intent.<sup>208</sup> Youthful immaturity of reason and conduct could therefore be connected to idiocy, or the failure to mature mentally.<sup>209</sup> Peter King has demonstrated that, in the context of courtroom practice, this period of “youth” could

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<sup>203</sup> J.M. Beattie “The Pattern of Crime in England, 1660-1800”, *P&P*, 62, (1974), pp.47-54. King “Decision-makers” pp.35-50. King *Crime* pp.32-34.

<sup>204</sup> Eigen *Witnessing* pp.15-17. Green *Verdict* pp.378-383. King *Crime* p.234.

<sup>205</sup> Eigen *Witnessing* pp.15-30.

<sup>206</sup> *Ibid* pp.28-30. See also Green *Verdict* pp.378-379.

<sup>207</sup> Eigen *Witnessing* p.18.

<sup>208</sup> Walker *Crime and Insanity I* pp.26-29. Eigen *Witnessing* pp.16-17. Loss of reason was associated also with senility.

<sup>209</sup> Andrews “Idiocy ... part I” p.85.

extend to a person's mid-twenties.<sup>210</sup> Mitigating verdicts, towards "youthful" offenders, could therefore have been inspired by perceptions that the reasoning faculties of these persons were less than fully developed.

According to English jurists, such restricted forms of mental affliction were worthy of neither full exculpation, nor reduction of sentence. England's criminal law did not obtain formally to the concept of "diminished responsibility" adopted in Scotland.<sup>211</sup> Eigen suggests that "partial verdicts" filled this theoretical void in England. By finding prisoners guilty of less serious offences which carried less severe penalties, "partial verdicts" declared that prisoners were less than fully responsible for their criminal actions.<sup>212</sup> "Partial verdicts" circumvented strict theoretical guidelines concerning culpability. Similarly, jurors could disregard the rigorous requirement that acquittals, owing to insanity, could only be procured where the mental affliction completely removed the prisoner's reason, criminal intent and responsibility. This was true of the Old Bailey, where prisoners were acquitted despite their madness falling "noticeably short of the law's constant criterion of total insanity".<sup>213</sup> Such verdicts suggest that courtroom participants could interpret insanity and criminal responsibility differently to English jurists.

Despite alternative interpretations, strict criteria of criminal responsibility could underpin verdicts of insanity and idiocy during the long eighteenth century. Legal

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<sup>210</sup> King "Juvenile" p.121.

<sup>211</sup> Walker *Crime and Insanity* I pp.138-142.

<sup>212</sup> Eigen *Witnessing* pp.15-30.

<sup>213</sup> *Ibid* p.57.

professionals could employ juristic guidelines and insanity defences could fail to meet the necessary legal criteria, sometimes with terminal consequences for the prisoner. Jurors could also be presented with such persuasive evidence that they had to return verdicts of insanity or idiocy. By contemporary standards, a verdict other than insanity upon John Sutcliffe in 1776 would have been perverse, for example. John Sutcliffe's suicidal tendencies, incapability to dress or converse correctly, combined with his inability to recognise that he had committed a crime, were obvious indications that he was "crak'd in the brain". It was recounted how Sutcliffe had "seemed to be very joyful ... and laughed heartily" after killing his "favourite son" and wife. In the context of Sutcliffe's altered behaviour, which included attending local Methodist meetings, such a peculiar emotional response to the deaths indicated a man who was perturbed mentally, rather than a callous delinquent. Verdicts of insanity mitigated the "Bloody Code", by finding the prisoner "not guilty" of their crimes, but this was a formal mode of alleviation, related directly to legal dogmas of criminal responsibility. Unlike "partial verdicts", jurors wielded mandatory, rather than discretionary, mitigation by acquitting prisoners like Sutcliffe, who clearly met the necessary legal criteria for insanity.

Some Northern Assize insanity verdicts could be described as being discretionary, however. In May 1783, John Swift confessed to his neighbours in the parish of Lewthorne, Yorkshire, that he had killed his infant child, Mary.<sup>214</sup> Swift claimed that he had not intended to kill his daughter, but "imagined he had been

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<sup>214</sup> ASSI 45/34/4 no.196.

rubbing the back of a Penknife across the Infants Throat".<sup>215</sup> At the subsequent coroner's inquest, four character witnesses concurred that the offender had been "in a low, dejected way" for almost two years. Mr. Joseph Ingham, a tammy-maker from Pashley-Green, declared that Swift "always appeared in a low spirited, melancholy way and for a week past he had observed [him] to be more dejected than ever before". The case was entered at the Yorkshire Assizes in August, where the petty jury concluded that Swift had murdered his daughter whilst he was insane.<sup>216</sup> The prisoner was acquitted of the crime and was ordered to be "kept closely confined in the Place of his last legal settlement".<sup>217</sup>

Swift's verdict contradicted the strict evidential guidelines for insanity which were presented by English legalists. Contemporary editions of Blackstone's Commentaries echoed its juristic predecessors: "The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, which is necessary ... to form a legal excuse".<sup>218</sup> In the seventeenth century, the term "melancholy" could be applied generally to describe the loss of sanity. Yet by the late eighteenth century, the idiom "melancholy" could expressly denote a particular form of mental affliction, whereby persons such as

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<sup>215</sup> *Ibid* deposition of Anne Hawksworth.

<sup>216</sup> This was one of the usual English "guilty but insane" verdicts. Interestingly, Swift was considered sane enough to stand trial. He may have recovered his senses between May and August, although Swift had attempted to take his own life some time after he was apprehended by his neighbours.

<sup>217</sup> The verdict and sanction are recorded in the York Courant, August 12<sup>th</sup> 1783.

<sup>218</sup> Blackstone Commentaries (1769) IV pp.189-190. The Commentaries was into its eighth edition by 1783, although this section remained unchanged. See also Hale Pleas p.30.

John Swift were subject to a “depression of spirits”.<sup>219</sup> Swift had not endured an isolated “fit”, but had suffered from melancholy for at least two years. Nevertheless, if legal theorists such as Hale and Blackstone were interpreted strictly, then Swift suffered from a permanent form of insanity which merely reduced his ability to reason. To borrow Hale’s interpretation, melancholy was a “partial degree” of insanity which did not remove fully a person’s ability to reason and therefore did not constitute a sound legal defence.<sup>220</sup> What was at issue at court was whether Swift’s species of mental affliction totally deprived him of his senses.

The witnesses and jurors in Swift’s case interpreted “melancholy” differently from Hale and Blackstone. They understood “melancholy” as an incapacitating condition which absolved Swift of his crime. In one sense, the verdict of insanity upon Swift was discretionary, because evidence of “melancholy” was deemed to have matched the stricter theoretical directives whereby only “a total idiocy, or absolute insanity, excuses from guilt”.<sup>221</sup> But the jurors did not commit “pious perjury” because their interpretation of Swift’s mental condition was based upon the weight of evidence which was presented at court, which deemed that Swift’s melancholy completely removed his capacity to form intent. The jury’s conclusions matched the community’s interpretation of insanity, law and hence justice. These

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<sup>219</sup> In 1665, the “melancholy fits” which excused Charles Jackson of murder did not necessarily indicate that the offender was sad or depressed, but that he was subject to manic, aggressive fits. ASSI 45/7/2.

<sup>220</sup> Hale *Pleas* p.30. Hale suggested that insanity could be “partial” in terms of degree, subject matter and permanence. See pp.56-63.

<sup>221</sup> Blackstone *Commentaries* (1769) IV p.25.

sentiments were accepted, at least, by the bench which did not rebuke the verdict.<sup>222</sup> In this particular case, the testimony and verdict represented a different understanding of “melancholic” insanity and criminal responsibility to that provided by contemporary juristic works. Swift’s verdict represented a “customary” interpretation of the criminal responsibility of “melancholic” persons.<sup>223</sup> This illustrates that principles of criminal responsibility were applied more flexibly in practice than the leading English jurists contended.

Swift’s verdict was unlike the “partial verdicts” which were returned for sane prisoners in important respects. The interconnected legal issues of intent and criminal responsibility were more prominent during insanity and idiocy defences.<sup>224</sup> Findings of insanity and idiocy therefore addressed directly the law, whereby the mentally impeded were not held accountable for their crimes. “Partial verdicts” suggested that prisoners were less than fully responsible for criminal offences, but maintained that they were culpable to a lesser degree and “guilty”. In contrast, verdicts of insanity or idiocy recognised that prisoners were not at all responsible for their crimes.<sup>225</sup> Swift’s melancholy earned him not a reduction in sentence, but acquitted him because his affliction was deemed to be completely debilitating. This contrasted with Scottish verdicts of “diminished responsibility” that merely reduced sentences.

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<sup>222</sup> Sadly no trial transcript survives, but the Minutes do not record any request by the bench for the jury to reconsider its verdict.

<sup>223</sup> Amongst Yorkshire trials, verdicts of insanity were also brought against the “melancholic” prisoners Granville Medhurst (Lammas 1800) and Philip Maister (Lent 1803).

<sup>224</sup> *Eigen Witnessing* p.29.

<sup>225</sup> *Idem. Green Verdict* p.379.

*English recommendations for post-trial mitigation*

Mental affliction was not a regular cause for post-trial clemency in England, at least after 1780, when the historical material is most abundant.<sup>226</sup> Where prisoners were acquitted on the grounds of mental incapacity, there was no punishment and therefore no need for post-trial alleviation. Some supplications for mercy were based upon the prisoner's mental incapacity, however, such as the petitions relating to Elizabeth Ward who was convicted at Yorkshire in July 1816.<sup>227</sup> Seventeen-year-old Ward was found guilty of poisoning her sibling, Charlotte, who survived the ordeal.<sup>228</sup> The jury produced no recommendation for mercy and Elizabeth was sentenced to hang, although judge Bayley allowed a respite pending submission to "Royal Mercy".<sup>229</sup> After a month of heated debate, the Prince Regent granted a remission and Ward's punishment was reduced to Transportation "to the Coast of New South Wales" for life.<sup>230</sup> Royal clemency could be itself mitigated, for Ward's sentence was reduced subsequently to confinement at Milbank penitentiary for seven years.<sup>231</sup> The supplications for Ward's mercy provide an informative case-study of the pardoning process in the context of mental disturbance.

The jury did not mitigate Ward's sentence, either madatorily or discretionally.

In 1816, the ultimate decision to grant royal clemency lay with Lord Sidmouth, the

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<sup>226</sup> Series: HO 13 and 47.

<sup>227</sup> HO 13/29 and 47/55.

<sup>228</sup> In 1816, the *York Herald* carried reports of the case on August 3<sup>rd</sup>, 10<sup>th</sup> and 27<sup>th</sup> as well as a review of the petitioning process on September 7<sup>th</sup>. The *York Herald's* editor, William Hargrove, signed one of the petitions to the Prince Regent. See HO 47/55 (no folio number).

<sup>229</sup> *York Herald* August 27<sup>th</sup>. HO 47/55/86.

<sup>230</sup> HO 13/29 ff.42-43.

<sup>231</sup> Green "Retrospective" p.387.

Home Secretary, on the Crown's behalf, but his judgement was informed by public and private correspondences. Two-hundred-and-forty persons from Ward's local community marked a petition imploring royal mercy on account of Elizabeth's youth and mental weakness.<sup>232</sup> The petition contained justifications for mercy other than Ward's imbecility, such as her poverty and that her young cousin had hung himself in distress because of the case.<sup>233</sup> It was also suggested that JP Benjamin Dealtry had only managed to coerce the victim, Charlotte, to prosecute by giving false assurances that her sister would "probably be spared" by the jury.<sup>234</sup> The community supplication was reinforced by a separate petition of ninety-eight Yorkshire dignitaries, led by the Mayor of York, the Recorder of Doncaster and a Justice of the Peace, which focused upon Ward's "alienation and derangement of mind".<sup>235</sup> These appeals were not successful initially.<sup>236</sup> Ward's mitigation was secured via private correspondences to Sidmouth from the presiding judge, John Bayley, and Viscount Lascelles, a local MP and JP.<sup>237</sup> Lascelles and Bayley were convinced that Ward was perturbed mentally and deserved clemency, but that insufficient evidence of her condition had been presented at court to allow the jury to recommend her to mercy.<sup>238</sup>

John Bayley's role in proceedings illustrates that the presiding judge's case-notes and opinions could direct the post-trial mitigation of prisoners. Home

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<sup>232</sup> HO 47/55 (no folio number).

<sup>233</sup> HO 47/55/92.

<sup>234</sup> *Idem.*

<sup>235</sup> *Idem.* Further letters were sent to Sidmouth and the Prince Regent, signed by the pseudonyms "Citizen of London" and "Friend of Humanity".

<sup>236</sup> *York Herald* September 7<sup>th</sup> 1816.

<sup>237</sup> HO 47/55/86-110.

<sup>238</sup> *Idem.*

Secretary Sidmouth accepted Bayley's opinion that Ward was imbecilic and worthy of mercy.<sup>239</sup> Contemporary commentators perceived that a judicial respite was effectively a reprieve, which would lead to either a post-trial pardon or amelioration of sentence.<sup>240</sup> In 1816, the legally trained Recorder of Doncaster reckoned that for, "eighteen years past certainly, and perhaps for a century, no criminal has been executed here [at York], after a respite from the Judge".<sup>241</sup> This happened certainly in Ward's case. The presiding judge's influence over such clemency was greater on the circuit than at the Old Bailey, where the "Hanging Cabinet" considered applications to mercy and the bench's recommendations could be ignored.<sup>242</sup> Indeed, the circuit bench's powers were cemented by a statutory change in 1823, which allowed judges to decide which prisoners deserved clemency in all criminal cases except murder.<sup>243</sup> Thus, at Yorkshire in 1826, George Bailey was found guilty of sheeptheft, but the judge reprieved him at the end of the Assizes on account of idiocy.<sup>244</sup> By the 1820s, England's circuit judge was firmly established as a principle source of post-verdict mitigation, even in cases which involved the consideration of a prisoner's mental condition. The bench could mitigate the jury's verdict, as occurred in Ward's case. Jurors played important mitigating roles during the long eighteenth century, but the bench's contribution should not be ignored.

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<sup>239</sup> HO 47/55/94. Bayley argued that "no Mercy can be expected but upon very extraordinary grounds; there must still be such a Punishment as will operate in some Degree by Way of Example" whilst ensuring that Ward could not commit a similar offence again.

<sup>240</sup> Walker *Crime and Insanity* I p.201.

<sup>241</sup> HO 47/55/122-123.

<sup>242</sup> Walker *Crime and Insanity* I p.201.

<sup>243</sup> 4 Geo IV c48.

<sup>244</sup> *York Herald* March 25<sup>th</sup> 1826.

In his correspondence to Sidmouth, Bayley provided two justifications for Ward's mitigation. The first concerned perceptions that Ward's trial had proceeded unfairly or inadequately. It was acknowledged that the family's extreme poverty had restricted Ward from employing counsel to either organize or direct her defence, although she had "expected such assistance".<sup>245</sup> The crown prosecution was conducted by a barrister, which compounded Ward's lack of counsel.<sup>246</sup> This illustrates growing expectations that poor, mentally impaired prisoners should be provided with counsel in England, especially if prosecuted by a barrister.<sup>247</sup> Bayley also argued that Ward's trial took place six days after her arrest, which left insufficient time to prepare a defence or locate the necessary witnesses to prove her mental state.<sup>248</sup> Strong evidence of Ward's mental weakness existed, but it was never presented to the petty jury. It was recounted that Ward's father carried testimony which furnished "more Satisfaction upon the subject of Mental Weakness than any Thing I have before seen". Bayley thought it "probable" that the jurors would have recommended Elizabeth to mercy if her father had testified, but he failed to do so due to his "poverty, ignorance and distress".<sup>249</sup> This rendered the guilty verdict untenable. During the long eighteenth century, such procedural criticisms were accepted regularly as cause for post-trial clemency, but no re-trials were undertaken.<sup>250</sup>

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<sup>245</sup> HO 47/55/108-109.

<sup>246</sup> HO 47/55/86 and 104-105. York Herald August 3<sup>rd</sup> 1816.

<sup>247</sup> See pp.391-392.

<sup>248</sup> Ward committed the act on the 27<sup>th</sup> July and was tried on the 2<sup>nd</sup> August.

<sup>249</sup> HO 47/55/86 and 108-110.

<sup>250</sup> Beattie "Scales" p.231.

Bayley's second justification was a contentious interpretation of England's law of criminal responsibility. English jurists maintained that "partial degrees" of insanity or idiocy (such as Elizabeth Ward's "weak-mindedness") clouded but did not remove the prisoner's intent. Persons thus afflicted were deemed to be fully responsible for their crimes and were punished accordingly. Bayley questioned the "inflexible Rule" that "Weakness of Intellect ... [could not] ... produce a Mitigation of Sentence".<sup>251</sup> The judge proposed that Elizabeth Ward's sentence should be ameliorated to Transportation because of her cumbersome affliction, as occurred in contemporary Scotland (although Bayley did not refer to Scots Law).<sup>252</sup> Bayley's interpretations of Ward's mental affliction and restricted culpability echoed the opinions of other correspondents and petitioners. Ward's verdict failed to meet broad expectations of the law and justice, which held that persons of weak understanding were not accountable fully for their crimes. Ward's pardon indicates that the conventional, strict English juristic guidelines for "total" insanity or idiocy could be ignored in practice, at least during the early nineteenth century. This rule was perceived to be too rigid by some lay persons and legal professionals, who adopted an intellection of criminal responsibility which was akin to Scotland's "Rule of Proportions".

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<sup>251</sup> HO 47/55/92.

<sup>252</sup> HO 47/55/94.

*Conclusions*

As befitted separate legal traditions, there were critical differences between the structure and composition of English and Scottish criminal jury panels, as well as the verdicts they returned. The uneven number of jurors was fundamental to Scotland's system where majority verdicts were regularly returned and accepted, in contrast to the English Assizes. Different preconditions for jury service existed in these autonomous traditions. In terms of the social standing of jurors, Southern Scottish "assizes" were more inclusive than their English counterparts. Tenants were more consistently involved as jurors in Scotland, as were the elites of local society. So the jury panels which assessed prisoners' mental conditions in England and Scotland regularly possessed different internal social dynamics.

English and Scottish criminal juries shared some common characteristics. The vast majority of Britain's male population, alongside all women, were excluded from sitting upon criminal trial juries. The majority of both southern Scottish and northern English jurors hailed from the middling ranks of property owners. Jurors did not merely represent the interests of the social and political elites. Provincial British jury panels were also dominated by laypersons between 1660 and 1829. Licensed legal professionals were exempted from serving as petty jurors in England. By comparison, Scottish "assizes" could include legal professionals in the guise of "writers", but such lawyers formed a tiny minority of southern Scottish jurors and were even less prevalent in Edinburgh. Professional medics and "alienists" increasingly informed the jury's verdict over the course of the long

eighteenth century, but these occupations did not evaluate the prisoner's state of mind as criminal jurors in provincial Britain. Laymen continued to decide whether persons were insane or idiotic within a criminal context.

English and Scottish juries functioned similarly during insanity and idiocy defences. Throughout 1660 to 1829, northern English and southern Scottish jurors assessed whether prisoners had been mentally troubled at the time of committing an offence. Northern Assize "petty juries" also contemplated whether prisoners were mentally fit and able to stand trial. By contrast, southern Scottish defences "in-bar-of-trial" were evaluated by the bench, not the "assize". Where British jurors determined the prisoner's mental condition, they grappled with the theoretical concept of criminal responsibility. By so doing, provincial British jurors could evidently consider matters of "law" as well as "fact" during insanity and idiocy defences.

By the late eighteenth century, it was evident that bench and jury could disagree and obtain to different interpretations of a prisoner's mental faculties. In most British insanity and idiocy defences, however, judge and jury concurred regarding the authentication of mental distraction and how a person's will and intent was restricted. In the context of Old Bailey insanity defences, Joel Eigen has argued that such concordance represented the impact of a dominant bench, which imposed its perceptions upon the jury.<sup>253</sup> The judiciary could guide jurors during provincial British insanity and idiocy hearings, but jurors could also reach verdicts

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<sup>253</sup> Eigen *Witnessing* p.33-34.

independent from judicial direction. Interactions between bench and jury were more complex in northern England and southern Scotland than the framework that Joel Eigen has proposed for the Old Bailey. Criminal juries did not inexorably show deference to courtroom participants of superior social status or legal experience, such as judges. Jurors could carry their own interpretations of criminal responsibility and mental distraction. Verdicts concerning the mental state of prisoners could accommodate local community understandings of justice and criminal responsibility, alongside neighbourhood interpretations of a prisoner's mental capacities and ability to form intent. Jurors could operate according to different imperative, interests and legal interpretations to legal professionals.<sup>254</sup>

The jury's verdict represented an important cog in the courtroom machinations of discretionary mitigation. Within England's sanction-specific legal environment, petty jurors could moderate the harsh penal code through "partial verdicts". Southern Scottish verdicts seem to have operated in a similar fashion, although further research is needed to clarify this thesis. Within both traditions, however, verdicts of insanity and idiocy were not simple extensions of such discretionary mitigation by jurors. Insanity and idiocy verdicts mitigated the "Bloody Codes", but such activity was mandatory, because jurors addressed principles of criminal responsibility (and hence the letter of the law) by finding prisoners incapable mentally.

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<sup>254</sup> Weiner "Judges V Jurors" p.472.

The persistence of distinctive legal traditions meant that different forms of verdict were available to English and Scottish jurors. In contrast to English Common Law, Scots Law obtained to the dogma of "diminished responsibility", or the "Rule of Proportions". This principle recognised that species of fatuity and furiosity which were partially debilitating should earn a proportional restriction of sentence. This meant that a wider array of conclusions was available to Justiciary Court "assizes" than their English equivalents. In contrast to English petty jurors, Scottish "assyzers" could discover forms of fatuity and furiosity which only reduced the prisoner's responsibility and sentence.

The principal English jurists did not observe a "Rule of Proportions" and insisted that only fully debilitating forms of insanity or idiocy be met with complete acquittals. At both the Old Bailey and Northern Assizes, however, prisoners could be acquitted despite failing to meet these stringent guidelines for criminal accountability. These acquittals on the grounds of what Hale termed "partial degrees" of insanity, such as melancholy, were different to "pious perjury". The verdict that John Swift was insane, for instance, did not violate but followed the proofs which were entered at court. Swift's verdict was justified by and reinforced community opinion regarding the prisoner's mental state and criminal responsibility. These verdicts endorsed alternative understandings of criminal accountability and mental distress to those imparted by England's jurists. Juristic constructs were not accepted monolithically during the long eighteenth century; in

some cases juristic principles were challenged successfully by lay persons and legal professionals.

Scottish "assizes" could recommend that incompletely incapacitating forms of fatuity and furiosity were sound bases for post-trial mitigation owing to the "Rule of Proportions". Post-trial clemency was rarely awarded on the grounds of insanity or idiocy alone in England, because no concept of "diminished responsibility" existed. Further research is once again required beyond the Northern Assizes, but it seems that such post-trial mercy was only considered in English cases where the judge deemed that either the jury had been misled or delivered a harsh verdict, or else persuasive evidence of insanity or idiocy emerged after the trial was completed.

The courtroom impact of English and Scottish juries was not restricted to the verdict. Juries had ceased to be panels of "neighbour-witnesses" by the 1820s, but they continued to act dynamically and inform themselves during the examination of witnesses. Even in the 1820s, juries were not passive recipients and assessors of information which was provided at court. The jury's function and composition had evolved from its mediaeval, inquisitive roots, but vestiges of this role remained through to the early nineteenth century. The questions posed by jurors provide priceless indications of what the jurors perceived to be persuasive testimony. Despite the legal profession's efforts to restrict "hearsay" testimony, British jurors continued to regard community judgment and identification of mental afflictions to be convincing forms of proof through to the 1820s.

## 9.

*Pleading by legally trained counsel in Britain*

Recent scholarship has investigated the impact of legally trained representatives upon British criminal trials between the sixteenth and nineteenth centuries.<sup>1</sup> However, most research into long eighteenth century British insanity and idiocy defences has ignored the practical element of legal counsel, or else has assumed rather than demonstrated their importance.<sup>2</sup> This chapter strengthens the historiography of British insanity and idiocy hearings by establishing the agency of courtroom pleaders at the provincial courts.

English and Scottish legal practices remained detached throughout the long eighteenth century. The Parliamentary Union of 1707 enshrined the independence of Scottish law, assuring that separate legal professions endured in Scotland. "Romano-Civilian" legal traditions were more apparent amidst Scots Law than English Common Law. It is established how the quantitative participation of

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<sup>1</sup> For England, see: Baker Introduction. J. Bailey, "Voices in the Court: lawyers' or litigants?", HR, 74, 186, (2001), Beattie "Scales". C.W. Brooks, Lawyers, Litigation and English Society since 1450, (1998), Duman Judicial Bench. Duman "English Bar". Ford "Brougham as Barrister". King Crime (2000), Landsman "Rise". Langbein "Shaping". Langbein "Law of Evidence". D. Lemmings, Gentlemen and Barristers. The Inns of Court and the English Bar 1680-1730, (1990). D. Lemmings Professors. Post "Defence Counsel". For Scotland: Cairns "Importing". Cairns, "Advocates' Hats". Cairns, "Alfenus Varus". Crowther "Crime". N.T. Phillipson "The Scottish Whigs and the Reform of the Court of Session 1785-1830", Stair Society, 37, (1990) Murdoch "Advocates". See also "An Introduction to Scottish Legal History" Stair Society (1958).

<sup>2</sup> R. Smith, Trial by Medicine – Insanity and Responsibility in Victorian Trials, (1981) pp.67-70 does deal with the impact of English barristers after 1836, when the right to defence counsel was extended formally to all felons. Otherwise, this subject remains untouched. See: Jones, Lunacy. Walker Crime and Insanity I. Walker and McCabe, Crime and Insanity II. Andrews, "In her Vapours ... [or] indeed in her Madness? Mrs Clerke's case: an early eighteenth century psychiatric controversy", History of Psychiatry, i, (1990), Eigen "Intentionality". *Ibid* "Delusion in the Courtroom: The Role of Partial Insanity in Early Forensic Testimony", Medical History, 35, (1991). *Ibid* "Opinion". *Ibid* Witnessing. Moran "Origin". Rabin "Law and Responsibility". Houston Madness. *Ibid* "Professions". *Ibid* "Courts".

counsel contrasted in northern England and southern Scotland because of different procedures and legal influences.<sup>3</sup> The involvement of lawyers upon the provincial circuits will also be compared to published research concerning Scotland's High Court and the Old Bailey. The reasons why particular pleaders were involved in specific circuit trials deserves attention. A lawyer's participation might be driven by political and professional rivalry, alongside perceptions of how counsel ought to function at law. Ideological contentions between lawyers could be supplanted onto trials and it is examined how these conflicts affected the outcome of some insanity and idiocy defences.

England's legal codes restricted the involvement of legal representatives, particularly defence counsel, during the long eighteenth century. Therefore, it is considered why counsellors were allowed to represent litigants during some Northern Assize insanity defences. It must be assessed how discretionary decisions to allow counsel were informed by perceptions of the prisoner's mental condition and crime. Litigants made greater use of legal representatives by the early nineteenth century. James Beattie has suggested that this change can be explained partially by a burgeoning corpus of qualified barristers who sought to earn a living through criminal business.<sup>4</sup> This thesis is tested in a provincial context. It will also be examined how a broader section of English society were disposed to employ barristers and were able to afford their services. A litigant's social contacts and wealth could determine their ability to retain counsel in both countries.

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<sup>3</sup> Gordon "Roman Law" pp.135-143.

<sup>4</sup> Beattie "Scales" p.228.

The courtroom impact that counsel had upon provincial British insanity and idiocy defences is juxtaposed with published findings for Scotland's High Court and England's Old Bailey. The courtroom function and behaviour of English and Scottish counsel are compared, such as their ability to cross-examine and summarise cases. Such activity could shape the contributions of other courtroom participants, most notably the judge, jury, witnesses and prisoners, besides opposing counsel. It is explored how counsel shaped the development of Britain's legal processes and structures after 1660. Stephan Landsman has argued that the increased appearance of legal representatives in England reflected the emergence of "adversarial" courtroom procedures.<sup>5</sup> Landsman's analysis is evaluated to establish whether these legal developments had an important impact upon English insanity and idiocy defences. A key aspect of "adversarial" practice was the evolution of stricter evidential standards.<sup>6</sup> It is argued that from around 1770 onwards, legal representatives initiated the appearance of medical experts during Northern Assize insanity defences. Joel Eigen has found a similar pattern at the Old Bailey, but from 1760 onwards.<sup>7</sup> Regarding the authentication of mental anomalies, lawyers encouraged perceptions that lay testimony could be fallible, whilst expert opinion could be highly persuasive.

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<sup>5</sup> Landsman "Rise" p.501.

<sup>6</sup> *Idem.*

<sup>7</sup> Eigen *Witnessing* p.133.

*Pleaders at the Justiciary and Assize courts*

Britain's legal professions were stratified by occupational function, education and social status.<sup>8</sup> Pleading at Britain's superior courts was reserved for the "bar"; elite cadres of lawyers whose elevated professional status was eclipsed only by the judiciary. On the southern circuit of Scotland's Court of Justiciary, pleading was only undertaken by "advocates" (from the French "avocats", meaning graduates in legal studies).<sup>9</sup> These lawyers belonged to the socially and professionally superior "Faculty of Advocates" which was based in Edinburgh.<sup>10</sup> They were the equivalent of England's barristers, who attended London's Inns of Court before being called to the bar and whose privilege it was to plead at England's Assize courts.<sup>11</sup> Britain's "inferior" legal strata were excluded from pleading at the superior circuit courts. English solicitors and attorneys, alongside Scottish "Writers to the Signet" ("W.S."), could prepare cases and plead at inferior courts. At the foot of the legal profession, English clerks and Scottish "writers" prepared cases and recorded legal documents.<sup>12</sup> The extent to which British litigants consulted these kinds of lawyer, outside of the formal setting of the criminal courtroom, is difficult to assess. This

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<sup>8</sup> Duman "English Bar" p.90-91. Cairns "Affenus Varus" pp.204-232. Murdoch "Advocates" pp.149-150. Phillipson pp.8-9.

<sup>9</sup> Cairns "Advocates' Hats" pp.50-51.

<sup>10</sup> Murdoch "Advocates" p.150. Phillipson "Scottish Whigs" p.8.

<sup>11</sup> See Duman "English Bar" and Lemmings' Gentlemen and Barristers and Professors for detailed synopses of the training and evolution of the English bar during this era. Some barristers were awarded a prestigious appointment as "serjeant-at-law", which could presage promotion to the bench.

<sup>12</sup> "Writers" could be involved as pleaders at the inferior courts; Phillipson "Scottish Whigs" pp.10-11. Murdoch "Advocates" p.151. Houston "Writers to the Signet" p.40. At Ayr in 1761, a "writer" was appointed by the bench to lead Janet Thompson's defence. See p.374 below.

chapter focuses upon Britain's "bars" at court, but the function of other kinds of lawyer in relation to the criminal courts is a fresh topic demanding research.

The scholastic qualifications of advocates and barristers reinforced their superior professional (and social) statuses. Typically, the lower strata of Britain's legal professions trained through practical apprenticeship. Britain's "bars" could also gain practical legal experience, but most had also obtained formal academic education.<sup>13</sup> English barristers could be schooled at the Inns of Court, but these evolved to become professional "clubs" rather than places of formal learning during the eighteenth century.<sup>14</sup> After 1750, most English barristers received their legal instruction at English universities, although they might visit European establishments whilst on "Grand Tour" and thereby garner knowledge of Continental legal theory and practice. By comparison, it was usual that Scottish advocates studied "Civilian" law at Continental universities, particularly in the Netherlands, during the late seventeenth and early eighteenth centuries.<sup>15</sup> By the 1750s, a greater proportion of Scotland's advocates attended courses on Scots Law which were taught at the universities of Glasgow and Edinburgh.<sup>16</sup> From 1750,

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<sup>13</sup> Murdoch "Advocates" p.150. Phillipson "Scottish Whigs" p.8. England's Inns of Court evolved from being places of formal legal education to professional "clubs" during the eighteenth century, see Duman "English bar" pp.15-16.

<sup>14</sup> Duman "English bar" pp.15-16.

<sup>15</sup> Cairns "Importing" p.139 and pp.143-145. At least forty-percent of lawyers who passed advocate between 1661 and 1750 had studied in Holland. Cairns cites political and religious reasons for this relationship between Scottish advocates and schooling in the Netherlands. The Dutch universities were also amongst the pre-eminent educational establishments in Europe, at least between 1675 and 1725.

<sup>16</sup> Lustig and Pottle (eds.) *Applause of the jury* p.1. Murdoch, "Advocates" p.150. The first Faculty of Law in Scotland was established as part of Edinburgh University in 1722, D.B. Horn, *A Short History of the University of Edinburgh (1556-1889)*, (1967). p.46.

advocates were expected to pass an examination upon Scots Law.<sup>17</sup> The practical impact of such changes and the decline in Continental “Romano-civilian” schooling amongst advocates is considered over the course of this chapter.

The Faculty of Advocates and Inns of Court remained socially elevated institutions. The social characteristics of Britain’s bars did alter between 1660 and 1829. By the late eighteenth century, fewer advocates and barristers belonged to noble families than during the early eighteenth century.<sup>18</sup> A rising proportion of British pleaders were born into “middling”, professional families.<sup>19</sup> To take a Scottish example, Robert Cullen passed Advocate in 1764 and was raised to the bench in 1796.<sup>20</sup> Cullen’s father had been a renowned physician rather than of noble birth. Nevertheless, acceptance onto the bar represented social advancement for persons who hailed from a middling status in society. So, despite changes in social structure, Britain’s “bars” continued to be dominated by persons who belonged to the local, land-owning, social, economic and political elites.<sup>21</sup> Britain’s bars were of high social and professional standing, although they did not necessarily share the same ideological outlook as the bench during trials.<sup>22</sup> Legal counsel could challenge

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<sup>17</sup> Murdoch “Advocates” p.150. Walker Scottish Jurists p.206. Cairns “Importing our Lawyers” p.143. Cairns “Alfenus Varus” pp.209-210 reveals that advocates could choose to be examined on Scots law from the seventeenth century onwards, but that this route was stigmatised and fell into disuse until the reform of admissions in 1750.

<sup>18</sup> Murdoch “Advocates” p.152. Cairns “Affenus Varus” pp.204-206. Duman Judicial Bench pp.51-52. Brooks Lawyers, Litigation p.187.

<sup>19</sup> *Idem.*

<sup>20</sup> Robert Cullen, (1742-1810). DNB V pp.278-279.

<sup>21</sup> Duman “English Bar” p.102. Phillipson “Scottish Whigs” p.9. Cairns “Affenus Varus” pp. 227-232.

<sup>22</sup> See, for instance the sections on the “Rule of Law” within Thompson Whigs and Hunters pp.258-269, Hay “Property, Authority” pp.58-59 and Hay “War, Dearth and Theft” p.152.

judicial influence. Lawyers could also initiate conciliatory, discretionary processes within the context of criminal cases.

*Trends in pleader participation in southern Scotland and northern England*

This section establishes the divergent quantitative patterns of legal representation during provincial British insanity and idiocy defences. It is considered how different legal influences, theories and procedures affected English and Scottish criminal tribunals. English sources allow a less comprehensive analysis than for Scotland, but it is possible to present some broad patterns regarding the emergence and contribution of pleaders at court.

*Southern Scotland*

Both defendant and prosecutor were represented regularly by legally trained pleaders during Justiciary Court criminal trials.<sup>23</sup> Between 1708 and 1829, at least one advocate was present in every southern Scottish fatuity and furiosity defence. Eighty-five advocates were involved in the thirty-five southern Scottish trials examined. Both the median and modal number of advocates at these trials was two. Scottish fatuity and furiosity trials recurrently featured a confrontation as legal representatives in court.

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<sup>23</sup> Smith "Criminal Procedure" p.438.

Criminal cases could be pursued privately at the Justiciary Court, but a system of public prosecution dominated Scottish procedure.<sup>24</sup> Regular prosecution in the “public interest” was redolent of contemporary, European “Romano-Civilian” traditions and distinguished Scottish from English practice.<sup>25</sup> Scotland’s “Advocates-Depute” prosecuted circuit prisoners (Table 9.1). Advocates-Depute were formally appointed delegates of Scotland’s principal legal official, the Lord Advocate.<sup>26</sup> Scotland’s Procurator-Fiscal and the Solicitor-General entered prosecutions in the public’s interest, but most Justiciary Court indictments were initiated through the Lord Advocate.<sup>27</sup> All but three of the prosecutions studied were activated through the Lord Advocate’s office, the remainder being organised by the Procurator-Fiscal. Even where the latter prepared prosecutions, Advocates-Depute delivered the case at court.

Number of prosecution lawyers at trial:	Number of cases:		Proportion of cases (%):	
	Prosecution	Defence	Prosecution	Defence
One	33	22	91	64
Two	2	13	6	38
Three	1	1	3	3

*Table 9.1. Comparison of the numbers of defence and prosecution counsel who appeared per case, southern Scottish fatuity and furiosity defences, 1708-1829.*

As in some contemporary Continental countries, such as Switzerland, defence counsel featured regularly during Scottish criminal hearings.<sup>28</sup> Scottish pannels were entitled to counsel by a statute of 1424, although this ruling was not employed

<sup>24</sup> Crowther “Crime” p.225.

<sup>25</sup> Cairns “Legal Theory” p.225. Lopez-Lozaro “No Deceit Safe” pp.451-477.

<sup>26</sup> Smith “Criminal Procedure” pp.432-437.

<sup>27</sup> *Ibid* p.432.

<sup>28</sup> Barras “Folies criminelles au XVIIIe siècle” *Gesnerus* 47 (3-4) (1990) p.294.

universally.<sup>29</sup> Of the thirty-five southern circuit fatuity and furiosity defences that occurred between 1708 and 1829, all but two were conducted by lawyers.<sup>30</sup> Every prisoner was legally represented after 1749.<sup>31</sup> Scotland's judiciary could assign pleaders to prisoners who were devoid of counsel and wished to be represented.<sup>32</sup> These appointments were not greatly remunerative, but lawyers did not refuse them.<sup>33</sup> As we shall see, some advocates viewed these assignments as philanthropic and ideological objectives.<sup>34</sup>

Formal accusations at Edinburgh's High Court could be pursued by two or more lawyers, but Advocates-Depute typically acted alone on circuit (Table 9.1). Criminal defences were also most regularly presented by a single advocate. But, in contrast to prosecutions, around two-fifths of defences involved two or more advocates. The public prosecutor was outnumbered by adversary pleaders in fourteen (forty-percent) of the furiosity and fatuity defences studied. A defence's success was not guaranteed by the involvement of more than one advocate, but additional lawyers could enhance the pre-trial preparation and courtroom presentation of cases.

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<sup>29</sup> Smith "Criminal Procedure" p.438.

<sup>30</sup> So only five-and-a-half-percent of Scottish southern circuit fatuity and furiosity trials lacked defence counsel. By comparison, all the prisoners studied at the High Court were legally represented between 1704 and 1820.

<sup>31</sup> The last southern circuit furiosity trial where no counsel was employed by the defence was at Ayr in May 1749 (trial of Anne Millar, JC 12/6).

<sup>32</sup> The prisoner could waive the right to be represented.

<sup>33</sup> Ford "Brougham" pp.109-110.

<sup>34</sup> See below p.389-393.

The statute of 1424 was invoked twice during southern circuit furiosity trials, in 1752 and 1761, to provide destitute pannels with counsel. Janet Thompson entered court Ayr's court in May 1761 without a legal representative, for instance.<sup>35</sup> The Advocate-Depute, Robert McQueen, implored the presiding judge to provide counsel for Thompson so that her trial for child-murder might proceed justly.<sup>36</sup> No advocate could be found, so a writer called Alexander Forsyth was appointed to "speak for [Thompson] in court".<sup>37</sup> Only four cases were arranged for trial at this Ayr meeting and such scarce prospective business may have dissuaded advocates from attending. Pleading was monopolised by advocates, but Scottish practice adapted to ensure that the prisoner received counsel from a legal professional. Interestingly, Forsyth does not seem to have examined any witnesses and was not allowed to provide a summary of Thompson's case. Instead, "as the pannel was destitute of Councill, Lord Minto summ'd up the evidence on both sides" after the Advocate-Depute had produced his concluding remarks.<sup>38</sup> The advocates' entitlement to raise questions and summarise cases at the Justiciary Court was protected. Forsyth's courtroom activities were prohibited, probably because of his inferior professional status.

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<sup>35</sup> JC 12/10. The other hearing involved the pannel James Blackie or Blaikie, at Jedburgh in September 1752 (JC 12/7).

<sup>36</sup> Robert McQueen (1722-1799) was elevated to bench in 1776 and assumed the title of Lord Braxfield. *DNB* vol. XII pp.718-9.

<sup>37</sup> JC 12/10. This vignette evidently suggests that lawyers were not always available in southern Scotland and that they did not attend all of the courts upon a circuit.

<sup>38</sup> JC 12/10.

*Northern England*

English legislation restricted the participation of barristers at the Assize courts before 1830, especially in comparison with the regular involvement of advocates at Scotland's Justiciary Courts. The statutory right to defence counsel was extended to all England's felons in 1836. Before then, defence barristers were only allowed to appear in criminal cases of treason and misdemeanour, at least according to statute. England's legal system was based upon the design that prisoners knew the veracity of accusations and were therefore best equipped to defend themselves.<sup>39</sup> In an era when a prisoner's character could be imperative to the outcome of a trial, it was important that the accused was both seen and heard to speak at court. England's judge could also ensure that trials proceeded in a "legal and strictly regular" manner, thus negating the need for defence counsel in this respect.<sup>40</sup> There were fewer constrictions regarding the legal representation of victims, although England lacked a ubiquitous public prosecution service. Privately initiated suits predominated at the English Assizes.<sup>41</sup> In practice, courtroom counsel was only employed by the accusers (or prosecution associations) who could afford the expense, or in some specific circumstances which are outlined below.

The historical materials do not lend themselves to accurate quantitative impressions of the participation of barristers at the Northern Assizes between 1660 and 1829. The minutes record that barristers were active during northern English

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<sup>39</sup> Blackstone *Commentaries* IV p.348. Blackstone cited Coke in this instance.

<sup>40</sup> *Idem.*

<sup>41</sup> Gaskill "Providence" p.344.

insanity defences from at least the 1750s, but these documents register the presence of counsel in a mere seven of the 142 hearings studied. Tellingly, the Minutes make no mention of barristers during the early nineteenth century, a period when legal representation increased dramatically at the Old Bailey and when barristers travelled England's circuits in greater numbers.

Printed narratives suggest that legal representatives were more heavily involved in northern English insanity and idiocy defences than the minutes reveal, at least from the 1770s onwards. These narratives did not record methodically the presence and activity of barristers, however. Newspaper reports were most likely to refer to lawyers when they had a dramatic impact upon specific criminal hearings. Particularly vehement contests between adversary barristers were also recorded regularly, perhaps because such courtroom pursuits were rare in England before the 1830s and therefore of interest to the newspapers' audience.

Consecutive published accounts only become available for a restricted set of trials belonging to the end of the period studied. Between 1800 and 1829, comprehensive published reports were found for forty-seven northern English insanity and idiocy hearings, whilst a further twenty reports and court minutes recorded the names of courtroom participants, including barristers. At least one barrister was present in twenty-three of these hearings (just under one-third of this sample). The failings of the Minute Books are all too evident, for they only record the presence of lawyers in four of these twenty-three tribunals. It is impossible to

relate precisely the involvement of barristers on England's northern circuit. However, it is clear from minutes and printed narratives that legal representatives were involved in some Northern Assize insanity and idiocy defences from the 1750s onwards.

Research into late eighteenth century Northern Assizes is enhanced by a hitherto dormant set of printed criminal reports, commonly titled The Trials at Large of the Felons in the Castle of York, (1775-1778).<sup>42</sup> Tantalisingly, the Trials indicate that more barristers were involved in prosecuting and defending prisoners during the mid-1770s than Minutes and newspapers suggest. The Minutes record only that Mr. Lee appeared as counsel for "Dutch Michael" Rice in March 1776. By contrast, the Trials document that "Mr. Withers" represented Rice in July 1776 and that "Mr Chambrie" prosecuted the prisoner in the July of both 1776 and 1777.<sup>43</sup> The apparent absence of barristers at eighteenth century Northern Assize trials is therefore exacerbated by Minutes and printed reports which fail consistently to record their presence.

The presence of barristers cannot be quantified soundly by the available sources, but a base guideline to their appearance can be offered. The earliest recorded instance of counsel participation during a Northern Assize insanity defence occurred in March 1756. A Yorkshire jury discovered that John Windle, who was accused of committing "several misdemeanours", was "void of Reason

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<sup>42</sup> Trials ... (1775 to 1778).

<sup>43</sup> Trials ... Lammas Assizes (1776) pp.3-7 and Trials ... Lammas Assizes (1777) pp.9-11. "Chambrie" was a phonetic spelling of (Alan) Chambrè, the eminent Northern Assize lawyer.

and subject to Fitts of Frenzy and Lunacy". A barrister named Mr Stanhope motioned successfully to secure the detainment of Windle on the grounds of mental distraction.<sup>44</sup> At least one barrister was involved in a minimum of twenty-six of the 106 northern English insanity and idiocy hearings that were investigated between 1756 and 1829. Twenty-one of these cases took place between 1800 and 1829. It should be noted that the majority of Old Bailey hearings before 1830 lacked legal counsel and the same was probably true of northern England.

The apparent increase in legal representation during insanity defences after 1800 points undeniably to the improved accuracy and consistency of printed narratives. However, there is evidence that this enhanced reporting coincided with a real escalation in the numbers of litigants who employed barristers. England's bar expanded from the 1780s, after a period of stagnation and decline from the 1640s. This rapid enlargement of England's bar contrasted with the more sedate expansion of Scotland's Faculty of Advocates.<sup>45</sup> The numbers of barristers who rode England's Northern Assize circuit also increased from the 1780s. The Law List does not offer a complete register of practicing barristers, but it indicates that only six barristers rode England's northern circuit in 1782; this represented a tiny proportion of the barristers who plied their trade at the contemporary Old Bailey.<sup>46</sup> Remarkably, the Northern Assize bar increased from nineteen individuals in 1785,

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<sup>44</sup> ASSI 41/4 and 42/7.

<sup>45</sup> Duman "English Bar" p.88. Duman adds that of these 379 individuals, a minimum of 121 and a maximum of 295 actually practiced law in 1785. There were 880 registered barristers in England by 1810. Duman Judicial Bench p.8. The numbers of practicing Advocates grew from 200 1714 to about 300 in 1810, Murdoch "Advocates" p.150.

<sup>46</sup> Lemmings Professors p.55 provides the example of the barrister John Scott who attended the Northern Assizes between 1776 and 1782 but was excluded from the Law List.

to sixty-eight by 1798 and 113 by 1830.<sup>47</sup> Even when the vagaries of the Law List are accounted for, the 1780s marked the beginnings of a sharp change. England's bar swelled during the last decades of the eighteenth century, forcing barristers onto the northern circuit in search of legal briefs.<sup>48</sup> There was business to be found, for civil and criminal litigation expanded within the industrialising areas of northern England after the mid eighteenth century.<sup>49</sup> A recognisable, dedicated "criminal bar" also emerged in England after the 1780s, including lawyers such as James Parke, who regularly accepted Northern Assize criminal briefs during his career.<sup>50</sup> This augmented "supply" of barristers also provides one explanation for the rising demand for their courtroom services.<sup>51</sup> It seems likely that northern England's criminal bar expanded after 1780 and these lawyers became more involved in insanity and idiocy defences at roughly the same time.

Considering the formal and practical restrictions upon defence and, to a lesser extent, prosecution counsel, the pertinent question is why did barristers appear during Northern Assize insanity and idiocy defences at all? The evolution of stricter evidentiary standards encouraged the emergence of a confrontational style of court hearing in England. Consequently, "partisan" advocacy which employed aggressive cross-examination was criticised less robustly by the bench from the late eighteenth century onwards.<sup>52</sup> The bench's discretionary decision to allow counsel more

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<sup>47</sup> Lemmings Professors p.55. Duman "English Bar" p.96.

<sup>48</sup> Duman Judicial Bench p.8.

<sup>49</sup> Duman, "English Bar" p.97.

<sup>50</sup> Sir James Alan Park(e), (1763-1838), DNB, vol XV., pp.216-217. Parke was involved in Granville Medhurst's insanity defence at Yorkshire in 1800.

<sup>51</sup> Beattie "Scales" pp.229-230.

<sup>52</sup> Landsman "Rise" p.446 and p.449.

regularly at court was informed by broader criticisms of England's criminal code, particularly for its lack of interest in the prisoner's rights.<sup>53</sup> These critiques emerged in the late eighteenth century, intensified during the 1820s and were recognised formally by England's statutory extension of the entitlement to defence counsel in 1836.<sup>54</sup> The 1836 statute did not initialise the participation of defence barristers in England, but regularised their involvement.

Fewer objections from the bench must have encouraged counsel to offer their services and litigants to employ them. The courtroom involvement of pleaders could be directed by the wealth of prosecutors and defendants, or their household, kin and friends. Norma Landau has illustrated just how expensive and time-consuming an English law-suit might be during the eighteenth century, especially if lawyers' fees were included.<sup>55</sup> In both England and Scotland, persons of high social and economic station could also afford to employ counsel in greater numbers. The wealthy Scottish landowner, William Douglas, was able to arrange for three advocates to present his defence of furiosity at Dumfries in 1795.<sup>56</sup> This was the only occasion that more than two advocates represented a defendant during southern Scottish fatuity and furiosity defences. In July 1800, a defence of insanity was entered successfully for a wealthy Yorkshire gentleman called Granville William Wheler Medhurst, who had killed his wife Sarah in an unprovoked

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<sup>53</sup> *Ibid* pp.249-252.

<sup>54</sup> Beattie "Scales" pp.250-253.

<sup>55</sup> N. Landau, "Indictment for Fun and Profit. A Prosecutor's Reward at Eighteenth Century Quarter Sessions", *Law and History Review*, 17, (1999), p. 534.

<sup>56</sup> JC 12/22.

attack.<sup>57</sup> The affluent Medhurst household was able to afford the services of four barristers and a solicitor, some of whom may have been Granville's social clients. By contrast, if Old Bailey and Northern Assize litigants did employ counsel, typically they used just one barrister.<sup>58</sup> Most English litigants could not afford to retain a single lawyer, let alone five of them.

Kin, family and "friends" of the litigant could arrange for lawyers to both research and present British criminal cases. In 1829, for instance, Jonathan Martin's insanity defence was orchestrated by his brothers, who arranged for the respected pleaders Henry Brougham and serjeant Jones to appear at court.<sup>59</sup> The prisoner was unaware of the plea and was "highly exasperated when he heard of the defence his brothers were going to set up for him".<sup>60</sup> Martin had set fire to York Minster in a religiously motivated attack; he was convinced that his actions were ordained by God and therefore justifiable, exclaiming in court that "God would not chuse a madman to do His work".<sup>61</sup> Martin's sibling, also called John, was a fashionable and well-heeled artist during the 1820s. He sold a celebrated painting (called "Balshazzar's Feast") for £200 and owned a large house in a stylish quarter of London.<sup>62</sup> John Martin certainly had the financial means to manage the courtroom defence of his brother, and apparently did so against the wishes of the prisoner.

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<sup>57</sup> ASSI 41/10, *York Herald*, August 2<sup>nd</sup> 1800.

<sup>58</sup> Langbein, "Shaping", p.27.

<sup>59</sup> *Trial of Jonathan Martin* (1829).

<sup>60</sup> *London Morning Herald* 2<sup>nd</sup> April 1829.

<sup>61</sup> *Trial of Jonathan Martin* (1829).

<sup>62</sup> *DNB* XII, pp.1167-9. John Martin was official painter to Princess Charlotte and Prince Leopold.

England may have lacked a comprehensive system of public prosecution, but some types of victim began to receive legal aid over the course of the eighteenth century. "Prosecution associations" were formed in England with the common purpose of ensuring that apprehended suspects were accused formally. These associations could use common funds to employ lawyers, but this subsidy was not open to all victims. By the late eighteenth century, specific offences were subject to "public" accusation in England. "Pleas of the Crown" (arson, murder, rape, robbery and treason) could be prosecuted by lawyers who were employed by the government on the Crown's behalf.<sup>63</sup> Barristers who had been promoted to the position of King's or Queen's "Counsel" could lead the prosecution of these capital transgressions against the common peace. Lawyers were utilised so that these heinous offences were prosecuted effectively and that exemplary punishment was inflicted upon guilty felons.<sup>64</sup> Insanity and idiocy defences followed this broader trend. Of the hearings where prosecution barristers were recorded as being present, just over ninety-percent of them related to a "plea of the Crown" and seventy-percent were murder cases. In these trials, the interests of both the public and the victims (or family of the deceased) were represented by lawyers.

Some Northern Assize insanity hearings featured defence counsellors from at least the 1770s, despite the severe statutory constraints against their involvement before 1836.<sup>65</sup> Defence barristers appeared at the Old Bailey from the 1730s and in

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<sup>63</sup> Lemmings *Professors* p.212. Sedition was also subject to "public" prosecution.

<sup>64</sup> Gaskill "Providence" p.3.

<sup>65</sup> Beattie "Scales" p.205. Landsman "Rise" p.539. Langbein "Trial Jury" pp.307-314. Post "Defence Counsel" p.23. Defendants were allowed counsel in cases of Treason so that prisoners might avoid

greater numbers after 1750.<sup>66</sup> There were significant patterns to the types of case where representation was allowed (at the discretion of judge and prosecutor) in England. The consecutive hearings regarding James alias “Dutch” Michael Rice, at the Yorkshire Assizes between 1776 and 1777, illustrate the archetypical reasons why defence counsel might appear and be accepted during English criminal trials.<sup>67</sup>

The Dutchman Rice (or “Rijks”) had stabbed fatally his friend, Thomas Wastdell, in an unprovoked attack and in plain view of witnesses. Deponents recounted that Rice acted bizarrely after gouging Wastdell in the back; he stabbed himself (the knife “sticking on a rib”), beat his head with a stone, “threw off his Hatt and ran into the sea”.<sup>68</sup> Rice was apprehended and charged with murder. The prisoner appeared four times at the Yorkshire Assizes and was deemed unfit to stand trial in all but the last instance, when he was found guilty and sentenced to hang. Rice was represented by lawyers during both of his trials in 1776: in March by “Honest Jack” Lee and in July by a Mr. Withers.<sup>69</sup>

Lawyers argued successfully that James Rice was mentally incapable of standing trial at both of the prisoner’s hearings in 1776. British legal theorists held that sufferers of mental distraction or incompetence could not be tried whilst their

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malicious prosecutions and to counter prosecuting lawyers. Misdemeanours were petty offences and bore some strong similarities to civil court cases. Indeed, the involvement of pleaders in misdemeanours may well be related to civil court practice, where both litigating parties had the right to counsel. Garnham has demonstrated that counsel continued to be restricted to these sorts of crime in eighteenth century Ireland, *Crime* p.114.

<sup>66</sup> Beattie “Scales” p.225.

<sup>67</sup> *Trials ... (1776-1777)*. ASSI 41/7, ASSI 42/9, ASSI 24/32/2 nos. 135-140.

<sup>68</sup> ASSI 24/32/2 nos. 135-140.

<sup>69</sup> ASSI 41/7 and 42/9. *Trials ... Lammas Assizes (1776)*

afflictions lasted. Defence counsel most regularly appeared (and hence were most frequently accepted) during insanity and idiocy defences when a prisoner's mental capability of standing trial or organising their case was in doubt. In around two-thirds of twenty-five hearings where prisoners were represented by lawyers, the defence focused upon the prisoner's mental inability to stand trial, rather than their mental condition at the time of the crime (Table 9.2). Expert and lay witnesses concurred that Rice had recovered his senses by July 1777, which may explain why the prisoner was without counsel at his final, critical hearing. This suggests that a pre-trial evaluation of Rice's mental capabilities was undertaken to assess whether he ought to be granted legal counsel.

Focus of defence:	% of trials involving defence counsel
Insane at Crime	32
Insane at Court	68

*Table 9.2. Type of insanity or idiocy defence argued when the prisoner was represented by a barrister, Northern Assizes 1776-1829.*

By the 1810s, newspapers noticed instances where prisoners were insane at court and lacked legal representation.<sup>70</sup> It was thought odd that such prisoners should be asked to defend themselves at court without legal counsel, especially if they were incapable of conversing rationally. Arguably, such prisoners were in most need of legal representation, because mental afflictions were understood to rob persons of their reason, rendering the distressed individual unable to conduct their

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<sup>70</sup> See, for instance, the report of Elizabeth Ward's trial in the *York Herald*, 27<sup>th</sup> July 1816.

defence or understand the nature of legal proceedings. Such sentiments existed from at least the 1770s in northern England's courtrooms. This legitimisation of legal representation for insane and idiotic prisoners may have propagated a broader acceptance of defence counsel during eighteenth and early nineteenth century English criminal hearings.

Defences of insanity and idiocy broached fundamental legal principles. The centrality of these legal issues legitimised the involvement of defence counsel at court. As Blackstone commented, concerning transgressions other than misdemeanour or treason, prisoners in England were only permitted to employ courtroom counsel where "some point of law ... [arose] ... to be debated".<sup>71</sup> Simply put, barristers were most likely to be used and accepted where legal points were contested, such as criminal responsibility. In the cases studied, it was appropriate that prisoners be represented because their mental discomposure propagated discussions of criminal accountability. Thus, barristers were more likely to appear cases where a prisoner's sanity was debated than in straightforward criminal hearings where the prisoner's sagacity remained unchallenged. In this respect, eighteenth century insanity and idiocy defences helped to establish both the presence and role of defence counsel within England's criminal courtrooms.

As greater attention was paid to evidential rules over the course of the long eighteenth century, so the pleader's ability to understand and manipulate these points of law became paramount. In July 1776, defence counsel Withers reinforced

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<sup>71</sup> Blackstone Commentaries (1769) IV p.349.

his argument with persuasive proof (from the gaoler and gaol-surgeon) that Rice had been afflicted consistently with insanity for the previous eight months.<sup>72</sup> Withers therefore allayed fears that Rice feigned mental discomposure to avoid punishment. Even where prisoners' appearance, speech and deportment at court evinced mental distraction, long term observations were sought out in an effort to prove, "beyond a reasonable doubt", that the prisoner did not dissimulate mental affliction. The augmented courtroom presence of counsel was both a cause and effect of the evolving standards of proof within England's criminal processes.

English judges took the ultimate decision to allow counsel to plead and were most willing to assent to defence barristers where the prosecution was also represented. Barrister Alan Chambrè organised and presented the prosecution against Rice in July 1776. The bench allowed Withers as defence counsel to "balance" the trial and ensure that the prisoner was not undone by legal jargon. It will be illustrated later how Withers nullified Chambrè's case by expounding upon the law and attacking the expediency of the prosecutor's evidence, something which the (insane) prisoner was unlikely to achieve by himself. As Stephan Landsman has suggested, judges were most likely to accept forceful, antagonistic defences by counsel when prosecuting lawyers were present and hence liable to use similar tactics themselves.<sup>73</sup>

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<sup>72</sup> *Trials ... Lammas Assizes* (1776) pp.3-4.

<sup>73</sup> Landsman "Rise" p.503.

Rice's hearing in July 1776 would substantiate Penelope Corfield's suggestion that lawyers were employed recurrently to negate one-another during English trials.<sup>74</sup> Corfield claims that if a prosecutor was legally represented, for example, then the accused made a greater effort to procure counsel. This tautological argument is not reinforced by the small sample of northern English insanity cases that included legal representatives. Opposing barristers appeared in only eight of the twenty-three cases where counsel was recorded. Confrontations between lawyers occurred in one-third of all trials where pleaders were in attendance and such conflicts rose after 1820. Pleadings could be utilised to neutralise the impact of one-another before 1830, but in the majority of northern English cases studied, only one of the litigants employed counsel.

Offence:	% of all trials involving defence counsel:
Non-Capital	7
Capital	93
Murder	86

*Table 9.3. Defence counsel participation, by crime type, Northern Assizes, 1776-1829.*

Judges were most prepared to show discretion and allow the prisoner to be assisted by counsel where prisoners faced capital conviction.<sup>75</sup> As Blackstone implored, "what face of reason can that assistance be denied to save the life of a

<sup>74</sup> Corfield *Power and the Professions in Britain 1700-1850* p.70.

<sup>75</sup> Landsman "Rise" p.539. Beattie "Scales" p.223.

man, which yet is allowed ... in prosecution of every petty trespass?"<sup>76</sup> In northern English insanity defences, over ninety-percent of prisoners who were legally represented had committed capital offences (Table 9.3). The overwhelming majority of these capital offenders had committed murder, just like "Dutch Michael" Rice. This was significant, because convicted murderers faced a strong likelihood of being hung.<sup>77</sup> From 1512, murder ceased to be subject to the "benefit of clergy" in England and murderers were rarely shown post-trial clemency when compared with other crimes.<sup>78</sup> Rice was eventually found guilty of murder in July 1777 and was hung at York's "old gallows, without Mickelgate Bar".<sup>79</sup> Clemency could only be expected in murder cases where it was argued that a verdict was based upon insufficient or defective evidence; such legal matters were firmly within the remit of counsel's role before, during and after a trial had taken place. No such contentions were presented successfully on Rice's behalf. Courtroom debate was vital to determining the eventual punishment which was applied to capital offenders. Defence counsel was allowed in murder cases to provide prisoners with the greatest chance of exoneration, or at least of proving that they did not intend to kill the victim.

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<sup>76</sup> Blackstone Commentaries IV p.348. Blackstone here criticised a system that allowed defence counsel in cases of "misdemeanour" (which carried relatively light sentences), but that could refuse them in cases where the prisoner faced sentence of death.

<sup>77</sup> Beattie Crime p.433. This, in part, explains the proliferation of partial verdicts of "manslaughter" in cases where it seemed likely that the prisoner did commit murder, but the evidence was too slight to prove such guilt beyond a reasonable doubt.

<sup>78</sup> 4 Hen VIII c2. M. Gaskill Crime and mentalities in early modern England (2000) p.207 (fn 14 contains a list of statutes pertaining to murder). J.M. Beattie Crime and the Courts in England, 1660-1800, (1986) pp.433-436 suggests that under a quarter of murderers were reprieved at the Surrey Assizes between 1660 and 1800. Clemency was usually granted on the grounds of insufficient or defective evidence.

<sup>79</sup> Knipe Criminal Chronology, p.90.

*Why did counsel participate in specific circuit court trials?*

There were important patterns to the appearance and acceptance of counsel during English trials. The reasons why barristers and advocates appeared during circuit court insanity and idiocy defences must also be examined. Upon being called to the bar, British lawyers usually chose to attend a specific jurisdictional circuit.<sup>80</sup> Few advocates or barristers restricted themselves to provincial work; most lawyers established themselves in the lucrative legal hubs of Edinburgh and London. Ninety-five-percent of the barristers who appeared at the Northern Assizes in 1815 also practiced in London.<sup>81</sup> Familial roots could inform a pleader's choice of circuit.<sup>82</sup> Circuit courts were important social occasions. The northern English barrister, Nicholas Ridley, preferred to attend the balls and events connected to the Morpeth Races (which followed the Newcastle and Northumberland Assizes) rather than continue on the northern circuit beyond Carlisle.<sup>83</sup> Thus, an anonymous poet wrote of the Northumberland Assizes of 1751, "The LADIES handsome, brilliant, gay, To dance, took half the BAR away".<sup>84</sup> The revelry and ceremony which accompanied the Assizes established and re-affirmed a lawyer's personal, political and professional relationships in the provinces.

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<sup>80</sup> Duman Judicial Bench p.24. Lemmings Professors p.52. "Circuiteering" barristers usually continued to attend a single circuit throughout their careers.

<sup>81</sup> Duman "English Bar" p.97.

<sup>82</sup> *Ibid* p.96. Lemmings Professors p.51.

<sup>83</sup> Lemmings Professors p.55.

<sup>84</sup> Anon. A northern circuit described, (1751) p.24.

Integrated professional and political ties informed a pleader's choice of circuit and criminal case. In 1796, Alan Chambrè was promoted to the position of "Recorder of Lancaster" thanks to Tory patronage, which allowed him to prosecute cases at the Palatinate of Lancaster.<sup>85</sup> Likewise, Scotland's Advocates-Depute were selected upon notoriously politicised grounds.<sup>86</sup> British lawyers who adhered to Whiggish political and legal attitudes embraced the principle that prisoners ought to receive legal counsel. "Honest Jack" Lee's decision to represent James Rice, at Yorkshire in March 1776, was informed by such an outlook.<sup>87</sup> The impoverished, tramontane and mentally distracted Rice was an especially deserving subject of Lee's philanthropy, because the prisoner was incapable of organising his defence or comprehending England's legal processes. The acceptance of Lee's presence as defence counsel and his success in postponing Rice's trial were important ideological victories for English Whigs.<sup>88</sup> Lee countered a "public" prosecution that was prosecuted on behalf of a Tory administration by a Tory appointee, Alan Chambrè. Lee's important (if temporary) impact upon the prisoner's fate also vindicated beliefs in the necessity of defence counsel, as championed by a succession of Whig lawyers.

British pleaders and litigants might not meet until the court tribunal itself.<sup>89</sup> Legal agents (such as solicitors and WS) could organise cases and present briefs to

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<sup>85</sup> *DNB* IV p.30.

<sup>86</sup> Murdoch "Advocates" pp.154-157. Phillipson "Scottish Whigs" pp.16-22. Smith "Criminal Procedure" pp.432-436.

<sup>87</sup> *DNB* XI p.802. John Lee, (1733-1793).

<sup>88</sup> ASSI 41/7 and 42/9

<sup>89</sup> Phillipson "Scottish Whigs" pp.10-13. Ford "Brougham" pp.109-110.

superior court pleaders. These agents could select courtroom representatives for litigants and broad political dynamics could inform this selection process. By the 1790s, Scotland was gripped by a strong Tory political hegemony.<sup>90</sup> Tory dominion resounded through the legal professions, where promotion was preferred consistently to lawyers with Tory sympathies. Legal agents chose persistently to hand legal briefs to advocates with Tory, rather than Whig, sympathies. The selection of criminal pleaders could be infused by national and professional politics.

British legal professionals could imbue insanity defences with broader political and legal divisions. The furiosity defence of William Douglas, at Dumfries in 1795, reflected the politicised courtroom conflicts of late eighteenth century Scotland. Lord Braxfield, a Tory-appointed judge with a harsh reputation, sat on the bench.<sup>91</sup> Braxfield had presided over sedition trials at the Justiciary Courts during the late-1780s and early-1790s. Tory-appointed lawyers had prosecuted these crimes of political agitation against the Tory-dominated regime in Scotland. Braxfield and his fellow-benchers had been criticised for favouring the Tory prosecutions and dismissing summarily the arguments of (Whiggish) defence advocates.<sup>92</sup> Douglas' defence was led by "Harry Erskine", a renowned pleader and toast of the Scottish

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<sup>90</sup> Phillipson "Scottish Whigs" *passim*.

<sup>91</sup> Robert Macqueen, Lord Braxfield (1722-1799). William Craig, Lord Craig (1745-1813) also presided.

<sup>92</sup> Phillipson "Scottish Whigs" pp.16-24. Cockburn *Memorials* (p.83) noted the "indelible inequity" of the sedition trials. Cockburn, a Whig, was not a contemporary of Braxfield and would only have been sixteen years old when the first sedition trials took place, so his comments ought to be treated with caution. During the 1790s, those who had received Tory patronage in Britain, such as the leader of the English bench, earl Mansfield, commended publicly Braxfield's role in the trials. To Whigs, Braxfield's role became instructive of the dangers posed by an overpowering judiciary.

Whigs.<sup>93</sup> Erskine had appeared as defence counsel during sedition hearings and witnessed Braxfield's forceful activities first-hand. At Dumfries in 1795, Erskine argued persuasively that Douglas' complete loss of memory was indicative of a temporary aberration of reason and the "assize" reached a majority-verdict of furiosity.<sup>94</sup> Erskine had debated successfully a difficult case before Lord Braxfield, the judge who had previously negated defence counsel during the sedition trials. Douglas' defence revisited conflicts between Tory and Whig lawyers which were most evident during sedition hearings.

Political ideologies did not govern the course and outcome of all British insanity and idiocy defences. Only a minority of the English trials examined ever included legal representatives and adversary lawyers did not always hold to opposing politics, even in 1790s Scotland. The Yorkshire Assize hearing of Granville Medhurst, in 1800, featured opposing lawyers of Tory inclination.<sup>95</sup> Medhurst's defence was led by Edward Law, the leading contemporary northern circuit barrister whose practice was assured. The case was prosecuted by James Park, a King's Counsellor who was the pre-eminent prosecuting barrister of the northern circuit at the turn of the nineteenth century. Law and Park were professional rivals who appeared in a highly-publicised case which featured a local, wealthy gentleman. Lawyers could advertise their skills, enhance their professional

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<sup>93</sup> Henry Erskine (1746-1817).

<sup>94</sup> JC 12/22.

<sup>95</sup> York Herald July 2<sup>nd</sup> 1800. Law reconsidered his Whiggish allegiance during the 1790s; Pitt's Tory administration promoted Law to Attorney-General and Serjeant of the County Palatinate of Lancaster in 1793. Law was raised to the bench in 1802 and adopted the style of Lord Ellenborough. DNB XI pp.657-662. Park was less overtly political, but also received Tory patronage. Park was raised to the bench of Common Pleas in 1816. DNB XV pp.216-217.

prospects and guarantee future practice by appearing in such spectacular, high-profile hearings. British pleaders could accept cases because of professional considerations.

*The activity of pleaders at court*

When barristers participated during insanity and idiocy trials, greater consideration was paid to formal legal procedure and theory. Counsel could also make explicit references to the evidential rules which governed the admissibility of witnesses and the value of their testimony. Historians have argued that such barrister activity marked the advent of "adversarial" criminal procedure in England. It is contended that criminal trials were restructured and reconceptualised by the presence of counsel.<sup>96</sup> The appearance of lawyers altered the roles and input of the other principal actors of the courtroom drama, most notably the prisoner, witnesses and bench. This thesis can be tested in the context of northern English insanity defences and compared with contemporary Scottish trials.

Professional and political prejudice from the bench could nullify a pleader's efforts within the courtroom. Around the turn of the nineteenth century, Eskgrove was engaged in a persistent series of confrontations with the belligerent Scottish

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<sup>96</sup> Landsman "Rise" pp.500-502. Langbein "Trial Jury" pp.30-36. Beattie "Scales" p.229. Lemmings, Professors p.208.

advocate, Henry Brougham, at the Justiciary Courts. Brougham delighted in acting as a robust defence advocate before Eskgrove, who developed a strong antipathy for the man he monikered “the Harangue”.<sup>97</sup> Such rivalries could influence the Court’s decisions. Brougham earned the enmity of Eskgrove and the general distrust of the Scottish bench by acting in a manner which was perceived to be disrespectful to his legal superiors. These professional obstacles further damaged Brougham’s early career in Scotland. Already starved of patronage, promotion and practice owing to his piquantly Whiggish politics, these added professional impediments drove Brougham from both Scotland and (temporarily) the legal vocation.<sup>98</sup>

The internal politics of England’s legal profession also moulded barrister activity during trials. Professional prejudice was not always to the detriment of a lawyer or his case. Thomas Erskine’s famous defence of James Hadfield at the Old Bailey in 1800 was regarded as an extraordinary piece of advocacy.<sup>99</sup> The presiding bench allowed Erskine considerable latitude to challenge legal theories surrounding criminal responsibility. Erskine was a legal client and courtroom favourite of Lord Kenyon, the principal judge in Hadfield’s case.<sup>100</sup> This relationship may explain why Kenyon received the case for Hadfield’s insanity so readily. Hadfield’s case did not occur at the Northern Assizes, but it was suggestive of how personal and professional favouritism could play an important role within Britain’s courtrooms.

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<sup>97</sup> Cockburn *Memorials* (1856) pp.83-86.

<sup>98</sup> Brougham left Scotland in 1806. He served as a spy for Wilberforce in Spain before returning to England, entering the political sphere and being called to the English bar. Chalmers *Eminent Scotsmen* (1834) 3 (supplement) pp.571-574.

<sup>99</sup> Moran “Origin” pp.502-506.

<sup>100</sup> *DNB* VI p.855.

Professional pleaders appeared infrequently at England's Northern Assizes, but their presence could have a striking impact upon criminal hearings. Aggressive, confrontational conflicts of proof were more likely to take place when opposing lawyers were present at England's Assizes. This characterised an "adversarial" courtroom, as did lengthy debates about evidential standards and points of legal theory.<sup>101</sup> Within such antagonistic processes, litigants bore responsibility for producing proofs, increasingly through the medium of specialist legal advocacy.<sup>102</sup> The northern English insanity trials which featured a confrontation between barristers certainly contained these different elements, as did cases where only a single legal party was represented in court. The amplified appearance of barristers after 1800 therefore both reflected and informed the development of "adversarial" practice in England.

Legal representation could restrict the voice of English and Scottish prisoners at court. Scottish prisoners did not usually speak after pleading, because lawyers conducted their case. English prisoners without counsel were allowed to make statements in their own defence, but they rarely cross-examined witnesses and did not enter into lengthy legal debates concerning criminal responsibility and the nature of proof. English prisoners who left their defence to counsel could be restricted to acting as "witnesses" to their case, rather than conducting it.

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<sup>101</sup> Landsman "Rise" pp.500-502.

<sup>102</sup> *Idem.*

Stephan Landsman has argued that more witnesses were involved in English trials where lawyers were employed to organise and represent Old Bailey cases.<sup>103</sup> Legal professionals could undertake concentrated searches for suitable evidence and provide extensive lists of potential witnesses. The average number of testimonies per Northern Assize insanity trial which lacked counsel was six. Unusually high numbers of testimonies were heard in some English insanity defences which included legal professionals. At least sixteen witnesses took the stand during Jonathan Martin's sensational trial at York Castle in 1829, which was almost three-times the average.<sup>104</sup> But, in general, similar numbers of witnesses were examined in court whether pleaders were present or not. Barristers represented both prisoner and prosecution during James Rice's hearing in July 1776 and a total of five witnesses gave testimony at that hearing.<sup>105</sup> At the same Assizes, six testimonies were delivered at John Sutcliffe's trial, which involved no counsellors. The presence of legal representatives did not automatically affect the numbers of testimonies which were adduced during Northern Assize insanity defences.

It need not follow that an "adversarial" trial involved a greater number of courtroom testimonies, even if the hearing did become a highly confrontational affair between counsellors. When lawyers organised a case (either in a pre-trial or courtroom capacity), they utilised strategies which tailored the evidence to best suit

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<sup>103</sup> Landsman "Rise" p.530. On the rare occasions where southern Scottish pannels lacked counsel, the numbers of testimonies produced were not greatly affected, either. Most Scottish civil court cognitions only involved two or three witnesses, although a longer list of possible deponents could also be arranged.

<sup>104</sup> London Morning Herald 2<sup>nd</sup> April 1829. The average number of courtroom testimonies per Northern Assize insanity or idiocy defence was 6.

<sup>105</sup> Trials ... Lammas Assizes (1776) pp.3-6.

their brief. Where legally trained individuals were involved in England and Scotland, they chose the most persuasive testimony to underpin their arguments and destroy the opposition's case.<sup>106</sup> A legion of witnesses was not required necessarily to prove a case.

British pleaders employed the cross-examination of deponents to craft cases.<sup>107</sup> Lucid prisoners asked questions at court, but few provided effective cross-examinations.<sup>108</sup> In 1823, Andrew Ryding's attempts to examine witnesses were observed to be unusual and hence newsworthy.<sup>109</sup> A pleader's oral prowess, as well as their legal knowledge, could guide British criminal trials. Barrister Withers used cross-examination to promote his defence of James Rice, who was arraigned for murder at Yorkshire in July 1776.<sup>110</sup> Withers challenged the factual assertions of the prosecution witness, constable Anthony Thompson. Prompted by astute questions from a prosecuting lawyer, Thompson stated that Rice had been "in liquor", which exacerbated criminal transgressions in English law.<sup>111</sup> Thompson had also declared that Rice had "put on the appearance of madness" when arrested to avoid responsibility for his crime.<sup>112</sup> When the prosecution rested, Mr. Withers took Thompson to task:

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<sup>106</sup> Houston "Professions" p.20.

<sup>107</sup> Baker "Procedure at Criminal Law" pp.36-37. Landsman "Rise" p.534. Eigen Witnessing p.9. Lemmings Gentlemen and Barristers p.208.

<sup>108</sup> See my section on the role of the prisoners. Such a conclusion, of course, may be skewed by the available sources. The same point is made concerning trials in general by Beattie "Scales" p.232, Landsman "Rise" pp.534-7 and Lemmings Gentlemen and Barristers p.208.

<sup>109</sup> Lancaster Gazette, August 21<sup>st</sup> 1823. Cumberland Pacquet, August 25<sup>th</sup> 1823.

<sup>110</sup> Trials ... Lammas 1776 (1776) pp.4-5.

<sup>111</sup> Smith Trial by Medicine p.85.

<sup>112</sup> *Ibid* p.4.

*Mr. Withers:* Do you know if [Rice] had got any liquor?

*Thompson:* I was not with him, but he had got liquor.

*Withers:* Did you, yourself, see him take any liquor?

*Thompson:* When I first went to him there was a man bringing him a jack of gin.

*Withers:* How did he behave himself?

*Thompson:* He went very readily with me to the house [where he was confined initially].

*Withers:* What reason had you to believe he was drunk?

*Thompson:* I did not say he was drunk.

*Withers:* Did the soldiers beat him much?

*Thompson:* They did it to make him be still; I do think he was a man in his senses when I took him.

Withers' consistent badgering of the witness produced a definitive statement that Rice may have imbibed gin, but he was not robbed of his senses through alcoholic intoxication. So neither the prisoner's bizarre actions (such as running into the sea fully clothed) nor the murder could therefore be attributed to drunkenness. Thompson maintained that Rice had been sane when arrested, but the admission that Rice was sober allowed for the possibility that the prisoner had been mentally distracted. The impact of Mr. Withers' aggressive cross-examination was resonant a year later, at Rice's final trial in 1777. Thompson again bore testimony and the prosecution lawyer, Alan Chambrè, asked,

*Chambrè:* Upon the whole, did he appear to behave as man in his senses or not?

*Thompson:* I cannot say; but sometimes I thought he was very sensible, but I will not swear to say, I will not run the risque to swear he was so.<sup>113</sup>

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<sup>113</sup> *Trials ... Lammas Assizes (1777)* p.10.

Following Mr Withers' verbal barrage in 1776 and a year of reflection, Thompson altered his estimation of Rice's mental condition. Thompson's uncommitted response hindered Chambrè's prosecution in 1777. Hostile cross-examination could affect the testimony produced in northern England from the late eighteenth century onwards, just as at the Old Bailey.<sup>114</sup>

Mr Withers' activity illustrates that legal representatives were not restricted merely to questions about the law during cross-examinations, for questions could challenge factual assertions too. In practice, the boundary between "fact" and "law" could be indistinct. Lawyers were adept at cloaking factual criticisms with arguments about points of law. Such practice was again evident at Rice's trial in July 1776. Prosecutor Chambrè introduced three witnesses to prove that Rice's insanity was a deceptive sham.<sup>115</sup> All three of these testimonies focused plainly upon Rice's state of mind "when Thomas Westell was killed". No questions, either from Chambrè, the judge, jury or Withers probed the prisoner's fitness to stand trial. Yet in his summary, Mr Withers argued deftly that the trial ought to be postponed on legal grounds, addressing the courtroom, "May it please your Lordship, and you, Gentlemen of the Jury, to indulge me with a few words in behalf of this poor unfortunate prisoner now at your bar. The question for you to try is, not whether this poor man was insane or no, at the time when the melancholy affair happened, *but whether he is now in a state of insanity*".<sup>116</sup> Withers' reference to the

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<sup>114</sup> Beattie "Scales" *passim*.

<sup>115</sup> *Trials ... Lammas Assizes* (1776) pp.4-5.

<sup>116</sup> *Ibid*, pp.5-6. My emphasis.

“melancholy affair” evoked impressions that the murderer was insane, for “melancholy” could mean both mad and sad.

The main thrust of Withers’ argument contended that the relevant point of law was Rice’s ability to stand trial, not his state of mind when committing the offence. Withers then outlined the law regarding criminal responsibility, which dictated that prisoners could not be tried whilst they were insane.<sup>117</sup> Withers continued by drawing attention to the “insensible” appearance of the prisoner and summarised the strong evidence of insanity provided by the gaoler and gaol surgeon.<sup>118</sup> Withers toyed with Chambrè’s case and then delivered a swift *coup de grace*, declaring astutely that “none of their witnesses speak to any time during [Rice’s] confinement” and that “the prosecutor has not called a single evidence to prove that this man is not now insane”. Chambrè’s case was outflanked and routed by Withers’ adroit argument. The jury found Rice insane and his case was postponed until the following Assizes.

Withers’ pursuits also demonstrate that barristers could summarise cases to juries, despite regulations restricting such activity in England.<sup>119</sup> Summations were allowed because they focused upon points of law; Withers’ *précis* addressed legal principles of criminal responsibility and protested that the prosecutor’s case was irrelevant. Defence counsel could manipulate successfully the law concerning insanity to counter legally represented prosecutions. Withers’ assertions were

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<sup>117</sup> *Idem.*

<sup>118</sup> *Idem.*

<sup>119</sup> Beattie “Scales” pp.253-254.

grounded in legal theory, but he denigrated implicitly the “facts” produced by prosecution witnesses. In practice, courtroom pleaders could extend their role beyond objections which concerned points of law.

Evidential tenets evolved during the long eighteenth century. British counsel paid close attention to the “rules of evidence”, selecting their proofs carefully and scrutinizing those laid against their case. Fierce debates could arise concerning the value which ought to be attached to certain testimonies and testifiers. Legal counsellors recognised that community consensus proved persuasive in the authentication of prisoners’ mental conditions through to 1830. By the late eighteenth century, Britain’s bars also highlighted the shortcomings of “hearsay” testimony and promoted the corroborative value of expert opinion. These developments have been considered elsewhere in this thesis, but lawyers’ perceptions of the worth of expert evidence deserves further attention. It has been contended that medical authority in the courtroom was promoted by lawyers, rather than by a proactive and aggressive medical profession that sought to wrestle the identification of mental conditions from the legal profession. Joel Eigen has argued that, from 1760, England’s barristers promoted the value of expert opinion during Old Bailey insanity defences.<sup>120</sup> Barristers also initiated and endorsed the qualitative weight of medical testimony at the Northern Assizes from at least the 1770s onwards.

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<sup>120</sup> Eigen *Witnessing* p.133.

At James Rice's hearing in July 1776, defence counsel Withers challenged directly the lay person's ability to authenticate insanity. Upon arresting Rice, constable Thompson deemed that the prisoner was drunk rather than insane. Thompson added that soldiers had beaten Rice "to make him be still".<sup>121</sup> Initially, Withers specified that the witness never saw Rice "get any liquor to make him drunk". Addressing the jury, Withers destroyed Thompson's evidence, "[Thompson] perceived some inconsistencies in [Rice's] behaviour, that induced him to suppose he was drunk; but in fact he was in a state of insanity ... Gentlemen, he has told you a great deal respecting the soldiers beating the prisoner, which made [Rice] sober: Will beating make a drunken man sober? No, but I appeal to you all, that beating will frequently strike awe upon a man who is insane, and will make him quiet and sulky, and shew himself more rational than at other times".<sup>122</sup> Withers challenged explicitly this lay person's ability to distinguish between insanity and drunkenness. The defence counsellor continued to pick apart lay testimonies, highlighting how Rice's behaviour, speech and appearance were indicative of insanity. By challenging lay evidence, Withers reinforced the detached, long term observations of the expert witnesses that he adduced. Gaoler Clayton and gaol-surgeon Stillingfleet were convinced that Rice was insane and unfit to plead. The barrister's activities enhanced the qualitative value of expert opinion, suggesting that it was more persuasive in the authentication of mental conditions than untrained lay persons. Withers contended that lay persons could misinterpret the mental state of prisoners.

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<sup>121</sup> *Trials ... Lammas Assizes* (1776) pp.3-7.

<sup>122</sup> *Ibid* p.6.

English and Scottish counsel operated in some similar ways, such as the cross-examination of witnesses. Scottish defence and prosecution advocates summarised cases more regularly than English barristers. Concluding “addresses” followed a coherent pattern, whereby synopses were delivered firstly by the Advocate-Depute, then on the pannel’s behalf and finally by the judge. Advocates could reinforce their arguments with a succinct supposition of the evidence and their case immediately before the verdict was considered by the “assize”. Such reviews ended and fortified the courtroom deliberation of a prisoner’s mental condition.

The “Romano-Civilian” influences upon Scottish procedure meant that advocates could also act distinctly from English barristers. Justiciary Court hearings began with legal debates between advocates (the “relevancy”), before the “assize” was empanelled formally. During furiosity trials, these opening discussions focused upon legal theory and evidential criteria. English barristers argued in the presence of a jury, but Scottish lawyers could debate confrontationally the “relevancy” of cases before the judge, rather than the jury.

The trial of Thomas Towart, at Ayr in 1713, illustrates this aspect of Scottish procedure. Towart was indicted for the gruesome murder of John Miller, a five year old son of a family in Amlaird with whom he had lodged.<sup>123</sup> After Towart had been unshackled, Advocate-Depute Thomas Hamilton opened his case by “repeating the

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<sup>123</sup> JC 17/4 and 13/4.

lybil” of murder laid against the prisoner.<sup>124</sup> George Smollet, the solitary defence counsel, denied the libel as produced and then criticised Towart’s “extrajudicial” confession as insubstantial evidence.<sup>125</sup> More specifically, Smollet attempted to introduce a defence of furiosity, describing how Towart had been, “bound in Chains, and did goe up and down the Countray like a madman not speaking or not answering to the purpose when spoke to”. Smollet added that, “by the civil court madmen are putt in the same Class with Infants and are not punishable for what they do”.<sup>126</sup> The prosecution responded that Towart’s flight from the scene was indicative of sanity and that he “behaved in his right witts”.<sup>127</sup> Smollet reacted with a strong invective, drawing upon Mackenzie’s Matters Criminal and arguing that “a man once furious and distracted ought to be presumed still to be distracted except it could be proven that he had again come to his reason”.<sup>128</sup> Towart had committed a capital crime, but Smollet demanded that the sentence ought to be “restricted to ane arbitrary punishment”, rather than death.<sup>129</sup> The bench allowed the defence of furiosity to be argued before the “assize”. Towart was eventually found guilty and hung for his crime, but Smollet succeeded in persuading the judge that the prisoner’s insanity was a relevant defence.

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<sup>124</sup> JC 13/4.

<sup>125</sup> George Smollet of Inglisoun, (1708-1744).

<sup>126</sup> JC 13/4.

<sup>127</sup> *Idem.*

<sup>128</sup> *Idem.* This echoed Mackenzie Matters Criminal (Edinburgh 1678) I, I, VIII p.16: “Yet, when a Man is once proved to have been furious, the Law presumes that he still continues furious, till the contrair be proved, for Madness is but too sticking a Disease; and is seldom ever cured ... and this presumption should rather hold in the committing of Crimes, than in any thing else; for the committing of a Crime, looks liker the madness, than the lucid Intervals.”

<sup>129</sup> *Idem.*

The “viva voce” manner by which the defence and prosecution advocates in Towart’s case delivered their relevancy arguments marked a change from late seventeenth century practice. At the High Court trial of Philip Standsfield in 1688, the prosecuting advocate George Mackenzie had dictated a written account of the relevancy.<sup>130</sup> This was the regular form of procedure until 1695, when arguments began to be presented “viva voce”, with written informations being entered afterwards.<sup>131</sup> This enhanced reliance upon oral delivery marked a key development in the role of Scottish counsel. It also signified a shift away from the dominance of written legal processes which typified Continental, Romano-Civilian traditions. After 1695, the pleader’s ability to improvise oral arguments was tested more fully at court.

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<sup>130</sup> JC 2/7, Edinburgh, February 1688.

<sup>131</sup> Smith “Criminal Procedure” p.439. This latter form of process was ratified within the Heritable Jurisdictions (Scotland) Act of 1747; 20 Geo II c43.

*How the involvement of pleaders affected the outcome of hearings*

English litigants who employed counsel were not guaranteed to be successful in their cause.<sup>132</sup> In 1806, Peter Atkinson stood accused of assaulting and intending to murder a fellow-servant, called Betty Stockdean, at Swillington in the West Riding of Yorkshire. No prosecution barrister appeared, but Atkinson was represented by Mr Williams, who attempted to prove that the prisoner had been insane when attacking his victim. Williams could find no persuasive evidence of Atkinson's troubled mind to reinforce his case. The lawyer found a single comment made by Betty Stockdean in her deposition, where she referred to her attacker as being "crazed". This unsubstantiated evidence was very poor proof of insanity and did not impress judge or jury. Williams' bogus defence failed and Atkinson was found guilty.<sup>133</sup> The use of lawyers did not guarantee success, even when the courtroom opposition lacked counsel.

Mr Williams' fallacious legal argument raises a critical issue concerning mental distraction as a criminal defence: that madness might be shammed by prisoners or argued craftily by lawyers to avoid guilty verdicts. Successful, deceptive pleas of insanity are difficult to detect, unless contemporary reports doubted the veracity of the defence. Williams' efforts illustrate that fraudulent insanity defences were undertaken. It seems likely that such nefarious manipulations of legal principles were successful infrequently, because insanity defences required a consensus of lay

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<sup>132</sup> ASSI 45/43. York Herald March 22<sup>nd</sup> 1806.

<sup>133</sup> *Idem*.

evidence (possibly, but not necessarily, reinforced by “expert” opinion) to be convincing. Fears about the dissimulation of insanity persisted in Britain, but it was also believed widely that troubling mental conditions did exist and rendered prisoners unaccountable for their actions. In the vast majority of successful insanity and idiocy defences, the weight of testimony meant that prisoners were perceived to suffer truly from debilitating mental conditions.<sup>134</sup>

Despite Williams’ failure in 1806, the use of defence counsellors decreased the chances of insanity defences failing at the Northern Assizes. The prisoner’s insanity was proven in around ninety-percent of cases where barristers led the defence. Only sixty-four percent of such defences succeeded where the prisoner lacked counsel. English defence lawyers countered prosecution barristers successfully. Such “adversarial” confrontations between lawyers only occurred in eight northern English trials before 1830, all after 1775. The prisoner’s mental distraction was proven in every single case, even when prosecutors outnumbered defence counsel. Defence barristers were employed to counter prosecution lawyers in a tiny proportion of cases, but they did so effectively. The success of defence barristers in pleading insanity or idiocy may have encouraged prisoners to utilise such legal representatives at the Northern Assizes. By comparison, only five of the thirty-three southern Scottish defences which were conducted by an advocate failed, with the prisoner being found guilty and fully responsible for their actions.<sup>135</sup> This meant

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<sup>134</sup> Houston “Class, Gender” pp.58-59.

<sup>135</sup> Furiosity and fatuity could, of course, be argued in full or partial mitigation of punishment. These figures include both types of defence; I have interpreted a “success” by a defence Advocate to

that around fifteen-percent of Scottish furiosity and fatuity defences which were led by advocates were unsuccessful between 1708 and 1829. These findings suggest that defence counsellors could have an important impact upon British insanity defences.

Lawyer representation (1756-1829)	Dominance (Number of trials):	Dominance (Proportion of trials):
Prosecution:	13	53%
Defence:	8	28%
Appeared in equal numbers:	5	19%

*Table 9.4. Dominance of legal representatives in northern England, 1756-1829.*

The exceptional success of defence lawyers during northern English insanity and idiocy defences might suggest that prosecution lawyers had little positive impact upon verdicts. Even when prosecution lawyers were present and prisoners lacked legal representatives, guilty verdicts were not produced regularly. But prosecuting lawyers had not necessarily “failed” when prisoners were found to be mentally incompetent. Verdicts of mental ineptitude could secure the custody of offenders, potentially for the remainder of their lives. Mr. Stanhope’s motions to secure the “safe custody” of James Ridley and John Windle during the 1750s were indicative of such an agenda.<sup>136</sup> Stanhope’s argument reflected desires that the responsibility for the supervision of dangerous lunatics should be affixed to the

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include those cases where guilt was asserted but punishment was mitigated owing to “partial” insanity.

<sup>136</sup> ASSI 41/4 and ASSI 42/7, Yorkshire, March and July 1755 and March 1756. Stanhope’s role was reminiscent of a civil court action, which might suggest that the initial activity of criminal court barristers during insanity defences was borrowed from civil court practice and traditions.

offender's parish of legal settlement, as directed by England's poor laws.<sup>137</sup> The prosecutor's strategy could wish to ensure that the prisoner could not re-offend, rather than seeking blindly a guilty verdict. Such actions were informed by the legal principle that mentally disturbed persons should not be held responsible for transgressions.

Political considerations could also affect the potency of a prosecution led by barristers. The prosecuting lawyers at Jonathan Martin's trial in 1829 were instructed to press for a verdict of insanity, rather than proving the prisoner's guilt.<sup>138</sup> Martin had clambered nimbly into York Minster one February night and set fire to the edifice. Martin held to extreme religious beliefs and had wished to purge the Church of what he perceived to be idolatrous, immoral sinfulness. To conformists and less radical non-conformists alike, Martin's actions represented the dangers which religious enthusiasm posed to the social fabric and spiritual order.<sup>139</sup> An insanity verdict held the greatest potential to diffuse a case which carried such religious and political potency. Martin's insanity could explain his radical religious beliefs and destructive behaviour. Some witnesses doubted that Martin was insane, but the most persuasive testimonies proved the prisoner's delusions. Newspapers accepted the verdict and there was no public outcry against any alleged injustice. Insanity was perceived to exist and was understood to have afflicted Jonathan Martin, ensuring that he became an exhibit of wonder and pity at St Luke's Hospital

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<sup>137</sup> Bartlett Poor Law of Lunacy pp.33-36, 112-121 and 246-49. See Houston "Poor Law" for a Scottish commentary.

<sup>138</sup> Trial of Jonathan Martin (1829).

<sup>139</sup> D. Hempton, Religion of the People. Methodism and popular religion c1750-1900, (1996), p.50.

in London until his death in 1838.<sup>140</sup> The prosecution may have desired an insanity verdict, but the prisoner's disturbed mental condition was not invented to suit their case.

Prosecuting lawyers did not necessarily act in partisan manners during insanity and idiocy defences. English prosecutors could be consulted by the judge about the admissibility of defence counsellors. Where they acquiesced, prosecuting barristers acted discretionarily and accommodated the interests of the accused. Even where the only attendant barristers appeared for the prosecution, they could argue impartially that the prisoner was mentally disturbed. To take one example from March 1828, Margaret Paisley had "no legal advisor" when she stood trial at the Westmoreland Assizes.<sup>141</sup> Paisley had confessed to stabbing her child whilst sharing a cell of the Milnthorpe Poor House in October of 1827.<sup>142</sup> The prosecution was undertaken by Mr. Courtenay, "at the instance of the Parish Officers" and he began by addressing the jury with the persuasive evidence of the murder itself.<sup>143</sup> Thereafter, Mr Courtenay sought to prove that Paisley had been mentally distracted, rather than pressing for her guilt. Courtenay concluded his opening statement by "humanely suggesting that the act was that of an insane person" and then produced evidence "which left no doubt of the unfortunate person's insanity".<sup>144</sup> Paisley's hearing resembled an inquisition to prove her mental imbalance. There was no

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<sup>140</sup> Jonathan Martin (1782-1838), *DNB* XII pp.1172.

<sup>141</sup> *Cumberland Pacquet*, March 11<sup>th</sup> 1828.

<sup>142</sup> *Carlisle Patriot*, March 8<sup>th</sup> 1828. *Cumberland Pacquet*, March 11<sup>th</sup> 1828.

<sup>143</sup> *Cumberland Pacquet*, March 11<sup>th</sup> 1828. The parish officers, Governor and staff of the Poor House may have desired a verdict of insanity to somehow absolve them of any blame for driving the prisoner to commit the crime.

<sup>144</sup> *Idem*.

doubt that Paisley had attacked her child with a penknife, but Courtenay recognized that she was insane and therefore could not be held accountable for her actions. In tribunals such as these, where the prosecuting lawyer was unopposed by counsel and there was no living victim to compensate, the barrister did not automatically adopt an “adversarial” approach.

Nor did Scottish trials always acquire “adversarial” tones. Advocate-Deputes could ensure that prisoners received legal assistance, as occurred in the trials of James Blaikie (Jedburgh, 1752) and Janet Thompson (Ayr, 1761).<sup>145</sup> These public prosecutors upheld the principle that Scottish prisoners were entitled to legal counsel. Prosecuting advocates could also instigate and prove the “panel’s” fatuity or furiosity defence, rather than demonstrating that the prisoner was guilty. Advocate-Depute John Grant argued that prisoner John Burton was delirious and incapable of being tried for housebreaking and theft at Jedburgh in 1747.<sup>146</sup> Grant did not pursue the victims’ interests ahead of the dogma that Burton was mentally unfit for trial. Scottish fatuity and furiosity hearings did not feature automatic confrontations between lawyers, who introduced conflicting legal cases at court.

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<sup>145</sup> JC 12/7 and 12/10.

<sup>146</sup> JC 12/5.

### *Conclusions*

Autogenous legal traditions and procedures meant that legal counsel had different quantitative impacts in England and Scotland during the long eighteenth century. Victims and defendants were represented regularly by lawyers at Scotland's Court of Justiciary. The consistent presence of public prosecutors in Scotland was evocative of contemporary Continental legal systems and reflected the strong influences of "Romano-Civilian" traditions upon Scots law. Defence counsel was involved from an earlier date in Scotland than in many European codes, however. Forthcoming work ought to consider whether Scotland exported as well as imported practices and theories, in both the British and European theatres of law.

Legal representatives were involved in a far smaller proportion of criminal hearings in England, including the Northern Assizes, when compared with Scotland's Justiciary Court. English barristers were most likely to be allowed in cases which promulgated points of law, such as criminal responsibility and the evidential criteria which were needed to prove mental incapacity. In England's sanction-specific legal environment, lawyers might appear according to the kind of offence committed and the sentence faced by the prisoner. Prosecuting counsel was most evident in "Pleas of the Crown", which carried capital sentences. Most prisoners who were represented legally had also committed capital transgressions, particularly murder. Formal post-trial discretionary measures were limited for

murderers, so counsel was allowed because the prisoner's fate could be sealed by the courtroom debate and jury's verdict.

The social and economic status of English prisoners impinged upon whether they employed courtroom counsel. A broader section of English society was willing and able to retain barristers by the early nineteenth century. Such social characteristics also determined the numbers of representatives who appeared during cases in both Scotland and England. The enhanced supply of circuiting counsel also encouraged demand for their services by the late eighteenth century. Barristers and advocates could select circuits and appear during criminal cases owing to political and professional considerations. High-profile cases, such as well-publicised insanity defences, could enhance a lawyer's occupational prospects. Britain's legal professions were also riddled by micro- and macro-political divisions. Political concerns and ideologies could dictate the presence of particular lawyers during some criminal cases. Legal professionals could politicise hearings by importing intersected legal and political conflicts into the courtroom with them, alongside personal amities and antipathies.

English and Scottish counsel operated in similar ways during insanity and idiocy defences. Within the context of evolving standards of evidence, both bars sought selective and persuasive testimonies to prove cases "beyond a reasonable doubt". British counsel could cross-examine witnesses and summarise their arguments, although advocates undertook the latter more regularly than barristers.

Legal representatives could be restricted formally to legal debates, but the boundary between “fact” and “law” was indistinct where the prisoner’s mental state was debated. British bars could denigrate implicitly the factual assertions of witnesses. Britain’s counsellors also operated in divergent manners, owing to distinctive legal procedures. At the Court of Justiciary, advocates could open hearings with fierce legal debates during the “relevancy”, which was settled by the judge rather than the jury. England’s barristers always argued in presence of a jury, but Scotland’s advocates could act confrontationally before the “assize” was empanelled.

Counsel activity affected the contributions of other courtroom participants. Prisoners were less directly involved in the presentation of their cases when legally represented. Opposing counsel could counteract one-another’s arguments. In England, the involvement of counsel altered the structure of criminal trials and marked the advent of “adversarial” legal processes.<sup>147</sup> A barrister’s courtroom impact could be directed by the presiding judge’s personal opinion regarding the role and necessity of counsel. But some judges did not lead trials so vociferously when counsel were present. English judges were not restricted to being passive umpires before 1830, but the establishment of proofs could be driven by counsel rather than bench. Evidential discussions typified “adversarial” contests between counsellors. Legal representatives initiated and augmented perceptions that expert testimony carried enhanced qualitative worth at court. From at least the 1770s, legal representatives at the Northern Assizes instigated doubts that lay persons could authenticate mental afflictions and suggested that jurors ought to pay heed to expert

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<sup>147</sup> Landsman “Rise” p.501.

opinion. Similar developments have been charted at the Old Bailey from the 1760s.<sup>148</sup> These findings indicate that the emergence of medical testimony during insanity defences was driven by legal professionals, rather than a remedial profession which sought actively to wrestle the identification of mental afflictions from lay persons.

Counsel represented one cog in the mechanics of Britain's criminal processes and a component that was largely inactive in England. Nevertheless, the assessment of the prisoner's mental capacities could be shaped by such counsellors in Britain. Conclusive analysis regarding "success-rates" of defences which were led by counsel is tempered on two accounts. Firstly, abortive arguments by English counsel may have gone unrecorded in the source materials examined. Secondly, prosecutors might seek to prove the prisoner's mental incompetence rather than establish their guilt. The use of legal representatives did not guarantee the litigant's success at court, although British defence counsel were effective in proving the prisoner's mental affliction and countering prosecution-lawyers. The apparent success of English defence counsel during insanity and idiocy defences may have propagated the acceptance and necessity of defence barristers in other kinds of criminal trial by the 1820s.

This study opens avenues for future research. The courtroom role of Britain's bars has been considered, but the pre- and post-trial activities of legal professionals

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<sup>148</sup> Eigen *Witnessing* p.133.

demand closer attention.<sup>149</sup> Further research upon the lower echelons of the legal occupation must be examined to understand their relationship with the superior courts and courtroom pleaders. This thesis treats England's Northern Assizes and the south circuit of Scotland's Justiciary Court as "global" entities, providing comparisons to the broad trends which have been published for Edinburgh and the Old Bailey. This approach obscures the regional differences in lawyer participation. Source material may obscure barrister activity, but printed narratives suggest that very few insanity defences that were entered at the Cumberland or Westmoreland Assizes included pleaders before 1830. Further, localised research is required to appreciate the vocational labour of legal professionals within a provincial context.

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<sup>149</sup> Jackson, "“It begins with the goose and ends with the goose”: Medical, Legal and Lay understandings of Imbecility in *Ingram v. Wyatt*, 1824-1832", *SHM*, 11, (1998), pp.361-363.

## 10.

***Mentally disturbed prisoners and the coordination of their criminal hearings.***

*“Please you, my Lord Judge, to hear a poor prisoner: - Why you see here, I am a poor outlandish man, and I fancy that I have been in a very bad condition...”<sup>1</sup>*

Some histories of crime have portrayed criminal defendants as passive victims of the criminal processes, unable to shape their hearings significantly.<sup>2</sup> Such interpretations have been deconstructed by research which has shown that defendants could interact with legal proceedings and influence criminal hearings.<sup>3</sup> Joel Eigen has demonstrated that Old Bailey prisoners were involved in the coordination of their own insanity cases.<sup>4</sup> Provincial English and Scottish prisoners could also manage and present criminal defences. Prisoners did not have to be mentally incompetent at court for insanity defences to be successful. Observers could perceive prisoners to be “in their sound mind and senses” whilst on trial, but to have been mentally distracted whilst committing crimes.

Michel Foucault’s challenging thesis highlighted the study of the sufferers as a viable avenue of research within the broader history of mental affliction.<sup>5</sup> Foucault

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<sup>1</sup> Trials ... Lammas Assizes (1777) p.9.

<sup>2</sup> McLynn Crime and Punishment *passim*.

<sup>3</sup> King Crime and “Punishing assault” *passim*.

<sup>4</sup> Eigen Witnessing p.161-181.

<sup>5</sup> Foucault also suggested that historians must focus upon physical indications, such as the prisoner’s appearance and behaviour, as well as their speech. Foucault Madness and Civilisation. See also Gordon “Histoire de la Folie” p.37. A. Ingram Madhouse of Language. Writing and Reading Madness in the Eighteenth Century, (1991), pp.10-12. A. Still and I. Velody “Introduction” in Still and Velody (eds.) Rewriting the History of Madness. Studies in Foucault’s “Histoire de la Folie”, (1992), p.3.

also suggested that a rational discourse could not be entertained between persons who suffered from insanity and persons who did not. According to Foucault, insane persons were deemed to be incapable of employing intelligible language.<sup>6</sup> This theory was replicated by “anti-psychiatrist” scholars, such as Thomas Szasz, who argued that the concept of mental distraction was invented and applied oppressively to control persons who failed to conform to social norms.<sup>7</sup> According to these theses, sane persons perceived sufferers from insanity to be devoid of rational values.

This study tests these hypotheses in the context of provincial criminal defences of insanity. Following Allan Ingram’s analysis of eighteenth-century literature, it is questioned whether sanity and insanity was so clearly distinguished by an ability or inability to employ rational discourse.<sup>8</sup> Contemporary understandings of the transitory nature of insanity suggest that sufferers from mental afflictions could interact rationally during extended periods of lucidity. Mentally afflicted persons could therefore construct criminal defences reasonably during lucid spells. Roy Porter has also criticised Foucault’s thesis for failing to recognise that insanity could be understood as the misapplication of reason (as argued by Locke, for instance), rather than the complete loss or absence of this mental faculty.<sup>9</sup> Contemporary concepts of “delusion” and ideas that insane persons might appear to

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<sup>6</sup> Ingram *Madhouse* pp.4-18.

<sup>7</sup> Szasz *Myth* p.10 and *Manufacture* pp.14-18.

<sup>8</sup> Ingram *Madhouse* pp.10-14.

<sup>9</sup> Porter “Foucault’s Great Confinement” pp.119-122. Gordon “Rewriting” p.180 has defended Foucault’s work in this respect and argued that he did consider madness as the error as well as the loss of reason. Once again, the faulty and incomplete translation of Foucault’s original thesis has confounded academics but sparked a lively series of debates.

argue rationally, but from false premises, will be considered. Such theories contended that insane persons might use structured and intelligible language, but towards unreasonable goals.

Prisoners who were unfit mentally to stand trial were incapable of pleading or engaging rationally with legal processes. British defendants were expected to plead either “guilty” or “not guilty” at the outset of their hearings and a failure to do so could lead to their mental state being investigated.<sup>10</sup> In 1777, a Yorkshire jury believed that James Rice’s silence at the bar was indicative of insanity.<sup>11</sup> Inability to employ language rationally or intelligibly could also signal that the prisoner was idiotic or insane. At Appleby in 1829, William Luss ranted upon a nautical theme, exhorting imaginary crewmen to “Heave the lead”, instead of pleading. Luss’ verbal pandemonium convinced onlookers of his mental distraction.<sup>12</sup> A sudden change of plea could also suggest mental confusion.<sup>13</sup> David Brown altered his plea to “guilty” at Jedburgh, against the advice of his counsel, who had presented a sound defence of mental incompetence.<sup>14</sup> This irrational action was indicative of Brown’s imbecility. It was perceived that persons who were mentally afflicted at court could not make reasonable choices and did not comprehend the nature of legal proceedings.

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<sup>10</sup> Eigen Witnessing pp.165-166. Houston Madness pp.357-359.

<sup>11</sup> Trials ... Lammas Assizes (1777) p.9.

<sup>12</sup> Carlisle Patriot March 7<sup>th</sup> 1829.

<sup>13</sup> *Idem.*

<sup>14</sup> Kelso Mail September 22<sup>nd</sup> 1828.

Richard Routledge's failed insanity defence, at Cumberland in 1824, reinforced perceptions that persons who were troubled mentally at court were incapable of coordinating systematically their defences.<sup>15</sup> The court assessed Routledge's mental state after he declared "I pay turnpike!" instead of pleading directly. At the end of the trial, Routledge was aware that no persuasive testimony of his insanity had been offered. Whilst the jury "turned to deliberate", the prisoner instructed that further witnesses be adduced to prove his mental unfitness to stand trial. A reporter noted that Routledge organized his defence rationally and therefore "conducted himself ... not at all like a mad man". The judge recognised this and advised the deliberating jury, "I think if you look into the dock, gentlemen, you will see enough to determine the question". Routledge was found sane and guilty of sheepsteft. Routledge had been conscious of his failing defence of insanity and was able to manage his case reasonably. These actions had betrayed Routledge's dissimulation.

Contemporaries understood that insanity could be a transient affliction. It was recognised that prisoners could be insane whilst committing crimes but return to their senses afterwards and therefore be capable of organising their defences. In 1795, William Douglas shot and killed Archibald Little in Park, Dumfriesshire.<sup>16</sup> It was argued successfully that Douglas was insensible whilst perpetrating the crime. Douglas had no recollection of "having been in company with ... the defunct [deceased] any time this day and [knew] nothing of the matter, and had nothing to

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<sup>15</sup> Carlisle Patriot August 28<sup>th</sup> 1824.

<sup>16</sup> JC 12/22.

do with the man's death".<sup>17</sup> Such a loss of memory was equated with unsoundness of mind. Douglas' sanity returned whilst he lay in gaol and he coordinated his own defence. Douglas requested "Letters of Exculpation" and signed a list of sixty-six witnesses to prove his insanity. Only sane persons were deemed capable of endorsing such binding legal documents. Douglas was also sane at his court hearing, for his fitness to plead and receive judgement was never questioned. Douglas' case illustrates contemporary British perceptions that insanity could be an ephemeral condition. Prisoners afflicted by insanity could enjoy lucid spells and could therefore engage rationally with legal proceedings and coordinate their defences in a structured, reasonable manner. British prisoners who received verdicts of insanity could be highly active within the legal process of authenticating their mental state.

Some sufferers from insanity, such as Douglas, were not robbed permanently of their abilities to reason and converse intelligibly. This challenges Michel Foucault's sweeping assertion that no viable discourse could exist between the sane and sufferers from mental afflictions.<sup>18</sup> Douglas was able to interact normally once he returned to his senses. Douglas could recount, using comprehensible language, how his affliction rendered him senseless. Prisoners who organised or presented their own insanity defences were not "labelled" involuntarily as sufferers from mental afflictions. Insanity was not always authenticated via an oppressive discourse and

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<sup>17</sup> JC 26/282.

<sup>18</sup> Foucault Madness and Civilisation (transl) *passim*. See also Midelfort "Madness and Civilization" pp.249-251. Ingram Madhouse pp.5-6.

against the interests of the afflicted person, as contended by “anti-psychiatrist” scholars.<sup>19</sup>

Apart from coordinating defences and pleading, British prisoners could also speak in their defence whilst evidence was adduced. Prisoners made statements, such as explaining their affliction, describing crimes or questioning witnesses, in around one-half of Old Bailey insanity defences between 1760 and 1843.<sup>20</sup> Similar activity was recorded in twelve of the forty-nine detailed narratives that were discovered for northern English trials after 1775. By comparison, few Scottish “pannels” spoke after entering their plea because legal counsel participated regularly on their behalf. Of the thirty-five southern Scottish hearings studied, only Anne Millar offered her own defence, that she had “become disordered in her Judgement Occasioned by a Surprize”.<sup>21</sup> The sources could mask prisoner contributions, however. Minutes fail to mention such details, whilst narratives might only record instances where the prisoner’s defence was effective or noteworthy. On occasion, newspapers reported that prisoners “said nothing” in their defences, when they had actually provided abortive, unintelligible or unpersuasive arguments at court. Despite such problems, it seems likely that few of the English and fewer still of the Scottish prisoners provided lengthy cross-examinations or arguments at court before 1830.

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<sup>19</sup> Szasz *Myth* p.10. *Manufacture* pp.14-18.

<sup>20</sup> Eigen *Witnessing* pp.165-166.

<sup>21</sup> JC 12/6, Ayr 1749.

British defences which were presented by prisoners differed strongly to those presented by legal counsel. Typically, lawyers produced detailed cross-examinations of witnesses and summaries of their cases. Defendants entered rarely into such activities. When Andrew Ryding presented an energetic defence at Lancaster in 1823, newspapers noted that such activity was extraordinary amongst prisoners, insane or otherwise.<sup>22</sup> Ryding provided a protracted explanation for why he had assaulted Samuel Horrocks, MP, with a blunted cleaver, on a Preston street, in broad daylight. Ryding, a cotton-spinner, blamed Horrocks for the economic plight of his occupational colleagues. In the context of contemporaneous "Luddite" disturbances in north-west England, Ryding had committed a spectacular and politicised crime.<sup>23</sup> Ryding also questioned witnesses and even had the temerity to ask Horrocks, "Do you think ... that you were in your right mind or not [when being attacked]?"

Ryding's courtroom activities were paradoxical because they spoke both of insanity and rationality. He used intelligible language to conduct his defence and "displayed extraordinary acuteness, consistency and discrimination" whilst cross-examining witnesses.<sup>24</sup> On the other hand, Ryding's performance at court was also perceived to be confused and indicative of mental distraction. Ryding's examinations served no specific, discernable purpose as he shifted between proving his own sanity and insanity. When strong evidence of Ryding's madness was

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<sup>22</sup> Lancaster Gazette August 21<sup>st</sup> 1823. Cumberland Pacquet August 25<sup>th</sup> 1823.

<sup>23</sup> Liversedge, The Luddite Machine breakers of the early-nineteenth century, (1972). Bailey, The Luddite Rebellion, (1998).

<sup>24</sup> Lancaster Gazette August 21<sup>st</sup> 1823.

produced by his mother, Andrew accused the witness of lying and asked the judge to “stop the examination, and strike out all she had said”.<sup>25</sup> This led observers to note that, whilst Andrew was capable of constructing rational sentences, he was incapable of employing them towards rational objectives. This irrationality convinced the jury that Ryding was insane at court.

As a medical witness summarised, Ryding suffered from “delusion”, or the misapplication of reason. The prisoner was convinced that his brutal assault upon Mr. Horrocks was justified because he blamed Horrocks for the economic hardships of all cotton-spinners. Observers noted that this reasoning was based upon false premises; firstly, that Horrocks was indeed responsible for lowering wages and secondly, that physical retribution could be justified in such circumstances. In Ryding’s case, the prisoner’s mental debility was recognised despite his use of intelligible language. By the early nineteenth century, insanity was not purely associated with verbal pandemonium or unintelligible verbal expressions. As Joel Eigen has suggested, the concept of delusion had become embedded into the English legal consciousness by the 1820s, where it was both offered and accepted as a sound criminal defence.<sup>26</sup>

This study reveals what expected of British prisoners who were of sound, as well as unsound mind, in court. Prisoners were required to enter intelligible legal pleas at the outset of their trials. Failure to speak or confused pleas might signal

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<sup>25</sup> *Idem.*

<sup>26</sup> Eigen *Witnessing* pp.49-51.

mental discomposure. Beyond the plea, British prisoners were expected neither to speak at length in their defence nor systematically cross-examine witnesses. Such activities were normally reserved for legally trained professionals.

Hearings were postponed owing to insanity or idiocy because the prisoners were incapable of interacting reasonably with either other human beings or legal processes. Persons so afflicted were not classified as being mentally disturbed against their preference, for their condition robbed them of their will and discrimination. As the concept of delusion evolved in Britain, there was a growing awareness that insanity could also be understood as the misapplication of reason. Defences of "delusion" were accepted in both England and Scotland by the 1820s. Regarding criminal responsibility, the line between the rational criminal and the transgressor who acted on the basis of false reason was fine, but necessarily distinct.

Insanity could be evanescent. Sufferers could enjoy long spells of lucidity, when they operated as (and related to) persons who were not troubled mentally. Some of the prisoners studied could employ rational, structured language which was understood and accepted by sane persons. The mentally afflicted could therefore interact correctly with persons who had never experienced mental distress. Prisoners could be in their "sound mind and senses" at court and argue successfully that they had been insane at the time of committing an offence. In these types of defence, English and Scottish prisoners could coordinate their legal case and attempt to prove their own insanity by employing rational arguments. These

defendants were not passive victims of criminal processes, nor was the label of insanity affixed to them against their will.

## 11.

### *Conclusions*

Mental afflictions were perceived to be genuine pathologies in Britain between 1660 and 1829. This thesis reinforces criticisms of “anti-psychiatric” historical interpretations, which contended that insanity and idiocy were purely socio-cultural constructs. Concepts of mentally troubling afflictions were not employed carelessly within Britain’s legal environment. They were not utilized to “label” all conduct which was abnormal, or all persons who refused to conform to cultural norms regarding their demeanour or activity. Terms such as “insane” and “idiotic” were applied most regularly in a specific way, to describe persons who displayed repetitive or incessant archetypes of abnormal and unacceptable behaviour, but who were incapable of choosing to act ant-socially. The context of a prisoner’s speech, appearance and conduct framed and informed interpretations of their mental state. Also, appreciations of normal or typical conduct were reflected inversely through perceptions of abnormal demeanour.

British juristic works provided imperative guidelines relating to mental afflictions and criminal responsibility. Despite different legal traditions, influences and processes, English and Scottish legal traditions trusted to some broadly similar concepts. It was understood that mentally distracted or imbecilic persons could lack the ability to reason and control their will; it was understood that such persons could not form intent and could not be held responsible for their actions. Both legal

codes also distinguished clearly between “insanity” and “idiocy”, broad terms which indicated a variety of specific mental pathologies. It was recognised that the insane were persons who had lost temporarily, if repetitively, their faculty of reason and ability to control their will. By contrast, it was proposed that the mental aptitude of idiots had never developed beyond those of infants and that this condition was irrecoverable. In some cases, persons might regress into a state of idiocy which was also appreciated to be a permanent and irremediable affliction, unlike insanity which was perceived to be both transient and, in some instances, tractable.

England and Scotland owned some distinctive features regarding crime and mental abnormality. In both theory and practice, Scots Law maintained to the principle of “diminished responsibility”, whereby a less than fully debilitating forms of mental affliction were understood to reduce the culpability of the afflicted, thereby earning them a moderation of sentence. England’s theoretical conceptions of criminal responsibility were narrower than Scotland’s. English juristic tradition rejected notions of “diminished responsibility” and insisted that the mentally afflicted could only earn a complete acquittal if it were proven that they were robbed utterly of their ability to reason and form intent. Scottish and English law were therefore based upon divergent conceptions of criminal responsibility and mental afflictions.

Scotland's "Rule of Proportions" was employed recurrently in practice at the Justiciary Courts during the long eighteenth century. In contrast, England's narrow juristic principles of criminal responsibility were not followed regimentally at the Assize courts. Theorists argued that "melancholics" were not deserving of relief at law because their condition was less than fully debilitating. By the late eighteenth century, at least, juristic opinion was rejected as "melancholy" was treated readily as sound proof that the afflicted prisoners were robbed totally of their intent and responsibility. By the early nineteenth century, some prisoners were granted post-trial mitigation of sentence because they suffered from partially incapacitating mental difficulties (such as "weak-mindedness"). English theories of criminal responsibility were confronted directly by such activity. Alternative concepts of criminal responsibility may have persisted amongst English and Scottish jurists, but such differences were not always so evident in practice during criminal trials. This suggests that there were no static, monolithic legal interpretations and understandings of mental distraction and imbecility in England and Scotland during this era.

Legal treatises established how the prisoner's mental incompetence could affect the criminal process, from the moment of arrest through to execution of sentence. Most regularly, insanity and idiocy were argued in exculpation of crimes. In such cases, British jurors deliberated whether the prisoner had been sane at the crime and therefore responsible for his or her actions. Also, trials could be postponed owing to the prisoner's mental affliction. Persons who were *non compos mentis* at their

hearings could not be tried or punished for their offences whilst their insensibility lasted, even if it could be proven that the accused had been of sound mind whilst committing the transgression. These discrete types of “insanity defence” have been analysed independently. Such classification has reaped dividends, for distinctive courtroom dynamics could govern the outcome of pleas that sought to exculpate prisoners and those that sought to adjourn tribunals.

Joel Eigen has argued that Old Bailey proceedings were dominated by legal professionals, particularly judges, and their perceptions of criminal responsibility between 1760 and 1843. The judiciary could also be proactive during northern English and southern Scottish insanity and idiocy defences. Britain’s judiciary could be especially vocal during these particular hearings, because the alleged mental incompetence of the prisoner raised important issues regarding criminal accountability. Judges could examine witnesses and extract testimony which addressed directly the criteria for insanity and idiocy. Benchers also imparted their estimations of the prisoner’s mental capacities within their conclusive summaries. Such activity was informed by the judiciary’s function as the expounder and clarifier of points of law. This aspect of judicial activity became more important after 1660, as stricter evidential rules evolved in Britain and “adversarial” processes emerged during some English trials. In the context of defences “in-bar-of-trial” at Scotland’s Justiciary Court, the judiciary was established as the primary decision-taker after 1801. In these hearings, the remit of Scotland’s bench resembled stereotypical interpretations of Continental judges, who operated within

“Inquisitorial” procedural frameworks. Scottish practice may have become more “Anglicized” in some respects during the long eighteenth century, but the ruling in 1801 demonstrates that Scots Law did not shed inexorably vestiges of “Roman-Civilian” influences.

This study of provincial defences of idiocy and insanity offers an alternative interpretation of the courtroom dynamics than Eigen’s proposals for the Old Bailey. It should not be expected that procedures were identical at the provincial Assizes and the Old Bailey, or that interpretations of one of these jurisdictions can be supplanted upon the other. Provincial English and Scottish judges led, rather than dictated, verdicts during insanity and idiocy defences. Trial jurors, who were the ultimate assessors of the prisoner’s state of mind in the vast majority of British criminal cases, could be proactive and self-informing. Juries could reach similar conclusions to the bench, independent of coercion. A verdict of “insanity”, or “guilty”, could therefore represent a concordance of judgement, which was based upon commonly understood perceptions of the criminal responsibility of the mentally afflicted, rather than dictation from the bench. English and Scottish historiographies have emphasised that consensus reigned between bench and jury during the assessment of mental conditions. In some provincial hearings, however, judges and jurors could reach conflicting evaluations of the prisoner’s mental state and criminal responsibility.

Judicial activity could be constrained in other ways. In contrast to England, Scottish legal counsel had a regular impact upon trials through the manipulation of evidence and legal arguments. The standard participation of prosecution and defence advocates affected the role of Scotland's judiciary, which was less inquisitive than its English counterpart during the production of proofs. Northern Assize criminal hearings were restructured when barristers became embroiled in proceedings. These trials could resemble "adversarial" confrontations between lawyers, relegating the bench to a more passive role in court. Conversely, some judges counteracted aggressive advocacy, especially where only one litigant was represented. In England, judicial tolerance of partisan legal representation was guided by personal, political and professional ideologies regarding the respective roles of judge and counsel at court. The evaluation of a prisoner's mental state could be informed strongly by the testimonies imparted at court, whether the final decision was taken by judge or jury. British evidential evolutions were driven by legal professionals. Evidential prerequisites were debated most regularly where barristers appeared during English trials. Scottish hearings opened with the "relevancy", where judges ruled upon specific points of law (including necessary proofs) that were raised and debated by opposing advocates.

Fundamental evidential developments affected the way in which insanity and idiocy were identified at court. By the mid eighteenth century, greater pedagogic and practical value was attached to "expert" testimony. Deponents with experience in either medical matters or "mad-doctoring" were classed as "expert" witnesses,

who could impart “opinion testimony” that was based upon occupational skills and knowledge. “Gaolers” were also expert witnesses because they were experienced in authenticating mental afflictions amongst their prisoners. Persuasive expert testimony was buttressed by long term and frequent observations of prisoners as they lay in gaol awaiting trial. Medical and custodian evidence was adduced regularly where prisoner’s mental fitness to plead had to be evaluated in both England and Scotland by the early nineteenth century. After 1801, at Scotland’s Justiciary Court, procedural changes meant that the bench’s assessment of the “panel’s” mental condition was informed by “expert” testimony (from gaolers and generic medics), but not lay evidences. Such experts were not elevated to the status of sole advisors to England’s courts before 1830, but their evidence was used to authenticate the prisoner’s fitness to plead at the Northern Assizes from at least the late eighteenth century onwards.

This emergence of “expert” testimony did not represent aggressive efforts, by medical professionals, to wrestle the process of identifying mental afflictions from lay and legal persons. The enhanced participation and value of “expert” testimony were driven by Britain’s legal occupations and developments in legal procedure. An increased attention to evidential standards meant that legal professionals sought out “expert opinion” to prove a prisoner’s mental capacities “beyond a reasonable doubt”. Despite such evidential evolutions, the efficacy of lay testimony persisted. “Hearsay” was not always curbed successfully from lay testifiers. Even in the 1820s, British jurors regarded second-hand, neighbourhood interpretations of the

prisoner's mental state to be persuasive, clinching proof. Medical and "alienist" testimony played restricted roles in the authentication of mental afflictions within England and Scotland's criminal courtrooms, particularly concerning the proof of the prisoner's mental condition at the time of committing a crime. Most often, medical testimony legitimised lay or community evaluations of the prisoner's mental state in Britain. Even in the 1820s, the lay person's capability of identifying mental disorders was challenged rarely by medical testifiers, either implicitly or explicitly. In most British trials, lay witnesses continued to dominate the assessment of the prisoner's mental faculties in quantitative and qualitative terms through to 1830.

Criminal records provide priceless indications of how the "lower" and "middling" orders of society, both male and female, conceived of mental afflictions and criminal responsibility. These conceptions were not merely imposed upon proceedings by persons of superior standing. Community interpretations of the prisoner's mental abilities were matched regularly by courtroom assessments. Legal decisions regarding the prisoner's mental state both reflected and were legitimised by broad perceptions of justice and criminal accountability. In contrast with England, Scotland's procedural change of 1801 could remove this element somewhat. Decisions made by the judge, informed by "detached" expert witnesses, could actually reject lay and communal interpretations of the prisoner's mental abilities.

The study of provincial prisoners suggests that insanity and idiocy were not perceived universally to be experienced by women. These afflictions were not merely “female maladies”, at least within the context of provincial British criminal trials. This thesis also suggests that the authentication of mental disturbance at court was not an oppressive discourse, driven by male professionals, that sought to label indiscriminately women who failed to conform to social norms as being “mad” or “imbecilic”. Females were under-represented as deponents. Indeed, there were instances where male testimony was preferred over female. But women were capable of imparting persuasive testimony, which might challenge the content and context of male evidences. Male and female prisoners could have their mental conditions authenticated by witnesses of the same sex, who were also of roughly similar social and economic standing to the accused. Additionally, women could provide important evidences regarding male sagacity and vice-versa. Contemporary perceptions of normality and abnormality were influenced by a wide range of “contingencies”. The study of an afflicted person’s gender provides one methodology for historians to consider, but such analysis needs to be employed shrewdly and with reference to other determinants, such as social status, wealth, age and the person’s relationship with the law and religion.

England’s Northern Assizes and the southern circuit of Scotland’s Court of Justiciary have provided some fresh avenues of historical enquiry regarding criminal defences of insanity and idiocy, as well as conceptions of criminal responsibility. The materials relating to these circuit courts allow an engagement

with the principal historiographical debates concerning mental afflictions, as well as crime and the criminal courts. This study also raises some new questions which need to be addressed. Pre-trial decision-making processes, both formal and informal, ought to be investigated further in the context of criminal defences of insanity and idiocy. How and why victims and prosecuting officials might apply discretionary measures to mentally incompetent persons must be examined. Some broader issues regarding courtroom dynamics also need to be considered in a provincial context and in comparison to other British and European countries and their colonies. Although counsel was restricted in England, for instance, barristers did pervade insanity defences from the mid eighteenth century onwards. Further research is required to ascertain whether barristers were more regularly involved in provincial criminal trials than was once thought, or whether insanity defences were exceptional in this case. Finally, there is scope to expand the comparative basis of this research to other parts of Britain and the Continent. Relative analyses of the developments in Welsh and Irish criminal defences of insanity and idiocy during the long eighteenth century are long overdue, whilst published English interest needs to expand beyond the confines of the Old Bailey. With recent interest in the "Atlantic World" in mind, it would be fascinating to observe how English and Scottish concepts of mental distraction and criminal responsibility were transplanted to the American colonies. Did Scottish emigrants maintain to notions of diminished responsibility in lands which adopted and adapted English Common Law?

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