ENLIGHTENMENT, LEGAL EDUCATION, AND CRITIQUE

Selected Essays on the History of Scots Law, Volume 2

John W Cairns

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Preface

This is the second of two volumes of selected essays on Scottish legal history. It focuses on the eighteenth century and explores themes relating to the Scottish Enlightenment. As with the first volume, what are gathered together are essays, some difficult to access, with others that are easier to obtain, but which are collected together to ensure a thematic coherence to the collection.

I wish here to restate the debts, expressed in the Preface to Volume I, owed to Professors Elspeth Reid, Kenneth Reid and Hector MacQueen for their encouragement to gather these essays together, as well as to the Editorial Board of Edinburgh Studies in Law. Elspeth Reid's support and trust has been admirable. Once more I am grateful to Dr Karen Baston for her assistance. If there is no need to repeat at length what I said in the preface to the first volume, my intellectual debts, particularly to Professor Alan Watson, Hector MacQueen and Dr Paul du Plessis among others, remain; likewise the assistance from the libraries and archives named there should also be acknowledged here.

The period over which I published these essays – 1988 to 2005 – is not as wide as that in the first volume. But, at over a quarter of a century, it is still considerable. Like most legal historians in Scotland I have benefited from attending the British Legal History Conference and the Scottish Legal History Group, where I have learned a lot from the scholarship of others and gained valuable criticism of my own.

Given the focus of this volume, it is necessary, however, to single out the Eighteenth-Century Scottish Studies Society, and the individuals I have met through it. The first conference of the Society I ever attended was in Glasgow in 1990. I presented there a paper which is now the seventh chapter of this volume. It was a memorable conference. Glasgow was that year's European City of Culture, and a highlight was dinner in the wonderful City Chambers, with a recital from members of Scottish Opera. I also remember that a particularly good claret from the City's cellars was drunk with the meal: and, like all Scots who specialise in study of the eighteenth century, I know that the red wine of Bordeaux is our true national drink. But as well as a trip to Burns country and a visit to Auchinleck – not yet restored by the Landmark Trust – the intellectual programme was superb. Glasgow in the eighteenth century

was examined from all angles and aspects. For me, this set a high standard. I have not been able to attend all the subsequent conferences of the Society, ably organised by Professor Rick Sher, the indefatigable Executive Secretary, along with local and programme committees; but I have attended many, and have never felt disappointed or that my time has been wasted.

Through the Society I have met many scholars who have helped and enriched my work. It might be thought invidious to single out any individual, but I do need to mention Professors Roger Emerson and Paul Wood, both of whom I met for the first time in Glasgow in 1990. Both helped shape my understanding of the Scottish Enlightenment. Both made me realise the significance of the natural sciences. Paul focuses on the history of science, with which I am not competent to engage; but Roger's decades of outstanding and path-breaking work on patronage, institutions, and societies in eighteenth-century Scotland has profoundly influenced me. This will no doubt be obvious to any who know his work who read these essays. Roger is also one of the most generous scholars I have ever known, happy – indeed delighted – to share his knowledge. Over the years, I have received from him many letters – typically picture postcards – covered with detailed information and references relevant to what I am working on. He once told me he believed in always sharing what he knew, and he had never regretted doing so. I hope I live up to this ideal.

I knew Professor Knud Haakonssen before I ever attended a conference of the Eighteenth-Century Scottish Studies Society. For many years now, my research has had to engage with his work. Knud has encouraged me and engaged me in projects relating to aspects of natural law in the eighteenth century that have helped and challenged me. It has also been fun. Recently he has involved me in the exciting project on natural law in Europe (see *http://www.natural-law.uni-halle.de/*). As some of the chapters below will show, I have learned a lot from Knud with his penetrating intelligence and wide knowledge. As with Roger's work, Knud's scholarship has shaped much of what I have done in studying the eighteenth century.

At least one of these essays was written when I was a Visiting Professor at the University of Miami in Coral Gables, Florida; others were thought about there. As well as the stimulation from students in my classes there on Law and the Enlightenment, I benefited from the support of talented and hospitable colleagues, while enjoying the unique and stunning beauty of South Florida. But other than during the Festival, particularly the Fringe Festival, Edinburgh remains the most delightful and civilised of cities to live in and the School of Law a great place to work.

John W Cairns, Old College, August 2013

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Introduction

The essays selected for this volume all deal in some way or another with law and its institutions in eighteenth-century Scotland. The influence of the Enlightenment on Scotland and the impact of the Scottish natural and social or moral sciences on the European and transatlantic Enlightenments are both incontestable. The essays here show how the social – especially historical and philosophical – thought of the eighteenth century affected the essentially Humanist and Dutch-oriented legal culture of early modern Scotland, particularly through formal legal education in the universities.

The Enlightenment, however, was as much about people and institutions as about ideas. Individuals of energy and talent could overcome disadvantages of situation and background if placed properly. Eighteenth-century Scotland was run – often with considerable success – through a system of patronage. Patrons, such as the Earl of Ilay (from 1743 third Duke of Argyll), could promote careers or block them, though themselves subject to ever-changing political and intellectual pressures. Would Adam Smith have achieved what he did without Argyll's initial patronage?[1] It is an interesting reflection. Ideas were promoted not just through publication, but through the possession of positions of influence, such as university chairs or distinguished pulpits.[2] To understand the Scottish Enlightenment properly, it is necessary to think about politics and institutions.

In the later seventeenth century, legal systems and universities with which Scots were familiar had started to innovate, pushing the curriculum in different directions beyond the traditional disciplines of the Civil and Canon Laws. New structures and styles of teaching were also being developed.[3] In France, a *règlement* of 1679 had required the Universities to teach

1 R L Emerson, *Academic Patronage in the Scottish Enlightenment: Glasgow, Edinburgh and St Andrews Universities* (2008) (henceforth Emerson, *Academic Patronage*) 123–124.

2 R Sher, *The Enlightenment and the Book: Scottish Authors & Their Publishers in Eighteenth-Century Britain, Ireland, and America* (2006); R B Sher, *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh* (1985).

3 L Brockliss, "Curricula", in H de Ridder-Symoens (ed), *A History of the University in Europe. Volume II: Universities in Early Modern Europe (1500–1800)* (1996) 563 at 599–608.

"French" law.[4] In the United Provinces of the Netherlands such centralised direction was impossible, each Province being a sovereign republic; but the popular and successful Dutch law schools also started to innovate through the actions of individual professors in response to demand. Thus, professors focused their efforts on their private *collegia*, reflecting student need and economic opportunity.[5] They developed classes on the *ius hodiernum*, on a specialised *ius publicum*, and on *ius naturale* and *ius gentium*. The curriculum opened up in new ways.[6] Further, they started to teach from *compendia*, rather than the actual texts of Roman law; this last was to prove controversial.[7] No Dutch university had a specialised chair in the Law of Nature until 1746;[8] but chairs devoted to the Laws of Nature and Nations were created in a number of German universities.[9] In France, however, according to Notker Hammerstein, the earlier reforming regulations stood in the way of further development during the Enlightenment, so no chairs were created in Public Law or Natural Law in the universities, until a chair of Natural Law was founded at the Collège Royal in Paris in 1771.[10]

These innovations form the backdrop to the introduction of formal law teaching in the Scottish universities. A chapter in the first volume of the *Selected Essays* has already examined the influence of the Dutch law schools and Dutch Humanist thought on the development of legal education in

4 C Chêne, *L'enseignement de droit français en pays de droit écrit* (1982) 12–54; L W B Brockliss, *French Higher Education in the Seventeenth and Eighteenth Centuries: a Cultural History* (1987) 277–330.

5 M Ahsmann, "Teaching in *Collegia*: The Organization of *Disputationes* at Universities in the Netherlands and in Germany in the 16th and 17th Centuries", in A Romano (ed), *Università in Europa: Le istituzioni universitarie dal Medio Evo ai nostri giorni: strutture, organizzazione, funzionamento* (1995) 99 at 106–114.

6 M Ahsmann, "Teaching the *Ius Hodiernum*: Legal Education of Advocates in the Northern Netherlands (1575–1800)" (1997) 65 *Tijdschrift voor Rechtsgeschiedenis* 423; C J H Jansen, "Over de 18E Eeuwse Docenten Natuurrecht aan Nederlandse Universiteiten en de door hen Gebruikte Leerboeken" (1987) 55 *Tijdschrift voor Rechtsgeschiedenis* 103.

7 M Hewett, *Ulric Huber (1636–1694) de ratione juris docendi & discendi diatribe per modum dialogi . . . Academisch Proefschrift* (2010) 75–78.

8 G C J J van den Bergh, *The Life and Work of Gerard Noodt (1647–1725): Dutch Legal Scholarship between Humanism and Enlightenment* (1988) 131 n 29.

9 H Coing, "Die juristische Fakultät und ihr Lehrprogramm", in H Coing (ed), *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte: Zweiter Band, neuere Zeit (1500–1800). Das Zeitalter des gemeinen Rechts. Erster Teilbad: Wissenschaft* (1977) 3 at 46–47.

10 N Hammerstein, "Relations with Authority", in de Ridder-Symoens (ed), *Universities in Early Modern Europe* (n 3) 113 at 128; Brockliss, *French Higher Education* (n 4) at 279. Brockliss points out that the Universities in France strongly influenced by German culture – Strasbourg and Besançon – reflected developments in Germany.

Scotland.[11] The first section of this volume, "Enlightened Legal Education", after examining the background to the foundation of new chairs in Law, is devoted to the progress of legal education in Scotland under the pressure of differing streams of Enlightenment thought, examining it from a variety of related perspectives.

From the 1680s onwards, the Faculty of Advocates had intermittently campaigned for the establishment of chairs in Law in Scotland.[12] Their primary desire was for a chair in Civil Law, but, when the first chair was created in 1707, an existing and recent privilege granted by Parliament to Alexander Cunningham as "professor of the Civil Law in this Kingdome" meant the new chair was designated as of Public Law and the Law of Nature and Nations – Civil Law was specifically excluded from the sphere of the professor's duties.[13] The apparent success of private teachers in Edinburgh suggests that the market for such classes was sufficiently large to make a chair in Civil Law viable.[14]

The pressure to create chairs in Civil Law raises the question of why the Faculty ignored the fact that in Aberdeen there was in the 1680s and 1690s a functioning chair of Civil Law in King's College, continuously occupied by professors who did in fact teach. In the first volume, it has been noted that, in opposing the proposals to create a chair in Law in Edinburgh in the late sixteenth century, the advocates pointed to the existence of chairs in St Andrews and Aberdeen;[15] if teaching had vanished at St Andrews, at least some of the members of the Faculty of Advocates in the late seventeenth and early eighteenth centuries were aware of the chair at Aberdeen, which presumably was unaffected by Cunningham's privilege since it had long predated it.[16]

11 J W Cairns, *Law, Lawyers, and Humanism: Selected Essays on the History of Scots Law*, vol 1 (2015) (henceforth Cairns, *Law, Lawyers, and Humanism*) ch 8.

12 J W Cairns, "John Spotswood, Professor of Law: A Preliminary Sketch", in W M Gordon, *Miscellany III*, Stair Society vol 39 (1992) 131 (henceforth Cairns, "John Spotswood") at 131–133.

13 J W Cairns, "The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 EdinLR 300 at 313–314. On Cunningham, see J W Cairns, "Alexander Cunningham's proposed edition of the Digest: an episode in the history of the Dutch Elegant School of Roman Law" (2001) 69 *Tijdschrift voor Rechtsgeschiedenis* 81 (Part I) and 307 (Part II); J W Cairns, "Alexander Cunningham, book dealer: scholarship, patronage, and politics" (2010) 5 *Journal of the Edinburgh Bibliographical Society* 11.

14 Cairns, "John Spotswood" (n 12) at 133–134.

15 Cairns, *Law, Lawyers, and Humanism* (n 11) ch 4.

16 J W Cairns, "Academic feud, bloodfeud and William Welwood: legal education in St Andrews, 1560–1611" (1998) 2 EdinLR 158 (Part I) and 255 (Part II).

As is argued in the first chapter, the problem may have been the elementary and perhaps intermittent nature of the teaching. William Forbes described the law classes at Aberdeen as "having dwindled away and resolved into the perfunctory reading of a publick Lesson by one called a Civilist". He then purported to paraphrase Sir George Mackenzie as stating that, "in his Time" the Civilist "had ordinarily as much Law as served those that came to hear him, that is just none at all".[17] Further, after 1690, King's College remained tainted with Jacobitism. This was not a good place for loyal Whigs to send their sons – an institution dominated by a Jacobite family faction that included the Civilist, John Gordon. In 1715, Gordon duly supported the Old Pretender, to be deprived when the two Aberdeen universities were subsequently purged.[18] But there was more to it than this. Even the purged university did not attract law students. Further, between 1720 and 1750, David Verner, a Regent at Marischal College, Aberdeen, also taught elementary Civil Law. This did not lead students from other areas of Scotland to attend his classes for a legal education.

The basic problem for the two Aberdeen universities was locality. The Faculty of Advocates wanted law to be taught close to Edinburgh, preferably in Edinburgh itself. The Advocates wanted classes to prepare students for the Advocates' examinations; they wanted them taught by professors whom they knew and whose appointments and tenure they could influence. Aberdeen was simply too distant and too subject to local pressures. By the 1720s, however, the advocates had achieved their aims. There was a functioning law school with four professors in Edinburgh, and a developing one in Glasgow.[19]

To speak broadly, through much of the first half of the eighteenth century law continued to be taught in a traditional way with the professor dictating notes on a chosen textbook. The second chapter examines how the development of theories of rhetoric affected styles of teaching, leading to the development of the practice of teaching in English rather than in Latin. In most

17 Glasgow University Library, MS Gen 1246 at 83. (This is the first volume of Forbes' "Great Body" – MS Gen 1246–1252. The complexity of the structure of Forbes' manuscript makes it easier to cite by page than in any other way.) Forbes cites G Mackenzie, *Observations Upon the 18. Act. 23. Parl. K. James VI., Against Dispositions Made in Defraud of Creditors*, 2nd edn (1698) at 13. He is clearly relying very closely on the passage from Mackenzie, sometimes word for word, but the passages quoted about the Civilist's ignorance are not found there. I have been unable to trace them elsewhere in Mackenzie's *oeuvre*.

18 R L Emerson, *Professors, Patronage and Politics: The Aberdeen Universities in the Eighteenth Century* (1992) 26, 32.

19 See below, ch 5.

disciplines, the transition was unproblematic; and, in the law schools, Scots law had, in any case, always been taught in English. Where the change was seen to raise difficulties was in the central university legal discipline of Civil Law, which was covered in two courses, one on Justinian's *Institutes*, usually given twice each academic year, and the other on Justinian's *Digest*, both taught using *compendia* in the style of Dutch *collegia*.

The essay discusses the change to teaching in English, the reaction against it by the Faculty of Advocates, and Professor Wilde's resumption of teaching the course on the *Digest* in Latin in the 1790s. Wilde is an interesting and tragic figure already met in the first volume.[20] Also involved are issues arising out of rivalry and competition for students between the professors in the Universities of Edinburgh and Glasgow and between the university professors and private teachers. In a more recent essay, not included here, I have suggested that some of the criticisms I originally thought Wilde to have directed particularly at John Millar in Glasgow were in fact more directly aimed at a private teacher in Edinburgh, John Wright.[21]

The chair of Public Law and the Law of Nature and Nations in Edinburgh may have been the first chair in law created in Scotland in the eighteenth century, but the main focus of legal education remained the classes in Civil Law and Scots law, the former being the sole subject in which intending advocates were examined until an examination in Scots law was added to the advocates' trials in 1750.[22]

The first half of the eighteenth century saw the growing dominance of natural-law thinking in teaching moral philosophy in Scotland.[23] Rejecting certain types of moral rationalism, some Scots philosophers had come to focus on ideas of a moral sense or of moral sentiments that developed through social interaction, recognising a historical development of rights. For law, the crucial figure here was Adam Smith. He gave lectures on jurisprudence in his moral philosophy class in Glasgow.[24] Though he left Glasgow in 1763, his approach was adopted by his pupil, John Millar, the Professor of

20 Cairns, *Law, Lawyers, and Humanism* (n 11) ch 13.

21 J W Cairns, "The face that did not fit: race, appearance, and exclusion from the Bar in eighteenth-century Scotland" (2003) 9 *Fundamina: A Journal of Legal History* 11 (henceforth Cairns, "The face that did not fit") at 18–23.

22 Cairns, *Law, Lawyers, and Humanism* (n 11) chs 11–12.

23 The literature is enormous. See, e.g., K Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (1996) 63–128.

24 See, e.g., D Lieberman, "Adam Smith on Justice, Rights and Law", in K Haakonssen (ed), *The Cambridge Companion to Adam Smith* (2006) 214. The focus is more on the ideas than the institutional context.

Civil Law.[25] Smith, as argued in chapter 3, revitalised the teaching of natural law as a potential discipline for lawyers. He understood law as a dynamic response to social and economic development. From around 1750, the advocates became interested in promoting education focused on more modern, Enlightenment thought, so that, by the 1760s, the Faculty of Advocates were encouraging study of the law of nature and nations in Edinburgh.

Chapter 4 traces the development of teaching from the chair of Public Law and the Law of Nature and Nations in Edinburgh, exploring both the intellectual content of the classes and the politics of appointments. For the first half-century, teaching from the chair was intermittent. But this does not mean that the holder was incapable or unlearned; and Karen Baston's recent thesis has shown the importance of Charles Areskine, the first Regius Professor, as a book collector, and the significance of his collection for our understanding of the intellectual formation of Scots lawyers in this period.[26] When the holder of the chair did teach, the class was based on Grotius' *De iure belli ac pacis*, and a student compend of it was published in Edinburgh in 1760 for the use of the class of the then professor, Robert Bruce.[27]

Bruce was the last holder of the chair to teach Grotius' natural law. The success of his class may have encouraged John Millar in Glasgow to develop his lectures on jurisprudence; but be that as it may, the next successful teacher to occupy the chair was Allan Maconochie, the future Lord Meadowbank. Maconochie's classes were comparable to those of Millar or indeed to Adam Smith's lectures on jurisprudence. He taught the law of nature and nations as a science of legislation founded on the natural history of mankind.[28]

The next section of the volume deals with the "Development of the Glasgow Law School". It traces in detail, in the context of one university, some of the points already developed in the first four chapters. The fifth chapter thus examines the creation of the first chair in law in the University of Glasgow in the early modern period. Probably in emulation of the recent successful creation of a chair of Civil Law in Edinburgh (1710), the University of Glasgow erected a chair in Civil Law in 1713, gaining

25 See below, chs 7–8.

26 K G Baston, "The Library of Charles Areskine (1680–1763): Scottish Lawyers and Book Collecting, 1700–1760", unpublished PhD thesis, University of Edinburgh (2011), available at *http://hdl.handle.net/1842/6417*.

27 *Hugonis Grotii De jure belli ac pacis librorum II. Compendium in usum studiosae juventutis Academiae Edinensis* (1760).

28 Since this chapter was first printed, Edinburgh University Library has acquired some of the surviving papers of Lord Meadowbank, many of which relate to his classes. See Edinburgh University Library, Accession no: E2008.18 Collection no: Coll-1137.

funding through an allocation by the Crown from "King William's Gift". Though the University was allowed to appoint the first professor, the chair was thus a Regius chair, with appointments thereafter made by the Crown. This was to cause problems for the professors when they tried to ensure the appointment of candidates whom they favoured. Managing succession to the chair required the cooperation of politicians in London who could secure the royal signature.[29]

The first professor was William Forbes. He owed much to members of the Dalrymple family; but the support for his appointment to the chair was relatively broad. He had published a number of works, and had embarked on a massive project to restate Scots law. He was keen to gain the post. His new colleagues had defined the scope of his teaching to be Civil, feudal, Canon and Scots Law. This was probably done, not to ensure he had a wide field of competence, but to prevent him from venturing into natural law, which was already taught as an aspect of moral philosophy. He initially offered classes in Civil Law and Scots law (the first time the latter subject was to be taught in a University). The evidence suggests that he never acquired many students; certainly towards the end of his tenure of the chair only Civil Law was being taught. It was later to be made clear that classes in Civil Law were the duty of the occupant of the chair. A manuscript on the Civil Law held in Glasgow University Library has recently been identified as in his hand. This four-volume commentary on Justinian's *Institutes* now awaits further study.[30]

By the 1720s control of the University was disputed by the two main Whig groupings in Scotland, the Squadrone and the Argathelians: the former was basically a family grouping led by the Dukes of Montrose and Roxburgh, along with the Marquess of Tweeddale and a number of significant landed families such as the Dundases of Arniston; the latter consisted of men grouped around the second Duke of Argyll and his brilliant brother, Archibald, Earl of Ilay.[31] From 1714 to 1742 the Duke of Montrose was Chancellor of the University of Glasgow; but the Argathelians were seeking and acquiring influence and power in both the University and the rising commercial city. Though the University was a self-governing corporation, its officers and professors were closely linked to and drawn from the Scottish

29 See below, ch 6.

30 See *http://universityofglasgowlibrary.wordpress.com/2013/07/09/forbess-manuscript-commentary-on-justinians-institutes-rediscovered-in-tercentenary-year/*.

31 On Ilay, see now, R L Emerson, *An Enlightened Duke: The Life of Archibald Campbell (1682–1761), Earl of Ilay, 3rd Duke of Argyll* (2013).

landed and political classes.[32] This inevitably meant that they were players in the Scottish political game, both individually and as a corporation. The changing factional politics of the quarrelsome University, while creating opportunities for politicians to intervene, caused problems for Forbes. At one stage Ilay had considered getting rid of him as a political enemy; in 1728, he simply bought Forbes' shifting loyalty by getting his son made the College's lawyer.[33]

A real problem came for the University on the death of Forbes in October 1745. Contrary to the desires of the masters, William Crosse gained the royal appointment. It was procured for him by Argyll, though Crosse was not his own choice; the circumstances of the time, along with the fall of his ally Walpole, had loosened Argyll's grip on Scottish politics. The story is told in chapter 6. The masters rightly suspected Crosse wished to hold the regius chair of Civil Law as a sinecure. By applying unremitting pressure they quickly forced him out, and got the man whom they had always wanted, Hercules Lindesay. The latter was a well-regarded teacher, who had substituted for both Forbes and Crosse. He taught the traditional course on Justinian's *Institutes* twice each year, and the course on the *Digest* annually. He had to teach if five students presented themselves: the duties had been carefully defined in the course of the masters' quarrels with Crosse. Lindesay started to teach the course on the *Institutes* in English rather than the hitherto normal Latin.[34]

The appointment of Crosse had alerted the masters to the type of problem that could arise from inattention to managing the succession to the Regius Chair of Civil Law. Thus, when Lindesay lay dying they started to organise. He died on 2 June 1761; the next day the masters approved a letter to the Earl of Bute that indicated their unanimous choice of John Millar as Lindesay's successor. On 15 June, Bute secured the king's signature on a warrant appointing Millar.[35]

John Millar's tenure of the chair of Civil Law is the subject of chapter 7. Millar turned Glasgow from a minor law school with very few students to a major centre of legal education. A pupil of Adam Smith, Millar taught Smith's jurisprudence in all his courses at some level or another. He used Smith's theory of rights to understand and to structure his courses in Civil Law. Millar started to develop the curriculum, turning the second course

32 Emerson, *Academic Patronage* (n 1) at 21–149.
33 Ibid at 92.
34 See below, ch 2.
35 See also Emerson, *Academic Patronage* (n 1) at 154–155.

on the *Institutes* into one more focused on Smithian jurisprudence, while progressively adding classes in Scots law, government, and, in the 1790s, English law. Further, he moved away from the traditional reliance on a textbook on which notes were dictated to the class to a much freer form of teaching. He also taught all his classes in English.[36]

In Millar's early years in the chair, he benefited from lack of competition from the University of Edinburgh, where the standards seem to have declined. The successful classes by Robert Bruce, Professor of Public Law and the Law of Nature and Nations at Edinburgh, ended when he resigned the chair in 1764. His successor was unremarkable and probably never taught. John Erskine retired from the chair of Scots Law in 1765 to be replaced by William Wallace, who was not a man of the same distinction. The Professor of Civil Law was Robert Dick, appointed in 1755. By the time he retired, his class, still taught as a commentary on the textbooks of J G Heineccius, must have seemed rather old-fashioned.[37] His successor, John Wilde, appointed in 1792, developed mental health problems and had to be removed from the professorial chair.[38] The most successful teacher in Edinburgh was David Hume, appointed to the chair of Scots Law in 1786. Hume had been Millar's pupil in Glasgow. He developed further Millar's approach to teaching, if not following the Glasgow professor's philosophical approach, so that his class had no connection to a textbook. His lectures were also very elaborate and detailed. Such evidence as there is supports the anecdotal evidence that Millar was acquiring significant numbers of students. It is telling that when Maconochie was appointed to the Regius chair in Edinburgh in 1779 he followed Millar's approach to jurisprudence. Aspects of Millar's teaching in Glasgow were starting to influence practice in Edinburgh.

Millar attracted pupils from all over Great Britain and Ireland. He even had Russian pupils on whom he exerted demonstrable influence, as noted and argued in chapter 8. The Russians' association with Adam Smith has attracted more attention; but they were also – and for a longer time – law students with Millar and took doctoral degrees in law.[39] Since this chapter was written, the doctoral *disputatio juridica* of one of these Russians has become

36 See below, ch 2.

37 H Arnot, *The History of Edinburgh* (1779) 398–399.

38 See Cairns, "The face that did not fit" (n 21) at 19–23.

39 See R L Meek, *Social Science and the Ignoble Savage* (1976) (henceforth Meek, *Social Science*) 5.

more readily accessible.[40] The chapter also further explores the progressive development of his classes. As a teacher Millar moved classes in law from a still traditional focus inherited from the Dutch law schools to instruction informed by the approach and learning of the Scottish Enlightenment. He developed a critical jurisprudence that that explained how law ought to be developed.

Millar died in 1801. His successor, Robert Davidson, was a man of a very different stamp. He lacked Millar's broad, philosophical approach. While, with Millar, the masters at Glasgow had been keen to use the patronage system to gain an active and successful professor who would attract students and promote the values of Enlightened education, Davidson was appointed because he was the Principal's son. He failed to maintain viable classes in Civil Law, and appears to have ceased to teach it after 1819. He did have students for Scots law, seemingly in reasonable numbers. This was because, at a time of significant increase in the size in the legal profession in Scotland, the Royal Faculty of Procurators in Glasgow now required their apprentices to attend a university class in the subject. He thus had a growing captive market. In this way, Davidson, whose lectures on Scots law were based on those of Professor Hume in Edinburgh, can be seen as to some extent a success. But his tenure marks a change in legal education in Glasgow, away from the values of Smith and Millar, and towards a supposedly "practical" rather than theoretical focus. Thereafter, through much of the nineteenth century, legal education in the University of Glasgow was to consist of lectures on Scots law for apprentices.[41] The era of Enlightened legal education in the style of Millar was over.

The third section of this volume explores both the impact of the type of Enlightened education on interpretation and development of the law and, indeed, the limits of such influence. Scholars have explored the general development of interpretation in the Enlightenment, usually perceiving it, to put it simply, as related to a growing "constitutionalism" related to a desire to restrict the authority of judges as interpreters of the law.[42] It has also generally been seen as leading to codification.[43] Intellectual development

40 I A Tret'yakov, *Disputatio juridica ad tit. 4. lib. II. Pand. de in jus vocando* (1766).

41 D Murray, *Memories of the Old College of Glasgow* (1927) 227–234.

42 See, e.g., the essays in Y Morigiwa, M Stolleis and J-L Halpérin (eds), *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law* (2011).

43 D Klippel, "Legal reforms: changing the law in Germany in the *Ancien Regime* and in the Vormärz" (1999) 100 *Proceedings of the British Academy* 43; F Wieacker, *A History of Private Law in Europe* (1995) 257–275.

in Scotland took a rather different course when it considered authority and interpretation in law.

The first chapter in this section, 10, takes us back once more to the crucial figure of John Millar, and explores his approach to Scots criminal law. His Smithian analysis of law led him to argue that punishment was based on the need to right wrongs done, founded on the resentment of the person wronged supported by the indignation and sympathy of the spectator. The secondary foundation of punishment, if primary in importance and utility, was to discourage crime. The chapter also discusses how others, including earlier law teachers, had classified Scots criminal law. There is no need to go into Millar's arguments here; but his particular approach meant that some crimes could be considered simply as crimes against society and punished purely on the grounds of police or utility, not on that of justice. He comes very close indeed to the modern idea of a victimless crime.[44] In many ways this is a classic example of Enlightened reason and analysis providing a critique of the law, and Millar develops a type of critical criminal jurisprudence.

Hamesucken is the crime of pursuing someone into their home to assault them. Found in medieval Scottish sources, it was generally taken to be a capital offence. Through the eighteenth century its prosecution seems to have become relatively rare, and when it was libelled in an indictment, the prosecutor often restricted the punishment to an "arbitrary" one, that is, one less than death. One of John Millar's last surviving letters is to John Wilde, the Professor of Civil Law in Edinburgh, discussing a recent conviction for the crime, expressing his view that hamesucken had fallen into disuse.[45] Chapter 11 explores prosecutions for hamesucken between 1672 and 1770, the first date being that of the establishment of the refounded Court of Justiciary. It shows how arguments were developed in framing the major premiss in the libel from the law of nature and nations, a practice which also allowed influence from English criminal law.

Chapter 12 explores how the jurisprudence of the Scottish Enlightenment had a potential if indirect impact on reform of the Court of Session and its procedure. The major reforms in the Court and its procedure in the early nineteenth century are well known. The Court was split into two divisions.

44 M Muravyev, "Sex, crime and the law: Russian and European Early Modern legal thought on sex crimes" (2013) 1 *Comparative Legal History* 75 at 91–92 and 95–96 discusses Millar's Russian pupils (though noting only that they had studied with Smith) and Scots commentators, but not mentioning Millar. This is unfortunate as consideration of Millar would have helped her argument.

45 J Millar to J Wilde, 10 June 1800, Edinburgh University Library, MS La.II.475.