

# **PLAGIUM: 'AN ARCHAIC AND ANOMALOUS CRIME'**

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## **INTRODUCTION**

In the case of *SB v HMA*,<sup>1</sup> the *per curiam* opinion of the Court of Criminal Appeal, delivered by Lord-Justice Clerk Carloway, held that any person who abducts a ‘pupil’ child<sup>2</sup> may be charged with the crime of *plagium*.<sup>3</sup> The crime of *plagium* is ‘an aggravated form of theft’.<sup>4</sup> In Scotland, the crime of theft involves the wrongful and intentional appropriation of a corporeal thing which is owned by another person.<sup>5</sup> Moveable corporeal things may be termed ‘goods’;<sup>6</sup> the ‘goods’ which are stolen in instances of *plagium* are prepubescent children. The aggravation in a charge of *plagium* arises as a result of the importance ascribed to the stolen object, not for any other reason.<sup>7</sup> The child is consequently considered to be an object of ‘property’ in the eyes of Scotland’s criminal law.<sup>8</sup> This raises an uncomfortable question: Are children regarded as mere things according to the law of Scotland?

The answer would appear to be, *prima facie*, a resounding ‘no’. If, as is generally asserted,<sup>9</sup> the human body itself cannot be regarded as a mere thing by law,<sup>10</sup> one may reasonably presume that the living body of a child cannot be considered such. One may only make this presumption, however, if one eschews consideration of the illiberal roots of Scots

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<sup>1</sup> [2015] HCJAC 56

<sup>2</sup> Understood as a boy under the age of 14, or a girl under the age of 12: Hansard, *Age of Legal Capacity (Scotland) Bill*, HL Deb 01 July 1991 vol.530 cc866-82, p.879

<sup>3</sup> *SB v HMA* [2015] HCJAC 56, para.20

<sup>4</sup> *Brouilliard v HM Advocate* (2004) JC 176

<sup>5</sup> Sheriff Cubie, *Scots Criminal Law*, (3rd Edition) para.14.1

<sup>6</sup> Sale of Goods Act 1979 c.54, s.61(1)

<sup>7</sup> *Downie v HMA* (1984) SCCR 365, Sir Archibald Alison, *Principles of the Criminal Law of Scotland*, (Oxford: W. Blackwood, 1832), p.280

<sup>8</sup> See *Rachel Wright* (1808) Burnett App. VII; *Mary Millar or Oates* (1861) 4 Irv. 74; *Downie v HMA* (1984) SCCR 365

<sup>9</sup> See, for example, *C v Advocate General for Scotland* 2012 S.L.T 103, para.63, wherein Lord Brodie stated, uncritically and in passing, that there can be no proprietary rights in a human corpse.

<sup>10</sup> *Per* David M. Walker, *Principles of Scottish Private Law, Book 1: Introductory and General*, (Oxford: Clarendon Press, 1988) p.4: This claim, first posited in connection to Scots law by Professor T.B Smith in *Law and Professional Ethics*, [1959] S.L.T (News) 245, is accepted as fact within the context of Anglo-American Common law systems, but may nevertheless be doubted in Scots law: See Jonathan Brown, *Theft, Property Rights and the Human Body – A Scottish Perspective*, [2013] JMLE 43

law.<sup>11</sup> The contemporary crime of *plagium* is underpinned by the notion that pre-pubescent children, having no will of their own, are things held in the possession of – indeed, held as the property of – others.<sup>12</sup> It was for this reason that the Institutional writer Hume provided *plagium* with a proprietary basis<sup>13</sup> and for this reason that, in 1987, the Scottish Law Commission concluded that the continued existence of the crime of *plagium* remains ‘*at odds with contemporary thinking*’.<sup>14</sup> In spite of the Law Commission’s report, *plagium* remains a common law crime in the 21<sup>st</sup> century. The ‘uncomfortable question’ posed at the end of the preceding paragraph consequently merits serious consideration.

This article provides such consideration by examining the history of the crime of *plagium* and exploring its connection to the Scottish concept of ‘property’. It begins by defining ‘property’, within the Scottish context, and thereafter analyses the connection between the historic *crimen plagii*, the crime of *plagium* in early Scots law and the crime as it is currently conceptualised. Thereafter, this paper addresses the chapter’s central question and seeks to argue that, at present, Scots law does doctrinally view children as no more than simple objects of property.

The author acknowledges that this is an unsavoury conclusion. The article consequently concludes by analysing the contemporary crime of abduction before recommending that *plagium* ought to be abolished if, indeed, it is too late for the law to practically rediscover the non-proprietary roots of the crime. The crime of abduction has been described as ‘*the crime of carrying off or confining a person forcibly, against his will and without lawful authority*’.<sup>15</sup>

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<sup>11</sup> See Alan Rodger, *Thinking about Scots Law*, [1996] 1 Edinburgh L. Rev. 1, p.3; see also Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and The Myth of the Genius of Scots Private Law*, [1998] LQR 228

<sup>12</sup> *Downie v HMA* (1984) SCCR 365

<sup>13</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (Edinburgh: Bell and Bradfute, 1797), p.84

<sup>14</sup> Scottish Law Commission Report on Child Abduction, February 1987 para.2.3

<sup>15</sup> *Brouilliard v HM Advocate* 2004 JC 176, LJG (Cullen) at para [18]

The criteria of this crime ostensibly appears to coincide with the essential elements of *plagium*, however, the way in which ‘abduction’ is framed treats the person who is taken as both a person and a victim.<sup>16</sup> The crime of *plagium*, on the other hand, regards the ‘owner’ of the ‘stolen’ child as the victim and the child who is taken as no more than a mere piece of property. It consequently appears that the kidnapping of children is better dealt with under the law of abduction, rather than *plagium*.

This argument cannot be called novel, as it finds support in a 1987 report of the Scottish Law Commission,<sup>17</sup> yet, since the law has remained unchanged in the 28 years since the report’s publication, it is nevertheless necessary to reiterate it. In the 21<sup>st</sup> century, one must ask why the crime of *plagium* – and its resulting implications – continues to exist within the framework of contemporary Scottish criminal law, particularly when one considers the contemporary crime of abduction, recent statutory changes to the law and the court’s documented unwillingness to make use of the common law crime. As such, this paper ultimately submits that, since the courts have alluded that continued reference to the crime is unnecessary, there is no reason for Parliament to shy away from expressly abolishing the crime and ruling that children are never to be considered ‘property’ in the eyes of the law.

## **‘PROPERTY’ AND CRIMES AGAINST IT**

‘Property law’, within the Scottish and the Civilian milieu,<sup>18</sup> is the law pertaining to ‘things’<sup>19</sup> – the *ius quod ad res pertinet*.<sup>20</sup> In law, an ‘owner’, or ‘proprietor’, can be understood

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<sup>16</sup> Scottish Law Commission Report on Child Abduction, February 1987 para.3.5

<sup>17</sup> Scottish Law Commission Report on Child Abduction, February 1987, chapter 3

<sup>18</sup> Scottish property law (ostensibly) remains ‘resolutely civilian’: David Carey-Miller, Malcolm Combe, Andrew Steven and Scott Wortley, *National Report on the Transfer of Movables in Scotland*, in Wolfgang Faber and Brigitta Lurger (Eds.), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Sellier, 2009) p.311

<sup>19</sup> Kenneth Reid, *The Law of Property in Scotland*, (Buttersworth, 1993), p.1

<sup>20</sup> Gai Inst. 2. 8; J. Inst.2.2.12

as a legal person who enjoys a relationship of *dominium* with a thing (a *res*).<sup>21</sup> This relationship confers a number of benefits on the proprietor, including the authority to lawfully possess the thing in question, to enjoy it and dispose of it.<sup>22</sup> These benefits are ‘naturally unlimited’,<sup>23</sup> however they may be (indeed, in practice, they generally are) limited by operation of the law or by a private agreement brokered by the proprietor.<sup>24</sup> Anything may be understood as ‘property’ for the purposes of the positive law if it is categorised as a ‘thing’ by that law.

Although some Anglo-American scholars have suggested that interpreting ‘property’ as the thing which is the object of rights may be ‘*easily discredited by lawyers and philosophers for its awkwardness and incompleteness*’,<sup>25</sup> this claim stands at odds with the concept of ‘property’ in the Civil law. Unlike in English law, wherein there is no defined concept of ‘ownership’<sup>26</sup> and the distinction between things ‘real’ and ‘personal’ rights enjoys little more than a ‘shadowy existence’,<sup>27</sup> the Civilian tradition contemporaneously recognises ‘*an unbridgeable divide*’ between ‘real’ rights and ‘personal’ rights.<sup>28</sup> ‘Ownership’, in Scots law, has been termed the ‘*sovereign, or primary real right*’ by Erskine<sup>29</sup> and, likewise, modern French and South African law consider it to be ‘*the most comprehensive real right*’ which one

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<sup>21</sup> John Rankine, *The Law of Land Ownership in Scotland*, (4th Ed.) (Edinburgh: W. Green, 1909), p.99

<sup>22</sup> *Anstruther v Anstruther* (1836) 14 S.272; *Alves v Alves* (1861) 23 D.712; *Corporation of Glasgow v M'Ewan* (1899) 2 F (H.L.) 25, p.26

<sup>23</sup> George Mousourakis, *Fundamentals of Roman Private Law*, (Berlin: Springer, 2012) p.126; John Rankine, *The Law of Land Ownership in Scotland*, (4th Ed.) (Edinburgh: W. Green, 1909), p.99

<sup>24</sup> John Erskine of Carnock, *An Institute of the Law of Scotland*, (8th Edition) (J.B Nicholson, 1871) II.i.1

<sup>25</sup> J. W. Harris, *Who Owns My Body?* Oxford Journal of Legal Studies Vol. 16 (1) (1996), pp.11-12

<sup>26</sup> Jesse Wall, *Being and Owning*, (Oxford: OUP, 2015) p.20

<sup>27</sup> George Gretton, *Ownership and its Objects*, [2007] *Rabels Zeitschrift* Vol 71 803, p.830

<sup>28</sup> See *Burnett's Trustee v Grainger and Another* [2004] UKHL 8; particularly para.87. This distinction stemmed from the equally ‘unbridgeable division’ between *actiones in rem et actiones in personam* present in the classical Roman law: The Romans had no concept of ‘rights’ as we would understand them, however Professor Nicolas argued that parts of the *ius quod actiones pertinent* could be contemporaneously understood as pertaining to ‘rights’ – see Barry Nicholas, *An Introduction to Roman Law*, (Oxford, Clarendon Press, 1962) p.100

<sup>29</sup> John Erskine of Carnock, *An Institute of the Law of Scotland*, (8th Edition) (J.B Nicholson, 1871) II.i.1

may have in a thing.<sup>30</sup> It is therefore apparent that a ‘real’ right, in the Civilian tradition, refers specifically to a *thing* and its relationship with legal persons<sup>31</sup> and not, as has been suggested by Common law commentators,<sup>32</sup> the relationship between persons in respect of a thing.

The law clearly recognises that corporeal and incorporeal things may be ‘owned’. With that said, some English academics are uncomfortable with the idea of incorporeal objects being categorised as ‘property’ and question whether or not intellectual property should be called such.<sup>33</sup> Equally, some Romanist scholars claim that the Roman jurists had only corporeal things in mind when discussing the *ius quod ad res pertinet*.<sup>34</sup> These claims are ultimately unsustainable. It is usual for Anglo-American lawyers to talk of ‘ownership’ of incorporeal things such as copyrights<sup>35</sup> and patents<sup>36</sup> when considering ‘property law’ (in spite of the theoretical absence of ‘ownership’ within the Common law’s lexicon)<sup>37</sup> and there is English doctrinal authority which suggests that even ‘personal rights’ arising as a result of obligations

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<sup>30</sup> J.R.L Milton, *Ownership*, in Reinhard Zimmerman and Daniel Visser, *Southern Cross: Civil Law and Common Law in South Africa*, (Oxford: Clarendon Press, 1996) p.699; Françoise Moulin and Edwige Laforêt, *Introduction au Droit*, (Dunod, 2009), p.253

<sup>31</sup> Barry Nicholas, *An Introduction to Roman Law*, (Oxford, Clarendon Press, 1962) p.100

<sup>32</sup> See Simon Douglas, *Property Rights in Human Biological Material*, in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene (Eds.), *Persons Parts and Property: How Should We Regulate Human Tissue in the 21<sup>st</sup> Century*, (Hart, 2014) ; Ngaire Naffine, *The Legal Structure of Self-Ownership: Or The Self-Possessed Man and the Woman Possessed*, [1998] *Journal of Law and Society* 25(2) 193 at 197

<sup>33</sup> Simon Douglas, *Property Rights in Human Biological Material*, in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene (eds.) *Persons, Parts and Property: How Should We Regulate Tissue in the 21<sup>st</sup> Century?*, (Hart Publishing, 2014)

<sup>34</sup> William W. Buckland, *The Main Institutions of Roman Private Law*, (Cambridge: Cambridge University Press, 1936) p.91; Rudolph Sohm, James Crawford Ledlie, Bernhard Erwin Grueber, *The Institutes of Roman Law*, (Gorgias Press, 2002) p.225

<sup>35</sup> See, for example, s.2(1) of the Copyright, Designs and Patents Act 1988 c.48, which provides that ‘**The owner of the copyright in a work of any description has the exclusive right to do the acts specified in Chapter II as the acts restricted by the copyright in a work of that description**’ (Author’s emphasis).

<sup>36</sup> U.S Department of Commerce, *Manual of Patent Examining Procedure*, (9<sup>th</sup> Edition) (2014), Chapter 301.01: <<http://www.uspto.gov/web/offices/pac/mpep/s301.html>>

<sup>37</sup> Jesse Wall, *Being and Owning*, (Oxford: OUP, 2015) p.20

can be categorised as ‘property rights’<sup>38</sup> (though this position has attracted much academic criticism).<sup>39</sup>

The assertion that the *ius quod ad res pertinet* is only concerned with *res corporales* is not borne out by a true translation of *res*. In the second paragraph of *De Rebus Incorporalibus*, Justinian states ‘*Incorporales autem sunt, quae tangi non possunt. Qualia sunt ea, quae in iure consistunt: sicut hereditas, usus fructus, obligationes quoquo modo contractae*’.<sup>40</sup> This can be translated as ‘[M]oreover, there are incorporeal [things], which are not capable of being touched. Such things exist by law [or ‘the law’s authority’]: such as inheritance, usufruct and obligations, however these are acquired.’ Accordingly, in both English law and the classical Roman law, the analysis that one who has ‘ownership’ has a ‘right in a thing’ holds true in relation to both corporeal and incorporeal things (though the ‘right of ownership’ itself is incapable of being ‘owned’).<sup>41</sup>

Professor MacCormick consequently conceived of ‘things’ as either corporeal or incorporeal objects which are ‘durable’ – extant in time, even if they have no relative physical dimension in space – and which exist separately from and independent of other objects and persons.<sup>42</sup> It is clear, however, that ‘persons’ must be given a restricted meaning here, as is evinced by the fact that, in Scots common law, pupil children – boys below the age of fourteen

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<sup>38</sup> *OBG Ltd v Allan* [2007] UKHL 21

<sup>39</sup> See the discussion in Jonathan Brown, Review of *Persons, Parts & Property: How Should We Regulate Human Tissue in the 21st Century?*, [2015] Med. L. Rev. Advance Access Published 6th May 2015, doi: 10.1093/medlaw/fwv015

<sup>40</sup> J.B Moyle, *Imperatoris Iustiniani Institutiones*, (3<sup>rd</sup> Edition) (Oxford: Clarendon Press, 1896) p.217

<sup>41</sup> See George Gretton, *Ownership and its Objects*, (2007) *Rabels Zeitschrift* Vol 71 p.804, p.831

<sup>42</sup> Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford University Press, 2007) para.8.2

and girls below the age of twelve – are not imbued with legal personality or regarded as *personas*.<sup>43</sup>

This state of affairs is explained by the etymology of the Latin word *persona/personae*, which declines to *personas* in the accusative. This word is something of a *faux ami* in the sense that, while it is analogous to ‘persons’ in a certain sense,<sup>44</sup> in classical Latin the term was used to refer to a theatre mask, or an actor. It is used as such in the *Institutes* and the *Corpus Iuris Civilis* and thus the term must be understood as meaning ‘players in a law suit’ in Romanistic legal writing.<sup>45</sup> The view that all persons were beings imbued with an intrinsic human dignity<sup>46</sup> did not gain prominence in law until the 14<sup>th</sup> century<sup>47</sup> and the idea that natural rights (*iura naturalia*, as termed by Grotius) were imparted on individuals at birth was all but unknown until the early modern period.<sup>48</sup> Indeed, legal citizenship was a rarity in Gaius’ day; it did not become universal until the passing of an imperial edict in 212CE.<sup>49</sup>

Everything which had a physical existence could be recognised as a ‘thing’ by the Roman law.<sup>50</sup> Human beings – whether free or enslaved – were considered *res*: ‘*Corporales*

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<sup>43</sup> Scottish Law Commission Report on Child Abduction, February 1987; Patrick Fraser and James Clark, *A Treatise on the Law of Scotland relative to Parent and Child and Guardian and Ward*, (3<sup>rd</sup> Edition) (Edinburgh: T&T Clark, 1906) p.204

<sup>44</sup> Barry Nicholas, *An Introduction to Roman Law*, (Oxford: Clarendon Press, 1962) p.60

<sup>45</sup> Laurent L.J.M Waelkens, *Medieval Family and Marriage Law: From Actions of Status to Legal Doctrine*, in John W. Cairns and Paul J. du Plessis (eds.), *The Creation of the Ius Commune: From Casus to Regula*, (Edinburgh: Edinburgh University Press, 2010)

<sup>46</sup> The Roman law protected the *corpus*, *fama* and *dignitas* of citizens (by means of the *actio iniuriarum*), but not every human being was a Roman citizen. Thus, though ‘dignity’ was recognised by the Romans, ‘human dignity’ was an alien concept. Slaves were regarded as *res* – any protections that they enjoyed extended from the limits placed on the *dominium* of the slave’s *dominus*.

<sup>47</sup> A. Lefebvre-Teillard, *Introduction Historique au Droit des Personnes et de la Famille*, (1996) 41-43

<sup>48</sup> H. Grotius, *De Iure Belli Ac Pacis*, Liv.4, ed B.J.A de Kanter-van Hettinga Tromp (1939; new edition with notes by R. Feenstra, 1993) p.31. The idea that human beings hold inherent moral worth is even more modern; this notion appears to be wholly Kantian: Christopher Berry Gray, *The Philosophy of Law: An Encyclopedia*, Vol. I (New York and London: Garland, 1999) p.208

<sup>49</sup> Dig. 4.1.4

<sup>50</sup> J. Inst.2.2.12



*ae sunt quae sui natura tangi possunt: veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles*. ('Corporeal things are those which are tangible by nature, such as farmland, human beings, clothes, gold, silver, and other innumerable things').<sup>51</sup> This elucidation of *res corporales* and *res incorporales* – termed the 'Gaian schema' by Professor Gretton<sup>52</sup> – informs the fundamental understanding of 'property' in the Common law, the Civilian tradition and in contemporary mixed legal systems.<sup>53</sup> The recognition of legal personality does not, therefore, negate the possibility that the person's body may be considered a 'thing' for the purposes of law, in spite of MacCormick's claim; the significance (or otherwise) of personality, as it pertains to property law, is left to be determined by the peculiarities of any particular legal system.

Just as a legal system may choose to recognise an intangible object as a legally significant this, so too may the law choose to recognise a *res corporalis* as something more than a 'mere thing', or to deny that a *res corporales* is, in fact, a thing.<sup>54</sup> The German *Bürgerliche Gesetzbuch* expressly provides that animals are not things,<sup>55</sup> in spite of the fact that they have a corporeal existence. Similarly, the English common law maintains that there is '*no property in a corpse*',<sup>56</sup> which implicitly denies that corpses are 'things' for the purposes of law. It is therefore apparent that an element of legal recognition is necessary to establish that an object is a 'thing' for the purposes of law.

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<sup>51</sup> J. Inst.2.2.12

<sup>52</sup> George Gretton, *Ownership and its Objects*, [2007] *Rabels Zeitschrift* Vol 71 803

<sup>53</sup> George Gretton, *Ownership and its Objects*, [2007] *Rabels Zeitschrift* Vol 71 803, *passim*

<sup>54</sup> To use the words of Professor T.B Smith in *Law, Professional Ethics and the Human Body*, [1959] *SLT* (News) 245

<sup>55</sup> § 90a Tiere: '*Tiere sind keine Sachen*'

<sup>56</sup> See the discussion in Imogen Goold and Murieann Quigley, *Human Biomaterials: The Case for a Property Approach*, in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene, *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?*, (Hart, 2014) at p.238

‘Property’ gains significance only insofar as it is recognised by the laws of the State.<sup>57</sup> Since the concept of ‘property’ is inherently bound to the regulation of things, it is clear that ‘things’ are significant within the context of ‘property law’ insofar as they are recognised as ‘things’ by the authority of the positive law. Accordingly, a ‘thing’ may be defined, in law, as an object which is both ‘durable’, to use MacCormick’s phraseology, and legally recognised and considered a *res* or ‘thing’ *iure* – by law or by the law’s authority.

The notion that Scots law considers children to be ‘property’ encounters some notable problems. The judgement in the early case of *Reid v Scot of Hardin* states quite plainly that ‘*mothers cannot sell their bairns*’.<sup>58</sup> In spite of Scotland’s jurisdictional link to the Roman law (particularly in the area of corporeal moveable property)<sup>59</sup> and the nature of the Romanistic *pater familias*,<sup>60</sup> there is nothing to suggest that Scottish fathers have ever been imbued with the legal authority to do this where mothers have not. The law grants neither parent the authority to sell their children. The fact that Scottish parents have no *commercium* – the ability to sell or otherwise alienate – in relation to their children may suggest, *prima facie*, that the proprietary relationship between parent and child lacks a salient (some might even say an essential) feature of *dominium*, or ‘ownership’. This is not so; as shown above, one cannot look to the benefits which a person enjoys in respect of a thing in order to determine whether or not that object may be termed their property. One must, instead, look to the nature of the relationship between a thing and a legal person (or persons) in order to determine whether or not that thing is an object of property.

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<sup>57</sup> Gregory Alexander, *The Social-Obligation Norm in American Property*, [2009] Cornell L. Rev. 745, p.748

<sup>58</sup> 1688 (Mor. 9505)

<sup>59</sup> David L. Carey-Miller and David Irvine, *Corporeal Moveables in Scots Law*, (2<sup>nd</sup> Edition) (Edinburgh: W. Green, 2005) para.8.01

<sup>60</sup> Carlos Amunategui Perello, *Problems Concerning Familia in Early Rome*, [2008] Roman Legal Tradition 37

A thing does not necessarily need to have a commercial value, or be held by a legal person in private patrimony in order to have a proprietary characteristic.<sup>61</sup> The law may recognise that certain things are governed by property law, although they are incapable of being lawfully sold,<sup>62</sup> alienated,<sup>63</sup> or appropriated.<sup>64</sup> This idea lies at the heart of ‘property’ in the *Corpus Iuris Civile*; Justinian divided the *ius quod ad res pertinent* in two, asserting that some things could be held as an object of private ownership while some things could not be. The former were termed *res in nostro patrimonio* while the latter were designated *res extra nostrum patrimonium*.<sup>65</sup>

Gaius dispensed with the distinction between these two categories of things rather quickly, ruling that the divide was simply one between things governed by the *ius humani* and the *ius divini* respectively.<sup>66</sup> Justinian, conversely, subdivided *res extra nostrum patrimonium* further, stating that *res communes*, *res publicae*, *res universitatis* and *res divini iuris* were all *extra nostrum patrimonium*.<sup>67</sup> The early Scottish institutional writers adopted, developed and made use of the Justinianic *rerum divisione*; however, the practical significance of the division began to fade in both Mixed and Civilian jurisdictions as the importance placed on the category *res communes* declined.<sup>68</sup>

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<sup>61</sup> Rudolph Sohm, James Crawford Ledlie, Bernhard Erwin Grueber, *The Institutes of Roman Law*, (Gorgias Press, 2002) p.225

<sup>62</sup> *University of Edinburgh v Presbytery of Edinburgh* (1890) 28 S.L. Rep. 567: as per Lord Wellwood at p.573.

<sup>63</sup> Dig. 20.3.1.2

<sup>64</sup> George Mousourakis, *Fundamentals of Roman Private Law*, (Berlin: Springer, 2012) p.120

<sup>65</sup> J.B Moyle, *Imperatoris Iustiniani Institutiones*, (3<sup>rd</sup> Edition) (Oxford: Clarendon Press, 1896) p.197

<sup>66</sup> Gai. Inst. I, 8

<sup>67</sup> J. Inst.2.2.12

<sup>68</sup> Jill J. Robbie, *Private Water Rights in Scots Law*, [2012] PhD Thesis, Edinburgh University, p.34

With that said, the division does remain relevant in contemporary legal practice, to at least some extent.<sup>69</sup> As well as recognising that some things were incapable of being held as private property, the Roman law also recognised that some *res* were economically valueless and, though able to be held in the patrimony of a *persona*, incapable of alienation.<sup>70</sup> Although the Romanistic division of things has fallen out of fashion, the existence of this category of things has evidently retained its relevance in modern Scottish law as the doctrine of *res extra commercium* has featured in a recent Scottish Parliament consultation paper,<sup>71</sup> wherein its continued existence is expressly noted.<sup>72</sup> The doctrine was placed on a statutory footing by the schedule to the Prescription and Limitation (Scotland) Act 1973.<sup>73</sup>

Things which fall within this category of *res* cannot be transferred into private hands.<sup>74</sup> Similarly, any rights enjoyed in respect of *res extra commercium* are imprescriptible.<sup>75</sup> Such things are generally designated *extra commercium* as they are held by a public body for the public good,<sup>76</sup> although private bodies or private individuals who hold certain *res* which are of public interest may similarly be prohibited from alienating property which they lawfully own.<sup>77</sup> In Scotland, ‘property’ cannot consequently be defined as a thing which forms a part of an individual’s patrimony, as it is for the Austrians,<sup>78</sup> or as a thing with economic value; rather, ‘property’ must be understood as a durable object which is recognised as, and termed, a ‘thing’

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<sup>69</sup> The category of *res divini iuris* has some continued relevance as it pertains to the common-law crime of violation of sepulchre: See James Logie, *Scots Law*, in *The Treatment of Human Remains in Archaeology*, [2006] Historic Scotland Operational Policy Paper 5, p.19

<sup>70</sup> J.B Moyle, *Imperatoris Iustiniani Institutiones*, (3<sup>rd</sup> Edition) (Oxford: Clarendon Press, 1896) p.197

<sup>71</sup> *Prescription and Title to Moveable Property (Scotland) Bill Consultation*, (Scottish Parliament Publication, July 2015)

<sup>72</sup> *Prescription and Title to Moveable Property (Scotland) Bill Consultation*, (Scottish Parliament Publication, July 2015) para.2.40

<sup>73</sup> Prescription and Limitation (Scotland) Act 1973

<sup>74</sup> Karl-Heinz Siehr, *International Art Trade and The Law*, [1993] VI *Receuil des Cours* 9,82

<sup>75</sup> Prescription and Limitation (Scotland) Act 1973

<sup>76</sup> *University of Edinburgh v Presbytery of Edinburgh* (1890) 28 S.L. Rep. 567: as per Lord Wellwood at p.573.

<sup>77</sup> Karl-Heinz Siehr, *International Art Trade and The Law*, [1993] VI *Receuil des Cours* 9,82

<sup>78</sup> §353 Allgemeines Bürgerliches Gesetzbuch

by law,<sup>79</sup> or as a legally recognised proprietary relationship (such as *dominium*)<sup>80</sup> between a thing and a natural or artificial legal person.<sup>81</sup>

It is submitted that if a relationship between a person and a thing is given legal protection, then that relationship must necessarily be considered proprietary. Numerous private law doctrines offer remedies to those who suffer loss or damage in respect of their property;<sup>82</sup> similarly, the criminal law evidently seeks to protect the integrity of proprietary relationships by threat of legal sanction. It imposes such sanctions for conduct which interferes with a proprietor's enjoyment of their thing and prohibits actions such as wilful fire-raising, malicious mischief and theft.<sup>83</sup> These actions are each species of a genus of crime; they can each be termed 'crimes against property', in contrast to 'crimes against the person'.<sup>84</sup> The division of crimes highlights the fact that crimes against the person pertain directly to the victim affected, while crimes against property necessarily involve a separate 'thing' which is, in some way, related to the victim.<sup>85</sup> A victim of assault, therefore, suffers as the subject of an attack on their bodily integrity. A victim of theft is regarded as the subject of a theft as, by dint of this crime, they lose the enjoyment of their property or possession. The piece of property, or the possession, is the object of the crime. It is not the subject of it.

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<sup>79</sup> Thus, property may be corporeal or incorporeal: Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford University Press, 2007) para.8.2

<sup>80</sup> 'Ownership' can be better understood as a relationship which gives rise to real rights than as a 'real right' itself: See the discussion in John Rankine, *The Law of Land Ownership in Scotland*, (4<sup>th</sup> Ed.) (Edinburgh: W. Green, 1909), p.99

<sup>81</sup> John Rankine, *The Law of Land Ownership in Scotland*, (4<sup>th</sup> Ed.) (Edinburgh: W. Green, 1909), pp.99-100

<sup>82</sup> Joe Thomson, *Delictual Liability*, (5<sup>th</sup> Edition) Chapter 1 (C)

<sup>83</sup> Sir Gerald H. Gordon, *The Criminal Law of Scotland*, (3<sup>rd</sup> Edition) Vol. II (Edinburgh: W. Green, 2001)

<sup>84</sup> See, for example, the Visiting Forces Act 1952 c.67, s.3

<sup>85</sup> Gwynne Nettler, *Explaining Crime*, (Michigan: McGraw-Hill Ryerson, 1984), *passim*

In England and Wales, the crime of theft is codified in the Theft Act 1968.<sup>86</sup> In Scotland, theft of corporeal property is a crime at common law.<sup>87</sup> Any such object or thing may be stolen according to Scots law and the object of theft needn't necessarily be a piece of private property; one may steal things which would be considered *res publicae*, *extra commercium* or *extra nostrum patrimonium* by the *ius privatum*. In the words of the Institutional writer Burnett, 'everything that is moveable may be the subject of theft, whether it is moveable property strictly so called, or made moveable by the act and deed of the away taker'.<sup>88</sup> Thus, even heritable property may be the object of theft if the thief separates the thing from the land to which it is affixed. Both publically owned and privately owned things may be stolen; a thing need not be held in private patrimony to be the object of a theft.<sup>89</sup> The unlawful appropriation of things which cannot lawfully be sold (or, indeed, lawfully possessed), such as controlled drugs would likely be actionable as theft in Scotland; indeed, there is precedent for this in English law.<sup>90</sup> It is clear that, in Scotland, theft is committed when a *thing* is stolen, whatever that thing may be.

The *actus reus* of theft is no longer the 'away-taking' of a thing, as it was in the time of Burnett and Hume.<sup>91</sup> The salient feature of theft is now appropriation of a thing.<sup>92</sup> One may commit theft by depriving an owner or custodian of the control and possession of the thing in any manner; there is now no need to physically remove the object or to carry it off.<sup>93</sup> The exact *mens rea* requirement of theft is now subject to some academic debate, but it is nevertheless clear that an intention to deprive the proprietor (or the holder) of the enjoyment of their thing

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<sup>86</sup> c.60

<sup>87</sup> See Stuart P. Green, *Theft by Omission*, in James Chalmers, Fiona Leverick and Lindsay Farmer (Eds.) *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edinburgh: EUP, 2010) p.161

<sup>88</sup> John Burnett, *A Treatise on the Various Branches of the Criminal Law of Scotland* (Edinburgh: George Ramsey and Company, 1811), 124

<sup>89</sup> *Ibid.*

<sup>90</sup> *R v. Adam Mark Dyer* [2007] EWCA Crim 90

<sup>91</sup> *John Smith* (1838) 2 Swin. 28

<sup>92</sup> See *O'Brien v Strathern* 1922 JC at 57

<sup>93</sup> *Carmichael v Black*; *Carmichael v Penrice* 1992 SCCR 709, *per* Lord Justice-General Hope at 719A

is required.<sup>94</sup> Each side in the debate accepts this; the controversy arises as it is not clear if the thief must intend to deprive the proprietor permanently, or if intent to temporarily deprive the proprietor is sufficient.<sup>95</sup>

As the existence of a legally recognised ‘thing’ is essential in Scottish property law (indeed, it may be argued, all property law), the law must recognise the existence of a ‘thing’ in order to categorise a crime against property. The crime of *plagium* is specifically listed as an offence against property in the schedule to the Visiting Forces Act 1952.<sup>96</sup> It appears here alongside other aggravated forms of theft<sup>97</sup> (and the crime of theft itself). Indeed, the crime of *plagium* has now been framed as a crime against property for centuries.<sup>98</sup> Hume stated that the crime has its roots in the Romanistic *crimen plagii*,<sup>99</sup> which he (and later Scottish writers)<sup>100</sup> defined as ‘*the stealing of a human creature*’.<sup>101</sup> This implies that the relationship between guardian and child is proprietary, as well as familial.

The later jurist Burnett noted that the language of *furtum hominis* – ‘man-stealing’ – is common to ‘the laws of most states’,<sup>102</sup> however he also recognised that this designation is a misnomer, noting that as there is ‘no property’ in ‘human creatures’,<sup>103</sup> such creatures cannot

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<sup>94</sup> The purpose and temporal duration for which an accused person need deprive a proprietor of their thing in order to display the requisite *mens rea* of theft are the points of contention: See Andrew M. Cubie, *Scots Criminal Law*, (3<sup>rd</sup> Edition) (Sweet and Maxwell, 2010) para.14.15

<sup>95</sup> Sheriff Andrew Cubie, *Scots Criminal Law*, (3<sup>rd</sup> Edition) para.14.1

<sup>96</sup> At para.4(a)

<sup>97</sup> Such as housebreaking with intent to steal, opening lockfast places with intent to steal, reset and breach of trust – see *ibid.*

<sup>98</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (Edinburgh: Bell and Bradfute, 1797), p.84

<sup>99</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (Edinburgh: Bell and Bradfute, 1797), p.84

<sup>100</sup> John Erskine, *The Principles of the Law of Scotland, in the Order of Sir George Mackenzie's Institutions of that Law*, (Edinburgh, Bell & Bradfute, 1809) p.513; Sir Archibald Alison, *Principles of the Criminal Law of Scotland*, (Oxford: W. Blackwood, 1832) , p.280

<sup>101</sup> John Erskine, *The Principles of the Law of Scotland, in the Order of Sir George Mackenzie's Institutions of that Law*, (Edinburgh, Bell & Bradfute, 1809) p.513

<sup>102</sup> *Ibid.*

<sup>103</sup> While such creatures are alive, at least, as Burnett recognises the authority of *M'Kenzie* (1733), wherein the *away-taking* of a corpse was competently charged as theft.

be properly termed the object of a theft.<sup>104</sup> This claim is not borne out by later authority, which expresses that *plagium* is no more than an aggravated form of theft<sup>105</sup> and that children can, therefore, be termed the objects of theft whenever a charge of *plagium* is held to be competent.<sup>106</sup> Indeed, in the case of *Downie v HMA*,<sup>107</sup> both counsel for the Crown and for the defence conceded that children were to be regarded as property in Scots law; their dispute concerned in whom the proprietary right in the child was vested, not whether or not it was appropriate to regard the child as a mere thing.<sup>108</sup>

This later authority (and indeed, Burnett's description of *plagium*) does not accurately reflect the operation of the *crimen plagii*. Nor does the description of *plagium* elucidated by Hume represent a true account of the Roman law. The rules pertaining to the operation of the Roman *crimen plagii* were set out in the *Lex Fabia*.<sup>109</sup> This penal statute unequivocally criminalised the kidnapping of men, women and children alike, as well as proscribing the act of treating a free man as a slave and the act of convincing a slave to leave their master.<sup>110</sup> In later Roman law, the definition of *plagium* expanded to cover the act of treating a free man as the object of a transaction.<sup>111</sup> Those who committed any of these actions could be subjected to the death penalty.<sup>112</sup>

## **PLAGIUM**

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<sup>104</sup> John Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland*, (London: G. Ramsey, 1811) p.132

<sup>105</sup> *Brouillard v H.M.A* (2004) JC 176

<sup>106</sup> *Mary Millar or Oates* (1861) 4 Irv. 74

<sup>107</sup> (1984) SCCR 365

<sup>108</sup> *Ibid.* para.

<sup>109</sup> Adolf Berger, *Encyclopedic Dictionary of Roman Law*, (Philadelphia, The Lawbook Exchange, Ltd., 1953) p.632

<sup>110</sup> Dig. 48.15.6.2; Adolf Berger, *Encyclopedic Dictionary of Roman Law*, (Philadelphia, The Lawbook Exchange, Ltd., 1953) p.552

<sup>111</sup> *Ibid.*

<sup>112</sup> Dig. 48.15; Cod.9.20; Danilo Ceccarelli Morolli, *A Brief Outline of Roman Law*, (Gangemi, 2012) p.112



## **Plagium, Crimen Plagii and Deprivation of Liberty**

The *crimen plagii* was not a crime which necessarily involved property; it primarily concerned legally illegitimate actions taken against individuals who were recognised, by law, as persons.<sup>113</sup> The Roman law recognised that free individuals had interests in their *corpus*, *fama* and *dignitas*<sup>114</sup> and protected such interests by way of both the *ius privatum* and *ius publicae*. The *crimen plagii* generally involved an infringement of a free individual's interest in their *corpus*.

In modern terms, the *crimen plagii* could, in theory, be categorised as a crime against the person, although one ought not to embark on this endeavour as to term it such is to anachronistically superimpose a modern idea onto a framework wherein that idea has no place. The dangers of making use of this anachronism can be observed in consideration of other elements of the crime, as the *crimen plagii* could involve an item of property, such as in instance in which a perpetrator enticed a slave to leave their *dominus*. In addition, though the *crimen plagii* primarily pertained to the abduction of free persons, the law also penalised the kidnapping of slaves.<sup>115</sup>

There is a clear link between the Roman *crimen plagii* and the Scottish concept of *plagium*; Hume was correct in this assertion. The Fabian law was clearly received into the Continental European legal tradition, with which Scots law shares its common heritage.<sup>116</sup> From this reception, the *ius commune* constructed a sub-category of the delict *iniuria* (or rather,

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<sup>113</sup> Danilo Ceccarelli Morolli, *A Brief Outline of Roman Law*, (Gangemi, 2012) p.112

<sup>114</sup> Dig. 47.10.1.2

<sup>115</sup> Danilo Ceccarelli Morolli, *A Brief Outline of Roman Law*, (Gangemi, 2012) p.112; in such instances, the wronged party was the *dominus*, not the *servus*.

<sup>116</sup> John Blackie, *Doctrinal History of the Protection of Personality Rights in Europe in the Ius Commune: General Actions or Specific Actions*, vol 13.1 *Electronic Journal of Comparative Law*, (March 2009), <<http://www.ejcl.org/131/art131-1.pdf>>

specifically, sub-categories of *iniuria realis*),<sup>117</sup> which sought to protect an individual's interest in their own personal freedom and liberty.<sup>118</sup> An individual's interest in their own liberty was initially protected as all lieges of Scotland were '*the King's free* [men]'<sup>119</sup> and the law considered that to deprive such a person of their liberty was an attack on, and affront to, the Crown's authority.<sup>120</sup> By the 17<sup>th</sup> century, however, the law began to develop, with Stair, a more theoretical view of the concept of 'liberty' which was underpinned by Christian (Calvinist) theology.<sup>121</sup>

The sub-category of delict pertaining to the protection of the individual's liberty included *raptus*, *plagium* and the *crimen privati carceris*. The *crimen privati carceris* was based on the Roman law which prohibited the detention of free subjects,<sup>122</sup> rather than the *crimen plagii* of the *Lex Fabia*, which, as noted, concerned forcible abduction. *Raptus* and *plagium* both initially concerned 'forcible abduction' in Scots law and so were directly linked to the *crimen plagii*. The term 'forcible' was given a wide meaning by the law; it was not understood as a necessarily violent act,<sup>123</sup> but in fact included enticement and seduction (i.e.,

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<sup>117</sup> John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*, in Niall Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law*, (Dundee: DUP, 2009), p.38

<sup>118</sup> John Blackie, *Doctrinal History of the Protection of Personality Rights in Europe in the Ius Commune: General Actions or Specific Actions*, vol 13.1 Electronic Journal of Comparative Law, (March 2009), <<http://www.ejcl.org/131/art131-1.pdf>>

<sup>119</sup> *Suthirland* (1539) Pitcairn 222

<sup>120</sup> *Innes* (1561) Pitcairn 411; *Oliphant* (1571) 1(2) Pitcairn 24

<sup>121</sup> John D. Ford, *Stair's Title "Of Liberty and Servitude"*, in Andrew D.E Lewis and David J. Ibbetson (Eds.) *The Roman Law Tradition*, (Cambridge: CUP, 1994), p.135; John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*, in Niall Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law*, (Dundee: DUP, 2009), p.38

<sup>122</sup> C.4.12.4; C.9.5.1; C.10.31.54.1-3; Dig.48.2.1

<sup>123</sup> The defender (unsuccessfully) pleaded such in *Chirmesyde* (1616) 3 Pitcairn 402, at p.413

such charges were relevant where “the defender intyset and seducet” the victim),<sup>124</sup> *per* the authority of the *ius commune* jurists.<sup>125</sup>

Charges of *raptus* and *plagium* could be brought alongside that of *crimen privati carceris*.<sup>126</sup> The victim, in a case of *plagium*, did not necessarily have to be a child.<sup>127</sup> Although *raptus* could contemporaneously be understood as the sexual offence of rape,<sup>128</sup> *raptus* and ravishment were not confined to cases in which sexual intercourse (forced or consensual) occurred;<sup>129</sup> indeed, they were not, until MacKenzie,<sup>130</sup> confined to cases in which the victim was female.<sup>131</sup> In practical terms, *plagium* and *raptus* were identical,<sup>132</sup> although some scholars did debate whether or not *libidinis causa* was an essential element of *raptus*,<sup>133</sup> until a 1616 case explicitly ruled that it was not.<sup>134</sup>

It is apparent that *plagium* was not necessarily a proprietary offence in the 16<sup>th</sup> or 17<sup>th</sup> centuries, but rather it could be a delict committed against a person’s interests in their personal integrity.<sup>135</sup> Thus, it is clear that neither the Romans nor the early Scots lawyers regarded *plagium* as a purely proprietary crime or wrong; the taxonomy of ‘crimes against property’ and ‘crimes against the person’ have no place here. With that said, just as the delict of *raptus*

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<sup>124</sup> John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*, in Niall Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law*, (Dundee: DUP, 2009), p.61

<sup>125</sup> *Per* Bartholomaeus à Saliceto, ‘*quod persuasion dolosa in talibus, plus est quam violenta tractio*’; see also – Prosper Farinacii, *de Delictis carnis*, quaest 146; Barthélemy de Chasseneuz, *Catalogus Gloriarum Mundi*, (Feyerabend, 1586) p.310

<sup>126</sup> *McIntoshes* (1648) Irv. Jus. Vol.3, 769

<sup>127</sup> *Bannatyne* (1596) 1(2) Pitcairn 379

<sup>128</sup> Limited, as it was until the enactment of the Sexual Offences (Scotland) Act 2009, to women.

<sup>129</sup> *Kennedy* (1537) 1 (1) Pitcairn 182; *Craufurd* (1550) 1(2) Pitcairn 349

<sup>130</sup> George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal*, (2<sup>nd</sup> Edition) (1699), p.83

<sup>131</sup> *Ker* (1649) Irv. Jus. Vol.3 p.826

<sup>132</sup> John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*, in Niall Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law*, (Dundee: DUP, 2009), p.59

<sup>133</sup> Clarus, *Raptus*; Prosper Farinacii, lib.5, tit.16, quaest 145, n.75-78

<sup>134</sup> *Chirnesyde* (1616) 3 Pitcairn 402

<sup>135</sup> John Blackie, *Doctrinal History of the Protection of Personality Rights in Europe in the Ius Commune: General Actions or Specific Actions*, vol 13.1 Electronic Journal of Comparative Law, (March 2009), <<http://www.ejcl.org/131/art131-1.pdf>>

evolved into a sexual offence gradually, after MacKenzie's discussion on 'matters criminal' asserted that the wrong necessarily involved *libidinis causa*,<sup>136</sup> so too did *plagium* begin to evolve into an exclusively proprietary crime through the course of the eighteenth century.<sup>137</sup> With the passing of the Act anent Wrongous Imprisonment<sup>138</sup> (which remains in force and is contemporaneously termed the Criminal Procedure Act 1701),<sup>139</sup> the Court of Session began to exercise jurisdiction over matters of *iniuria* pertaining to the protection of personal liberty.<sup>140</sup> The Justiciary courts retained jurisdiction over instances of *plagium* and *raptus*.

The case of *Helen Torrence and John Waldie*<sup>141</sup> appears to have marked the inception of *plagium* as a crime purely concerned with property. Here, the indictment charged the two co-accused with *plagium*, framed as '*the stealing or away-taking of a living child*', who was, at the time of the crime, nine years old.<sup>142</sup> At first instance and on appeal, the perpetrators were ultimately convicted of theft as a result of this charge.<sup>143</sup> In the words of the defender's Counsel (Muirhead)<sup>144</sup> in the nineteenth century case of *Mary Millar or Oates*,<sup>145</sup> "*Torrence and Waldie a very peculiar case; for there the child stolen actually became a thing while still in the hands of the men who stole it*"<sup>146</sup> as, after committing the crime of *plagium* by stealing away the child,

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<sup>136</sup> George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal*, (Edinburgh: James Glenn, 1678)

<sup>137</sup> John Blackie, *Doctrinal History of the Protection of Personality Rights in Europe in the Ius Commune: General Actions or Specific Actions*, vol 13.1 Electronic Journal of Comparative Law, (March 2009), <<http://www.ejcl.org/131/art131-1.pdf>>

<sup>138</sup> The Act had been presented to Parliament in 1698, but was heavily scrutinised and did not become legislation until 1701: T. Thomson (Ed.), *The Acts of the Parliaments of Scotland*, Vol. X (Lyon Public Library, 1823) p.208

<sup>139</sup> c.6

<sup>140</sup> John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*, in Niall Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law*, (Dundee: DUP, 2009), p.57

<sup>141</sup> (1752) Maclaurin, 152

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> James Muirhead; later Professor of Civil Law at Edinburgh University, 1862-1889.

<sup>145</sup> (1861) 4 Irv. 74

<sup>146</sup> *Ibid.* p.82

the co-accused jointly murdered him and sold his corpse to a group of surgeons for lucre.<sup>147</sup> The defence in *Mary Millar* sought to argue that a living ten year old child could not be categorised as a ‘thing’ by law, but they clearly (indeed, expressly) accepted that the corpse of such a child could clearly be considered a mere thing, or ‘property’<sup>148</sup> and that infant children are to be regarded as pieces of property.<sup>149</sup>

The salient point of Muirhead’s argument stood against the eighteenth century authority. The authority of, and reasoning in, *Torrence and Waldie* may be dubious, *per* Muirhead’s later submissions (although such a challenge may be repelled by the fact that the relevant charge therein was of ‘*stealing the child*’ **and** ‘*soon thereafter delivering its body, then dead, to some surgeons*’,<sup>150</sup> indicating both that the charge of theft was relevant before the child was murdered and that the court considered both the living and dead body of the child to be a ‘thing’ in the eyes of the law),<sup>151</sup> but it is plainly evident that after Hume penned his authoritative treatise on crimes, *plagium* was imbued, necessarily, with a proprietary characteristic. The extant 19<sup>th</sup> century authorities display, overwhelmingly, that *plagium* is a crime against property. The crime has retained this characteristic well into the 21<sup>st</sup> century.

### **Plagium as a Crime Against Property**

Hume categorised *plagium* as a crime against property since children ‘*have no will of their own*’<sup>152</sup> and so can properly be said to be in the possession or patrimony of their parents.<sup>153</sup>

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<sup>147</sup> *Torrence and Waldie* (1752) Maclaurin, 152

<sup>148</sup> The eighteenth century case of *M’Kenzie* (1733) sustained the relevance of a charge of theft of a corpse.

<sup>149</sup> (1861) 4 Irv. 74, pp.82-83

<sup>150</sup> *Torrence and Waldie* (1752) Maclaurin, 152

<sup>151</sup> As discussed, the child could never have been considered a *persona*: Patrick Fraser and James Clark, A *Treatise on the Law of Scotland relative to Parent and Child and Guardian and Ward*, (3<sup>rd</sup> Edition) (Edinburgh: T&T Clark, 1906) p.204

<sup>152</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (Edinburgh: Bell and Bradfute, 1797), p.84

<sup>153</sup> *Downie v HMA* (1984) SCCR 365

The Scottish courts have never enthusiastically endorsed this state of affairs, however, the judiciary has repeatedly reaffirmed that it is factually accurate to consider children ‘property’ for the purposes of criminal law.<sup>154</sup> In the 1808 case of *Rachel Wright*, Lord Justice-Clerk Granton expressed the view that he was ‘*not yet convinced... that a child is not the property of its parents*’ before expressly (and, by his own admission, proudly)<sup>155</sup> affirming that ‘[p]lagium is a species of theft and rightly classed under that name’.<sup>156</sup>

Later authorities have vindicated Lord Granton’s claims. In *Hamilton v Mooney*,<sup>157</sup> Sheriff McKay affirmed the relevance of a charge of *plagium* as it pertained to the theft of a child from its mother. In doing so, he stated:

‘For something to be stolen it must belong to someone, is the definition of theft in its purest sense... Modern writers confirm and the old authorities agree that for the purposes of theft a child is regarded as being the property of its parents. It is trite law that plagium is a crime in Scotland. My considered view is that plagium is the depriving of the custodier or rightful possessor of his child.’<sup>158</sup>

In 2004, the High Court of Justiciary Appeal Court similarly held, *per curiam*, that ‘*plagium is an aggravated form of theft*’.<sup>159</sup> The charge of *plagium* was not libelled in that case, however, and the court ultimately ruled that it could be appropriate to bring a charge of abduction instead of one of *plagium*.<sup>160</sup>

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<sup>154</sup> *Rachel Wright* (1808) Burnett App. VII; *Mary Millar or Oates* (1861) 4 Irv. 74; *H.M.A v Cairney or Cook* (1897) 2 Adam 471; *H.M.A v Downie* (1984) SCCR 365; *Hamilton v Mooney* (1990) SLT (Sh Ct) 105; *Hamilton v Wilson* 1994 SLT 431; *Anderson v H.M.A* (2001) SLT 1265; *Orr v K* 2003 SLT (Sh Ct) 70; *Brouillard v H.M.A* (2004) JC 176

<sup>155</sup> *Rachel Wright* (1808) Burnett App. VII

<sup>156</sup> *Ibid.*

<sup>157</sup> 1990 S.L.T. (Sh. Ct.) 105

<sup>158</sup> 1990 S.L.T. (Sh. Ct.) 105, p.108

<sup>159</sup> *Brouillard v H.M.A* (2004) JC 176, para.19

<sup>160</sup> Citing *Anderson v HMA* 2001 SLT 1265 and *M v HMA* (1980) SCCR Supp. 250

The similarity between *plagium* and abduction has long been recognised. In *Mary Millar or Oates*, the panel had been severally charged with both *plagium* and ‘*the wicked and felonious abduction from its parents of a female child under the age of puberty*’.<sup>161</sup> Counsel for the defence argued that a child of ten years old could not be considered an ‘infant child’ with ‘no will of its own’ as it was, at common law, *capax doli* and so the charge of *plagium* was incompetent.<sup>162</sup> With that said, he was, however, forced to concede that in the earlier cases of *Smith*<sup>163</sup> and *Margaret MacMillan or Branaghan*<sup>164</sup> children who could not be considered ‘infant’ on his construction of the term had been competently charged with the crime.<sup>165</sup>

The appellate court ultimately rejected the panel’s submission and held that the consent of a child to its own theft was immaterial. Only the consent of the parents was germane. This decision, in effect, ruled that a pupil child, as an ‘infant’, has no will of its own for the purposes of law. The charge of *plagium* – framed as the theft of the child – was held to be relevant *per curiam* and the panel was convicted by jury, although the alternative charge of abduction was ultimately withdrawn by the Crown.<sup>166</sup>

The defence had argued that abduction was no more than an English legal importation which was ‘*not a nomen juris in the law of Scotland and was unknown in the law of Rome*’. As a result of this, they submitted that such a charge was irrelevant.<sup>167</sup> Lords Cowan and Ardmillan did not go so far as to agree with counsel; they did not expressly rule the charge irrelevant. They did, however, venture to criticise the utility of the abduction charge; Lord Cowan opined

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<sup>161</sup> *Mary Millar or Oates* (1861) 4 Irv. 74

<sup>162</sup> *Ibid.* p.75

<sup>163</sup> (1829) *Alison*, vol. I, p.630

<sup>164</sup> (1839) *Bell’s Notes*, p.26

<sup>165</sup> The prosecution also drew the court’s attention to the case of *Aitkenhead* (1831) (Unreported), wherein a charge of the theft of a ten year old was served on the indictment: *Mary Millar or Oates* (1861) 4 Irv. 74, p.77

<sup>166</sup> *Mary Millar or Oates* (1861) 4 Irv. 74, p.86

<sup>167</sup> *Ibid.* p.76

that its purpose and use was of dubious assistance and Lord Ardmillan noted that it ‘*did not raise anything not covered by the charge of plagium*’ and so, in his view, ‘*an alternative charge of that sort ought to be avoided*’.<sup>168</sup> Lord Ivory went further than both of his colleagues and expressly stated that, in the absence of fuller argument, he considered the charge of abduction to be completely irrelevant.<sup>169</sup>

The preference for charges of *plagium* over those of abduction in the 19<sup>th</sup> century has been reversed in modern law. The courts of the 21<sup>st</sup> century have sought to distance themselves from that crime and have generally eschewed any opportunity to make use of it where it has been possible to do so. In *Orr v K*,<sup>170</sup> the Sheriff held that although the law pertaining to *plagium* had not been abrogated, the accused could not be competently charged with that crime in that particular dispute as she enjoyed parental rights under section 3 (1) (a) of the Children (Scotland) Act 1995. In the Sheriff’s view, section 11 of the 1995 Act had created a civil law framework and so it was for the civil, not the criminal, courts to remediate the dispute between mother and father.<sup>171</sup>

Even when faced with instances in which a charge of *plagium* may be competent, the courts have attempted to avoid enjoining the necessary consequences of the crime by utilising different strands of law to achieve the same eventual outcome. Indeed, if the case of *Mary Millar* were to be heard today, it is quite likely that the charge of abduction would be given greater weight than that of *plagium*. As noted, the court in *Brouillard v HMA* ruled that it was competent to bring a charge of abduction in place of a charge of *plagium*,<sup>172</sup> which ostensibly stands against the authority of *Mary Millar*. This had previously been affirmed, implicitly, in

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<sup>168</sup> *Ibid.* p.80

<sup>169</sup> *Ibid.* p.81

<sup>170</sup> 2003 SLT (Sh Ct) 70

<sup>171</sup> *Ibid.* p.72

<sup>172</sup> *Brouillard v H.M.A* (2004) JC 176, para.20



both *Anderson v HMA*<sup>173</sup> and *M v HMA*.<sup>174</sup> In *SB v HMA*,<sup>175</sup> the court ruled that, ‘*although in certain situations, a person abducting a pupil child may be charged with theft of that child (plagium), limited assistance can be derived from decisions on that crime given its association with rights of ownership and property*’.<sup>176</sup>

The distaste expressed for the implications of *plagium* by Lord Carloway does not dispense with them. It is important to note that the charge of abduction simply serves as an alternative to one of *plagium*; issues of property and ownership are still relevant in relation to children and they shall continue to be until the crime of *plagium* is expressly abrogated. The court in *Brouillard* expressly affirmed that the question of the child’s consent is irrelevant in a charge of *plagium*;<sup>177</sup> the law consequently continues to deny children their agency in this context. It also continues to frame the crime as one committed against one with parental rights, with the child reduced to a mere indirect, incidental object. *Brouillard* affirmed this as well, citing the *ratio* of (then) Lord Justice-General Hope from the case of *Hamilton v Wilson*:

‘[Plagium is] *the deliberate taking of a child from the custody of a parent or other person who has for the time being the parental right of custody in terms of the statute [the Law Reform (Parent and Child) (Scotland) Act 1986] or under an order made by the court*’.<sup>178</sup>

As such, it is clear that, as of 2015, there remains binding judicial precedent in Scotland which expressly recognises that a child is the mere object of a charge of *plagium*. The ‘custodier’ is wronged by the act, not the directly affected child. *Brouillard* has confirmed that

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<sup>173</sup> 2001 SLT 1265

<sup>174</sup> (1980) SCCR Supp. 250

<sup>175</sup> [2015] HCJAC 56

<sup>176</sup> *Ibid.* para.31

<sup>177</sup> *Brouillard v H.M.A* (2004) JC 176, para.19

<sup>178</sup> 1994 SLT 431, p.433

the charge is ‘rightly’, to use the words of Lord Justice-Clerk Granton,<sup>179</sup> classified as theft within the taxonomy of crime<sup>180</sup> and so, since an object must be property to be the object of a theft,<sup>181</sup> it is clear that children are classified as ‘property’ and consequently as ‘things’ within the context of Scottish criminal law.

Accordingly, it is submitted that it is plainly evident that there are a plethora of problems with *plagium*, particularly as the crime is contemporaneously conceptualised in Scottish legal thought. In order to solve these problems, one may suggest that it would be best for *plagium* to return to its Romanistic and early Scottish roots; that Scottish legal scholars and commentators ought to reframe all discourse surrounding the crime and conceptualise it as one which pertains to personality as opposed to property. This is not possible; as Lord Carloway notes, the crime is now essentially bound up in the notion of property and proprietorship.<sup>182</sup> *Plagium* may be an ‘archaic and somewhat anomalous crime’,<sup>183</sup> but one cannot swim against the overwhelming tide of judicial authority which has developed since *Torrence and Waldie*.<sup>184</sup>

Alternatively, one may suggest that, since the crime of abduction is akin to *plagium* in all material respects, it would be best for Scottish prosecutors to simply eschew the use of indictments for *plagium* in instances where a child is kidnapped and substitute the charge of abduction in its place. As the existence of *plagium* is recognised by statute, this is not a satisfactory solution.<sup>185</sup> It is submitted that it is unlikely that a crime which has been given Parliamentary recognition can fall into desuetude by simple lack of citation. Similarly, since

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<sup>179</sup> *Rachel Wright* (1808) Burnett App. VII

<sup>180</sup> *Brouillard v H.M.A* (2004) JC 176, para.19

<sup>181</sup> *Hamilton v Mooney* 1990 S.L.T. (Sh. Ct.) 105, p.108

<sup>182</sup> [2015] HCJAC 56, para.31

<sup>183</sup> Sir Gerald Gordon, *The Criminal Law of Scotland*, (Second Edition), (Edinburgh: W. Green, 1978), para 29-52

<sup>184</sup> (1752) Maclaurin, 152

<sup>185</sup> Visiting Forces Act 1952 c.67, Schedule para.4(a)

plentiful and recent common law authority recognises the continued existence of the crime, it remains significant in Scottish jurisprudence. If the law is to be regarded as having an ‘expressive function’,<sup>186</sup> then the law of Scotland expresses a rather unsavoury statement by continuing to recognise the crime and, by implication, its resultant consequences.

In the 1987 Scottish Law Commission Report on Child Abduction,<sup>187</sup> the authors noted that, after inviting views on what ought to be the future of the crime of *plagium*, the majority of respondents to the Commission’s memorandum favoured the complete abrogation of the crime.<sup>188</sup> A significant point of concern arose, in the Commission’s view, since ‘*as a result of the concept of ownership or possession of the child by the parent*’, the question ‘*as to whether the crime of plagium can be committed by a parent*’ was left broadly unanswered (save for the then recent and untested authority in *Downie*)<sup>189</sup> and, resultantly, the law was unclear.<sup>190</sup>

That this point is clarified by later case law<sup>191</sup> is no reason to eschew the Commission’s recommendation, however; the Commission also expressly criticised the fact that the approach of the law pertaining to *plagium* was ‘*still based on the question of whether the parent had any rights in the child rather than on the interests of the child*’.<sup>192</sup> It is submitted that in any legal regime (such as that of 21<sup>st</sup> century Scotland) wherein the welfare of the child is the paramount concern in any legal case in which they are involved,<sup>193</sup> the Commission’s concerns ought to carry even greater weight. If the child were the subject of the crime of *plagium*, the courts would be obliged to consider the child’s rights, interests and views if a decision as to the child’s

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<sup>186</sup> See Cass R. Sunstein, *On the Expressive Function of Law*, [1996] U. Pa. L. Rev. 2021, *passim*

<sup>187</sup> Scottish Law Commission Report on Child Abduction, February 1987

<sup>188</sup> *Ibid.* para.3.6

<sup>189</sup> (1984) SCCR 365

<sup>190</sup> *Ibid.* para.3.4

<sup>191</sup> *Hamilton v Wilson* 1994 SLT 431, p.433

<sup>192</sup> Scottish Law Commission Report on Child Abduction, February 1987 para.3.4

<sup>193</sup> See the foreword to *The Children (Scotland) Act 1995 Regulations and Guidance*, Volume 1: *Support and Protection for Children and Their Families*, (2004) and *The Children (Scotland) Act 1995*, s.16(1)

custody were ultimately to be made.<sup>194</sup> As it stands, since the child is a mere object, there is no obligation to do so; *plagium* only accounts for the immediate custodian's rights and interests.<sup>195</sup>

The issue of 'pupillarity' also caused the Commission concern.<sup>196</sup> They submitted that the fact that boys and girls ceased to be regarded as 'pupils' at different ages was not in line with the fact that the law, at the time of the report, treated all those under sixteen as children and that pupillarity had no real practical application.<sup>197</sup> As a possibility, they suggested that if *plagium* were to remain a part of Scots law, then the crime ought to apply to children of either gender who are under the age of sixteen.<sup>198</sup> This possibility was expressly rejected when the Age of Legal Capacity (Scotland) Bill was debated in Parliament<sup>199</sup> and the Age of Legal Capacity (Scotland) Act expressly states that nothing therein affects the criminal or delictual responsibility of 'any person'.<sup>200</sup>

It is consequently apparent that the continued existence of the crime of *plagium* stands even more at odds with contemporary thinking than it did when the Law Commission levelled this accusation at it in 1987. The law presently recognises that 'infant' pupil children may have a will of their own for the purposes of the civil and criminal law; as noted at the start of this chapter, the civil law affords all children some contractual capacity,<sup>201</sup> decision making capacity in relation to medical treatment<sup>202</sup> and the ability to instruct a solicitor.<sup>203</sup> It also grants testamentary capacity to pupil boys, since everyone in Scotland is imbued with such capacity

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<sup>194</sup> The Children (Scotland) Act 1995, s.16

<sup>195</sup> *Hamilton v Mooney* 1990 S.L.T. (Sh. Ct.) 105, p.108; Scottish Law Commission Report on Child Abduction, February 1987 para.3.4

<sup>196</sup> Scottish Law Commission Report on Child Abduction, February 1987 para.3.3

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> Hansard, Age of Legal Capacity (Scotland) Bill, HL Deb 01 July 1991 vol 530 cc866-82, at p.879

<sup>200</sup> Age of Legal Capacity (Scotland) Act 1991 c.50, s.1(3)(c)

<sup>201</sup> *Ibid.* s.2 (1)

<sup>202</sup> *Ibid.* s.2(4)

<sup>203</sup> *Ibid.* s.2(4A)

after attaining the age of twelve,<sup>204</sup> yet boys do not cease to be pupils until the age of fourteen. Pupil children of both sexes are *capax doli* for some years before their pupillage ends, as, at present, the age of criminal responsibility in Scotland remains set at eight.

As a result of this, there is one particular concern which can be raised with the recent calls to reform the age of criminal responsibility in Scotland.<sup>205</sup> For as long as *plagium* remains a crime in the law of Scotland, the law implicitly expresses the view that a child has ‘*no will of its own*’, as a result of the law’s expressive function. It is consequently submitted that, if Parliament is indeed to raise the age of criminal responsibility, it should also take the opportunity to abrogate the crime of *plagium* and make clear that, while the law does not recognise that children possess full decision-making capacity, it nevertheless views their rights, interests and welfare as paramount. If the law pertaining to *plagium* is not reformed when this change is made, the argument that the law considers children no more than mere ‘things’ gains strength.

## **CONCLUSION**

From the above, it is ultimately clear that Scots law recognises that children may be stolen. ‘*For something to be stolen it must belong to someone, [that] is the definition of theft in its purest sense*’.<sup>206</sup> Things which the law recognises as belonging to persons may be termed ‘property’ and the relationship between a person and a thing may similarly be termed ‘proprietary’ if it is given legal protection. In Scotland, ‘*property law is the law of things*’;<sup>207</sup> the rights or obligations which may arise in relation to property are not indicative of the nature of ‘property’, they are simply incidental consequences which arise as a result of the relationship

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<sup>204</sup> *Ibid.* s.2(2)

<sup>205</sup> Elaine E Sutherland, *Time to Raise the Age of Criminal Responsibility*, (14/09/2015), The Journal

<sup>206</sup> *Hamilton v Mooney* 1990 S.L.T. (Sh. Ct.) 105, p.108

<sup>207</sup> Kenneth Reid, *The Law of Property in Scotland*, (Buttersworth, 1993), p.1

between the proprietor and the thing which the proprietor claims to own. In defining ‘property’ within the Scottish context, it is therefore pertinent only to consider if the object of the property right which is claimed is regarded as a ‘thing’ by law and if the person who asserts that they have ‘ownership’ of it is authorised to do.

The word ‘thing’ can be interpreted, in the legal context, as a tangible or intangible object which is ‘durable’ and separate from other things and *personas*, *per* Professor MacCormick, but only if they are also granted legal significance and recognition by law. The positive law can choose to create *res incorporales*; intangible things, such as personal rights,<sup>208</sup> which exist only as juristic creations. Equally, it can choose to deny that *res corporales* are ‘things’ for the purposes of law, in spite of their existence as physical objects.

Scots law does not deny that the bodies of children, whether living or dead, have a proprietary nature. Since the common law denies the personality of children and the criminal law regards them as property, so too must it be concluded that the law necessarily regards them as ‘mere things’, regardless of the fact that it currently recognises that they may have a will of their own and may be the subject, as well as the object, of rights. The common law and statute both currently understand *plagium* as a crime against property, in spite of the fact that the roots of the crime lie primarily in the protection of personality and liberty.

The courts have, in the 21<sup>st</sup> century, indicated that they are uncomfortable with the continued existence of the crime of *plagium*. Its links to questions of property and ownership render it ‘*of limited assistance*’ to any tribunal which is faced with an instance of abduction or

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<sup>208</sup> As *res incorporales* such as *hereditas, usus fructus et obligationes* would be contemporaneously understood: See Cribbet and C.W Johnson, *Principles of the Law of Property*, (3<sup>rd</sup> Edition) (1989) pp.380-389; it is, however, submitted that the *res incorporales* are better understood as just that – incorporeal things – than as ‘rights’, since the Romans had no concept of ‘rights’; see Ernest Metzger, *Actions*, in Ernest Metzger (Ed.) *A Companion to Justinian’s Institutes*, (London: Duckworth, 1998) pp.208-209 and Barry Nicholas, *An Introduction to Roman Law*, (Oxford, Clarendon Press, 1962) p.100

what may be broadly termed ‘abduction’.<sup>209</sup> With that said, the crime still influences Scottish jurisprudence and its resultant implications reverberate through the law. Since *plagium* is framed as a crime against property, the interests of custodians is protected above those of the child.

It is ultimately submitted that if the Scottish legal system truly seeks to place the welfare of the child as the paramount consideration in any case which involves a child, the crime of *plagium* must be abolished. This matter is particularly pressing if the Scottish Parliament is, indeed, to the age of criminal responsibility. While the reasons for possibly enacting this change are good and, indeed, there are legally and ethical sound, progressive reasons to ensure that vulnerable children are spared the vicissitudes of the criminal justice system, for as long as *plagium* remains a recognised crime, the law of Scotland expresses an unduly possessive and paternalistic attitude towards children. The crime of *plagium* was imbued with a proprietary characteristic in respect of children because children were seen as having ‘*no will of their own*’ in the eighteenth century.<sup>210</sup> There is absolutely no reason for the law of the 21<sup>st</sup> century to continue to enjoin this idea and so, this article submits, the crime of *plagium* ought to be abolished.

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<sup>209</sup> *SB v HMA* [2015] HCJAC 56, para.20

<sup>210</sup> David Hume, *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*, (Edinburgh: Bell and Bradfute, 1797), p.84