“Forcibly and Against Her Will”: Mid Nineteenth-Century Scottish Rape Law and Proceedings

A Thesis Submitted
To the Graduate School
Valdosta State University

in partial fulfillment of requirements
for the degree of

MASTER OF ARTS

in History

in the Department of History
of the College of Arts and Sciences

July 2016

Victoria Grady

B.A., Valdosta State University, 2013

© Copyright 2016 Victoria Grady

All Rights Reserved

This thesis, "'Forcibly and Against Her Will': Mid Nineteenth-Century Scottish Rape Law and Proceedings," by Victoria Grady, is approved by:

Thesis Co-Chairs

Mary Block, Ph.D.
Professor of History

Paul T. Riggs, Ph.D.
Dean of Arts, Humanities, and Social Sciences
Wilkes University

Committee Member

Melanie S. Byrd, Ph.D.
Professor of History

Catherine Oglesby, Ph.D.
Professor of History

Theresa Mae Thompson, Ph.D.
Professor of English

Dean of the Graduate School

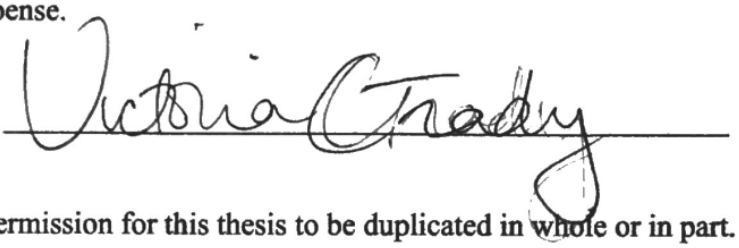
James T. LaPlant, Ph.D.
Professor of Political Science

FAIR USE

This thesis is protected by the Copyright Laws of the United States (Public Law 94-553, revised in 1976). Consistent with fair use as defined in the Copyright Laws, brief quotations from this material are allowed with proper acknowledgement. Use of the material for financial gain without the author's expressed written permission is not allowed.

DUPLICATION

I authorize the Head of Interlibrary Loan or the Head of Archives at the Odum Library at Valdosta State University to arrange for duplication of this thesis for educational or scholarly purposes when so requested by a library user. The duplication shall be at the user's expense.

Signature 

I refuse permission for this thesis to be duplicated in whole or in part.

Signature _____

ABSTRACT

Scottish historians have remained largely silent on rape, particularly in the nineteenth century. This study uses criminal precognitions, indictments, and court records found in the AD6, AD14, JC4, and JC26 series of documents in the National Archives of Scotland to analyze rape in nineteenth-century Scotland for the first time. Throughout this period, Scottish rape law remained unchanged. The law defined rape as carnal knowledge of a woman by force and against her will and prescribed death as the punishment for this crime. Even though the law remained the same, only two men hanged for rape in years ranging from 1830-1860. Prosecution rates for rape remained high in the middle of the century, but conviction rates remained low as juries were reluctant to convict men of rape and instead convicted men of lesser charges to avoid the harsh penalty of death. The sources examined also reveal that most victims were under the age of 12 and their attackers were between the ages of 20-29. The law defined the rape of young girls as particularly heinous, yet no man hanged for raping them. The law also offered protection to prostitutes, yet these women are absent from legal records. Institutional writers also extensively commented on the use of stupefying agents to purposefully drug a woman to overcome her will. Only two rape cases involved purposeful intoxication and they were never prosecuted because the perpetrators fled from justice. The lack of hangings and presence of elements extensively commented on in legal sources demonstrates contradictions within the Scottish legal system. This study examines these disparities to demonstrate how the "law in books" differed from the "law in action" during rape proceedings in nineteenth-century Scotland. This study is the first study to examine rape law and proceedings as well as the victims, perpetrators, and spaces of rape itself.

TABLE OF CONTENTS

LIST OF TABLES

ACKNOWLEDGMENTS

I cannot express enough thanks to my committee members for their advice and time: Dr. Mary Block and Dr. Paul Riggs, my co-chairs, Dr. Melanie Byrd, Dr. Catherine Oglesby, and Dr. Theresa Mae Thompson. A special thank you to Dr. Riggs for introducing me to Scottish law and guiding me through this process from miles away, and to Dr. Block for all your time and patience.

My completion of this project could not have been accomplished without funding from the Graduate School and History Department at Valdosta State University and the Highland Society of Valdosta, Georgia. Thank you all for believing in my project and funding my research at the National Archives in Edinburgh, Scotland.

Finally, my deepest gratitude to my amazing husband and family for all your love, support, and encouragement. Thank you for helping at home to ensure I completed my work.

Chapter I

INTRODUCTION

In 1833, 16-year-old Mary Shields accused 16-year-old Philip Cairnie of raping her. Shields resided with her employer, a weaver, and Cairnie and his mother had previously lodged with them on Cheapside Street near Anderston, a district in Glasgow. Shields stated her employer had given her a glass of spirits on the day of her attack, but she only drank half a glass. After having a drink, she headed to Mr. Crum's provision store for mutton. Cairinie approached her at the store and told her that he had a letter containing money from her aunt and that if she would go with him to his mother's home, she could receive the letter. Cairnie then led her through a field saying it was the shortest way to his mother's home and violently seized hold of her hair, twisted it around his hand, and threw her on the ground. When she cried for assistance, he took a handful of mud from the field and thrust it into her mouth to keep her silent. She attempted to get up, but he threw her down and kicked her in the face several times. After kicking her, he raised her petticoats and succeeded in having "carnal connection" with her. She felt his "private parts" enter her body and she felt "wetness" as if something had come from him. When he got up, she tried to rise too, but he kicked her on the small of the back saying "damn you, you buggar, I will put you from telling tales about me." Having dealt his final blows, he then left her in the field.

Cairnie admitted to authorities that he had been drinking all day and evening when he met Shields. However, he claims that she approached him and put her arm around his neck and walked with him. Cairnie stated he had several times lifted Shields

up and helped her walk because "she was much the worse of drink." When they got near "a piece of wasted ground" and fell, he told Shields he "would have her maidenhead for carrying her," and she consented. Cairnie was indicted for rape and sent to trial in the Glasgow circuit court. A jury found him guilty of rape, but recommended him to mercy because of his young age. Despite this recommendation for mercy, the prosecutor did not "restrict the libel," or remove the death penalty, and a judge sentenced him to death and to be hanged.[1]

Philip Cairnie's case is only one out of the two rape cases featured in legal archival documents examined in this study that resulted in death. Lacking any codification in the nineteenth century, Scottish law relied on common law, institutional writers, and case law to define crimes and their punishments.[2] All these authoritative sources defined rape as a man having "carnal connection with a woman forcibly and against her will" with a punishment of death upon conviction.[3] However, out of 229 rape cases from the years 1830-35, 1840-45, 1850-55, and 1860-65, only two men hanged for rape.[4] Furthermore, records indicate that no man hanged for raping adult women. Therefore, contrary to the "law in books" of Scotland that punished the rape of all children and women with death, the "law in action" demonstrates that judges rarely sentenced men to death for the crime and when they did, it was only for raping girls.

---

[1] NAS: AD14/33/211, Crown Office Precognitions, 1833 and NAS: JC26/1833/320, High Court of Justiciary Processes, 1500-2003.
[2] Scottish law referred to legal treatise writers as institutional writers. This study uses that term to refer to treatise writers.
[3] David Hume, "Of Rape," in vol. I of *Commentaries on the Law of Scotland Respecting Crimes*, ed. Benjamin Robert Bell 1986; reprint. 4th ed. with Bell's Notes, 301.
[4] The years 1830-35, 1840-45, 1850-55, and 1860-65 were chosen because they demonstrated specific changes in the criminal justice system and cover a total of twenty years to provide a more full examination of rape proceedings.

Positive law, or the "law in books," refers to "the authoritative pronouncements of legislators, judges, or jurists."[5] Positive law in Scotland derived from common law, institutional writers, and case law.[6] As James Bernard Murphy states, positive law derives from rules imposed by a "supreme authority within a political community."[7] George MacKenzie, an early institutional writer, stated that rape was one of the four pleas of the Crown, prosecutable only by the High Court, and punishable by death.[8] MacKenzie's definition of *raptus* as the "violent carrying away of a woman from one place to another, for satisfying the ravisher's lust" was supplanted by David Hume, another Scottish institutional writer who defined rape as the: "carnal knowledge of the woman's person, by penetration of her privy parts, or entry of her body" by "force and against her will."[9] Hume's successors, John Burnett and Archibald Alison, upheld his definition of rape. Unlike the English system of law, Scots law did not rely as much on statutes to define crimes and their punishments. Scots law looked more to its own common law of crimes, or the usage and practice of their own criminal courts over time. In Scottish eyes, this reliance on the common law allowed for more flexibility in the criminal justice system and even allowed the High Court to use its "declaratory power" to define actions as criminal.[10] Within the law of rape, the court used this flexibility in the

[5] Richard L. Abel, "Law as Lag: Inertia as a Social Theory of Law," *Michigan Law Review* 80, no. 4 (1982), 785.
[6] T.B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh: W. Green & Son Ltd., 1962), 25.
[7] James Bernard Murphy, *Philosophy of Positive Law: Foundations of Jurisprudence* (New Haven: Yale University Press, 2005), 3.
[8] George MacKenzie, "Raptus," in *Laws and Customs of Scotland in Matters Criminal: Wherein is to be Seen How the Civil Law, and the Laws and Customs of other Nations do agree with, and Supply Ours*, (Edinburgh: Thomas Brown, 1678), 83, 202.
[9] George Mackenzie, "Raptus," 83 and David Hume, "Of Rape," in vol. I of *Commentaries on the Law of Scotland Respecting Crimes*, edited by Benjamin Robert Bell (1986 Reprint; 4th ed. with Bell's Notes), 301.
[10] Scott Crichton Styles, "Something to Declare: A Defence of the Declaratory Justice and Crime: Essays. Power of the High Court of Justiciary," in *Justice and Crime: Essays in Honour of the Right Honorable The Lord Emslie*, ed. Robert Hunter (Edinburgh: Clark, 1993), 211.

case of Charles Sweenie in 1848, declaring his behavior, impersonating a woman's husband in order to gain consent, fell short of rape but was still criminal.[11] This new category of crime eventually acquired its own "nomen juris": clandestine injury to women. However, the "law in action" reveals that is not the case.[12]

While Scotland's rape law remained unchanged throughout the nineteenth century, the positive law, or written law, was often at odds with the law in action. The law in action refers to how the law is applied in actual cases. In Scotland "the law in books, or lack thereof, was irrelevant to the law in action, which continued to operate even under circumstances where the law in books was difficult to discover."[13] The law in action reveals how courts interpreted and applied rape law during proceedings. An examination of the law in books and the law in action in nineteenth-century law and legal documents reveals that convicted rapists almost always escaped the gallows.

In his article "What's Law Got to Do with It? Legal Records and Sexual Histories," Stephen Robertson argues that court documents provide an insight into how historians of sexuality use legal documents to examine the relationship between law and society.[14] He suggests that scholars should pay close "attention to the gap between the law on the books and the law in practice."[15] When scholars examine more than just the law, they "look beyond legal texts and doctrines, they tend to produce institutional histories, charting how the legal system worked on its own terms, not looking at it

[11] Catherine Devine accused Sweenie of entering her home and having sexual intercourse with her while she slept. He was found not guilty on all charges. *Charles Sweenie* (1858) 3 Irv 109.
[12] *Nomen juris* is the Latin legal term for name of the law.
[13] Riggs, "Scottish Criminal Law and Procedure in the Nineteenth Century," PhD diss. (University of Pittsburgh, 1997), 245.
[14] Stephen Robertson, "What's Law Got to Do with It? Legal Records and Sexual Histories," *Journal of the History of Sexuality* 14, no. 1 (2005): 163.
[15] Robertson, "What's Law Got to Do with It?," 184.

critically or as a part of culture."[16] This study follows Robertson's approach by examining the document series AD6, AD14, JC4, and JC26 found in the National Archives of Scotland from the periods 1830-1835, 1840-45, 1850-55, and 1860-65.[17]

Scotland's legal system differs from English law in significant ways. As Paul Riggs notes in his article "How Scotland became Postcolonial," Scotland's bench and bar carefully guarded the Scottish law after the Union of 1707 by reducing the degree of assimilation, particularly in criminal law and procedure.[18] The Scottish legal community prided themselves on the uniqueness of their legal system and continued to rely on it throughout the nineteenth century.[19] What follows is a brief overview of how the Scottish legal system operated, which demonstrates its uniqueness. The reporting process began when victims or their family members reported their attacks to local authorities. The police then brought the victim to the procurator-fiscal, which is the name for the local prosecutor in Scotland. The procurator-fiscal then gathered sworn statements, called "declarations." He also gathered witness statements, medical reports, and physical evidence, which in Scottish law are called "productions." Meanwhile, police apprehended the accused, or in Scottish legal terms, the panel, to bring to the procurator-

[16] Robertson, "What's Law Got to Do with It?," 171.
[17] The AD6 series of documents contains the High Court Minute Books which describes cases prosecuted in the High Court and their proceedings. The AD14 series contains criminal precognitions, which statements gathered by the victim, the accused, and witnesses. They also contain medical reports and documentation of physical evidence. The JC4 series contains the proceedings of cases in the High Court circuits and includes pleas, verdicts, and sentences. The JC26 series contains criminal indictments, prosecutorial notes, and final statements made by both the victim and the accused. The time periods examined were chosen because earlier records are fragmentary. These years also demonstrated specific changes in the criminal justice system and cover a total of 20 years to provide a more full examination of rape proceedings. All the information gathered is found solely in the National Archives of Scotland.
[18] Paul Riggs, "How Scotland Became Postcolonial: Scottish Lawyers and the Autonomy of Scots Law." *Journal of Commonwealth and Postcolonial Studies* 12 (2005): 9-23.
[19] The uniqueness of the Scottish legal system lies in its lack of codification, its own procedure, and its separate development from England.

fiscal.[20] When the police apprehended the accused, they notified him that any statement he made could later be used against him.[21] Panels could refuse to answer any questions but generally they did make declarations. Panels were then held in a local jail until court proceedings began.[22] Because it was a capital crime, rape was not bailable although one case was found where an accused man, Andrew Smith, was liberated on bail in 1833. He fled from justice.[23]

When the precognitions were complete, the procurator-fiscal sent them to the Crown Counsel where the "sorting" process began. The Crown Counsel consisted of the Lord Advocate, Scotland's chief law officer, the Solicitor-General, who supervised prosecution, and a group of advocates depute, junior members of the bar.[24] The advocates depute were responsible for most prosecutions and consulted with the Solicitor-General as needed.[25] The Crown Counsel determined the form of the indictment, the formal charges against the panel, and whether the prosecution should go to the High Court of Justiciary, the supreme criminal court, or a sheriff court where less serious crimes were heard. As one of the four pleas of the crown, rape cases were always heard in the High Court. Depending on the location of the crime, a rape case was tried in either the High Court in Edinburgh, or one of its circuits held every spring or autumn in either the north,

[20] Modern, funded police forces were established in Glasgow, Edinburgh, and Paisley by 1800, 1805, and 1806 respectively. Police had previously served public maintenance roles but by the nineteenth century, urban police forces focused on crime fighting. Riggs, "Scottish Criminal Law and Procedure," 36-77.
[21] Riggs, "Scottish Criminal Law and Procedure," 84-85.
[22] Jails were for holding prisoners until trial and for serving imprisonment terms. Prisons were larger institutions under more surveillance and stricter codes. A more detail account of jails and prisons can be found in Joy Cameron, *Prisons and Punishment in Scotland: From the Middle Ages to the Present* (Edinburgh: Canongate, 1983).
[23] NAS AD 14/33/257, Crown Office Precognitions, 1833.
[24] As the chief law officer, the Lord Advocate rarely appeared in court. His responsibility was handling legislature business in London.
[25] Riggs, "Scottish Criminal Law and Procedure," 145.

west, or south. Advocates depute went on rotation in the circuit court to try more serious crimes. In the Scottish legal system there is no notion of felony or misdemeanor, but sex crimes ranged in seriousness from the more serious crime, rape, to "assault with intent to ravish," or "lewd, indecent, libidinous behavior or practices."[26]

Once the Crown Counsel sorted a case to the High Court or one of its circuit courts, criminal proceedings began. Before the trial began, a jury was selected, the court appointed defense counsel, determined the "relevancy" of the libel, meaning a judge examined whether the specific acts warranted the indicted crime, and whether the time, location, and names of panel and victim were correct, and then the panel entered his plea. Panels usually pled not guilty to rape and when pleading guilty, they did so under a plea bargain agreement to the lesser charge in the indictment. At any stage during trial, a prosecutor could "restrict the libel" or "restrict the pains of the law," meaning he could remove the death penalty as punishment for a crime.[27] After entering a plea, proceedings began immediately with the advocate depute calling his first witness. The Scottish court rarely allowed for opening statements. After the prosecution made its case, the defense then called its witnesses. Once both sides presented their case, cross-examination occurred. Judges and jurors could also ask questions of their own. Trials concluded with closing statements by first the prosecution then the defense.[28]

The trial concluded with the "judicial charge," a summary of evidence by the presiding judge for the benefit of the jury. The jury were then enclosed to begin deliberations. All-male, 15 member juries could convict with a guilty verdict or acquit

[26] Smith, *A Short Commentary*, 222-224 and Riggs, "Scottish Criminal Law and Procedure," 82-83.
[27] If the prosecutor "restricted the libel," he usually did so before the jury rendered their verdict to determine the effect of their evidence on the jury and to ensure a conviction.
[28] Riggs, "Scottish Criminal Law and Procedure in the Nineteenth Century," 145.

with not guilty or not proven. Not proven verdicts meant that juries did not find the prosecutor's evidence sufficient enough to warrant a guilty verdict, but with enough to prevent a not guilty verdict. The rule of double jeopardy applied in Scottish courts, so a person acquitted could not be charged for the same crime again. Scottish juries did not rely on a unanimous verdict and could convict on a majority or plurality decision.[29] Once the jury rendered their verdict, the sentencing phase began.[30]

If the prosecutor restricted the libel, the judge could not sentence the panel to death. In rape trials, a man convicted of rape could receive a sentence ranging from death to transportation to imprisonment or penal servitude.[31] If a man was convicted on a lesser sex crime, he could receive either transportation or imprisonment or penal servitude. The unique nature of the Scottish legal system allowed for men accused and convicted of rape to avoid the extreme penalty for rape, but allowed for some form of punishment if convicted.

The men and women in these documents lived in a changing and industrializing world. One of the most important changes that occurred in the nineteenth century was increased urbanization. While Scotland had industrialized at a high rate in the beginning

[29] Majority decisions meant that a large number of jurors chose to convict or acquit. For example, ten jurors voting to convict represents a majority decision. Plurality decisions meant that slightly fewer jurors chose to convict or acquit. Eight jurors choosing to convict with seven choosing to acquit would represent a plurality decision.

[30] Riggs, "Scottish Criminal Law and Procedure," 152.

[31] For the purposes of this study, the two forms of punishment are combined as one. However, the two punishments differed in severity. Penal servitude was more severe than imprisonment and included hard labor, severe punishments, and harsh conditions in larger prisons under centralized control by the British government. The purpose was to make conditions as harsh as possible to deter criminals from committing future crimes. Imprisonment sentences were often served in local jails. Because many prisoners spent months in jail awaiting trial, judges considered these supplemental sentences and were considered part of the imprisonment sentence. Imprisonment and penal servitude is discussed at length in Cameron, *Prisons and Punishment in Scotland* and Riggs, "Scottish Criminal Law and Procedure," 160. Furthermore, men who received transportation as a sentence were transported to Australia where they served prison sentences.

of the century, many men and women lived in rural areas rather than in cities.[32] However, cities grew as people relocated to urban areas to seek employment, which in turn allowed Edinburgh, Glasgow, Dundee, and Aberdeen to emerge as the four main cities in Scotland.[33] Larger urban populations created sanitation and overcrowding issues in growing cities. Crowded housing conditions forced multiple families to share one to two bedroom tenement flats and also brought the easy transmission of disease among people. A housing commission report details a continuance of these issues from the nineteenth century into the twentieth century. The report states that some "rooms on the lower storeys have insufficient light and air…if the city is an old one…[there are] houses still more crowded" in closes, or alleys, and lanes that "face one another [and] are mutually obstructive."[34] Furthermore, the report details how children further contribute to overcrowding by playing in the streets or on the stairs.[35] Cholera and tuberculosis in particular were diseases of the tenements. For upper and middle-class society, the neighboring tenements proved an eyesore and a source of criminal activity. Population increases and the rural/urban divide did affect where rapes occurred.

Within the growing population of Scotland, class affected all parts of life for nineteenth-century men and women. For women especially, class shaped their personal experiences. All women were under male authority as Scotland remained a patriarchal society. Women were seen as subordinate to men, especially their father, husbands, and

[32] T.M. Devine, "Urbanisation," in *People and Society in Scotland: Volume I, 1760-1830*, eds. T.M Devine and Rosalind Mitchison (Edinburgh: Economic and Social History Society of Scotland, 1988), 328.
[33] Ibid.
[34] Scotland Royal Commission on Housing, "Report of the Royal commission on the housing of the Industrial population of Scotland, Rural and Urban," (Edinburgh: Station Office, 1917), 43, accessed electronically, https://archive.org/stream/reportofroyalcom00scotrich#page/42/mode/2up.
[35] Ibid.

sons.[36] Women of all classes were expected to marry and bear children.[37] However, working-class women often had to contribute to more than just child-rearing. With the nineteenth century came the ideal of domesticity and the firm belief in the public and private spheres.[38] Upper and middle-class women generally remained at home to perform their domestic duties. While upper and middle-class women remained largely in the private sphere, lower and working-class women participated more widely in the public sphere as they often had to work outside the home to supplement their household income. Urban working-class women tended to work either in textile factories or as domestic servants or alongside their husbands on their farms or in town shops.[39] Working-class women that entered the workforce were still responsible for taking care of their household and their children; .they had to balance their productive roles with their reproductive and domestic ones.[40] Nineteenth-century Scottish society was a patriarchy that allowed for men of all classes to have authority over their wives and daughters, including in matters of sex.

Attitudes toward sex were also formed along class and gender lines. T.C. Smout asserts that "there is no reason to suppose that the Victorians were less interested in sex than we are, and certainly not that they were a more moral people."[41] The upper, middle, and lower classes had their own sexual moral codes and any persons who deviated from that code became outsiders in their respective communities. Upper and middle-class society sheltered their women and girls from all sexual matters. Society expected a

---

[36] Michael Lynch, *Oxford Companion to Scottish History* (Oxford: Oxford University Press, 2007), 645.
[37] Lynch, *Oxford Companion to Scottish History*, 646.
[38] Eleanor Gordon, "Women's Spheres," in *People and Society in Scotland, Volume II, 1830-1914*, eds. W. Hamish Fraser and R.J. Morris (Edinburgh: Economic and Social History Society of Scotland, 1990), 206.
[39] Ibid.
[40] Lynch, *Oxford Companion to Scottish History*, 648.
[41] T.C. Smout, *A Century of the Scottish People: 1830-1950* (London: Fontana, 1986), 159.

woman of these social classes to be chaste until marriage to ensure a good financial or social match for herself and her family. Any girl who had sexual relations before marriage ruined her prospects of a good marriage and brought shame to herself and her family. A young girl was seldom if ever left unchaperoned out of fear that she would be seduced by a charming suitor. For upper and middle-class men, however, sex outside of marriage was expected. Linda Mahood argues that these men turned to brothels and lower-class women for sex because they saw women of their class as untouchable.[42] She takes a sympathetic view of the lower-class women who engaged in sexual relations with upper and middle-class men who had no other outlet for sex. Many broadsides warned against the dangers of prostitution for women. A broadside entitled "Life, Sufferings, and Death of Janet Fleming" details the seduction and "ruin" of a middle-class girl named Janet Fleming. Because of her loss of honor, she was forced into prostitution. The girl eventually caught a "fatal disease" and died. Her parents abandoned her and only visited her because of her dying plea to see them one last time. The broadside serves as a cautionary tale to girls about the perils of seduction and the outcome of "acts of debauchery."[43]

Besides visiting brothels or hiring prostitutes, upper and middle-class men could also use their positions of power to have sexual relations with their domestic servants. Smout argues that these young, single girls were prey for their employers because they worked away from outsiders and were thus at the mercy of their employers.[44] Even

---

[42] Linda Mahood, *The Magdalenes: Prostitution in the Nineteenth Century* (New York: Routledge, 1990), 4.
[43] NLS Scotland Broadside" 'Life, Sufferings, and Death of Janet Fleming," accessed electronically from http://digital.nls.uk/broadsides/broadside.cfm/id/15461/criteria/janet%20fleming.
[44] Smout, *Century of the Scottish People*, 161.

though sex was readily available to men in the higher rungs of society, no documents from the years sampled for this study contain a reported case of an upper or middle-class man sexually assaulting any female of any class. While using their positions of power over their domestic servants to enter into sexual relations is a form of coercion, these women did not report their attacks if their master was of the respectable classes. Fear of loss of employment, fear of discovery, or shame over her attack present possible explanations for why these women did not report their attack. Sadly, they did not leave behind written records of either their attack or why they would not report a sexual assault, so historians can only infer as to why these voices went unheard.

While upper and middle-class women were sheltered from sex, working-class women were more exposed to sex because of their living conditions. Some working-class women did resort to prostitution to earn money or to have a well-off man care for them.[45] Society took a sympathetic view towards women in this position and negatively viewed men caught keeping or frequenting brothels. After the discovery of a brothel in Edinburgh that housed young girls, the author of a broadside urged police to not shy away from shutting down brothels and arresting both the prostitutes and their customers.[46] The author, as well as the author of the newspaper clipping used in the broadside, used specific names so that their "wealth nor station…be sufficient to shield them."[47]

---

[45] Judith Walkowitz, "Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain," in *Powers of Desire: The Politics of Sexuality*, eds. Ann Snitow, Christine Stansell, and Sharon Thompson (New York: Monthly Review Press, 1983), 422-423, and Judith Walkowitz, *City of Dreadful Delight:Narratives of Sexual Danger in Late-Victorian London* (Chicago: University of Chicago Press, 1992), 200, and Mahood, *Magdalenes*, 6.
[46] NLS Broadsides, "Discovery of a Most Shameful and Infamous Den in the New Town of Edinburgh," accessed electronically, http://deriv.nls.uk/dcn3/7440/74408336.3.jpg.
[47] Ibid.

On a daily basis, working-class women witnessed sexual relationships. Cramped living conditions exposed young children to sex as homes had little to no privacy. Most houses were single-room dwellings that shared a thin wall with their neighbors with "no real privacy."[48] Children often shared beds with or slept in the same room as their parents or other family members and would have seen or heard something during their time at home. Furthermore, working-class youths had little to no supervision because their parents worked and left them in the care of inattentive neighbors or by themselves to take care of their siblings, leaving them at risk for sexual assault. While upper class women were less exposed to sex, the opposite occurred with working class women. However, both upper and lower class women's experiences as victims of rape have gone largely unheard because Scottish society remained largely silent on rape.

Just as historical sources have remained silent on rape, so have historians. No studies exist that fully examine rape in nineteenth-century Scotland. When examining women and criminality, scholars neglect to examine women as victims of rape or sexual assault and instead focus on the crimes of homicide and domestic violence. Carolyn Conley analyzes the victimization of women at the hands of abusive spouses in her book *Certain Other Countries*. According to Conley, Scotland had the highest rate of male-perpetrated spousal homicide than any other nation in Britain.[49] However, the number of spousal homicide cases decreased as the century progressed, which leads Conley to conclude that juries hesitated to convict men for murder for killing their wives.[50] In most

[48] Scottish Royal Commission on the Housing, "Report of the Industrial Population of Scotland, Rural and Urban (Edinburgh: Stationery Office, 1917), 52, accessed electronically https://archive.org/stream/reportofroyalcom00scotrich#page/52/mode/2up/search/privacy.
[49] Carolyn Conley, *Certain Other Countries: Homicide, Gender, and National Identity in Late Nineteenth-Century England, Ireland, Scotland, and Wales* (Columbus: Ohio State University Press, 2007), 126.
[50] Ibid.

cases brought to trial, men had habitually abused their wives and their counsel sought to distinguish between intentional homicide and death following a beating.[51] Judges often sympathized with men accused of murder and considered them victims of "bad wives," matrimonial discord, or drunkenness.[52] Because of the nature of Scottish indictments that allowed for lesser, alternate charges, the courts leniently punished men who killed "bad wives" by convicting them on the alternate charge.[53] Husbands who murdered their wives out of jealousy were not so lucky. Juries were more likely to convict these men with a guilty verdict, and judges gave them heavier sentences.[54]

Conley notes that the decline in domestic homicide cases brought to court reflects society's indifference to wife beating and murder within upper-class society based on the belief that the lower classes were the main perpetrators of this crime.[55] As this study will show, there is also a class difference regarding rape cases. Conley also notes an ethnic element to domestic homicide cases. She argues that juries convicted all Irish men charged with domestic homicide, but they received a sentence of 2 years or less.[56] However, judges treated Irishmen harsher in cases where the wife was Scottish rather than Irish.[57] Clearly, region and race mattered in domestic homicide cases.

Writing in 1997, Leah Leneman examines spousal violence in eighteenth- and nineteenth-century Scotland in her article "'A Tyrant and Tormentor': Violence against

[51] Conley, *Certain Other Countries*, 133.
[52] Bad wives were women who society considered shrews or drunks. Conley, *Certain Other Countries*, 134, 136-142.
[53] Conley, *Certain Other Countries*, 141-142.
[54] Conley, *Certain Other Countries*, 154.
[55] Conley, *Certain Other Countries*, 127.
[56] Conley, *Certain Other Countries*, 129-130.
[57] Ibid.

Wives in Eighteenth- and Early Nineteenth-Century Scotland."[58] Leneman uses spousal separation cases to examine the nature of the crime in these earlier periods in comparison to the twentieth century. Leneman found that spousal abuse began soon after marriage and consisted of verbal abuse, withholding food and money, and physical violence.[59] Leneman notes that this abuse often resulted from jealousy, unrealistic expectations, and the husband's belief in his own dominance.[60] Although not reported in separation cases, she believes that sexual violence also occurred within marriage, but society regarded sex within marriage, consensual or nonconsensual, as a husband's right, making it a legal impossibility for a man to rape his wife.[61] Leneman's article sympathizes with women, by pointing out the violent deeds of their husbands, and also provides a profile of the crime.

Annmarie Hughes confirms Conley's findings in her article "The 'Non-Criminal' Class: Wife-Beating in Scotland (c. 1800-1949)."[62] According to Hughes, the judiciary classified wife-beaters as "non-criminals," victims of nagging or drunk wives who received light punishment for assaulting their wives.[63] These men often escaped punishment because judges and juries saw their financial contribution to their families as more important than their assault on their wives, so they convicted these men of and punished them for lesser crimes.[64] These men too often received lighter sentences because drunkenness or provocation by their wives was seen as diminishing their

[58] Leah Leneman, "'A Tyrant and Tormenter': Violence against Wives in Eighteenth-and-Early Nineteenth Century Scotland," *Continuity and Change* 12, no. 1 (1997): 31-54.
[59] Leneman, "'A Tyrant and Tormenter,'" 35, 36-37.
[60] Leneman, "'A Tyrant and Tormenter,'" 38-41.
[61] Ibid.
[62] Annmarie Hughes, "The 'Non-Criminal' Class: Wife-Beating in Scotland (C. 1800-1949)," *Crime, History, and Societies* 14, no. 2 (2010): 31-53.
[63] Hughes, "The 'Non-Criminal' Class," 32.
[64] Hughes, "The 'Non-Criminal' Class," 38.

responsibility.[65] This contradiction reveals that the criminal justice system sided more with patriarchal values and men than they did women as victims.

While there are a few studies that elaborate on domestic violence and the effect that crime had on gender relations, even fewer studies exist on sexual violence towards women. Scholars perhaps avoid this topic because of the "Dark Figure" that exists or because the nature of rape serves as a deterrent for many scholars.[66] No matter the reason, the neglect of this crime in the historiography represents a major omission. The only study that examines rape in nineteenth-century Scotland is Tom Dunning's article "Narrow Nowhere Universes, Child Rape and Convict Transportation in Scotland and Van Diemen's Land, 1839-1853."[67] Using convict conduct registers and precognitions, he examines the fates of men convicted of rape, assault with intent to ravish, or using lewd or libidinous practices or liberties to a child under puberty.[68] He examines the shared spaces between victims and their attackers as well as other factors in rape cases including alcohol. He then details the effectiveness of transportation as a punishment. He argues that removing the criminal from society did not deter them from committing other crimes but they were effectively removed from Scottish society, which was the main goal of transportation. Dunning's article provides an example of a rape study in the nineteenth century, but he does not examine all rape victims from 1839-1853. His work, as interesting and suggestive as it is, does not examine the law of rape, nor does he expand

[65] Hughes, "The 'Non-Criminal' Class," 39-41.
[66] The Dark Figure represents the difference between the actual incidence of crime (the absolute number of crimes committed) and the number of crimes made known to the criminal justice system and that therefore appear in the records. Albert D. Biderman and Albert J. Reiss, Jr., "On Exploring the 'Dark Figure' of Crime," *Annals of the American Academy of Political and Social Science* vol.374 (1967), 2.
[67] Tom Dunning, "Narrow Nowhere Universes: Child Rape and Convict Transportation in Scotland and Van Diemen's Land, 1839-1853," *Scottish Historical Review* 86 (2007): 113-125.
[68] Ibid.

his study to include adult women. The following analysis examines all victims of rape during the middle of the nineteenth century as well its perpetrators and spaces to provide a more inclusive analysis of rape.

No clear explanation exists as to why historians have remained silent on this nineteenth-century crime. This study seeks to end that silence by providing an analysis of criminal precognitions, indictments, and court reports found in the National Archives of Scotland to demonstrate how the law in books defined rape as a capital crime but the law in action reveals that men hardly ever hanged for rape in the nineteenth century. The first chapter examines the nature of rape law in nineteenth-century Scotland. The law defined rape as using force to overcome a woman's will to have sexual intercourse with her and was punishable by death. However, the legal system rarely enforced death as punishment for rape. The second chapter examines this discrepancy to demonstrate the disjuncture between the written law and the law in action. The final chapter uses the same judicial documents, specifically precognitions and indictments, to reveal demographic information about both the victims and perpetrators of rape and the spaces where rapes occurred. Legal sources defined the rape of young girls as especially heinous, yet no man hanged for raping these girls even though they represent a majority of rape victims. All this information has been previously unexplored by scholars and will make an original contribution to the historical study of rape and the growing body of literature on the criminal law in nineteenth-century Scotland.[69]

[69] Scholars have examined rape in other industrialized countries, especially England and America. Therefore, the omission of historical rape studies appears to be a Scottish phenomenon.

Chapter II

THE LAW IN BOOKS: NINETEENTH-CENTURY SCOTTISH RAPE LAW

Before examining the cases and the law in action, which is the main concern of this research, it is necessary to consider Scottish rape law more generally – the law in the books – where it stood and how it developed in the nineteenth century. In the nineteenth century, Scottish law defined rape according to its own common law, institutional writers, and case law. The impact of statutory reform on the law of rape would have to wait until the late twentieth and the early twenty-first centuries. The Union of 1707 brought Scotland and England under one parliament, but Scottish law remained intact as a system. Because the Westminster parliament generally neglected Scottish legislation, the system did not often rely on statutes passed by Westminster to define crimes and punishments.[1] Hence, Scottish criminal law underwent no major statutory developments as the legal system relied mostly on other sources of law. The nineteenth-century legal system administered rape law based on the twin concepts of force and consent. Legal sources clearly defined force, but consent was a more nuanced concept as accused men used the gray area, or so they argued, between clear and definite consent on one hand, and a clear and definite statement of no consent on the other, successfully as a defense during trial. The Scottish legal system relied on these nineteenth-century concepts until

[1] Scottish common law derived from Scottish cultural tradition, pre-1707 Scots parliament legislature, and decisions made by Scottish courts. Paul Riggs, "Scottish Criminal Law and Procedure in the Nineteenth Century," PhD diss. (University of Pittsburgh, 1997), 12-13.

the twenty-first century when Scottish Parliament began consolidating and restating rape law.

Nineteenth-century Scottish law relied on common law, institutional writers, and judicial precedent. Common law pertains to long-standing customs, procedures, and rules with sometimes untraceable origins and little or no legislative basis.[2] Like most serious crimes in Scotland, rape as a crime, and its capital nature, is a part of the common law of Scotland. Institutional writers are authoritative sources of law whose reputation made their writings sources of law.[3] In criminal law, the most relevant institutional writer is Baron David Hume, nephew of the philosopher, whose landmark treatise on criminal law and procedure was published in two volumes in 1797 and 1800.[4] The next source of law, legislation, could either pre-date or post-date 1707. Unfortunately, the applicability of post-1707 legislation to Scotland is often unclear. Scottish law contains only one statute regarding sexual violence prior to the twentieth century. This statute refers to ravishment and derives heavily from Roman law. Passed in 1612, this statute states that any person guilty of ravishing a woman faces "his majesty's arbitral punishment of warding their persons, confiscat[ing]…their goods or imposing upon them pecuniary penalties at his majesty's pleasure."[5] This statute defines ravishing as both violent and forceful and asserts that the victim, her parents or nearest kin, or the lord advocate may bring charges of rape against an accused party.[6] This statute essentially defines ravishment as firstly, a

[2] T.J. Jones and M.G.A Christie, *Criminal Law* (Edinburgh: W. Green/Sweet & Maxwell, 1996), 10 and T.B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh: W. Green & Son Ltd., 1962), 41.
[3] Smith, *A Short Commentary*, 33.
[4] David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 2 vols. ed. Benjamin Robert Bell, 1986; Reprint. 4th ed. with Bell's Notes.
[5] K.M. Brown et al., eds., "The Records of the Parliaments of Scotland to 1707," (St Andrews, 2007-2015), 1612/10/11, accessed on April 15, 2015, http://www.rps.ac.uk/trans/1612/10/11.
[6] Ibid.

form of abduction, and secondly, a crime of sexual violence. As T.B. Smith notes, contrary practices render Scots Acts irrelevant because nineteenth-century judges neglected to refer to the law in support of their decisions and looked more to the writings of the institutional writers as well as case law.[7] Nevertheless, an early statute does exist in Scotland that defines force and violence as key components of rape.

Prior to Hume, the earliest institutional writer on criminal law and procedure was Sir George MacKenzie of Rosehaugh, who served as Scotland's top prosecutor (Lord Advocate) and wrote his treatise on crime in 1678. He also limits his definition of sexual violence to ravishment. MacKenzie's definition of *raptus* or ravishment is similar to the definition outlined in the 1612 statute. According to MacKenzie, *raptus* is the "violent carrying away a woman from one place to another, for satisfying the ravisher's lust."[8] MacKenzie's definition does not explicitly state forced sexual intercourse. When defining the act itself, Mackenzie provides an unclear and clinical definition. He states that *raptus* is the "unjust, oppressing of a woman, by a man, against the King's peace, in which it differs from the civil law."[9] However, he makes clear that it is not *raptus* if the ravisher does not carry the woman away.[10] MacKenzie's describes the crime of ravishment rather than rape, but his analysis provided the grounds for future writers to expand upon to create a modernized definition of rape.

As abduction is the necessary component for ravishment, MacKenzie notes that the law punishes ravishment without abduction differently because it is a separate crime.

---

[7] Smith, *A Short Commentary*, 29. In this way, old Scots acts and other legislation could be held in Scotland to be in "desuetude" – or no longer in force.
[8] George Mackenzie, "Raptus," 83.
[9] Ibid.
[10] Ibid.

Without the abduction, ravishment is rape. The punishment for the violent abuse of a woman's body, or rape, is "deportation or banishment," whereas the punishment for ravishment of a woman is death.[11] Abduction aggravates the ravishment, in MacKenzie's view, and therefore deserves more serious punishment than the sexual abuse of a woman, because the woman experiences more trauma by carrying her away rather than a woman whose attacker only ravishes her.[12] Ahead of his time, MacKenzie writes that women can also commit ravishment as accessories, or "art and part" to use the Scottish terminology, but if they do, their gender protects them from capital punishment.[13] *Raptus* and rape are a gender-specific crimes enacted by the forceful vaginal intercourse, so legally, in the seventeenth through the nineteenth centuries, a woman could not commit rape but could help a man commit *raptus* or rape.[14]

After MacKenzie, there is not another definitive source of law regarding rape until Hume's major restatement in 1797 and 1800. The work was regarded as authoritative by the courts almost immediately upon publication, and Hume effectively replaced MacKenzie as the main institutional writer on the subject. For the first time in Scottish law, Hume separates ravishment from rape. Hume states that rape "is one of the Four Pleas of the Crown, and is justly classed with [murder] in many of [the] statutes, as an injury of the most grievous nature."[15] Unlike MacKenzie, Hume adopts a more modern attitude and asserts that abduction is not a necessary component of the crime of rape, effectively sweeping away the distinction made by the 1612 statute that so

[11] Ibid.
[12] Mackenzie, "Raptus," 83-84.
[13] Ibid.
[14] Christoper H.W. Gane "Rape and Related Offences," in *Sexual Offences*, by Christopher H.W. Gane, (Edinburgh: Butterworths, 1992), 25.
[15] David Hume, "Of Rape," 301.

preoccupied Mackenzie. Hume then outlines the criteria to determine whether a rape occurred. First: "there must be carnal knowledge of the woman's person, by penetration of her privy parts, or entry of her body" by "force and against her will."[16] Hume remains silent on whether both *penetratio* and *emissio* were required for the completion of the crime of rape. He instead advises that the issue be determined on "certain convictions" or on a case-by-case instance.[17] Because force constituted the main factor in determining whether a rape occurred, Hume argues that force must be used to achieve the "forcible knowledge" and that a woman must continue to resist her attacker until he overcomes her will, by either threats or rendering her insensible.[18] Hume argues that rendering a woman insensible or overpowering her by drugging her constitute rape because these actions overcome a woman's will and prevent her from resisting.[19] In this same section, Hume clarifies the question of forcible knowledge of a person. He states that forcible knowledge applies only to adults because children do not have the ability to consent to sexual intercourse and therefore no force is necessary to overcome any resistance girls may offer.[20] The same rule applies to those people that Scots law officially termed "idiots" and the mentally ill. Members of these groups cannot freely give consent because they lack the ability to understand "carnal knowledge."

Hume also states that all women of any age, be she "maid, wife, or widow," and no matter her character, can be victims of rape because "the crime [is] independent…of

[16] Ibid.
[17] Ibid.
[18] Hume, "Of Rape," 302-303.
[19] Ibid.
[20] Even though Hume clarifies that any women can be a victim of rape, he asserted that husbands could not rape their wives. Ibid.

her situation," including prostitutes.[21] Hume states that in these cases, the proof must be extremely clear and without a doubt show continued resistance on behalf of the victim and force on behalf of the attacker.[22] The last two points that Hume makes regarding rape detail the punishment and prosecution of rape. According to Hume, the punishment for rape is death unless a woman willingly runs away with a man, and he then rapes her after they run away together, which is the crime of ravishment outlined in the 1612 statute and by MacKenzie.[23]

Overall, Hume's commentary on rape relies on the presence of force rather than a lack of consent. A woman could refuse consent, but unless her attacker overcame her will using some degree of force, he did not rape her. As Gane, a Scottish criminal law historian, states, Hume's version of the law emphasizes violence and resistance; in other words, the victim has a duty to do more than say "no." There must be physical resistance to violence, which goes to prove the victim's assertion that she did not give consent. Hume provides the most extensive definition of rape for the nineteenth century and expanded rape law from MacKenzie's commentary on *raptus*. Both Hume and MacKenzie note that Scottish common law is the most common source of reference when examining the law, and they both recognize rape as one of the four pleas of the crown. However, the two authorities diverge from here. For MacKenzie, the abduction of a woman during this crime is more serious than the sexual attack itself. More importantly, the abduction must occur to satisfy the ravisher's lust. As Hume states, MacKenzie's

[21] Hume, "Of Rape," 304. Although Hume comments on a woman's occupation, especially in regards to prostitution, no known cases (for the years examined in this study) exist in which the woman was a prostitute at the time of her rape. Hume's acknowledgment of this situation does lead to a conclusion that situations did arise in which prostitutes claimed they were raped. However, these crimes went unreported to local authorities for prosecution.
[22] Hume, "Of Rape," 304.
[23] Hume, "Of Rape," 309.

definition omits rape that occurs because of revenge or avarice even though the rape results in the same injury to a woman.[24] He even cites the 1701 case of Simon Fraser of Beaufort or Lord Lovat, in which Lord Lovat abducted and raped the mother of the heiress he pursued because she and her husband objected to his advances on her daughter.[25] He did not rape the heiress, but abducted and raped her mother out of revenge for an unsuccessful attempt at courting. Hume demonstrates that rape occurs for purposes other than lust and the law must therefore acknowledge these circumstances.

John Burnett, the next Scottish institutional writer whose treatise was published in 1811, agrees with Hume on several points. He agrees that under Roman law, abduction accompanies rape, but Scottish law does not require the presence of abduction for a rape to occur even though abduction shows a "greater degree of premeditation, and perhaps a more open and daring contempt of the Law."[26] Burnett also agrees with Hume's definition of rape as the forcible knowledge of a woman against her will, as well as the crime being a capital offense.[27] He emphasizes that the "carnal knowledge must be such as a man commonly has with a woman."[28] He also agrees that minors can commit rape, but a husband cannot commit rape on his wife.[29] Furthermore, he asserts that threats and violence constitute force because they overcome a woman's will.[30] Both Hume and Burnett address whether a prostitute can be a victim of rape. While Hume argues that even a prostitute can be a victim of rape, Burnett provides an exemption to what kind of

[24] Hume "Of Rape," 305.
[25] Ibid.
[26] John Burnett, "On Rape," in *A Treatise on the Various Branches of the Criminal Law of Scotland*, by John Burnett (Edinburgh: George Ramsay, 1811), 101.
[27] Ibid.
[28] Ibid.
[29] Burnett, "On Rape," 102.
[30] Burnett, "On Rape," 103.

women the law protects. Burnett argues that a prostitute can be raped only if she no longer works as a prostitute.[31] He provides an analogy to robbery, like Hume, but uses this analogy to describe how a man cannot use force or act against a woman's will if she sells herself for money because a man cannot steal or take something he bought.

In addition to disagreeing with Hume on the type of women protected by the law, Burnett differs from Hume on two important issues: whether both *penetratio* and *emissio* are necessary for a rape to occur and whether drugging or rendering a woman unconscious constitutes rape. Burnett cites English law that determined a boy under fourteen was physically incapable of the act of rape.[32] However, he acknowledges that English law does not apply to Scotland and analyzes legal precedent in Scotland. Unlike Hume, Burnett provides a definitive stance on *penetratio* and *emissio*. He asserts that both *penetratio* and *emissio* are necessary for the *actus reus* of rape, especially in cases involving mature women.[33] He uses the 1642 Gylor case involving a girl under 10, and the 1732 Foulden case, involving a woman, to prove both *penetratio* and *emissio* are necessary for the completion of rape no matter the victim's age.[34] Hume urges his readers to follow case law involving this issue and provides no stance on whether both are necessary. Hume offers no guidance on whether penetration alone was sufficient in case involving adult women. Hume also argues that rendering a woman insensible or overpowering her by drugging is rape. He specifies that the panel must administer the "stupefying agents" to the woman. Burnett, on the other hand, argues that administering these agents to render a woman insensible does not constitute rape because it is doubtful

[31] Burnett, "On Rape," 104.
[32] Burnett, "On Rape," 102.
[33] Burnett, "On Rape," 101.
[34] Ibid.

whether they constitute the same degree of violence necessary to commit rape.[35] Burnett defines violence and force by harmful threats and physical violence; therefore, "stupefaction" does not constitute this degree of violence. Although Burnett's treatise never achieved the same level of authority as Hume, mostly because it was published posthumously by his literary executor and Burnett was not available to correct proofs, judges later upheld Burnett's interpretation of "insensibility" in two cases that set judicial precedent.

Archibald Alison, the third institutional writer relevant to the nineteenth century, closely follows Hume's interpretation of rape law. His treatise appeared in two volumes in 1832 and 1833 and deliberately followed Hume's organization and billed his work as an update on Hume. Alison defines rape as "penetration of the privy parts and entry of the body, without any proof of actual emission."[36] He agrees with Hume's assessment that judicial precedent determined that emission need not accompany penetration. However, he argues that Hume's cases are not relevant to all rape cases. He argues that the case of William Montgomerie in 1821 better defines the law's position on *penetratio* v. *emissio*. In this case, the court upheld that penetration alone constitutes rape in cases involving adult victims.[37] He also argues that the English statute that determined penetration alone sufficient, while inapplicable to Scotland, would also affect future cases.[38] Therefore, Alison provides clarity on the law by establishing that penetration without emission completes the crime of rape on adult women. Alison further elaborates

[35] Burnett, "On Rape," 103.
[36] Archibald Alison, "Of Rape," in *Principles of the Criminal Law of Scotland*, by Archibald Alison (1989; Reprint, Edinburgh: Law Society of Edinburgh, 1832), 209
[37] Penetration alone was already sufficient in cases involving young girls. Alison, "Of Rape," 210.
[38] Alison, "Of Rape," 211.

on the law as her defies rape as the carnal knowledge of a woman "against her will, but it is immaterial whether by consent or forced by actual violence or by threats, or the administration of stupefying drugs."[39] Alison asserts that these acts deprive a woman of the right to exercise her will and therefore negate consent. Yet, he states that in administering "stupefying drugs," the court must acknowledge other factors. He states that the jury must regard the prior conduct of the victim, meaning, if she gave consent before consuming a "stupefying ingredient," then rape did not occur.[40] This circumstance must not have occurred to Hume because he does not refer to a woman giving consent before ingesting the intoxicating substance. According to Hume, if the panel intentionally uses violence, threats, or drugs to overcome a woman's will, then rape occurred. Once again following Hume, Alison argues that in cases involving young girls, the law does not require proof of force. Females under the age of 12 are incapable of giving consent and therefore do not have a will in sexual matters. No force was required, and no resistance was required to corroborate the lack of consent.[41] Because of a young girl's mental capacity, she does not understand the *actus reus* of sexual intercourse and cannot consent to something she does not understand. No matter their age, all types of women, no matter their station in life, can be victims of rape.[42] Like Hume, Alison agrees that even prostitutes deserve protection from unwanted sexual advances, but like Hume, he presents no cases that decided whether or not a prostitute could be a victim of rape. He states that the requirements of legal evidence would make proving this type of case

[39] Ibid.
[40] Alison, "Of Rape," 213.
[41] Ibid.
[42] Alison, "Of Rape," 214.

difficult.[43] As both Hume and Alison argue, all women deserve protection under the law and should not "be forcibly subjected to a man, with whom she does not choose to have connexion, against her will."[44]

Alison similarly discusses court proceedings in regards to evidence, testimony, and reporting. He diverges from Hume on using a victim's character as part of the defense. Hume states that a woman's character is not a defense of rape, but Alison argues that her character and previous actions determine the plausibility of her accusation. Alison, who had just concluded several years of active service as an advocate depute, was probably reflecting his experience in court, his attempts to prosecute rape cases, and the defenses that were raised. Because "life is at stake," the court should allow evidence indicating "previous improper proceedings on her part."[45] However, that evidence cannot arise in the middle of the trial. The panel must lodge a special defense before the trial begins.[46] Alison recognizes the dire consequence of false rape allegations and bases his perception of evidence on the seriousness of the sentencing in rape trials. While Alison asserts that all women deserve protection under the law, men also deserve protection from possible false accusations that could potentially lead to a sentence of death. Just like modern law, nineteenth-century law had the difficult task of protecting female victims, but also allowing enough scrutiny to prevent false allegations from convicting a man. With the exception of Burnett's dissenting opinion on *penetratio* and *emissio*, and administering drugs, legal authorities largely agreed on rape law. They all agreed that force and overcoming a woman's will constituted rape, but they do not include "without a

[43] Alison, "Of Rape," 215.
[44] Ibid.
[45] Alison, "Of Rape," 216.
[46] Ibid.

woman's consent" in their definitions. Therefore, nineteenth-century rape law focused on force rather than consent and created loopholes in which men could escape rape charges.

Outside of institutional writers, nineteenth-century Scottish law also changed because of the impact of judicial precedent. Judicial precedent relied on the discretion of judges who could uphold or overturn previous precedents.[47] The declaratory power of the High Court allows it to use its discretion to define or expand the law. [48] In the nineteenth century, the court did not significantly alter the law of rape, but largely upheld the institutional writers' definition of rape. The types of cases the High Court heard and created precedents for are in the realms of *mens rea* and the *actus reus* rape. The *mens rea* of a crime refers to an individual's state of mind at the time of a crime or the intent to commit a crime.[49] The *actus reus* of a crime refers to an individual acting upon the *mens rea* to complete a crime; *actus reus* is essentially the crime itself.[50] The question of whether the panel acted knowing that his victim did not consent to his sexual advances plays an important role in rape cases as it distinguishes rape from consensual sexual intercourse. As Jones and Christie, historians of Scots law, state in a modern context:

> The *mens rea* of the crime must be an intention to have vaginal intercourse with a female where the male knows that she refused, and continues to refuse, to have such intercourse with him, or, perhaps, where he knows that she had so refused up to the last moment she was incapable of doing so.[51]

In the nineteenth century, two infamous and leading cases emerged that raised the question of whether the accused acted knowingly and without their victim's consent. These cases also raise the question of the degree of force necessary for rape to occur.

---

[47] Smith, *A Short Commentary*, 39.
[48] Jones and Christie, *Criminal Law*, 18.
[49] Jones and Christie, *Criminal Law*, 49-50.
[50] Jones and Christie, *Criminal Law*, 43.
[51] Jones and Christie, *Criminal Law*, 231.

However, the degree of force is not as important as whether the accused persons acted knowingly without consent, which forms the *mens rea* of rape. Victor Tadros, a criminal law historian, classifies these cases as cases concerning the *actus reus* of rape, but they actually involve the use of fraud or sleep to bypass their victims' consent, thus revealing their *mens rea*.[52]

In the case of *William Fraser v. Her Majesty's Advocate* (1847), Fraser's defense objected to the charge of rape based on the lack of violence and the presence of consent in his alleged assault. His defense argued that Fraser acted with the belief that he had consent from his alleged victim to have sexual intercourse. The court charged Fraser, a farm servant, with rape, assault with intent to ravish, and "fraudulently and deceitfully obtaining access to and having carnal knowledge of a married woman by pretending to be her husband." Mary Swinton accused Fraser of entering her home while she slept, getting into bed with her, and having sexual intercourse with her while pretending to be her husband. The defense argued that the panel used neither violence nor did the victim resist his advances, which are vital elements in rape, and therefore his actions did not sustain the charge of rape.[53]

The prosecutor, Davidson, argued that Fraser overcame her will by pretending to be her husband and therefore overcame any resistance she may have had through his fraudulent behavior. He further argued that taking away a woman's ability to consent constitutes rape, which the panel committed when he pretended to be her husband. The court sustained the defense as to rape and assault with intent to ravish. The Lord-Justice

[52] Victor Tadros, "No Consent: A Historical Critique of the Actus Reus of Rape," *Edinburgh Law Review* 3 (1999), 317-340.
[53] *William Fraser* (1848) Arkley 280.

Clerk, in the minority, supported Davidson's opinion and stated that the victim believed he was her husband and thus gave her consent to her husband, "if had she known [that it was not her husband in her bed], she would have resisted." Lord Cockburn represented the majority decision when he stated that using deception to gain carnal access to a woman is not rape. According to the law, Fraser acted with the knowledge he had consent from the victim, even if by fraudulent means. Further, he used no force to have sexual intercourse with the victim as he acted with her "consent." The court sustained the objection to the rape and assault charges but upheld the relevancy of the third charge of "deceitfully obtaining access to and having carnal knowledge of a married woman, by pretending to be her husband."[54] Though not a major example of the use of the declaratory power, this case demonstrates the court's "native vigour" or ability to embrace new features of crime without recourse to new statutes.[55]

Similarly, in Charles Sweenie (1858), the High Court decided that having intercourse with a sleeping woman, without deception, also did not constitute rape. Catherine Devine accused Charles Sweenie of raping her while she slept, and the prosecutor subsequently charged him with rape and "wickedly and feloniously having carnal knowledge of a woman when asleep, and without her consent, by a man not her husband." His counsel objected to the relevancy of the indictment of rape stating that his actions did not constitute rape because of the lack of force, which according to Hume, is an essential factor in the crime. His counsel argued that the terms "forcibly and against her will" and "without her consent" did not apply to the panel because even though he acted immorally, did not use violence nor did the victim refuse consent. Lord Ardmillan

[54] Ibid.
[55] Riggs, "Scottish Criminal Law and Procedure," 17.

asserted that because Sweenie's actions did not include force, he did not commit rape. Lord Cockburn argued the opposite, stating that his actions still constituted rape because Sweenie acted without consent. However, the majority concluded that the occurrence of having intercourse with sleeping woman was "so improbable as to be almost incredible" that they dismissed the charge of rape. After debating the relevancy of the libel, the court again used its "native vigour" and upheld the relevancy of the alternate charge, the offense of "having sexual intercourse with a sleeping woman, without her consent, by a man not her husband." In the end, however, Sweenie was found not guilty by the jury, who perhaps agreed with the judges about the improbability of the act.[56]

Even though Hume held that having intercourse with a woman when by force or without consent is rape, in both of these cases the High Court decided that intercourse with a sleeping woman or by pretending to be her husband did not constitute rape even though both Fraser and Sweenie knowingly acted when their victims could not consent. Under the prevailing concept used by the court in the mid-nineteenth century, these women had no will to overcome because they were either asleep or offered no resistance.[57] In both cases, the prosecutor chose to move forward with the inclusion of novel alternate charges and the court accepted the novelties because they agreed that both men acted criminally. Pamela Ferguson suggests that in *Sweenie*, the judges were reluctant to create a new class of crime under rape, as the crime was still technically capital.[58]

---

[56] *Charles Sweenie* (1858) 3 Irv 109.
[57] Pamela R. Ferguson, "Controversial Aspects of the Law of Rape: An Anglo-Scottish Comparison," in *Justice and Crime: Essays in Honour of the Right Honorable The Lord Emslie*, ed. Robert Hunter (Edinburgh: Clark, 1993), 184.
[58] Ferguson," Controversial Aspects," 186.

Both cases fell outside of Hume's definition because the victims did not refuse consent. Therefore, legally, both Fraser and Sweenie did not knowingly act in violation of their victims' wills. Both men assumed they acted with consent because their victims did not refuse them. Gane asserts that the absence of consent is a necessary condition of rape, but it cannot stand alone and the accused must also overcome his victim's will.[59] Under the law, neither man committed rape because they did not believe they acted without a woman's consent. The *Fraser* and *Sweenie* cases demonstrate consent's critical importance in nineteenth-century rape law. The law defined consent as acting against a woman's will and proof of resistance was no longer important.[60] An insensible victim, like the victims of Fraser and Sweenie, cannot express or withdraw her consent because of her insensible state. Therefore, a man accused of raping an insensible woman lacks the *mens rea* to commit rape and consequently did not commit the *actus reus* of rape.

Along with the cases involving *mens rea*, the High Court also decided cases involving the *actus reus* of rape – the physical circumstances that constitute the crime. The court's decisions in cases involving *actus reus* also upheld the law and created judicial precedents based on common law and the institutional writers. The *actus reus* of rape entails that the panel acts with force and without consent, but the *actus reus* also involves the question of whether the completion of the physical act requires emission on the part of the perpetrator. In the nineteenth century, legal authorities debated over *penetratio* and *emissio*. As we have seen, Hume remained silent on the issue, Burnett argued that both were needed, and Alison thought that penetration was sufficient – that the *actus reus* does not rely on emission for completion of the crime.

[59] Gane "Rape and Related Offences," 33.
[60] Jones and Christie, *Criminal Law*, 229.

In the case of Archibald Robertson (1836), the court finally had the opportunity to settle the matter. In the case, the prosecutor charged Robertson with the rape of Christian Wright. Wright claimed that Robertson refused to leave her home after tea, he was a frequent visitor, and when she went to open the door for him to leave, he grabbed her, threw her on a bed, and raped her. She asserted that he overcame her will and that she resisted to her utmost. She even cried for help, which two neighbors heard and responded to by summoning the police to Wright's residence. Upon entering, the two neighbors and police saw Robertson on top of Wright, threw him off, and apprehended him. [61]

The importance of this case is that the victim asserted that she was not sure whether emission occurred, but knew that the accused "penetrated her privy parts."[62] The defense offered insanity as a special defense, which the court rejected, but later argued that if the accused did have sexual intercourse with Wright then it was with her consent, which she gave because of her loose character. Shand, for the panel, further asserted that rape did not occur because of the lack of emission. He stated that Hume refers only to young girls in his discussion of *penetratio* v. *emissio*, that Burnett asserts that both *penetratio* and *emissio* are necessary in rape, and that Alison also asserts that rape occurs with *penetratio*, but not necessarily *emissio*. Overall, he claimed that the law was unclear in Scotland and referred to English law and precedent as evidence that both *penetratio* and *emissio* were necessary requirements of rape. Lord Gillies stated that there was no precedent in Scottish law for the necessity of emission and argued that even English law determined that emission was not necessary. He further argued that the "law of England rendered clear by the late Acts of Parliament; and if we were to find that both penetration

[61] *Archibald Robertson* (1836) 1 Swinton 15.
[62] Ibid.

and emission necessary to the completion of the crime, a similar act relative to Scotland would be immediately required."[63] Thus, the court asserted that penetration alone was sufficient for charges of rape. The prosecutor recommended mercy, the jury found the panel guilty, and sentenced him to life transportation.[64] The Robertson case demonstrates the importance of institutional writers and judicial precedent in Scottish law as the judges used all three sources to determine whether *emissio* must accompany *penetratio*. While not deciding anything new in regards to rape law, the court maintained that for the completion of the *actus reus* of rape, penetration alone was necessary for adult victims.

While the Robertson case determined that *penetratio* alone as the necessary component for the completion of rape, the court also had the opportunity to decide that teenaged boys could be guilty of committing rape. In the case of Robert Fulton (1841), a jury convicted Fulton, a 14-year-old boy, for the rape of a 5-year-old girl. His defense argued that his young age made him physically incapable of committing the *actus reus*. His defense also argued that his young age prevented him from knowing not to incriminate himself by confessing to the crime and making a declaration. The court upheld the charge and argued that his age did not prevent him from admitting to and committing rape. The prosecutor recommended leniency, and he received a sentence of 15 years transportation.[65]

Fulton's case raises the issue of not only the physical capability of a 14-year-old boy to commit rape, but also his mental ability to make a declaration of guilt. The

[63] The Offences against the Person Act of 1828 made penetration alone sufficient evidence for rape in England. Before this act, both emission and penetration were necessary components of rape. Here, Gillies means that if the law makes both necessary then perhaps Scottish law needs a statute similar to the Offences against the Person Act of 1828 to provide a clear definition on the necessary components of rape.
[64] *Archibald Robertson* (1836), 20.
[65] *Robert Fulton* (1841) 2 Swinton 564.

importance of this case is that the court upheld that his young age did not prevent him from committing the *actus reus* of rape even though no emission occurred. Even though Westminster passed a statute in 1828 making penetration alone sufficient for rape, the statute did not apply to Scotland, but once again entered debates on penetration.[66] The High Court's refusal to use that statute demonstrates the discretionary power of the court as well as the reliance on the institutional writers and case law. Fulton's case upheld the law and made the physical ability of a teenage boy to commit rape a part of case law.

The court decisions concerning the *mens rea* and *actus rea* of accused rapists and *penetratio* v. *emissio* made modest improvements to nineteenth-century rape law, but overall the law stayed the same throughout the century, and changes would only come much later. Even though Timothy Jones writes about modern rape law, his call for the codification of rape law within the Scottish Parliament reflects the current trend toward codifying Scottish law.[67] The first two Scottish statutes regarding rape did not emerge until late in the twentieth century. The first statute, passed in 1976, neglected to further define rape and focused mainly on the punishments for procuring young girls, prostitutes, and young boys for lewd sexual practices. The 1976 law upholds the use of threats and "stupefying agents" outlined in the nineteenth-century law as the statute states:

> Any person who by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful sexual intercourse in any part of the world, or by false pretense or false representations procures any woman or girl to have any unlawful sexual intercourse in any part of the world, or applies or administers to, or causes to be taken by, any woman or any girl any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful sexual intercourse with such woman or girl, shall be liable on conviction

[66] *Robert Fulton* (1841), 566.
[67] Timothy H. Jones, "Common Law and Criminal Law: The Scottish Example," *Criminal Law Review* (1990), 301.

> on indictment to imprisonment for a term not exceeding two years or on summary conviction to imprisonment for a term not exceeding three months.[68]

Furthermore, the statute, looking back to Sweenie, defined impersonating a woman's husband and sexual intercourse with a girl under 12 as rape.[69] As Victor Tadros argues, this statute did not provide an adequate definition of rape as it neglected to include force as a component of rape.[70] He suggests that the law should define rape as overcoming a victim's will even in cases where the victim did not have an opportunity to express her will.[71] However, the 1976 law neglects to include consent in its definition and thus still maintained the nineteenth-century definition of an absence of consent. It was not a particularly comprehensive attempt at reform. The issue of consent remained unclear for another two decades before the Scottish Parliament passed a new rape statute that was comprehensive in nature.

The 2009 Sexual Offences (Scotland) Act answers Tadros' call for a clearer definition of consent in the Scottish law of rape. Furthermore, the statute also puts responsibility on men to ensure that they act with clear consent from their sexual partners. The statute defines rape as penile penetration without another person's consent, reckless to consent, or without reasonable belief that the other party consents.[72] By this definition, women are not the only persons that can be raped. Now, the law acknowledges that men can be raped. Any person who administers a "substance for sexual purposes" to another party without the other party knowing or without reasonable belief that the other party knows about the substance, commits the crime of "administering a substance for

[68] Sexual Offences (Scotland) Act (c. 67), 1-2.
[69] Sexual Offences (Scotland) Act, 2.
[70] Tadros, "No Consent," 317.
[71] Ibid.
[72] Sexual Offences (Scotland) Act, 2009 (ap 9), Edinburgh: 1.

sexual purposes," but is not guilty of rape.[73] Regarding consent, the 2009 statute asserts that a "free agreement" must exist between two persons entering into a sexual relationship. The law defines the following as violations of free agreement:

> Where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it, where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person, where B agrees or submits to the conduct because B is unlawfully detained by A, where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct, where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person personally known to B, or where the only expression or indication of agreement to the conduct is from a person other than B.[74]

Furthermore, sexual relations when the other party is asleep or unconscious or withdraws consent during the act negates free agreement. The law further asserts that reasonable belief refers to whether or not a person "took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were."[75] In the final section regarding consent, the 2009 statute outlines the capacity of consent. Reflecting a long-standing element of Scottish law, the statute asserts that mentally disordered persons who do not understand the conduct, cannot form a decision to engage in the conduct, or communicate any decision to engage in conduct, and are incapable of giving consent.[76]

The 2009 Act also outlines sexual offences against children and distinguishes between older children (children over 16) and younger children. The law always protected younger children because the law defines them as mentally incapable of

[73] Sexual Offences (Scotland) Act, 2009 6.
[74] Sexual Offences (Scotland) Act, 2009 7.
[75] Ibid.
[76] Ibid.

consenting to sexual intercourse. Now, for the first time Scottish law established a clear stance on consent for adult women. James Chalmers argues in "How (Not) to Reform the Law of Rape" that the Scottish legal system should not allow the High Court to establish rape law because of precedents like *Fraser* and *Sweenie* that based definitions of rape around the absence of consent.[77] The comprehensive reforms included in the 2009 statute answer his criticism. And, the Scottish legal system now currently relies on a comprehensive statute as its source of law. Throughout the nineteenth century, the law contained loopholes on the question of consent and defined rape as the forcible carnal knowledge of a woman by overcoming her will. Now, more than a century later, the law bases its definition of rape not on the *actus reus* of the crime, but on the *mens rea* of the accused and whether or not he acted without or without reasonable belief of consent. The most recent statute answered calls to reform by transforming the court's reliance on nineteenth-century sources of law that emphasized an absence of consent to free agreement. The law offers protection to a woman's right to privacy and protects her right to say "no."[78]

While the law is still changing, for the period under study in this thesis, the nineteenth-century law remained the same and focused on the absence of consent and the presence of force. A rape did not occur if consent was unclear or given under coercion or if no force, either physical or by threats, was present. Judicial precedent further settled that a boy as young as 14 could commit rape and that penetration was sufficient without emission, especially in cases involving young victims and panels. The cases mentioned

[77] James Chalmers, "How (Not) to Reform the Law of Rape," *Edinburgh Law Review* 6 (2002), 388-396.
[78] Besides clarifying the issue of consent, the 2009 act also expands the definition of rape to include non-vaginal intercourse and thus includes men as victims of rape.

above are extraordinary cases that settled a legal issue regarding rape. These judicial precedents, along with the institutional writers, represent the surface of the law. The application of the law – the law in action – did not always follow the written law – the law in books. While rape remained a capital crime throughout most of the nineteenth century, few men hanged for the crime even in the first few decades of the century when capital punishment was used more widely in non-murder cases. An examination of reported rapes in the criminal precognitions, indictments, and court records reveals how the court, prosecutors, and juries handled everyday rape cases and how judicial discretion allowed for many rapists to avoid capital punishment.

Chapter III

THE LAW IN ACTION: REPORTING, PROSECUTING, AND SENTENCING RAPE

Rape law throughout the nineteenth century in Scotland remained unaltered in its fundamentals as laid down by Hume in 1797. Although the law remained the same, there were substantial changes in how the prosecutors and courts responded to rape, specifically in reporting, prosecution, conviction, and sentencing. The number of reported cases for the years 1830-35, 1840-45, 1850-55, and 1860-65 mostly increased with the exception of 1860-65. Just as the number of reported cases increased, so did the prosecution rate, which remained high for the years examined, with Crown Counsel opting to pursue 183 of 196 cases reported to them, or 93.3%, during years under study. However, even though the prosecution rate was high, the number of men convicted of rape remained low, with juries often choosing to convict men of less serious alternate charges or of other crimes committed at the time of a rape. In cases where the prosecutor did not restrict the libel judges had no choice but to sentence a man to death if a jury found the accused guilty of rape.[1] However, because men were charged with alternate charges, juries could convict on lesser crimes, thus allowing judges to sentence men to less harsh punishments. Larger changes in punishment over the course of the nineteenth century also contributed to the lenient treatment of convicted rapists. These trends demonstrate that the court did not always enforce the harshest punishments of the law.

[1] Restricting the libel means the prosecutor removed death as punishment.

The problem of the Dark Figure is especially relevant to rape cases as many rapes or sexual assaults go unreported because of the victim's shame, fear, or distrust in the criminal justice system. Even though the Dark Figure presents a notorious problem for historians of crime, it should not deter or absolve historians from analyzing the data that can be gathered, particularly from those reported and prosecuted cases. From the analysis of reported crimes, historians can gather information on how prosecutors, judges, and juries interpreted and applied rape law. The data used in this chapter are derived from several types of judicial records that survive in the National Archives of Scotland, including reports on cases made by Crown Counsel, precognitions, and indictments.[2] Again, although these sources do not capture the total incidence of rape and sexual assault in nineteenth-century Scotland, they do allow for an analysis of how the criminal justice system prosecuted these cases.

The best starting point for conducting this analysis is a general view of the data, presented in Table 1, which includes information on the number of cases reported, the number of individual accused persons involved, the number of these men who were prosecuted, and the resulting prosecution rate. These data are presented across four different time periods ranging from 1830 to 1865. The starting point for the date range

[2] The AD6 and JC4 series of documents examined in this study contain the court proceedings and circuit court reports that reveal the charges, pleas, verdicts, and sentences for rape cases. The AD14 series of documents contains criminal precognitions. Precognitions contain witness statements, medical reports, and statements made by both the victim and accused. They also provide demographic data about the individuals involved in crime. The JC26 series of documents contains criminal indictments, which provide not only the indictments, but also the judicial declaration of the panel's and the victim's statement (they were sometimes missing from the AD14 precognition and moved to this series of documents). These documents also contain notes made by the procurator-fiscal and advocate depute. All of these documents exist as manuscripts and can only be found in the National Archives of Scotland as they have not been published elsewhere.

was selected because the availability of judicial data improved substantially around 1830.[3]

Table 1: Reported and Prosecuted Cases

Year	Reported Cases	Men Charged	Men Prosecuted	Percentage Prosecuted
1830-35	40	48	35	74.5%
1840-45	39	45	38	84.4%
1850-55	64	73	59	80.1%
1860-65	53	59	51	86.4%
Totals	225	196	183	81.3%

Source: Data gathered from the National Archives of Scotland from the AD6, AD14, JC4, and JC26 series of documents containing precognitions, indictments, and proceedings.

As Table 1 demonstrates, the number of cases of rape reported to Crown Counsel in 1830-35 was 40. This figure remained roughly the same for the next period with 39 in 1840-45, but then moved significantly higher in 1850-55 to 64 cases before dropping back somewhat to 53 cases in 1860-65. When the court began moving away from death as a punishment for rape in about the period 1835-1840, the case load did not significantly increase and remained more or less the same as the previous year set, although perhaps there was a delay in the public's response as we do see an increase in the early 1850s. This increase also coincides with the 1853 statute that began the process of replacing transportation with penal servitude, another move towards leniency. More cases were reported and tried once men no longer faced death or transportation for their crimes, and it is plausible to suggest that women became more likely to report their attack

[3] The years 1830-35, 1840-45, 1850-55, and 1860-65 were chosen because they demonstrated specific changes in the criminal justice system and cover a total of 20 years to provide a more full examination of rape proceedings.

after the punishment was reduced. Perhaps women believed that juries were now less reluctant to convict a man of rape since most cases really boiled down to their word against their attackers. It is also possible that women now had more faith in the criminal justice system and believed their attacker would be punished in some form for their crime. The period 1850-55 saw an increase in the number of cases from 1840-45 with 64 reported cases in comparison to 39. As the century progressed, populations continued to increase which in turn caused an increase in crime and case-loads. Furthermore, the increase in population led to better policing, especially in urban environments.[4] By patrolling the streets, police were better able to detect crime and their continued presence allowed women to report their crime swiftly and easily. The end of capital punishment, higher population, and better policing all account for the increased reporting rate for rape.

In total there were 196 cases reported during the four periods studied with a total of 225 men facing rape charges.[5] As also depicted in Table 1, out of the 225 men present in the sample, 183 of them went to trial, for an overall prosecution rate for the period of 81.3%. The number of panels differs from the number of cases because some cases involved more than one panel. For example, James Downie, Philip Donnelly, and Elijah Morton all faced charges for raping 20-year-old Jessie Mearns near a bridge.[6] From 1830-35, 35 out of the 47 men accused of rape went to trial, 38 out of the 45 men from 1840-45, 59 out of 73 men from 1850-55, 51 out of 59 for 1860-65. This finding demonstrates that the prosecution rate remained high during the years examined. A high

[4] Riggs, "Scottish Criminal Law and Procedure," 103.
[5] Some cases involved multiple defendants or "panels" as they were called in Scottish law. For this data, men charged with rape and alternate charges were used. The accused men had to have a charge of rape in their indictments to be selected for analysis. "Assault with intent to ravish" and other lesser crimes did not carry the same penalty as rape. Thus, men charged solely with these crimes were not used in this research.
[6] NAS: AD14/55/68, Crown Office Precognitions, NAS: JC26/1855/244, High Court of Justiciary Processes, 1500-2003.

prosecution rate reveals that prosecutors took rape charges seriously in alignment with its status as one of the four pleas of the crown. If charged with rape and apprehended, men were highly likely to face trial for their crimes. Of course, if they fled justice, as many did because of the capital nature of the crime, this could also impact the prosecution rate of reported cases. The increase in the prosecution rate that is visible from the 1830s to the 1860s, therefore, could represent greater success in apprehension, which is a plausible explanation given the improvement in policing that took place over the course of these decades.[7]

A variety of others factors also affected whether or not a case made it to prosecution. Crown Counsel, more specifically in most cases the advocate depute assigned to the region of Scotland where the crime occurred, could drop a case because of a lack of evidence. The law stated that corroborating evidence was necessary to prosecute, and in rape cases corroborating evidence was often difficult to find.[8] Witnesses and medical reports constituted corroborating evidence. However, men often committed their crimes when or where no witnesses were present, and medical examinations were sometimes performed long after the crime had been committed and no physical evidence remained. A woman's character could also impact whether or not a case made it to trial. Hume stated that a woman's character was not to be used against her, specifically if the woman was considered to be of "loose" character. No cases exist in the examined years in which the prosecutor dropped the case because of the woman

[7] Riggs,"Scottish Criminal Law and Procedure," 36-67, David Barrie *Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865* (New York: Routledge, 2012), 95-115, 192-216.
[8] Hume, "On Rape," 305.

being of "loose" character.[9] However, one example exists of the prosecutor abandoning a case because of a woman's past as a thief. In the case involving John Stuart, a police officer accused of raping an imprisoned woman, Catherine Douglas. Miss Douglas was apprehended by Stuart and another officer for theft. She stated that Stuart raped her in a jail cell after apprehending her.[10] While this case does not involve the specific kind of woman Hume mentions, it does prove that a woman's character did affect the believability of her declaration. Besides dropping a case because of the victim's character, the advocate depute could also refuse to prosecute a case if medical experts deemed the accused mentally unsound to continue to trial. Hugh McNeil, was accused of raping 7-year-old Bridget Connell. She claimed she was playing outside when McNeil approached her and offered her a half penny to accompany him to Mrs. Campbell's shop. When they arrived at the shop, he gave her whisky and then proceeded to take liberties with her. He denied having sexual intercourse with her. Before he could go to trial, he was deemed insane, proceedings were dropped, and he was indefinitely confined.[11] Advocates depute could also drop cases because of high case-loads or they could remit cases to the sheriff court.[12] However, the majority of unprosecuted cases resulted from the accused absconding. The number of men who absconded decreased throughout the middle of the century, perhaps because of better policing or the move away from death

[9] All authoritative writers discuss how prostitutes could be victims of rape. Hume and Alison assert that a prostitute can be raped, but Burnett asserts that she cannot. Even though the institutional writers mention that a prostitute can be raped, no cases exist for the years examined in which a prostitute reported a rape. The only case close to this is the 1851 case involving Yates and Parkes. The two men were charged with raping a woman who had in previous years been a prostitute, but no longer following that profession. Her past reputation did not impact the prosecution of the case. The case made it to trial and a jury found both men guilty of the alternate lesser charge and served 18 months imprisonment.
[10] NAS, AD 14/30/282: Crown Office Precognitions, 1830, NAS: JC26/1830/283, High Court of Justiciary Processes, 1500-2003.
[11] NAS AD 14/54/156: Crown Office Precognitions, 1854.
[12] Riggs, "Scottish Criminal Law and Procedure," 93, 105-106.

and transportation to imprisonment or penal servitude. The number of case involving fleeing men went from five cases in 1830-35, to two cases from 1840-45, one case from 1850-55, and no cases from 1860-65. Besides fleeing, cases may have not gone to trial because the advocate depute dropped charges. During the years 1830-35, four cases were dropped, two in 1840-45, one in 1850-55, and four in 1860-65. With the exception of 1860-65, more men fled from justice rather than advocates dropped cases.

Even though advocates dropped some cases, they normally proceeded with prosecution, as the high prosecution rates in Table 1 demonstrate. The actual number of rapes that occurred will remain unknown, but from the documented rape cases in the sample, it is clear that a man accused of rape in the mid-nineteenth century was highly likely to go to trial for the crime. However, that does not mean that juries convicted every man accused of rape. So, while the number of men prosecuted for rape is high, the number of men actually convicted for rape was a function of decisions made by all-male juries, and as expected, was not as high.

Table 2: Conviction Rates for Rape

Year	Prosecuted	Convicted (Other Charges)	Percentage Convicted (Other Charges)	Convicted Rape Only	Percentage Convicted Rape Only
1830-35	35	16	45.7%	9	25.7%
1840-45	38	21	55.3%	10	26.3%
1850-55	59	37	62.7%	14	23.7%
1860-65	51	33	64.7%	5	9.8%
Totals	183	107	58.4%	38	20.8%

Source: Data gathered from the National Archives of Scotland from the JC4, JC26, and AD6 series containing indictments and court proceedings.

Examination of the outcomes of cases that could be carefully tracked using documents in the AD6, AD14, JC4, and JC26 series reveals that men seldom faced convictions for rape even though they were more than likely to go to trial for their crimes. Furthermore, the data revealed higher conviction rates for alternate charges, such as assault with intent to ravish, than for rape itself. From each period, the percentage of men convicted of other sexual crime charges, such as assault with intent to ravish, or lewd, indecent or libidinous practices was higher. Some men were convicted of separate crimes committed during a rape, like robbery, theft, or murder. As seen in Table 2, juries convicted 16 men of alternate charges in 1830-35, 21 in 1840-45, 37 in 1850-55, and 33 in 1860-65. Even though there was a slight decrease in the number of men convicted of alternate charges in 1860-65, the percentage of those convicted steadily increased throughout the period under study. The percentage of men convicted of alternate charges went from 45.7% in 1830-35 to 55.3% in 1840-45, to 62.7% in 1850-55, to 64.7% in 1860-65. These data reveal that juries were more likely to convict a man of a lesser sexual crime or another crime altogether rather than convict a man of rape. The heavy penalty rape carried appears to have deterred juries from convicting a man of rape.

Moving from those convicted of alternate charges to those convicted of rape itself, what do we find? In Table 2, in the period 1830-35, juries convicted 9 men of rape, 10 in 1840-45, 14 in 1850-55, and 5 in 1860-65. The number of men convicted rose in the 1840s and 1850s before dropping back in the 1860s. Turning now to the rate of conviction, juries convicted 25.7% of men for rape in 1830-35, 26.3% in 1840-45, 23.7% in 1850-55, and 9.8% in 1860-65. The slight increase of convicted rapists in 1840-45 coincides with an increase in case-loads resulting from increased populations and better

policing. However, this slight increase also coincides with the move away from capital punishment. The small decrease from 1840-45 to 1850-55 could also result from the increase in convictions for other charges. The drastic decrease in the percentage of convictions in 1860-65 also coincides with higher convictions for alternate charges. For all the periods examined, there was a 58.4% conviction rate for alternate charges out of all the men prosecuted for rape and alternate charges and only a 20.8% conviction rate for rape alone.

The inclusion of alternate charges in indictments contributed to the low conviction rate for rape. Indictments offered juries lesser crimes to convict men. In rape indictments, men charged with rape were typically also charged with assault with intent to ravish, or lewd, indecent, and libidinous practices.[13] An 1813 rape case demonstrates how juries chose to convict men on alternate charges. The prosecutor in this case noted that the accused, McKeever, "was guilty of the rape" but the jury did not think the same but found him "so far culpable that he ought to be punished and thus they found him guilty of the lesser crime charged."[14] Although earlier than the time period examined, the prosecutor's notes on this case demonstrates leniency within the Scottish legal system. This leniency in sentencing and punishment allowed men to escape the harsh penalties brought by rape convictions. In turn, juries convicted fewer men of rape than their alternate charges listed in their indictments. In all crimes, the number of prosecuted men is less than the number of reported men and the number of convicted men is lower than the number of men prosecuted. For the sample of cases drawn for these decades of the

[13] Paul Riggs, "Prosecutors, Juries, Judges and Punishment in Early Nineteenth-Century Scotland." *Journal of Scottish Historical Studies* 32 (2012), 182.
[14] Quoted in Riggs, "Prosecutors, Juries, Judges and Punishment," 182.

nineteenth-century, a total of 225 men were charged with rape; 183 were prosecuted; but only 38 received convictions. While the number of men convicted of rape remained low, the alternate charge system allowed for some form of punishment rather than an acquittal because of jury reluctance to convict on the more serious charge.

Another way to ensure punishment for either rape or an alternate charge was to make a plea bargain. In exchange for a guilty plea, advocates offered less severe punishments. Advocates depute could accept or reject a plea bargain brought forth by the defense or they could offer a plea bargain to the defense. Panels rarely pleaded guilty to the more severe charge, instead pleading guilty to a lesser charge. Punishment was in the hands of the prosecutor who restricted the libel and the judge who gave convicted men lighter sentences for saving the court time.[15] Even though men could receive a lighter punishment if they pleaded guilty to rape, few men pleaded guilty to the crime.

The social stigma of a rape charge may have deterred men accused of rape from pleading to rape or these men pleaded to a lesser charge to avoid a heavy sentence of transportation in lieu of death. However, a small number of men pleaded guilty to rape and received either a harsh punishment of transportation or a lighter punishment of imprisonment. The punishments for pleas and for those found guilty of rape follows the larger pattern of the change in punishment from death, to transportation, to penal servitude. Furthermore, men who pleaded guilty to an alternate charge found themselves with shorter or less severe sentences than if a jury had decided their fate and convicted them of rape.

[15] Riggs, "Scottish Criminal Law and Procedure,"153.

From 1830-35, only two men in these years pleaded guilty to rape in exchange for a lighter sentence. 10-year-old Eliza McPhie and 9-year-old Mary McPhie accused 25-year-old Alexander Dewar of raping them on the Fingal steamboat where both the accused and the girls' father worked. On the day of the crime, the accused followed them to their bed and proceeded to rape them. Eliza reported that he had touched her "private parts" on another occasion and Mary reported that he had raped her. A week after their attack, the girls complained of pain "when making water" and noticed a light, yellow discharge. Their mother took them to a doctor where he discovered the girls had contracted gonorrhea and they then revealed that Dewar had raped them. Police apprehended Dewar, he gave his declaration to the procurator-fiscal, and the doctor performing the medical examination discovered that he also had gonorrhea. In exchange for a guilty plea, Dewar received 14 years transportation. The second man to plead guilty to rape was 17-year-old John Smith, who was accused of raping 13-year-old Margaret Ann Warren. Margaret accused him of raping her when she was on her way home from the market. He approached her on the road, offered her two pence "for a play." She refused and he pushed her toward a farm and raped her. For his guilty plea, Smith received 7 years transportation.[16]

In both cases where the panel pleaded guilty to rape, the advocate depute restricted the libel for a less harsh sentence.[17] For the alternate charges, the pleas and punishments vary. One man pleaded guilty to "assault with the intent to rape" and

[16] NAS: AD 14/31/169, Crown Office Precognitions, 1831 and NAS: JC26/1831/116, High Court of Justiciary Processes, 1500-2003, NAS: AD14/33/173, Crown Office Precognitions, 1833, and NAS: JC26/1833/299, High Court of Justiciary Processes, 1500-2003.
[17] Riggs, "Prosecutors, Juries, Judges, and Punishment," 181.

another pleaded guilty "art and part" to "assault with the intent to ravish."[18] In the examined cases, the least severe punishment for a plea to "assault with intent to ravish" was 12 months imprisonment and the most severe punishment found among the cases was 14 years transportation. In comparison, men found guilty of rape faced capital punishment. However, of the five men sentenced to death, only two actually hanged for rape. One man, William Watson, was found guilty of rape, but was found to be insane and confined for life.[19] This information reveals that from 1830-35, during the time when execution was still a viable punishment for rape, prosecutors and judges meted it out. They followed common law and the institutional writers' stance on the punishment for rape: death. Because men knew the punishment for rape was death, men rarely pleaded guilty to rape during these years.

The cases from the period 1840-45 demonstrate how the court moved away from the death penalty and instead favored transportation. During these years, men pleaded guilty to rape as well as the alternate charge of assault with intent to ravish. The men who pleaded guilty to rape received as lenient a sentence as 7 years transportation to the longer transportation sentences of 10, 14, or 15 years. The court sentenced only one man to death for rape during this period, but his sentence was commuted to transportation by the application of royal mercy. All other men convicted of rape faced either 15 years transportation or life transportation. Only one man, William Arnet, received a sentence of less than 15 years transportation and it was fourteen years transportation for raping 19-

[18] "Art and part" was the Scottish term for being an accessory to a crime.
[19] NAS AD14/30/35: Crown Office Precognitions, 1830 and NAS JC26/1830/99: High Court of Justiciary Processes, 1550-2003.

year-old Helen Hood.[20] Overall, only five men pleaded guilty to rape and their sentences were either 7, 10, 14, or 15 years transportation.

The period 1850-55 saw even fewer men who pleaded guilty to rape. Only two men did so, and their sentences were 7 and 10 years transportation. Most men pleaded guilty to assault with intent to ravish and faced a sentence of transportation, imprisonment, or penal servitude. Other men pleaded guilty to lewd, indecent or libidinous behavior or practices received either transportation or in one case, penal servitude, as their punishment. Even though the men who pleaded guilty to rape faced transportation, the punishments for the lesser charges demonstrate the move away from transportation and the movement toward penal servitude as punishment for these sexual crimes.

By the 1860-65, statutory changes to punishment made transportation illegal and fully replaced it with penal servitude. Even though the criminal justice system ceased to use the death penalty and transportation as a punishment for rape, most men still refused to plead guilty to rape. Only one man pleaded guilty to rape during these years, receiving a sentence of 2 years penal servitude. Once again, men pleaded guilty to assault with the intent to ravish or other crimes committed during alleged rapes. For example, John Williamson, an Irishman with some sort of brain injury, pleaded guilty to robbery instead of rape after a woman accused him of raping and robbing her, and received a sentence of 12 months imprisonment.[21] Throughout the century, men pleaded guilty to rape, alternate charges, or other crimes to gain mercy and receive lighter sentences. Henry Cockburn, an

[20] NAS: AD 14/40/205, Crown Office Precognitions, NAS: JC26/1840/ High Court of Justiciary Processes, 1550-2003, and AD6/2, Circuit Reports, 1838-1841.
[21] NAS AD 14/63/259: Criminal Precognitions, 1863, add AD.6

advocate and later judge, observed this pattern of pleading and noted his distaste for the practice. He stated that no "sane man can dream of pleading guilty unless it is to please the court, and thereby soften the sentence."[22] He further described guilty pleas as "odious" and that "they sometimes happen from genuine despair and sometimes from a desire to hide the atrocious features of the offence by preventing their disclosure in evidence but [these are rare]" and they also occur from the "idea that saving trouble will conciliate the court…that the prisoner had pleaded guilty and thereby saved the court all the trouble."[23] It was also sometimes remarked from the bench that the plea saved the court from learning the full "enormity" of the crime, leading to a reduced sentence.[24] From the examined cases, it appears that the court considered a plea as saving the court time and expressing some remorse for a crime and rewarded men who confessed with a lighter sentence.

The sentencing for men who pleaded guilty to rape or a lesser charge reveals that pleading to a lesser charge gave men a chance to avoid the gallows. After capital punishment fell into disuse in the 1830s, transportation became the norm for punishing alleged rapists before being replaced with penal servitude. This change in sentencing represents the larger century-long phenomenon of moving away from capital punishment and transportation in the Scottish criminal justice system. Because these men pleaded to lesser crimes to avoid a harsher sentence, they created a smaller number of men who were actually convicted of rape, creating perhaps the mistaken impression that few men committed rape in nineteenth-century Scotland.

---

[22] Henry Cockburn, *Circuit Journeys* (Edinburgh: 1888), 21.
[23] Cockburn, *Circuit Journeys*, 4-5.
[24] Riggs, "Scottish Criminal Law and Procedure," 149.

The courts historically prescribed death as the punishment for rape. Lord Moncrieff, quoted in a broadside, stated during an 1813 rape trial:

> From your years and other circumstances, you was calculated to be the protector rather than the destroyer of the young woman, whom you have so deeply and irreparably injured. After she had cast herself upon your confidence and protection you have planted in her heart a wound which she herself has declared was more painful to her than death itself. When our Creator presented to man in his lonely and unfallen state, woman, to be a comfort and a blessing, he did not give her for the gratification of passions, degrading in themselves, or like that of the brutes that perish, but for the perpetuation and preservation of our own species. The God of Nature has implanted in the constitution of women, principles and feelings which are calculated to exalt and improve our condition, and has given to our sex, affections and privileges, which woman, in her proper place, can well esteem and repay. But for you, unfortunate man, you have violated the laws of God and nature, and with a determination and recklessness degrading to our sex, for the gratification of your selfish passions, turned a blessing into a bitter curse.[25]

As Lord Moncrieff demonstrates, nineteenth-century attitudes towards women shaped legal and public perceptions on alleged offenders. Rape was a crime that violated the gentle nature of women and merited some form of punishment. Unfortunately for convicted rapists that punishment was death. Capital punishment for those who committed the most atrocious crimes was to serve as a deterrent to others to commit crime as well as to rid undesirables from society.[26] David Cooper also notes the importance of capital punishment in deterring future crimes. He argues that hanging was not only cheaper than housing prisoners, but that early nineteenth-century elites believed that the public spectacle of hanging instilled fear in others and added shame to the punishment.[27] Notable crimes, trials, and executions provided excellent opportunities for

---

[25] NLS Broadsides, "Awful Crime," accessed electronically, http://digital.nls.uk/broadsides/broadside.cfm/id/14625/criteria/rape.
[26] Sheila Livingstone, *Confess and Be Hanged: Scottish Crime and Punishment through the Ages* (Edinburgh: Birlinn Limited. 2000), vii, 9.
[27] David D. Cooper, *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England* (Athens: Ohio University Press, 1974), 199.

the publication of broadsides, cheap, one-page printed sheets, urging young men to avoid a life of crime. In an 1815 broadside entitled "Address, or Warning to the Young," the writer advises his countrymen to avoid a life a crime for "the sad example/keep in mind/ of we poor mortals now confin'd/and doom'd we are hanged to be."[28] Despite the severity of punishment for crimes like rape, men still committed the crime. Few men faced a rape conviction for their crimes and in turn received milder forms of punishment for their crimes.

Table 3: Death Sentences for Rape and Other Crimes

Year	Death Sentence Rape	Death Sentence Commuted	Death Sentence Nonsexual Crimes
1830-35	5	2	2
1840-45	1	1	0
1850-55	0	0	0
1860-65	0	0	0
Totals	6	3	2

Source: Data gathered from the National Archives of Scotland in the JC4, JC26, and AD4 series of documents containing indictments and court proceedings.

Sentencing patterns for rape in 1830-1835, 1840-1845, 1850-1855, and 1860-1865 demonstrate that rape was rarely a capital crime in practice, with judges preferring to sentence men to transportation or imprisonment or penal servitude for alternate charges. When the advocates depute restricted the libel, they removed death as the punishment for the crime, thus allowing for a less harsh sentence for rape. The data in Table 3 demonstrate that from 1830-1835, seven men received death as punishment for

[28] NLS, Broadsides, "Awful Crime," accessed electronically, http://digital.nls.uk/broadsides/broadside.cfm/id/14625/criteria/rape.

rape, with two of these seven men eventually receiving a commutation of their sentences to transportation and two of these men being convicted of crimes other than rape. In 1833, Agnes Stark accused William Grieve of raping her, a jury convicted him of rape, and a judge sentenced him to death but the crown later commuted his sentence to transportation.[29] According to a broadside, the court granted him a 14 day reprieve to examine new evidence surrounding the principal witness.[30] The broadside states that the reprieve was "the general wish of the public at large, who have known or heard particularly of his awful situation."[31] In 1834, Richard Hill also faced death for the rape of 25-year-old Janet Bruton but received a remitted sentence from the royal commission.[32] A jury also convicted 39-year-old James Newlands of raping 17-year-old Jean Ross. The jury recommended him to mercy, but he received a death sentence and was later granted a commuted sentence.[33] The men who were not lucky enough to get a respite and have their sentences commuted to transportation faced the grim reality of punishment for their crimes.

There is a distinct pattern in the use of the death penalty in these cases connected to the age of the victims. In 1835, 14-year-old Ann McLachlan accused a family friend, 26-year-old Mark Devlin of raping her. He was convicted and sentenced to death.[34] Similarly, in 1833 16-year-old Mary Shields accused her neighbor and fellow lodger, 16-year-old Philip Cairnie, of raping her. He was recommended to mercy because of his age,

[29] NAS AD 14/33/537: Crown Office Precognitions, 1833., need circuit report
[30] NLS, Broadsides, "Respite for William Grieve," accessed electronically from http://digital.nls.uk/broadsides/broadside.cfm/id/14596/criteria/rape.
[31] Ibid.
[32] NAS AD 14/34/50: Crown Office Precognitions, 1834.
[33] NAS AD 14/33/59: Crown Office Precognitions, 1833.
[34] NAS AD 14/35/87: Crown Office Precognitions, 1835.

but a jury nonetheless found him guilty of rape and a judge sentenced him to death.[35] Both of these rapists were hanged for their crimes against young girls. The law defined girls under puberty as children and defined sexual contact with them as "constructive rape." Meaning, sexual intercourse with girls under 12 was criminal whether it was consensual or not.[36] While the victims of the hanged men were over the age of puberty, their young age appears to have played a part in convicting and punishing their attackers. Juries were probably moved by the testimony of these victims and saw their youth as evidence of sexual innocence – strengthening the prosecution's argument that there was no consent.

In one notable case, two men who were charged with rape, but were ultimately given the death sentence for a nonsexual crime that they also committed together on the victim. The case of John Thomson and David Dobie was publicized in newspapers because of the atrociousness of their crime. Thomson and Dobie were charged with the robbery, rape, and murder of 35-year-old Margaret Paterson giving her a ride home in their cart. Dobie admits to falling asleep in the hay of the cart driven by Thomson. Rather than seeing Thomson, his co-accused, drive, he woke to see him on top of the victim. He did not help her because he did not see her resisting. Thomson states that he assisted her home and helped her out of his cart because she was too drunk to get out. He then left her on the road and claims not to know what happened to her after he left her. Her murdered body, however, was later discovered. The medical report determined that she had contusions and bruises on several parts of her body and died of these injuries. Dobie

[35] NAS AD 14/33/21: Crown Office Precognitions, 1833.
[36] Constructive rape means that young girls are unable to consent to rape as constructed by the law. The law found the rape of children especially heinous. Hume, "Of Rape," 301.

claims he later saw Thomson with the tin box Paterson carried with her, as well as her other belongings. A jury found both men guilty of the murder, the robbery, and the alternate charge of assault with intent to ravish, but found the charge of rape not proven.[37] Because murder and robbery were capital offences, the men hanged for these crimes. Why the jury did not convict the men of rape is unknown, especially when Dobie stated that he saw Thomson having sex with the victim. The probable explanation is that their victim was deceased and could not testify to the sexual assault, or no other witnesses could corroborate Dobie's statement or because the medical report determined that no connection occurred. Perhaps the jury saw no sense in convicting them of rape after finding them guilty of murder and robbery when those charges alone warranted death.

By 1840-1845, only one man received a death sentence for rape. In 1841, 14-year-old Marjory MaKintosh accused 49-year-old Alexander McRae of raping her. He pleaded not guilty and a jury found him guilty. Even though a judge sentenced him to death, he was granted a reprieve and his sentence was commuted to transportation.[38] After 1841, no man received a death sentence for rape.[39] Sheila Livingstone asserts that capital punishment was still effective generally as late as 1855 for murder, but the use of capital punishment for rape ended with the last person hanging for the crime in 1835.[40] Cockburn states that there was such a "prevailing aversion to capital punishment, that no verdict could be obtained."[41] Paul Riggs also notes that juries were reluctant to convict

[37] NAS AD 14/30/344: Crown Office Precognitions, 1830 and NAS JC 26/1830/346: High Court of Justiciary Processes, 1550-2003.
[38] NAS: JC 26/1841/40, High Court of Justiciary Processes, 1550-2003.
[39] The last man sentenced to death for rape was Alexander MacRae in 1841, who had his sentence commuted.
[40] Livingstone, *Confess and Be Hanged*, 65 and Riggs, "Prosecutors, Juries, Judges, and Punishment," 180.
[41] Cockburn, *Circuit Journeys*, 92,.

men who faced the death sentence because of the severity of the sentence.[42] Certainly juries were reluctant to convict men of rape, especially if there were no, or no reliable, witnesses to the crime other than the victim or any other solid form of corroboration. Essentially, juries may have been reluctant to convict a man of rape on a child or woman's word.

Contrary to the tradition of the law and the crime of rape's status as one of the four pleas of the crown, this analysis of the law in action reveals that the vast majority of convicted rapists did not hang for their crimes. Instead, judges favored transportation or imprisonment charges. M. Anne Crowther notes this occurrence in her essay "Crime, Prosecution, and Mercy: English Influence and Scottish Practice in the Early Nineteenth Century." Offering a comparative study between Scottish and English use of capital punishment, Crowther notes that at a time when the English had high hanging rates, the Scottish witnessed relatively fewer executions.[43] She states that Scots saw only three or four people hanged per year during the first decade of the nineteenth century, which increased to eight per year in the 1820s.[44] V.A.C. Gatrell also notes the disuse of capital punishment in England. He states that by 1837, the English did not capitally punish men for raping adult women but only girls under puberty.[45] On the other hand, in Scotland, no man hanged for rape after 1835. Crowther attributes the difference to less urbanization in Scotland and the later development of police forces, not a change in sentiment toward

[42] Riggs, "Prosecutors, Juries, Judges, and Punishment," 182.
[43] M.A. Crowther, "Crime, Prosecution, and Mercy: English Influence and Scottish Practice in Early Nineteenth Century," in *Kingdom's United? Great Britain and Ireland since 1500: Integration and Diversity*, ed.Sean J. Connolly (Dublin: Four Courts, 1999), 230.
[44] Ibid.
[45] V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford: Oxford University Press, 1994), 620.

capital punishment.[46] However, Crowther also places the decline of capital punishment in the hands of the prosecutors. She asserts that advocates depute had no choice but to restrict the pains of the law because juries were reluctant to convict when death was the likely punishment.[47] Based on the circuit reports and High Court proceedings, prosecutors did at times restrict the pains of the law in rape cases. However, they also charged men with a lesser or alternate charge to overcome jury reluctance by allowing the jury to choose the lesser charge with a less harsh punishment.[48] For example, in cases involving adult women, a man could be charged with the alternate charge of assault with the intent to ravish. In cases involving girls under puberty, he could be charged with rape or assault with intent to ravish or the crime of lewd, indecent, or libidinous practices with a child under puberty. Giving juries alternate charges to convict a man allowed for more men to receive some form of punishment for rape and also allowed juries to overcome their reluctance to convict a man of a sexual crime.

With the end of hanging as punishment for rape came a new form of punishment. Transportation was a more humane alternative to capital punishment in that it removed the criminal from society without ending his life. Cockburn expressed the general sentiment behind transportation in his *Circuit Journeys* when he stated that he was "clear for getting them out of this country in as great number as possible."[49] From 1830-35, transportation was the most common form of punishment for men convicted of alternate, sometimes lesser, charges. More men were convicted of alternate charges and received

[46] Crowther, "Crime, Prosecution, and Mercy," 233.
[47] Crowther, "Crime, Prosecution, and Mercy," 235.
[48] Riggs, "Prosecutors, Juries, Judges, and Punishment," 182.
[49] Cockburn, *Circuit Journeys*, 205.

transportation sentences than men convicted of rape and sentenced to death or transportation.

Table 4: Transportation and Imprisonment Sentences for Rape and Alternate Charges

Year	Transportation for Rape	Transportation for Alternate Charges	Imprisonment/Penal Servitude Sentences
1830-35	2	12	2
1840-45	9	7	6
1850-55	12	26	14
1860-65	0	0	39
Totals	23	45	61

Source: Data gathered from the National Archives of Scotland in the JC4, JC26, and AD4 series of documents containing indictments and court proceedings.

As Table 4 demonstrates, the period 1830-35 contains only two men convicted of rape and sentenced to transportation. However, three men sentenced to death had their sentences commuted to transportation. So, in actuality, all five men received transportation for rape. For other crimes, 12 men received transportation and only two men for lesser charges received imprisonment sentences. There was a slight increase in transportation sentences in 1840-45 with nine men receiving transportation for rape and seven receiving transportation for other charges. There was also a slight increase from the previous periods in the number of men who received imprisonment for their crimes. The period 1850-1855 saw a higher number of reported cases and prosecutions and thus more transportation sentences for both rape and other crimes. Twelve men were transported for rape while 26 were transported for other crimes and 14 received imprisonment or penal servitude. In the final period, no men received transportation for any charge with the

punishment having been abolished by statute. Therefore, all the men convicted for rape or alternate charges received imprisonment or penal servitude.

The percentage of rape convictions that resulted in transportation reveals that in the 1830s, 1840s, and 1850s, transportation was the typical punishment for men convicted of rape.[50] Table 5 below reveals that 77.8% of convicted rapists received a death sentence for their punishment, and all of these cases were confined to the 1830s. However, that percentage is actually lower, 55.5%, considering royal commutations occurred in most of the death sentences in that period. The period 1840-45 had 10% of cases that received death sentences. Once again that sentence was commuted to transportation. So, beginning in 1840-45, all men convicted of rape ultimately received transportation as their punishment. In the period 1850-55 all men convicted of rape received transportation sentences, and in the period 1860-65 all men received imprisonment or penal servitude subsequent to the statutory abolition of transportation. In earlier periods, judges typically reserved imprisonment or penal servitude for men convicted of lesser crimes like assault with intent to ravish or lewd, indecent, and libidinous practices, but by 1860-65, judges used these punishments for rape as well as the alternate charges.

[50] For this chart, the percentages were gathered by dividing the number of death, transportation sentences, and imprisonment/penal servitude sentences by the total number of men convicted of rape alone.

Table 5: Punishment Patterns for Convicted Rapists

Year	Death	Transportation	Imprisonment/Penal Servitude (Rape Only)
1830-35	77.8% (55.5%)	22.2% (44.4%)	0%
1840-45	10% (0%)	90% (100%)	0%
1850-55	0%	100%	0%
1860-65	0%	0%	100%

Source: Data gathered from the National Archives of Scotland in the JC4, JC26, and AD4 series of documents containing indictments and court proceedings.

The data in Table 5 also demonstrate that the number of transportation sentences for rape increased over the century as prosecutors and juries effectively confined the death penalty to murder cases in the 1830s. By 1860-65, judges ceased to sentence men to transportation, restrained as they were by the abolition of transportation and its substitution with penal servitude. These data reveal that sentencing patterns for rape follow the overall changes in the criminal justice system. After 1834, when the Scottish criminal justice system ceased using capital punishment for crimes other than murder, the number of transportation sentences drastically increased and reached their peak as the favored punishment in serious cases before the High and Circuit Courts of Justiciary. Riggs notes an increase in transportation for all crimes peaked between the implementation of the two penal servitude acts that restricted and then abolished transportation.[51] This assertion holds true for rape as the data reveals that transportation was the favored punishment for sexual crimes leading up to the 1857 Penal Servitude

[51] Riggs, "Prosecutors, Juries, Judges, and Punishment," 186.

Act. As an alternate to capital punishment, transportation allowed for the removal of criminals from Scotland entirely and offered a more humane punishment than death. Even though reformers debated the humanity of transportation, the main sentiment in Scotland was to "get rid of the offender at all cost, in whatever state he may be, to the next parish, the next county, or beyond the seas."[52] By 1858, judges ceased to use all terms of transportation for all convicted men and women as the Penal Servitude Act of 1857 mandated final abolition.

Joy Cameron attributes the end of transportation to the reform of the Scottish penal system during the nineteenth century. She states that reformers began to object to the treatment of prisoners that made many prisoners too ill to complete the journey to Australia.[53] Cameron also asserts that transportation to Australia had become a practical issue for the British government. British officials were tired of spending money and manpower on transporting men and women to Australia and began to question whether transporting criminals would deter them from committing further crimes.[54] Tom Dunning's research on child rapists in Australia from 1839-1853 examines whether transportation served as a deterrent of crime. He concludes that transporting men convicted of raping young girls had no effect as they committed other crimes upon arriving in Australia.[55] While the number of cases he uses is slim, he does demonstrate that the government's fears about transportation not being a deterrent to crime proved true in some cases.

---

[52] Joy Cameron, *Prisons and Punishment in Scotland: From the Middle Ages to the Present* (Edinburgh: Canongate, 1983), 119.
[53] Cameron, *Prisons and Punishment in Scotland,* 118-119.
[54] Cameron, *Prisons and Punishment in Scotland*, 119.
[55] Tom Dunning, "Narrow Nowhere Universes: Child Rape and Convict Transportation in Scotland and Van Diemen's Land, 1839-1853," *Scottish Historical Review* 86 (2007): 125.

The first penal servitude act enacted in 1853 provided the first change in sentencing that affected rape cases. This act substituted 4 years penal servitude for 7 years transportation and 4 to 6 years penal servitude for ten years transportation.[56] This act ended longer transportation sentences offered to punish rapists. Rape cases prosecuted in the years 1850-1855 demonstrate this sentencing trend. Towards the end of the year set, only one offender received a 7 years transportation sentence. All other convicted offenders received sentences ranging from 14 years transportation, 4 or 6 years penal servitude, or a year imprisonment with or without hard labor. By 1854, no convicted rapists received either 7 or 14 years transportation. From 1850-1853, 7 or 10 years transportation was a popular sentence for convicted men as the 1853 act banned longer transportation terms of life or 15 years. In 1857, Westminster passed the Penal Servitude Act that outlawed using any term of transportation overseas as a punishment. Although many criminal law statutes passed in London did not apply to Scotland, and there were potential applicability issues imbedded in the 1853 and 1857 acts, the Penal Servitude Acts were followed scrupulously by the Scottish bench. Just as transportation replaced capital punishment as the dominant form of punishment for rape, imprisonment and penal servitude replaced transportation. By 1857, transportation completely ended as punishment for rape. The Scottish criminal justice system applied the new statute swiftly, which once again demonstrates the flexibility in the Scottish criminal system to utilize its own discretion in incorporating statutes into its system.

The reporting, prosecuting, convicting, and sentencing patterns for rape in nineteenth-century Scotland parallel several larger trends occurring in the legal system.

---

[56] Cameron, *Prisons and Punishments in Scotland*, 120 and Riggs, "Prosecutors, Juries, Judges, and Punishment," 177.

First, these trends reveal an increase in reporting in the middle of the century. This growth in reported crime was probably caused by population increase and the increase in emigration to cities, which were more heavily policed than rural areas. Secondly, the prosecution rate for reported cases of rape was high at 81.7%. As expected, the number of men prosecuted for rape increased after the end of capital punishment before decreasing and then increasing. Thirdly, the number of men actually convicted of rape, versus alternate charges, remained low throughout the century despite the high prosecution rate. With increased case-loads came increased rape convictions, but the rape conviction rate for all the years examined remained low at 20.8%. And finally, the sentences for convicted rapists went contrary to the law. Only two convicted rapists received hanging as punishment for their crime even though capital punishment for rape was not formally ended until 1887. Most men convicted of rape received transportation sentences as transportation replaced hanging as the dominant form of punishment for rape, but by 1860-65 statutory changes brought an end to transportation and convicted rapists received penal servitude as punishment. The reporting, prosecution, conviction, and sentencing trends for rape in the years 1830-35, 1840-45, 1850-55, and 1860-65 reveal the changes in the Scottish criminal justice system in the nineteenth century. As the court moved away from sentencing men to death for other crimes, they did the same for men convicted of rape. This change in punishment resulted from the flexibility of Scottish law in punishing crimes. Even before statutes restricting certain punishments, the Scottish court exercised its power to change and limit punishments for certain crimes.

Chapter IV

PRECOGNITIONS AND RAPE

Under Scottish law and procedure, prosecutors prepared cases by "precognosing" witnesses, taking their sworn statements, and by gathering other written materials. These precognitions, as they are termed, survive in abundance in the National Archives of Scotland, and hold a great deal of value for historians. As M.A. Crowther asserts, they are "one of these most seductive historical sources imaginable" that offer insights into the lives of everyday people and how they viewed crime, but they cannot provide full statistical information because they only include documents from prosecuted cases.[57] Despite these shortcomings, they do provide information into the nature of crimes, like rape, as well as the ages of the victims and their attackers, the relationship between the victims and their attackers, their respective social classes, their respective ethnicities or races, whether alcohol played a part in the sexual assaults, and where these attacks occurred. While the Dark Figure prevents historians from knowing this information for every single rape that occurred in the nineteenth century, historians cannot overlook the information from these documented cases. The criminal precognitions hold important data concerning crime as well as demonstrate how criminal procedure operated in nineteenth-century Scotland. The findings presented in this chapter are based on information gathered from AD14 precognitions and JC26 indictments involving charges of rape in Scotland from 1830-35, 1840-45, 1850-55, and 1860-65.[58] These documents

[57] Crowther, "Criminal Precognitions and their Value for the Historian," *Scottish Archives* 1 (1995): 75-76.
[58] The AD14 documents contain the precognitions, or statements made by both victim and accused as well as other witnesses, the medical report, procurator-fiscal notes, and list of productions. The JC26 series of documents contain indictments and final statements made by the panel. The years 1830-35, 1840-45, 1850-

reveal several divergences between the law in books and the law in action. Firstly, they reveal that a majority of rape victims were young girls and their attackers were men in their twenties who attacked them in public spaces in rural environments. Even though legal sources defined the rape of young girls as more atrocious and more victims appear in this age range, the men who hanged for rape did not hang for raping young girls. Secondly, institutional writers frequently mention that the law protects prostitutes, giving readers the idea that prostitutes frequently reported rape. However, no prostitutes reported a rape from the 1830s-1860s. And finally, institutional writers defined and extensively commented on administering "stupefying agents" as rape, but these types of rapes rarely appear in criminal records and never go to trial in the years examined.

Table 6: Panels' Ages

Age Group	Number of Men
13-19	47
20-29	80
30-39	34
40-49	12
50-59	7
60+	3
Unknown	42
Total	225

Source: National Archives of Scotland AD 14 and JC 26 series: Criminal precognitions and indictments.

55, and 1860-65 were chosen because they demonstrated specific changes in the criminal justice system and cover a total of 20 years to provide a more full examination of rape proceedings.

Examining all panels from High Court cases, Ian Donnachie argues that the average male criminal in the first half of the nineteenth century was in his twenties.[59] Examining the precognitions reveals that accused rapists fit this profile. The law defined the age of 13 as the age under which a male was legally capable of committing rape, therefore, no males under this age appear in the record.[60] The data in Table 6 reveal that the age group 20-29 contains the most panels with 80 men of this age range facing rape charges. The next most common ages for alleged rapists were the 13-19 and 30-39 age range with a combined total of 81 accused men. The documents reveal that men over the age of 40 were rarely accused of the crime of rape. Therefore, as Donnachie proved with the first half of the nineteenth century, most men who committed crime in the middle of the century were young men.

While alleged rapists were often young men, their victims were often young girls. Taking the entire dataset as a whole, 83 of the 223 victims were under the age of puberty, or younger than 12.[61] Of those whose ages are known, 59 out of 223 were between the ages 13-18, 31 were between the ages of 20-29, 18 women were 30-39, and 3 were ages 40-49.[62] Even fewer women were over the age of 40 with only 11 victims over that age. The combined victims' ages reveal the reality of rape for young girls. At a glance, the numbers reveal that more reported cases exist involving young girls rather than adult women. Men perhaps chose younger victims because they were less able to resist, their

[59] Ian Donnachie, "'The Darker Side': A Speculative Survey of Scottish Crime during the First Half of the Nineteenth Century," *Scottish Economic and Social History* 15 (1995): 20.
[60] Hume, "Of Rape," in vol. I of *Commentaries on the Law of Scotland Respecting Crimes*, edited by Benjamin Robert Bell (1986 Reprint; 4th ed. with Bell's Notes), 306.
[61] Hume, "Of Rape," 303, and Archibald Alison, "Of Rape," in *Principles of the Criminal Law of Scotland*, by Archibald Alison (1989; Reprint, Edinburgh: Law Society of Edinburgh, 1832), 213.
[62] The women whose ages were unknown did not report their ages or died before they gave their declarations or the data was unavailable at the time of research.

age made their testimony less reliable, or they were sexually attracted to young girls.[63] More adult women may have experienced rape, but perhaps fewer of them reported their attack in comparison to crimes involving young girls.

Table 7: Victims' Ages

Age Group	Number of Victims
Under 12	83
13-19	59
20-29	31
30-39	18
40-49	3
50-59	4
60+	4
Unknown	21
Total	223

Source: National Archives of Scotland AD14 and JC26 series: Criminal precognitions and indictments.

No Scottish sources exist to explain this occurrence, but perhaps the burden of proof deterred women from reporting their attacks as well as a disbelief in the criminal justice system or fear of retribution from their attacker or fear of societal shame.[64] However, the burden of proof did not matter in cases involving girls under puberty as sexual relations with these young girls was criminal whether coerced or not. Young girls

[63] Diane Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2004), 43.
[64] In Scottish law, corroboration was necessary in criminal cases. This proved troublesome for the crime of rape as most did not have any witnesses. However, medical evidence proved beneficial at times as doctors could corroborate a victim's declaration with physical trauma.

also made better targets for rape because their size and naivety made it easier for men to overcome their will by coercion or persuasion.

Table 8: Marital Statuses of Panels

Marital Status	Number of Panels
Single	123
Married	55
Widowed	5
Unknown	42

Source: National Archives of Scotland AD14 and JC26: Criminal precognitions and indictments.

The average age groups for both rape victims and their attackers reveal that most victims and their attackers were single. Donnachie asserts that the typical criminal in the early part of the nineteenth century was both young and single.[65] Based on the data presented in Table 8, his finding also applies to accused rapists. According to the data gathered, out of the 225 panels in the precognitions and indictments, 123 were single, 55 were married, 5 were widowed, and 42 were unknown. 54.7% of the men accused of rape were single, 24.4% were married, 0.02% were widowed, and 18.7% were unknown. In each year set, the number of single men accused of rape is significantly higher than any married, widowed, or unknown status revealing no trend change regarding the marital status of panels.

[65] Donnachie, "'The Darker Side'," 20.

Table 9: Marital Status of Victims

Marital Status	Number of Victims
Single	178
Married	25
Widowed	12
Unknown	8

Source: National Archives of Scotland AD14 and JC26: Criminal precognitions and indictments.

Just as the men who committed these crimes were predominantly single, so were their victims. As Table 9 demonstrates, out of the 223 total victims, 178 were single, 25 were married, 12 were widowed, and 8 were unknown. Overall, 79.5% of victims were single, with the remaining categories forming only 20.5% of victims. This number is not surprising considering a majority of victims were under the age of puberty. Once again, there is no significant trend change during the examined years. Single victims outnumbered married and widowed victims, or unknown statuses in each decade studied. Single women, particularly single women of the working class, spent more time alone than upper or middle-class women. They often walked to and from work or school by themselves, which brought them in close contact with men. Whereas elite women were chaperoned and often separated from men, working-class women interacted with men either in passing, in close living conditions, or in working environments. These close spaces put all working-class women at a higher risk of attack, but this risk was even more of a reality for single women who were by themselves more than married women with children or even a widow who had children or lived with another family member. Not

surprisingly, men tended to choose the most vulnerable victims: younger, single females who were often without supervision.

Studies of rape tend to show that a majority of women know their attackers. Susan Estrich concludes that the stereotype of "stranger rape" is mythical as women are more likely to be raped by someone they know.[66] Carol Smart also notes that women were more likely to know their attacker rather than be raped by a stranger.[67] Therefore, women are more likely to be raped by somebody they know, either in passing or by acquaintance, rather than a stranger.[68] The data presented here reveals that in roughly 61% of cases, the victim knew her attacker. For the purposes of this study, the relationship between the victim and her attacker are: acquainted, familiar, strangers, and unknown. In Table 10, the acquainted category accounts for friendships, family members, neighbors, coworkers, master and servants, accused working for or with his victim's parents, the victim's parents working for or with the accused, lodgers, and the accused lodging where the victim works. The familiar category includes either the victim or accused seeing one another in passing on a previous occasion, knowing each other by name, or knowing each other by appearance. The stranger category is self-explanatory and includes the victim and accused having no previous relationship; and the unknown category represents missing data or neither the victim nor the accused stated the exact nature of their relationship with one another. The numbers for each category include every panel and their victim or victims. Therefore, each offender and his relationship with each of his

[66] Susan Estrich, "Is it Rape?" in *Rape and Society: Readings on the Problem of Sexual Assault*, eds. Patricia Searles and Ronald J. Berger (Boulder: Westview Press, 1995), 183.
[67] Carol Smart, "Prosecution, Rape, and Sexual Politics," in *Women, Crime, and Criminology*, ed. Carol Smart (London: Routledge and Keegan Paul, 1977), 95, 100.
[68] Menachem Amir, *Patterns in Forcible Rape* (Chicago: University of Chicago Press, 1971), 336.

victims is included. Furthermore, the data presented in Table 10 is the combined total of relationships for 5 year periods between 1830-1860, aggregated together since no change over time is observable in the relationship between victim and attacker.

Table 10: Relationships between Victim and Accused

Acquainted	Familiar	Strangers	Unknown
126	24	80	16

Source: National Archives of Scotland AD14 and JC26: Criminal precognitions and indictments.

The data in Table 10 reveal that 126 out of the 246 relationships examined involved victims who knew their attackers either intimately or casually. A majority of these relationships involved victims whose attackers were either friends or acquaintances, family friends, or neighbors. These men had the most intimate relationships with their victims and used this relationship to gain their victims' trust. Having an intimate acquaintance with their victim also allows rapists easier access to them because they know when and where their potential victims are most vulnerable. Outside of intimately knowing their attackers, however, seeing one another in passing or knowing one another by name or appearance represents the next highest number of reported relationships. Twenty-four out of 246 reported connections represent these forms of relationships. And finally, only 80 relationships involved complete strangers, thus dispelling the myth of stranger rape for mid nineteenth-century Scotland.

These numbers only represent the cases reported to the procurator-fiscal. Other sex crimes may have occurred that were not reported or detected that may have higher numbers of family members accused or coworkers or any other relationship. Overall, 150 out of the 246, or 51.2%, of relationships involve relationships in which the accused knew her attacker well, 9.7% involve relationships in which the victim was familiar with

her attacker, and 80, or 32.5%, of the cases involve complete strangers. Choosing strangers as victims may have allowed for a potentially swift escape from justice after the crime as victims may not have been able to successfully identify their attackers because of a faulty memory or a failure to report the crime quickly enough. However, from the precognitions, victims reported their attacks themselves or they told their family members or friends who in turn reported the crime. Also, witnesses proved effective in the apprehension of alleged rapists as they reported the attack upon seeing it or provided adequate descriptions of the men they saw. Overall, these numbers reveal, as expected, that women had more to fear from the men they knew or had encountered rather than the attack of a completely unknown man. In some cases, men that women interacted with daily or men in powerful and trusting positions abused their trust and had forceful sexual connection with women.

Scholars describe rape not as an act of fulfilling sexual desire, but an act of power. Rapists use sex to exert control and power over women. While the act itself is about power dynamics, historical studies of rape have sometimes brought to light cases in which men used their positions of authority to have sexual relations with their victims. In a study on child rapists in early modern England, Sarah Toulalan notes that child rapists were of the same class as their victims.[69] Criminologist Amir concludes that both rape victims and their attackers were usually of the same socio-economic background.[70] Historian Anna Clark also argues that while women employed in domestic service faced the threat of rape, however, they were more likely to be raped by someone of the same

[69] Sarah Toulalan, "'Is He a Licentious Lewd Sort of a Person?': Constructing the Child Rapist in Early Modern England," *Journal of the History of Sexuality* 23, no. 1 (2014), 30.
[70] Amir, *Patterns*, 13-14.

class.[71] No cases involving upper class-men exist for the years examined. Elite men's frequent visits to their lower class girlfriends, brothels or common prostitutes perhaps reduced their propensity to rape, although there is also likely a reporting effect at work here with working-class women reluctant to bring charges out of fear of not being believed or fear of retribution from their upper-class attacker. Clark also argues that upper-class men raped women with impunity, knowing that their victims would not report their attacks and that they would never be convicted.[72] Antony E. Simpson also notes the lack of upper-class rapists in his study of rape in eighteenth-century England. He argues that upper-class men rarely, if ever, went to court on rape charges because the middle-class people were not concerned with prosecuting them or they settled out of court.[73] Furthermore, rape convictions for upper-class men only occurred when the lower-class female was considered of good character.[74] The case in Scotland appears to be that women did not report these attacks. In the end, it is remarkable that no reported cases for the entire period exist of elite men victimizing working-class women or girls. Just as no upper-class men appear in the record, no upper-class women appear in the record as victims of rape. Upper-class women may have been reluctant to report their attacks because of they were supposed to be chaste. Their attacks perhaps brought two forms of shame. The shame some rape victims feel of being attacked and shame of no longer being chaste. These women could also have been reluctant to report their rape because their attackers might have been well-known and well-connected so local

[71] Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England 1770-1845* (London: Pandora Press, 1987), 91-92.
[72] Clark, *Women's Silence, Men's Violence*, 90.
[73] Antony E. Simpson, "Popular Perceptions of Rape as a Capital Crime in Eighteenth-Century England: The Press and Trial of Francis Charteris in the Old Bailey, February 1730," *Law and History Review* 22, no. 1 (2004), 37, 45.
[74] Simpson, "Popular Perceptions of Rape," 62.

authorities would have been less likely to believe that the sex was nonconsensual, hence leading to a woman's societal ruin. An upper-class man that was well-known and well-connected could also be harder to prosecute, thus making his victim hesitant to bring charges. Whatever the reason, these women do not appear in the record. The lack of any upper-class panels or victims creates the illusion that rape was a working-class crime. This makes it impossible to investigate social class as a variable.

However, cases do exist in which men used their authority as a woman's employer, as a police officer, or their positions as patriarchs to allegedly sexually exploit their victims. These men and women were of the same social class, but the men held authority over their victims. Six men used their position as employers to exploit their servants sexually. These men were in the same class as their victims, but were more well off than their victims. Because they were in the same larger social class, these rapes were not about class dynamics but power within class. In 1830, Mary Gilchrist, a servant to her attacker, accused James Hall of raping her at his home. She declared that Hall sent his son on an errand, locked her inside his home, and proceeded to rape her. The advocate depute gave up the case.[75] In 1850, 21-year-old Marion Muir, servant to Henry Adams accused him of both drugging and raping her. He evaded prosecution by fleeing.[76] In 1853, 16-year-old Ann McKenzie, also a servant to her attacker, accused John Waters of rape. She said that he insisted she sleep with him after bringing him a tumbler of water, she refused and he forced her to have connection.[77] The youngest victim was 11-year-old Ann Wilson, who accused William Jones of raping her when she was his servant. She

[75] NAS AD 14/30/246: Crown Office Precognitions, 1830.
[76] NAS AD 14/50/62: Crown Office Precognitions, 1850.
[77] NAS AD 14/53/326: Crown Office Precognitions, 1853.

states that she lodged with him and his wife and because his wife had no bed for her, she slept at the foot of their bed. During the night, she claimed that the accused raped her while his wife was gone and choked her to keep her quiet. He pleaded not guilty and a jury found him guilty of the alternate charge of assault with the intent to ravish and he received 1 year imprisonment.[78] The next victim was 13-year-old Elizabeth McFarlane who also accused her master, John McEneny, of raping her while she slept. She declared that he came home drunk and raped her. She told McEneny's wife, the mistress, who sent her back to bed. He first pleaded not guilty, then changed his plea to guilty and received a sentence of 12 months imprisonment with 4 months hard labor.[79]

Two men employed as police officers, and another pretending to be a police officer, faced rape accusations in the years examined in this study. The first panel was John Stuart, a police officer of 12 years. As mentioned in Chapter 2, in 1830 Catherine Douglas, a woman often in trouble with the law, accused Stuart of raping her in a jail cell after police apprehended her for theft. Her reputation as a thief by "habit and repute" probably worked in favor of Stuart as a jury found him not guilty of raping the girl.[80] The second police officer accused of raping a woman was Alexander Owen. In 1853, Janet Dunn, the wife of another Glasgow police constable, found Owen and her 7-year-old daughter Helen Dunn in a compromising position in the "privy." Her daughter later disclosed what happened to her, and her parents brought charges against the accused. Although Owen was a police officer, he did not lure his victim away using his position. He did, however, take her "into the necessary" to have sexual relations with her. His

[78] NAS AD 14/62/123: Crown Office Precognitions, 1862.
[79] NAS AD 14/61/207: Crown Office Precognitions, 1861.
[80] NAS AD 14/30/282: Crown Office Precognitions, 1830.

position as a police officer and coworker with her father made it easy for him to overcome his victim's will. He pleaded not guilty and a jury found him guilty of the alternate charge of assault with intent to ravish and he received a 14 year transportation sentence.[81]

Unlike these two men who were actually police officers, one man tried to impersonate a police officer to gain authority over his victim. In 1851, Isabella Blair accused Thomas Graham of impersonating a police officer and forcing her to go with him to another town after a scuffle. He pleaded not guilty, but a jury found him guilty and he received a life transportation sentence.[82] Both Stuart and Owen used their positions of power as police officers to exert control over their victims. Graham impersonated a police officer to use the same power to lure his victim away and to overcome her resistance in leaving with a stranger.

In a male-dominated society, men held positions of power over women, especially in their families. Unfortunately, men could use these positions of familial power to sexually assault their relatives. In the years examined, only two men faced accusations and charges of raping a member of their family. The first case, involves Alexander Roy, who in 1845 faced charges for the rape of his stepdaughter, Elizabeth Ross, a 14-year-old girl. She declared that her stepfather, who was the "worse of drink" at the time of her attack, raped her on their way home from a public house. He was subsequently tried and found not guilty.[83] The other reported case, from 1864, involves John Owens, a man accused of raping his granddaughter, a girl under the age of puberty. His case was not

[81] Ibid.
[82] NAS AD 14/51/418: Crown Office Precognitions, 1851.
[83] NAS AD 14/45/59: Crown Office Precognitions, 1845.

called to trial.[84] Clearly, both of these men allegedly chose young victims whom they had power over because of their position as patriarchs. Even though no reported cases exist that demonstrate a true class element to rape in which upper-class men raped lower class women, these cases nonetheless demonstrate that there was a power dynamic within the lower/working classes.

Just as there was no obvious class element to rape in nineteenth-century Scotland, it is hard to detect any sort of ethnic or racial element. There is very little ethnic or racial diversity among the men accused of rape in the sample. Of course, given the presence of Irish-born immigrants, they do appear as panels in rape cases. In comparison to Irish participation in murder during the nineteenth century, the presence of Irish offenders in rape cases is low. Carolyn Conley notes that 30% of defendants tried for homicide in brawls in western Scotland were Irish men and 23% of homicide defendants in Glasgow between 1867 and 1892 were Irish.[85] For rape in all areas of Scotland, only 23 Irish men were accused of rape with a majority of Irish panels appearing in the 1840-45 and 1860-65 documents. Three Irishman were accused of rape in the years 1830-35, six men from 1840-45, seven from 1850-55, and six from 1860-65. This increase in the number of alleged Irish rapists corresponds with the increase of the Irish population in Scotland during the 1840s when Irish men and women flocked to Scottish cities to seek employment.[86] The Scots, especially unskilled Scottish workers, did not welcome the Irish who worked for lower wages. Soon, Scots began to stereotype the Irish "as stupid,

[84] NAS JC 26/1864/123: High Court of Justiciary Processes, 1550-2003.
[85] Carolyn Conley, *Certain Other Countries: Homicide, Gender, and National Identity in Late Nineteenth-Century England, Ireland, Scotland, and Wales* (Columbus: Ohio State University Press, 2007), 53, 56.
[86] T.M. Devine, "Urbanisation," in *People and Society in Scotland: Volume I, 1760-1830*, eds. T.M Devine and Rosalind Mitchison (Edinburgh: Economic and Social History Society of Scotland, 1988), 41.

poor, diseased, drunken, violent, and criminal."[87] Despite this negative view of the Irish, they do not frequently appear as accused rapists in the criminal precognitions or indictments. Whenever they appear in records, the victims identify them by their accents or by their native home, if they knew their attackers. For example, in 1842, 23-year-old Margaret Galloway was raped by two Irishmen, James Hughes and James Means. The men were strangers to her and she identified them by their accents.[88] The records also show that victims of rapes by Irish men were typically native-born Scottish and not Irish immigrants. In 1843, Janet Scott, a Scottish native and servant to Mrs. Alexander, reported that William Dawson, an Irish sawyer also in Mrs. Alexander's employ, raped her after previously attempting to have connection with her.[89]

Not all non-Scottish accused rapists were Irish. Mary Jane Smith, an 11-year-old Glaswegian girl accused 52- year-old Antonio Gianelli, an Italian man living in Glasgow, of raping her. A little closer to home, three Englishmen also faced rape charges in Scotland. Edward Yates and Henry Parkes, both middle aged ironworkers, stood accused of raping 19-year-old Elizabeth Smith, a "sewer" living in a poor house. And James Chandler, an English soldier in the 80th Foot Regiment, faced both rape and murder charges when the body of a widow, Janet Fraser, was discovered. [90] This information does not mean that men of other ethnicities did not commit rapes upon women in other years in the nineteenth century. The record only reveals reported cases.

---

[87] T.M. Devine and Jenny Wormald, *Oxford Handbook of Modern Scottish History* (Oxford: Oxford University Press, 2012), 507.
[88] NAS: AD14/42/18, Crown Office Precognitions, 1842.
[89] NAS: AD14/43/51, Crown Office Precognitions, 1843, NAS: JC26/1843/532, High Court of Justiciary Processes, 1500-2003.
[90] NAS: AD14/50/33, AD14/53/157, AD14/55/185, Crown Office Precognitions, 1850, 1853, 1855.

Just as there is little to no ethnic or racial diversity among accused men, there is also little variation in the ethnicities and races of female victims. There are only two documented cases involving Irish women. 27-year-old Harriot Richardson accused 23-year-old, Irishman Frances Higgins of raping her in 1845. She claimed that she was resting on the side of the road when the accused approached her and asked for some tobacco. She said she only had a little and would walk with him to the store to get more. Along the way, he threw her on the ground, covered her mouth, and had "connection" with her against her will. The court found him guilty of rape and sentenced him to 15 years transportation.[91] In 1861, 23-year-old Irish woman Margaret Hindman accused 29-year-old John McAuley of raping her. After drinking at a public house, Hindman went with the prisoner and several others to the Gas Iron Works, the workplace of the prisoner. While there, they were left alone, and she claimed that he knocked her down a couple of times and she "became insensible." She awakened the next day in her lodgings with signs of abuse on her body. A jury found him guilty of rape and he received a sentence of 15 years transportation.[92]

It is highly likely that Margaret Hindman and Harriot Richardson were not the only Irish women to have experienced rape in nineteenth-century Scotland. However, other Irish victims of rape apparently did not report their attacks. Other Irish women may not have reported their rape because they were aware of the negative view of the Irish and did not think authorities would believe them – the usual credibility problem in this case being compounded perhaps by their ethnicity. Another possible explanation is, like other

[91] NAS: AD14/45/63, Crown Office Precognitions, 1845 and NAS: JC26/1846/106, High Court of Justiciary Processes, 1500-2003.
[92] NAS: AD 14/61/300, Crown Office Precognitions, 1861, NAS: JC26/1861, High Court of Justiciary Processes, 1500-2003, and AD6/8, Circuit Reports, 1861-1866.

victims, they had little faith in the criminal justice system, again due to their status as an ethnic minority

The only reported rape for a victim who was racially different from her attacker involved an 11-year-old girl named Martha Boynes. The girl's father was a black man from Bermuda and her mother was white. The accused, 40-year-old Scottish man Richard Jennings, was a neighbor that she often saw having a smoke. She declared that Jennings asked her to go to the end of the close with him and he would give her a half penny. He then led her to a stair in a covered passage nearby, laid her on her back, and then "put his naked body into hers." He ran away after two girls approached them, while she went home and told her mother what happened to her. The accused denied the accusations. He claimed that the girl sexually propositioned him and lifted up her own petticoats, but he did nothing when she lifted them. He was subsequently convicted of rape and sentenced to life transportation.[93] Even though the young girl was half-Bermudan, the court still punished him harshly. As Dianne Miller Somerville argues, gender mattered more than race in nineteenth-century American rape trials.[94] The same appears to be true in Martha Boynes' case. There are multiple elements that could have contributed to why Jennings chose Martha as his victim. He could have chosen her because of her age, weak mental state, familiarity or because she was half-Bermudan. No other cases in the years examined demonstrate a racial divide between victim and attacker so no real conclusion regarding race and rape in Scotland can be made.

[93] NAS: AD 14/50/335, Crown Office Precognitions, 1850.
[94] Dianne Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2004).

These cases demonstrate that few non-Scottish men enter the criminal records as perpetrators of rape. When they do appear in the record, they did not receive harsher punishments than Scottish men. Fear of the criminal justice system and harsh punishment may have deterred non-Scottish men from committing rape or victims may have refused to press charges because of double shame of loss of honor and the loss of honor at the hands of a foreigner. Nonetheless, the number of non-Scottish men who committed rape in the nineteenth century remained low. Only 31 out of 229 or 13.5% of perpetrators were either Irish, English, and in one case, Italian. This small percentage demonstrates that there was no significant visible ethnic or racial element to rape in Scotland.

Another important factor precognitions reveal is the presence of alcohol. The institutional writers vary in their opinion on whether using alcohol to weaken a woman's will to resist or take away her consent constituted rape. However, even though the writers vary in opinion, alcohol frequently appears as a panel's excuse for not remembering alleged attacks as well as discrediting his alleged victim. Table 11 demonstrates that alcohol was present in roughly half of all rape cases except for the year sets 1840-1845 when the percentage was at 38.46%, and 1860-1865 when the amount of reported cases involving alcohol was 33.3%. In some cases, the victim and accused drank together, the victim drank before her attack, or the accused had drunk alone before the attack. However, these types of alcohol-involved sexual attacks were not cases involving deliberate intoxication of the victim. That is not to say that these types of cases did not occur, but they were not common occurrences.

Table 11: Cases Involving Alcohol

Yesr	Percentage of Cases Involving Alcohol
1830-1835	45%
1840-1845	38.46%
1850-1855	54.69%
1860-1865	33.96%

Source: National Archives of Scotland AD14 and JC26: Criminal precognitions and indictments.

Although the institutional writers discuss at length the act of defeating consent by deliberately administering "stupefying agents", there were only two reported cases in the sample where men were accused of purposefully intoxicating or drugging their victims. For example, there is the case mentioned above of Henry Adams who knew his victim well. His victim, 21-year-old Marion Muir accused the 40-year-old married builder of intoxicating her and then raping her. In this case, Marion was a servant to the accused. She stated that she returned to his residence after delivering a message, when he offered her a drink of liquor. She refused, but he poured the drink, without her seeing him pour it, and handed it to her. She stated that it looked greasy and suspicious but she drank it. She immediately felt the drink go to her head and felt "giddy." He offered her brandy, she refused, and went to bed and became "insensible." She awoke with him above her. She stated that she felt "powerless" and "unable to resist." When he finally got off of her, she attempted to flee but he caught her and put her in her bed. She awoke to blood coming out of her "private parts" and on her shift. She left and did not return and he fled from justice.[95]

[95] NAS AD 14/50/62: Crown Office Precognitions, 1850.

The next case does not involve such a power dynamic relationship but entailed two people acquainted with one another. Mrs. Douglas Thorburn, a parish relief widow, accused Colin Livingston, a shoemaker and friend and neighbor, of intoxicating her to "ravish" her. Mrs. Thorburn admitted she had a drinking problem, but asserted that the accused brought alcohol to their mutual friend, Charles Ferguson's house and that she was "in a manner forced to swallow [the drink]." After a second drink, she did not recollect what happened or having "connection" with the accused, but woke up without her clothing. Ferguson and other neighbors reported that they saw the accused lying with the victim and taking advantage of her unconscious state. Apparently, the accused had a pattern of using alcohol to overcome a woman's will. Another witness stated that he heard that "the accused is in the habit of giving drink to girls till they are intoxicated, and then ravishes them."[96] Unfortunately, both men accused of purposefully intoxicating their victims fled before they faced prosecution, so historians will not know how the court punished these men for purposefully intoxicating their victims. However, these cases do demonstrate that men did purposefully intoxicate their victims in order to overcome their will and any resistance they might have offered, though not in the numbers implied by Hume, Alison, and others.

The space where rapes occur is important, especially during the nineteenth century when rapid urban expansion and immigration meant less privacy for more people. However, attacking a woman in a less-crowded, rural environment brought less chance of discovery and a quick escape from the crime scene. From the documented

[96] NAS AD 14/53/331: Crown Office Precognitions, 1853.

crimes, more crimes occurred in public environments than private, and in more rural places than urban.

Table 12: Rapes Occurring in Public vs. Private Space

Year	Public Spaces	Private Spaces
1830-35	32	14
1840-45	30	16
1850-55	43	26
1860-65	25	25
Totals	130	81

Source: National Archives of Scotland AD14 and JC26: Criminal precognitions and indictments.

The data presented in Table 12 reveals that in total, 130 rapes occurred in public spaces while only 81 occurred in private spaces. Living in tenement housing and working in confined quarters brought men and women closer together. A person's private space also became increasingly less private as he or she shared it with other people. In addition to shared space, men and women came increasingly more in contact with one another in passing, at their jobs, at the market, in the neighborhood, or alongside public roads. These new, crowded public and private spaces brought an increased risk of sexual assault for nineteenth-century women, especially working-class women. As seen in Table 12, in all periods except 1860-1865, the number of reported crimes involving public spaces is almost double the amount of cases involving private spaces. Men chose public places to attack their victims rather than attack a woman in her home or workplace. Public places, particularly roads, fields, and streets allowed for a quick escape as well as more privacy

and seclusion as "private" spaces in nineteenth-century Scotland were usually anything but truly private.

Just as important as the spaces in which rapes occurred, is whether they occurred in rural or urban areas. The population information from Ian Levitt and Christopher Smout's study on the Scottish working class, as well as the 1861 census, was used to classify locations as either rural or urban in the sample.[97] Donnachie argues that urban areas saw more crime because of increased populations, poverty, and vagrancy, but is careful not to dismiss the lawlessness of the countryside.[98] He further argues that the increased policing of cities caused a decrease in crime and that most crimes in the countryside were those involving poaching, child murder and infanticide, highway robbery, and maiming of animals.[99] Crowther also notes that crime was typically an urban phenomenon, but rural counties were not as effective at documenting crime.[100] While the larger trend in crime indicates a more urban element to crime, for specific crimes, the results may vary. For rape, more crimes were reported in rural rather than urban areas.[101]

[97] Usually, 5,000 people it the population cut-off for a rural definition. For the purposes of this study, the population was set at 6,000 to avoid classifying rural towns with populations of 5,028 or under 5,500 as urban when they were more rural. Ian Levitt and Christopher Smout, *State of the Scottish Working-Class in 1843: A Statistical and Spacial Enquiry Based on the Data from the Poor Law Commission Report of 1844*. Edinburgh: Scottish Academic Press, 1979, and Census of 1861.
[98] Donnachie, "'The Darker Side'," 18-19.
[99] Ibid.
[100] Crowther, "Scotland: A Country with No Criminal Record," *Scottish Economic and Social History* 12 (1992): 83.
[101] Each victims' reported attack was counted to gather this data. Therefore, if one case involved multiple victims, each victims' attack was counted as separate from the others.

Table 13: Rural and Urban Percentages of Reported Rapes

Year	Rural	Percentage of Reported Cases	Urban	Percentage of Reported Cases	Unknown
1830-35	17	37.8%	28	62.2%	0
1840-45	22	53.6%	18	43.9%	1
1850-55	38	56.7%	29	43.3%	0
1860-65	45	67.2%	21	31.3%	1
Totals	122	55.5%	96	43.6%	2

Source: National Archives of Scotland AD14 and JC26: Criminal precognitions and indictments
.

Table 13 demonstrates that with the exception of 1830-35, more women reported rapes in rural rather than urban areas. In the period 1830-35, 11 more women reported a rape in an urban area. The amount of reported rapes occurring in rural areas increased and surpassed its urban counterparts by at least 10% after 1835. Paul Riggs argues that urban policing became more effective while rural policing remained relatively unchanged until after the Police (Scotland) Act of 1857, which required counties to establish police forces.[102] David Barrie also notes the increased policing in cities as citizens became concerned about vagrancy and the urban poor.[103] In urban areas, police increased surveillance and information-gathering by infiltrating working-class neighborhoods and in turn became effective tools in detecting crime.[104] Patrolling was relatively easier in

[102] Riggs, "Scottish Criminal Law and Procedure," 60.
[103] David Barrie, *Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865* (New York: Routledge, 2012), 99, 103.
[104] Riggs, "Scottish Criminal Law and Procedure," 44-46, 60.

cities as conditions were crowded and made the opportunity for crime less available and easier to detect by both police and neighbors. So, the urban environment itself served as a deterrent for criminals. In contrast, rural areas provided a less crowded environment for a man to rape a woman. Rural areas were also slower to develop a modern police force and therefore crimes went unreported. As cities became more policed, vagrants were forced out of cities into the countryside.[105] This in turn created a higher criminal population, in the country, who took advantage of their new, less policed rural environment. More rapes occurred in public spaces off roadsides, streets, or alleys. A man walking along a public road in the countryside stood a greater chance of escape than a man who raped a woman in a crowded neighborhood or street in the city. Rural environments made committing rape easier because these wide-open spaces remained unpoliced. The increase in reported rural rapes could also result from a decreased reporting rate in cities or effective policing. Whatever the cause, the number of rural rapes steadily increased from the years 1840-45, 1850-55, and 1860-65 while urban rapes decreased. Overall, more than half of the cases for each period contained rural rapes, with the exceptions of 1830-35 when urban environments accounted for 62.2% of rapes and 1860-65 when the amount of rural rapes jumped to 67.2%.

Despite their shortcomings, criminal precognitions provide a variety of valuable information for historians to examine. This information provides historians with a profile of the typical circumstances surrounding rape cases for the examined years in nineteenth-century Scotland that legal historians can use as a comparative study for other crimes, regions, and modern Scottish rape studies. The precognitions reveal demographic

[105] Barrie, *Police in the Age of Improvement*, 181.

information, such as age, class, ethnicity/race of both the victims and their alleged attackers. They also reveal the presence of alcohol in sexual crimes as well as the spaces, locations, and areas where these rapes occurred. The precognitions for 1830-35, 1840-45, 1850-55, and 1860-65 reveal that the typical rapist was a young male between the ages of 20-29 and his victim was under the age of 13. Both the victim and the panel were of the same class and ethnicity/race and also knew one another. Furthermore, alcohol was involved in about half of reported rapes. A man was also more likely to rape a woman in a public, rural environment like off a roadside or street. These documents also reveal several more contradictions between the law in books and the law in action. Many victims were under the age of puberty, yet few of their attacks were punished to the full extent of the law. Legal sources also extensively mention the protection of prostitutes and purposefully intoxicating victims, yet they rarely appear in the records.

Chapter V

CONCLUSION

The second and last man to hang for rape in the years examined in this study was 26-year-old Mark Devlin. Fourteen-year-old Anne McLachlan, a servant to a weaver, reported to police that Devlin had raped her. She claimed that she and her 8-year-old sister Charlotte had decided to visit their mother at the Infirmary in Dundee where she worked as a nurse. As they were about to leave, Devlin, a friend and former coworker of their father, offered to go with them because he needed to speak with their mother. They all walked together to the Infirmary and stayed for about an hour before deciding to return home. Devlin offered to walk them home and requested that her sister Charlotte stay at his home for the night to assist his wife. Their mother approved of his walking them home and for Charlotte to stay at his house. He walked the two girls home and made them stop at a public house for a drink of whisky along the way. While at the public house, he insisted Anne take a drink, so she had half a drink at his insistence and he finished the rest. They continued home, and when they got to his house, Anne requested he walk her to her master's house so that she could go to Sunday school that evening. He took her down a road behind his house near a field with a hill. When they walked to the opposite side of the hill, he tried to kiss her. Anne refused and insisted he return her to her master's home. At this point she became scared and attempted to flee from Devlin. He caught her by her wrist and held her while he laid his handkerchief on the ground. He then sat down and asked that she sit with him. She refused and asked him what he wanted. He told her that if she sat down next to him, then he would tell her. She

tried to break free of his hold, he grabbed her by the waist, threw her down, and said he "would not let her up till he got what he wanted." When Devlin got on top of her and covered her mouth to keep her silent. Devlin then lifted up her clothes and pulled down his breeches "and by force and against her inclination, and in spite of her struggles had carnal connection with her." She felt his "private parts" enter her and "felt something warm come from him." She cried out that "she could not stand it" to which he replied "that she was old enough." After Devlin accomplished his purposes, she ran to her master's house, ignoring his calls that he would walk her home. When she got to her master's house, her mistress noted her disheveled appearance and asked what happened. She told her mistress what happened, and the next day returned home and recounted her attack to her parents, who then notified the police of their daughter's attack.

Devlin denied walking with the two girls to the Infirmary. He states that he left his home 15 minutes after Anne left to go visit with her mother. He claims he went to James Burke's house for a drink of whisky and on the way he saw her talking with someone. Devlin claims that the two girls were at his home when he returned and that Charlotte stayed the night with his wife. Crown Counsel indicted Devlin for rape and the lesser charge of assault with intent to ravish. He was tried in the High Court circuit in Perth where a jury found him guilty of rape, a judge sentenced him to death and he subsequently hanged for his crime on May 30, 1835.[1]

Both the case of Philip Cairnie and Mark Devlin reveal a contradiction between the law in books and the law in action in Scotland from 1830-1860. Nineteenth-century Scottish rape law remained fundamentally the same throughout the nineteenth century

[1] NAS: AD14/35/87, Crown Office Precognitions, 1835 and NAS: JC26/1835/112: High Court of Justiciary Processes, 1550-2003.

and defined death as the punishment for rape, yet only 2 out of 225 men hanged for rape. Legal sources also continuously commented on the rape of young girls and found the crime especially heinous. However, the men who hanged for rape were convicted of raping teenaged girls and not girls under puberty despite their frequent appearance as victims in the criminal record.

Chapter 1 and 2 demonstrated that common law, institutional writers, and case law defined rape as sexual intercourse with a woman by force and against her will. Any male above puberty could commit the crime and the crime could occur by penetration alone. Rape could occur on any woman no matter her station or her age. The law determined that drugging a woman or having sexual relations with a woman by fraud or while she slept was not considered rape because her consent was not technically overcome by means of force. However, the court used its discretion – often referred to as its "native vigour" – to create a category of crime to charge these men to ensure punishment. That category of crime eventually became known as "clandestine injury to women." Overall, the nineteenth-century law defined rape on the twin concepts of the absence of consent and use of force. A woman was raped if she did not give clear consent and if she resisted to her utmost will and was overcome by threat of violence or death. Legal sources defined death as the punishment for rape, yet this was rarely the case.

As Chapter 3 revealed, convicted rapists rarely hanged for the crime. This chapter also revealed that despite a high prosecution rate of 81.7%, only 20.8% of men prosecuted received a rape conviction from 1830-1860. The nature of the Scottish legal system allowed for only two men to hang for rape as the Lord Advocate indicted men with lesser charges as well as the capital offense of rape. Juries were also reluctant to

convict men of rape because of its capital nature. By charging men with lesser crimes or removing death as punishment for the crime, prosecutors could overcome a jury's reluctance to convict a man of rape and to ensure he received some form of punishment for his crime. Even though the native system allowed for few men to be hanged for rape, larger criminal justice trends also account for this contradiction between the law in writing and the law in action. The punishment for rape, along with other serious crimes short of murder such as robbery, transitioned from death to transportation to penal servitude.

Chapter 4 consulted archival records to allow for a profile to be developed of both the typical offender and victim as well as where rapes occurred. The typical offender was a Scottish, single male between the ages of 20-29 and his victim tended to be a Scottish female under the age of 13, with both of them belonging to the working class. Despite the high number of young girls involved in rape cases, the men who raped them were not hanged and were largely convicted of alternate charges. These young victims also knew their attacker either intimately or by acquaintance. No women in either the upper or middle classes reported a rape and no woman accused an upper class male of rape in the years examined. Even though the law protected prostitutes, no reported cases exist in which prostitute made claims of rape. Again, a disjuncture exists between the law in books and the law in action. The law in books legally protected these women for rape, but in reality, these cases never went to trial. Only two Irish women reported a rape against her. Scotland was a racially and largely ethnically homogeneous country, so little variation exists in race. Another important factor noted in the precognitions was the presence of alcohol. Less than half of all rapes involved alcohol consumed by either the

accused or the victim. The institutional writers emphasized that stupefying a woman to procure sexual intercourse constituted rape, but in practice, these cases rarely appear and were never prosecuted. Most rapes occurred in rural settings in open, public spaces like roads or fields. Overall, there are no major changes between year sets in the age, class, ethnicity/race, loci, or rural/urban factors.

Outside of these legal archival records and few broadsides, nineteenth-century Scottish sources, as well as modern scholars, have remained largely silent on rape except for recent studies on rape law and calls for reform. It was not until the late twentieth century that the law became statutory with defined punishments. The first statute in 1976 did not expand the definition of rape, essentially retaining the definition developed by Hume in 1797. The 2009 Sexual Offences Act is the most recent statute regarding rape. This statute still does not define administering stupefying agents to procure sexual relations with a woman as rape.[2] However, it clearly defines consent and the concept of free agreement, which makes men responsible for acting without a woman's consent. The 2009 statute also expanded the law of rape by including men and not restricting rape to vaginal intercourse alone. The law also defines life imprisonment and a fine as the maximum penalty for rape.[3] Scotland has finally modernized rape law by emphasizing consent rather than the use of force and by codifying a new punishment for rape.

[2] The statute defines this as a separate sex crime known as administering a substance for sexual purposes, 2009 Offenses against Person Act (Scotland), 6.
[3] 2009 Offenses against Person Act (Scotland), 35.

BIBLIOGRAPHY

Primary Sources

National Archives of Scotland (NAS)

AD6: Circuit Reports

AD14: Crown Office Precognitions

JC4: Books of Adjournal, 1799-1899

JC26: High Court of Justiciary Processes, 1550-2003

Broadsides

National Library of Scotland (NLS)

"Address, or Warning to the Young."
http://digital.nls.uk/broadsides/broadside.cfm/id/14660/criteria/capital%20punishment

"Discovery of a Most Shameful and Infamous Den in the New Town of Edinburgh."
http://digital.nls.uk/broadsides/broadside.cfm/id/14651/criteria/brothel

"'Life, Sufferings, and Death of Janet Fleming."
http://digital.nls.uk/broadsides/broadside.cfm/id/15461/criteria/janet%20fleming.

"Respite for William Grieve."
http://digital.nls.uk/broadsides/broadside.cfm/id/14596/criteria/rape

Books

Alison, Archibald. "Of Rape." In *Principles of the Criminal Law of Scotland*, by Archibald Alison, 209-227. 1989; Reprint, Edinburgh: Law Society of Edinburgh, 1832.

Burnett, John. "On Rape." In *A Treatise on the Various Branches of the Criminal Law of Scotland*, by John Burnett, 100-109. Edinburgh: George Ramsay and Company, 1811.

Cockburn, Henry. *Circuit Journeys*. Edinburgh, 1888.

Hume, David. "Of Rape." In Vol. I of *Commentaries on the Law of Scotland Respecting Crimes*, edited by Benjamin Robert Bell, 301-311. 1986; Reprint. 4th ed. with Bell's Notes.

Mackenzie, George. "Raptus." In *Laws and Customs of Scotland in Matters Criminal: Wherein is to be Seen How the Civil Law, and the Laws and Customs of other Nations do agree with, and Supply Ours*, by George MacKenzie, 163-168. Edinburgh: Thomas Brown, 1678.

Secondary Sources

Articles

Abel, Richard L. "Law as Lag: Inertia as a Social Theory of Law." *Michigan Law Review* 80, no. 4 (1982): 785-809.

Biderman Albert D. and Albert J. Reiss, Jr., "On Exploring the 'Dark Figure' of Crime," T*he Annals of the American Academy of Political and Social Science* vol.374 (1967): 1-15.

Chalmers, James. "How (Not) to Reform the Law of Rape," *Edinburgh Law Review* 6 (2002): 388-396.

Clarke, Tony and Tony Dickson. "The Birth of Class?" In *People and Society in Scotland: Volume I, 1760-1830*, edited by T.M Devine and Rosalind Mitchison, 292-309. Edinburgh: The Economic and Social History Society of Scotland, 1988.

Conley, Carolyn. "Atonement and Domestic Violence in Late Victorian Scotland." In *Crime, Law and Popular Culture in Europe, 1500-1900*, edited by Richard McMahon, 219-238. Portland: William Publishing, 2008.

Crowther, M.A. "Crime, Prosecution, and Mercy: English Influence and Scottish Practice in Early Nineteenth Century." In *Kingdom's United? Great Britain and Ireland since 1500: Integration and Diversity*, edited by Sean J. Connolly, 225-238. Dublin: Four Courts, 1999.

----. "Criminal Precognitions and their Value for the Historian." *Scottish Archives* 1 (1995): 75-84.

----. "Scotland: A Country with No Criminal Record." *Scottish Economic and Social History* 12 (1992): 82-85.

Devine, T.M. "Urbanisation." In *People and Society in Scotland: Volume I, 1760-1830*, edited by T.M Devine and Rosalind Mitchison, 9-26. Edinburgh: The Economic and Social History Society of Scotland, 1988.

Donnachie, Ian. "'The Darker Side': A Speculative Survey of Scottish Crime during the First Half of the Nineteenth Century." Scottish Economic and Social History 15 (1995): 5-24.

Dunning, Tom. "Narrow Nowhere Universes: Child Rape and Convict Transportation in Scotland and Van Diemen's Land, 1839-1853." *Scottish Historical Review* 86 (2007): 113-125.

Estrich, Susan. "Is it Rape?" In *Rape and Society: Readings on the Problem of Sexual Assault*, edited by Patricia Searles and Ronald J. Berger, 183-193. Boulder: Westview Press, 1995.

Ferguson, Pamela R. "Controversial Aspects of the Law of Rape: An Anglo-Scottish Comparison." In *Justice and Crime: Essays in Honour of the Right Honorable The Lord Emslie*, edited by Robert Hunter, 180-210. Edinburgh: Clark, 1993.

Gane, Christopher H.W. "Rape and Related Offences." In *Sexual Offences*, by Christopher H.W. Gane, 17-51. Edinburgh: Butterworths, 1992.

Gordon, Eleanor. "The Family." In *Gender in Scottish History since 1700*, edited by Lynn Abrams, Eleanor Gordon, Deborah Simonton, and Eilen Janes Yeo, 235-267. Edinburgh: Edinburgh University Press, 2006.

-----. "Women's Spheres." In *People and Society in Scotland, Volume II, 1830-1914*, edited by W. Hamish Fraser and R.J. Morris, 206-235. Edinburgh: The Economic and Social History Society of Scotland, 1990.

Gordon, Gerald. "Crimes without Laws?" *Juridical Review* 11(1966): 214-232.

Hughes, Annmarie. "The 'Non-Criminal' Class: Wife-Beating in Scotland (C. 1800-1949)." *Crime, History, and Societies* 14, no. 2 (2010): 31-53.

Jackson, Stevi. "The Social Context of Rape: Sex Scripts and Motivation." In *Rape and Society: Readings on the Problem of Sexual Assault*, edited by Patricia Searles and Ronald J. Berger, 16-27. Oxford: Westview Press, 1995.

James. "How (Not) to Reform the Law of Rape." *Edinburgh Law Review* 6 (2002): 388-396.

Jones, T.J. and M.G.A Christie. *Criminal Law*. Edinburgh: W. Green/Sweet & Maxwell, 1996.

Jones, Timothy H. "Common Law and Criminal Law: The Scottish Example." *Criminal Law Review* (1990): 292-301.

Leneman, Leah. "'A Tyrant and Tormenter': Violence against Wives in Eighteenth-and-Early Nineteenth Century Scotland." *Continuity and Change* 12, no. 1 (1997): 31-54.

Mackinnon, Catherine A. "Sex and Violence: A Perspective." In *Rape and Society: Readings on the Problem of Sexual Assault*, edited by Patricia Searles and Ronald J. Berger, 28-34. Oxford: Westview Press, 1995.

Porter, Roy. "Rape---Does it Have a Historical Meaning?" In *Rape: An Historical and Social Enquiry*, edited by Sylvana Tomaselli and Roy Porter, 216-236. New York: Basil Blackwell, 1986.

Robertson, Stephen. "What's Law Got to Do with It? Legal Records and Sexual Histories." *Journal of the History of Sexuality* 14, no. 1 (2005): 161-185.

Riggs, Paul. "How Scotland Became Postcolonial: Scottish Lawyers and the Autonomy of Scots Law." *Journal of Commonwealth and Postcolonial Studies* 12 (2005): 9-23.

-----. "Prosecutors, Juries, Judges and Punishment in Early Nineteenth-Century Scotland." *Journal of Scottish Historical Studies* 32 (2012): 166-189.

----. "Scottish Criminal Law and Procedure in the Nineteenth Century." PhD dissertation, University of Pittsburgh, 1997.

Scully, Diana and Joseph Marolla. "'Riding the Bull at Gulley's': Convicted Rapists Describe the Rewards of Rape." In *Rape and Society: Readings on the Problem of Sexual Assault*, edited by Patricia Searles and Ronald J. Berger, 58-73. Oxford: Westview Press, 1995.

Simpson, Antony E. "Popular Perceptions of Rape as a Capital Crime in Eighteenth-Century England: The Press and Trial of Francis Charteris in the Old Bailey, February 1730." *Law and History Review* 22, no. 1 (2004): 27-70.

Smart, Carol. "Prosecution, Rape, and Sexual Politics." In *Women, Crime, and Criminology: A Feminist Critique*, by Carol Smart, 72-107. London: Routledge & Keegan Paul, 1977.

Styles, Scott Crichton. "Something to Declare: A Defence of the Declaratory Justice and Crime: Essays. Power of the High Court of Justiciary." In *Justice and Crime: Essays in Honour of the Right Honorable The Lord Emslie*, edited by Robert Hunter, 180-210. Edinburgh: Clark, 1993.

Tadros, Victor. "No Consent: A Historical Critique of the Actus Reus of Rape." *Edinburgh Law Review* 3 (1999): 317-340.

Toulalan, Sarah. "'Is He a Licentious Lewd Sort of a Person?': Constructing the Child Rapist in Early Modern England." *Journal of the History of Sexuality* 23, no. 1 (2014): 21-52.

Walkowitz, Judith. "Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth Century Britain." In *Powers of Desire: The Politics of Sexuality*, edited by Ann Snitow, Christine Stansell, and Sharone Thomspson, 419-438. New York: Monthly Review Press, 1983.

Books

Amir, Menachem. *Patterns in Forcible Rape*. Chicago: University of Chicago Press, 1971.

Barrie, David. *Police in the Age of Improvement: Police Development and the Civic Tradition in Scotland, 1775-1865*. Cullumpton: Willan, 2008.

Cameron, Joy. *Prisons and Punishment in Scotland: From the Middle Ages to the Present. Edinburgh*: Canongate, 1983.

Clark, Anna. *Women's Silence, Men's Violence: Sexual Assault in England 1770-1845*. London: Pandora Press, 1987.

Conley, Carolyn. *Certain Other Countries: Homicide, Gender, and National Identity in Late Nineteenth-Century England, Ireland, Scotland, and Wales* (Columbus: Ohio State University Press, 2007).

Cooper, David D. *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England* (Athens: Ohio University Press, 1974).

Ellis, Lee D. *Theories of Rape: Inquiries into the Causes of Sexual Aggression*. New York: Hemisphere Publishing Corporation, 1989.

Gatrell, V.A.C. *The Hanging Tree: Execution and the English People, 1770-1868*. Oxford: Oxford University Press, 1994.

Livingstone, Sheila. *Confess and Be Hanged: Scottish Crime and Punishment through the Ages*. Edinburgh: Birlinn Limited. 2000.

Murphy, James Bernard. *Philosophy of Positive Law: Foundations of Jurisprudence*. New Haven: Yale University Press, 2005.

Smith, T.B. *A Short Commentary on the Law of Scotland*. Edinburgh: W. Green & Son Ltd., 1962.

Smout, T.C. *A Century of the Scottish People: 1830-1950*. Fontana Press: London, 1986.

Sommerville, Diane Miller. *Rape and Race in the Nineteenth-Century South*. Chapel Hill: University of North Carolina Press, 2004.

Tobias, J.J. *Nineteenth-Century Crime: Prevention and Punishment*. New York: Schocken Books, 1972.

Walkowitz, Judith. *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London*. Chicago: University of Chicago Press, 1992.