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“Subverting the Settled Order of Things”:

Sedition and Crimes against the State

I. The Rise and Fall of Sedition

In the introduction to *Leviathan*, where he developed an extended metaphor comparing parts of Leviathan, or the artificial man, to the human body, Thomas Hobbes described sedition as sickness, a sign of ill health in the body politic.¹ This understanding of sedition, between concord and civil war, indicates the seriousness of the threat which sedition was understood to pose to the ongoing life and healthy functioning of the state. The criminal law, as a system of rewards and punishments, was described as the ‘nerves’ of the Leviathan by which means men were moved to perform their duty, and so it is not surprising to find that sedition – as a form of treason or as a description of other kinds of conduct (conspiracy, libel, speech) directed against established authority – figured large in early modern systems of criminal law. This might be contrasted with a modern understanding of the importance of dissent or disagreement to a properly functioning political order, and the modern distrust of political and legal orders where dissent is stifled. In these orders the crime of sedition has either been abolished or, if it remains in the law, plays a greatly restricted role. This, in many ways, is a remarkable transformation, central not only to the development of modern ideas and forms of politics, but also the changing function of the criminal law.

¹ Hobbes, *Leviathan* p.1 (Introduction)

In this paper I discuss a number of legal issues around the definition and use of the crime of sedition and related offences. I am interested in particular in the way that the legal definition has developed or changed over the period from the eighteenth century to the present day. This is the period in which the modern crime of sedition emerged, but almost as rapidly fell into disrepute. There were sporadic prosecutions for the crime in many common law jurisdictions over the course of the nineteenth- and twentieth-centuries, but in many jurisdictions the crime has now been either abolished or substantially reformed. The story of this development is reasonably well known, but I want also to relate it to a broader set of questions about how the scope and nature of class of crimes against the state or political crimes changed over this period.² The criminal law has been, and continues to be involved in the criminalisation of various forms of dissent and political protest. It is also clear that the legal forms in which this criminalisation takes place change over time, partly in response to new kinds of protest and political emergencies and partly in response to changing tactics in the policing and prosecution of dissent. The question I want to address is what an analysis of these changing forms of criminalisation of political speech can tell us about the changing nature of the criminal law.³ The issues that I want to focus on here concern the changing conceptions of the relationship between thought, conduct and responsibility, and second how the idea of the state or the political was conceptualised in the criminal law as the object of this type of crime.

² See generally M Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820" (1990) 10 *Oxford Jnl of Leg. Stud.* 307-52; M. Head, *Crimes Against the State* (Ashgate 2010); KJM Smith, "Securing the State, the Institutions of Government and Maintaining Political Order" in Cornish et al, *The Oxford History of the Laws of England* (Oxford 2010).

³ Note that I am aware that 'political crimes' are not necessarily the only way of dealing with political protest; and that political protest does not always manifest itself in a form which will be identified by the law as a political crime.

The crime of sedition is an ideal case study for this exercise. It is an old crime, related at one extreme to the crime of treason, and at the other to lesser but distinct forms of ‘word’ crime such as blasphemy.⁴ However, it came to prominence with the emergence of modern forms of politics: in the words of Henry Cockburn, sedition is crime “of a somewhat orderly age”, its very existence presupposing some form of political liberty, and an underlying, if unexamined, conception of order.⁵ In its origins the boundaries of the crime of sedition were unproblematic: treason, sedition and blasphemy were all part of the arsenal of crimes that were used to police political and religious allegiance.⁶ Crimes against religion and the state were virtually indistinguishable either in terms of the threat that they were understood to pose to established order, their mode of commission, or in their justification. They were primarily focused on conduct, but the word was understood in most cases as a deed, and prosecution for certain kinds of speech or publication was accordingly unproblematic.⁷ Problems arose in the modern period in part because of the emergence of new spaces and forms of politics, but also because of a pulling apart of word and deed in the conception of the crime. The change came about as the authorities fell back on the crime of sedition as a means of suppressing dissent and political unrest in the immediate wake of the French revolution. But its use in this context required a broadening of the definition of the crime. Seditious language could no longer be understood in absolute terms as an attack on the state, but in terms of its

⁴ This term is from J. Marsh, *Word Crimes. Blasphemy, Culture, and Literature in Nineteenth-Century England* (Chicago, 1998). For discussion of the history of the term ‘sedition’ see C. Kyer, “Sedition Through the Ages: A Note on Legal Terminology” (1979) 37 *U Toronto Fac. L. Rev.* 266.

⁵ H. Cockburn, *An Examination of the Trials for Sedition* (1888)

⁶ See e.g. W. Blackstone, *Commentaries* vol.4 chs.4 & 6-9 on crimes against religion and against the state. Interestingly, writing in 1765 he does not even distinguish sedition/seditious libel as a distinct crime.

⁷ See Blackstone who acknowledges that treason requires an overt act as evidence of intent, but goes on to state that writing words out could constitute the deliberate act of treason p.80. Discussed in Stern, “Blackstone” ms p.5

tendency to lead to further action which might undermine the state. The same was true of other crimes such as blasphemy, which was understood not in terms of insult to a supreme god but as a crime which “tended to weaken and undermine the very foundation on which all human laws must rest” thereby encouraging acts of outrage and violence.”⁸ These changes made possible the conviction of prominent radicals such as Thomas Paine and Thomas Muir, but in doing so created problems for the future use of the crime.

In this paper I am primarily looking at the crime of sedition and its use in Scotland. The history of the law of sedition in Scotland is significant because the crime was in practical terms created in the trials of the 1790s, meaning that there is more overt discussion of the definition and function of the crime. There are slight differences here from the crime in English law and the law of other common law influenced jurisdictions such as Canada and Australia – notably that there was a single crime of sedition, rather than the different forms of seditious libel and conspiracy. However, the general patterns of development and use are similar between these jurisdictions and I shall refer to a range of jurisdictions in the latter part of the discussion. I will first of all give a general overview of the use of the crime of sedition in Scotland, before going on to look at more specific issues relating to the development of the crime. I will then conclude with a discussion of some more general points about the structure of the law of sedition and the place of political offences within criminal law.

II. The Scottish Seditious Trials of 1793-4

⁸ T. Starkie, *A Treatise on the Law of Slander and Libel* (1812) 2 127-30

When James Tytler was charged with the crime of sedition before the High Court of Justiciary in Edinburgh in January 1793 this was the first time that anyone had been charged directly with the crime of sedition in Scots law.⁹ While there had been earlier trials where the word sedition had been used in the charge, this had usually been to describe conduct that was linked to an allegation of some form of treason. Equally, there were a number of statutes of the Scottish Parliament that had used the term, but it was not clear from these that sedition was understood to be a distinct offence. This trial, though, was to be the first of thirteen sedition trials that took place between in the period January 1793 and March 1794 which completely transformed the understanding of political crimes in Scots law.¹⁰

The cases in this period fall into three main groups. The first six cases between January and March 1793 were of prosecutions against printers and booksellers for forms of seditious speech or for the publishing or circulation of forms of seditious writing.¹¹ These led to convictions in every case where the accused appeared for trial, but seem to have been regarded as relatively minor instances, attracting short custodial sentences or requiring sureties for future good behaviour.¹² There was a qualitative change, though, with the trial of Thomas Muir in August 1793. Muir was a

⁹ An important feature of the Scottish trials was that they all took place before the High Court – this is an important difference from England where seditious libel was misdemeanour and could be tried before lower courts. This is probably because the Crown was relying on a residual common law power to create or recognise new crimes as authority for the court’s actions.

¹⁰ All the Scottish sedition trials for this period can be found in T.B. Howell, *A Complete Collection of State Trials* (vol XXIII) (London: Hansard, 1817) Cockburn, *Examination*, supra n.5 draws on Howell’s edition and provides an overview of all the sedition trials in Scotland between 1793 and 1848 with extensive and opinionated commentary.

¹¹ In one case against the publisher and printer of a newspaper, the *Edinburgh Gazetteer*, for a report of a sedition trial that was alleged to have caricatured the judge: Captain Johnson & Simon Drummond Jan & Feb 1793 (Cockburn, *Examination*, pp.118-27.

¹² Those who did not appear for trial were outlawed, but it appears that no further or more strenuous efforts were made to prosecute. See e.g. the discussion of Tytler, Elder & Stewart, Alexander Scott in Cockburn. This is consistent with the practice in England described in C. Emsley, “An aspect of Pitt’s ‘Terror’: prosecutions for sedition during the 1790s” (1981) 6 *Social History* 155-84.

young advocate who was a founder member of the Scottish Society of the Friends of the People advocating parliamentary reform and extension of the franchise. He had attended a series of meetings at which he had made speeches and read from Thomas Paine's *The Rights of Man* – a work which had shortly before this been found to be seditious in the trial in absentia of Paine in London in 1792. Muir defended himself, using the occasion to restate his political convictions, arguing that he was defending the constitution and liberty rather than attacking them. He was convicted and sentenced to 14 years transportation – a sentence that was very heavy and surprised even many of those who supported the prosecution.¹³ This was followed by the trial of Thomas Fyshe Palmer at Perth in September 1793 on the charge of having written, printed and circulated a seditious writing – the text of an address to a meeting of the Friends of Liberty in Dundee. He was convicted and transported for seven years. The third group of cases then took place between January and March of 1794. These were four trials prosecuting members of the British Convention – William Skirving, Maurice Margarot, James Gerrard and Charles Sinclair. There was little surprise that all were convicted, and like Muir sentenced to 14 years transportation, not only because of the clear determination of the authorities to secure convictions in these cases, but also because they came in the wake of similar prosecutions (though for treason) of members of the British Convention in England.¹⁴ The attack on the British Convention in Scotland ended with the trial and execution of Robert Watt for high treason at the end of 1794.

¹³And out of step with the practice in England, where sedition was prosecuted as a misdemeanour. See M. Davis, "Prosecution and Radical Discourse during the 1790s: The case of the Scottish sedition trials" (2005) 33 *Intl. Jnl of the Soc. Of Law* 148-58 at 154-5. See also WDL, "A Trial for Sedition" (1891) 35 *Jnl. Of Jurisprudence* 638.

¹⁴ See trial of Hardy, Tooke, Thelwall & ors for treason. See J Barrell, *Imagining the King's Death* etc

These trials were controversial for a number of reasons. Politically the trials have to be seen in the context of wider radical agitation in Britain in the wake of the French Revolution. There had by 1793 already been a number of trials for seditious libel in England – notably the conviction of Thomas Paine in 1792. The crime, along with high treason, was seen as one of the principal weapons in the fight against political crime – notwithstanding changes made by Fox’s Libel Act in 1792.¹⁵ The Scottish authorities were anxious about the spread of radicalism, which it has been suggested, may have been even more intense than in England.¹⁶ The use of sedition charges was thus normal in the wider context, but it was novel in Scotland, and the courts were accordingly determined to demonstrate both that it was legitimate and effective, and even that it could avoid some of the technical difficulties that were seen as hampering the application of the English law. However, the prosecution of sedition in the High Court as a crime at common law, and the exceedingly severe sentences brought the Scottish courts under scrutiny for their actions. In addition to these issues relating to the definition and extent of punishment for sedition which will be discussed below, criticism focused on the composition of the juries in the trials and on the conduct of the judges.

Any trial before the High Court, either in Edinburgh or on circuit, was heard by a jury of fifteen. The procedure for the selection of the jury was that the sheriff clerk of the relevant counties would submit a list of 45 names from amongst eligible citizens who

¹⁵ 32 Geo.III c.60 placing the decision on whether or not something was libellous in the hands of the jury.

¹⁶ EP Thompson, *The Making of the English Working Class* (Harmondsworth, 1968) p.13. See generally H. Meikle, *Scotland and the French Revolution* (1912); N. Leask, “Thomas Muir and *The Telegraph*: Radical Cosmopolitanism in 1790s Scotland” (2007) 63 *History Workshop Journal* 48

met the property qualification.¹⁷ Those 45 would be required to appear in court at the start of the trial, and the senior presiding judge, would select the fifteen, without challenge from the defence. The identity of the jurors was challenged by Thomas Muir, on the grounds that they were known to have previously accused him of being an enemy of the constitution, but this was rejected.¹⁸ The procedure was criticised by Cockburn on the grounds not only that it pre-determined the outcome of the trial, but that it encouraged factions, and was thus more divisive than having more balanced juries. However, his greatest criticisms were reserved for the judges conducting the trials on the grounds of their political reasoning and “confident assumption of the truth of the charges”.¹⁹ In this respect the character and conduct of Robert McQueen, Lord Justice-Clerk Braxfield, was singled out for the greatest criticism, for he was regarded as providing the intellectual force and setting the tone in the courtroom:

“His blameableness (sic) in these trials far exceeds that of his brethren. They were weak; he was strong. They were frightened; he was not. They followed; he, the head of the court, led.”²⁰

Notwithstanding any of this, it is important to note that one of the most striking features to a reader of the trials is their legalism, making the reports into an often unlikely combination of political factionalism and legal analysis. The accused were legally represented, except where representation was refused, often by distinguished

¹⁷ See Hume, *Commentaries* p??. The procedure varied slightly for Edinburgh where 45 names would be submitted from each of the Lothians, and the clerk of court would reduce these to 45 who would be required to appear. See Cockburn, *Examination* pp.80-3. On the situation in England see Smith, *op. cit.* at fn 6 and generally J. Bentham, *On the art of Jury Packing*

¹⁸ Get ref

¹⁹ Cockburn, *Examination* p.88

²⁰ *Examination* p.87. On Braxfield’s character he said:

“Braxfield was a profound practical lawyer, and a powerful man ; coarse and illiterate; of debauched habits, and of grosser talk than suited the taste even of his gross generation; utterly devoid of judicial decorum, and though pure in the administration of civil justice where he was exposed to no temptation, with no other conception of principle in any political case except that the upholding of his party was a duty attaching to his position” (p.86)

members of the bar, and as a result there was detailed legal argument over certain points.²¹ This suggests, as Emsley has commented, that there was, even on the part of the radicals, a general commitment to rule of law – even as they protested the particular conduct of these trials.²²

III. Making Sedition

The trials of the 1790s introduced the crime of sedition into Scots law, but they did not establish the clear parameters of the crime. This was something that was done in mainly in subsequent doctrinal writings – treatises and cases. This also required that the crime be set within a narrative that could explain the harshness of the trials, as a necessity of a troubled period, while also demonstrating how the crime was unexceptional and necessary to the criminal law. There were three main issues that were looked at in this process: the scope and definition of the crime; the necessary mens rea; and the permitted punishment.

i) Definition

This process began in 1797 when the text that is regarded as the foundational text of modern Scots criminal law, Baron Hume's *Commentaries on the Law of Scotland Respecting Crimes*, was published.²³ Hume's text was a conscious attempt to produce a systematic modern account of the criminal law, and to this end he systematically reviewed all decided cases and sources, presenting the law in a structure that self-

²¹ cf England where unusual procedures Smith, *Subverting* p.??

²² Emsley, *Pitt's Terror* p.175.

²³ *Commentaries on the Law of Scotland respecting Crimes* (2 vols) (Edinburgh: Bell & Bradfute, 1797)

consciously mimicked that adopted by Blackstone's *Commentaries*.²⁴ There were, though, a couple of noteworthy features of the book. First, Hume was a died-in-the-wool Tory who attracted criticism from some of the *Edinburgh Review* Whigs for his defence of the established order.²⁵ This was nowhere starker than in relation to the crime of sedition. Cockburn, his best known critic, suggested in a review of the fourth edition that Hume had undertaken the work principally to vindicate Scots law in the face of its critics.²⁶ This is unlikely, given its scale and the fact that Hume must have been working on it for a substantial period before 1797. However, Hume did acknowledge in the preface that the criminal law of Scotland was falling in the esteem of the public, and Cockburn was probably right in suggesting that one of the principal causes of this falling esteem was the overtly political use of the criminal law in the sedition trials. Second, Hume was keen to assert the independence of Scots criminal law, such that he took pains to point out the superior qualities of Scots law compared to its English equivalent – a feature which led to some interesting comparisons in the law of sedition.²⁷

It is clear that while Hume appears to have had few doubts that the law was properly used, he struggles to identify clear principles which might define the proper use of the law or distinguish the crime from related offences. Earlier texts, by writers such as Sir George Mackenzie, had mentioned the crime, but had largely treated it as a description of a class of crimes, rather than a separate crime in its own right, and had

²⁴ On Hume see L. Farmer, "Scots Criminal Law" in M. Mulhern, *A Compendium of Scottish Ethnology* (Tuckwell Press, 2012)

²⁵ See e.g. Henry Cockburn's review of the fourth edition of the *Commentaries* [get ref]

²⁶ Get ref

²⁷ On Hume and national identity see L. Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge, 1997) ch.2

linked it to the presence of actual unrest or insurrection.²⁸ Hume, therefore, began by explaining why sedition amounted to a separate crime. Sedition, consisted in “stirring those foul and mutinous humours in the multitude, which, when once set afloat, may naturally issue in open violence and insurrection.”²⁹ Thus, the crime was to be understood as:

“reach(ing) all those practices, whether by deed, word, or writing, or of whatsoever kind which are suited and intended to disturb the tranquillity of the State, - for the purpose of producing public trouble or commotion, and moving his Majesty’s subjects to the dislike, resistance, or subversion, of the established government and laws, or settled frame and order of things.”³⁰

This is similar to English law in noting that the crime may be committed by deed, word or writing (mirroring libel, speech and conspiracy), but these are seen as different modes of committing a single crime, rather than distinct crimes. He goes on to list a number of examples, the common feature of which in his view was that they had been produced by the wickedness of the age (including teaching that monarchy and hereditary rank are contrary to reason and justice, or that the state is corrupt, or questioning the payment of taxes or septennial parliaments etc.). What these practices have in common, he suggests, is that they “exasperat[e] the multitude, and infect them with jealousy and dislike of the established order of the State, tend(ing) directly to a breach between sovereign and subject, and to fill the realm with trouble and

²⁸ “Sedition is a Commotion of the people without Authority, and if it be such as tends to the disturbing of the Government ... it is Treason; but if it only be raised upon any privat [sic] Account, it is with us called a Convocation of the Liedges.” Mackenzie, *On the Law and Customs of Scotland* (1696) p???. Mackenzie drew heavily on Roman law, in which *seditio* referred to a kind of insurrection.

²⁹ *Commentaries* p.553

³⁰ Hume, *Commentaries on the Law of Scotland Respecting Crimes*, i, 553. It is interesting to note that there is no substantial change in the text between the 1st and 4th editions, though Hume revised other parts of the text.

dissension.”³¹ The essence of the crime then was seen in conduct which was suited or intended to disturb the relation between sovereign and subject thus lead to unrest.

Sedition was also one of the crimes discussed at some length in Burnett’s *Criminal Law*, a treatise published in 1811.³² This text is of particular interest because its author acted for the Crown in several of the trials of the 1790s. It is less systematic in ambition than Hume, but contains a robust account of crimes against the state and a defence of the common law in repressing seditious unrest. For Burnett sedition consists in:

“Whatever tends to unsettle the established order of Government, by producing discontent in the minds of the people; lessening the Sovereign in the estimation of his people; or in general, exciting a spirit of disloyalty to the King, and disaffection to the established Government, is Sedition, though there is no commotion, tumult, or rising of the people.”³³

This is then followed by a list of examples: reviling or scoffing at the King; declamations or invectives against monarchy in general or any branch of the legislature or any existing law or ordinance; or exhorting the people to resist or disobey the law; or seducing them from their duty and allegiance to the King. This is a much broader definition than that offered by Hume – anything which tends to produce discontent, disloyalty or disaffection, even if not aimed at a “total change or subversion of the existing system”.³⁴

³¹ i, 554

³² *A Treatise on Various Branches of the Criminal Law of Scotland* (Edinburgh: A. Constable, 1811)

³³ p.239

³⁴ p.239

There is a marked change in tone by the time Archibald Alison's *Principles of Criminal Law* was published 1832. Alison follows Hume and Burnett in describing sedition as being directed against the peace of the state, but his definition seeks to narrow the scope of the crime.³⁵ Thus,

“[A]ll language or publications are seditious which stimulate the subjects of the realm to attempt the alteration of the laws and existing institutions by violent and illegal methods, and *not in the ordinary course prescribed by the constitution for their modification.*”³⁶

This narrows the object of sedition – altering the existing laws and institutions rather than attacking the sovereign – and introducing the qualification that the crime did not consist in criticism as such, but the attainment of legitimate objects by violent or illegal means. His emphasis was also on conduct or writings which were *aimed at* altering the laws or constitution by these means. The importance of this was a narrowing of the kinds of conduct that amount to sedition, while introducing also a clearer focus on the necessary *mens rea* of the crime. This reflects an ambivalence towards the law in Alison who, while a staunch Tory, nonetheless expresses concern over the way that the law was used in the 1790s, in particular the harsh penalties.³⁷

Alison also stresses that that the nature of sedition might depend on the circumstances: to publish seditious writings in a time of turmoil would justifiably lead to prosecution. This allowed him both to narrow the scope of the crime, while arguing that the actions of the authorities in the 1790s were completely justified. It is interesting to note the analogy that he draws here to the crime of fire-raising – that

³⁵ A. Alison, *Principles of the Criminal Law of Scotland* (Wm. Blackwood: Edinburgh, 1832) p.580. He also follows Hobbes in stressing its potential to lead to civil war.

³⁶ p.581. My emphasis

³⁷ See pp.583-8 where he defends the imposition of severe penalties against Muir etc and the general principle that prosecuting sedition at common law was the correct approach in allowing punishment to be adjusted to the circumstances.

just as a person who scattered burning firebrands could not escape liability for the resulting fire, so too a person who scattered words which caused unrest could not avoid liability for sedition.³⁸ This is to be contrasted with analogy that was commonly drawn in the earlier cases between sedition and poison: the concern was not unrest as such but the corrosive effects that the words would have on the social bond.³⁹

One of the major issues of definition for these writers was the difficulty in distinguishing the crime of sedition from other related crimes – notably treason, leasing-making, and mobbing and rioting.⁴⁰ Mackenzie saw sedition as a species of either treason or riot. Hume describes sedition as “the parent and forerunner of treason”.⁴¹ This clearly marks the seriousness of the crime, while linking it to his earlier definition of acts which might break the bond of loyalty between sovereign and subject. And to reinforce this point he notes the existence of a number of Acts of the Scottish parliament (1584, 1661, 1681, 1685, 1690 and 1703) which declared certain kinds of seditious acts either to be treasons or to be punishable as treasons (though it is not always clear which). He also sought to distinguish the crime from leasing making, a term which is a Scots corruption of the phrase *lese majeste*, was a form of treason and included offences against the dignity of the sovereign or the uttering of lies or libels upon the personal character of the sovereign, his court, or his family. For Burnett leasing making was to be distinguished from sedition in that it was primarily a

³⁸ See also Alison p.583. This reflects the changed concern that Smith points to with meetings which caused an immediate risk of public disorder, rather than seditious writings or speeches as such. See *infra*

³⁹ Get refs.

⁴⁰ This was believed to have important procedural consequences. Cockburn was of the view that if the facts alleged revealed treason then this had to be charged (Examination pp.??) and that this therefore should have been the charge in the British Convention cases. This was also the view taken by John Scott for the Crown in England, leading him to charge treason against Hardy, Tooke etc, where seditious libel might have been easier to establish. See FK Prochaska, “English State Trials in the 1790s: A Case Study” (1973) 13 *Jnl of Brit. Stud.* 63-82 at 66-7.

⁴¹ i, 553

verbal injury or slander against the Prince and this might be committed without a seditious intention, though it must always have a seditious tendency – thus leasing making would always be sedition, but not vice versa.⁴² Sedition was distinguished from riot in that riot was considered to have only a local or private aim concerning a particular place or neighbourhood, whereas sedition was directed at the overthrow of the institutions of the state.⁴³ Thus by the time of Alison it is clear that sedition is treated as the form of expression, and treason or riot were the potential outcomes.

The modern definition of the crime is generally regarded as having been settled in the 1848 case of *James Cumming & Ors* – the only reported case in Scotland after 1820 – which involved the prosecution of a group of Chartists for seditiously conspiring to alter the laws of the constitution by forming a group called the National Guard and making seditious speeches at a number of public meetings.⁴⁴ The leading decision was given by Lord Justice-Clerk Hope who said:

“The crime of sedition consists in wilfully, unlawfully, mischievously, and in violation of the party’s allegiance, and in breach of the peace, and to the public danger, uttering language calculated to produce popular disaffection, disloyalty, resistance to lawful authority, or, in more aggravated cases, violence and insurrection. The party must be made out not to be exercising his right of free discussion for legitimate objects, but to be purposely, mischievously, without regard to his allegiance, and to the public danger,

⁴² pp.249-50. see also Hume i, 559

⁴³ Hume, i, 558

⁴⁴ (1848) J. Shaw 17

scattering burning firebrands, calculated to stimulate and excite such effects as I have mentioned – reckless of all consequences.”⁴⁵

While the object of sedition remains the same – uttering language calculated to produce public disaffection, disloyalty or violence and insurrection – there are a number of features of this definition that suggest how the law had changed. These are, first, the recognition of the right of free discussion for legitimate objects, such that it must be established by the Crown that the accused is not exercising this right. Second, there is the distinction between ordinary and aggravated cases, in the former where disaffection is produced, but in the latter where the language aims or is calculated to produce violence and insurrection. And third, there is more stress on intention, though as we shall see this need not be an intention to produce unrest, but merely to be intentionally uttering the language. It is also clear that the concern is less with the general stirring up of discontent than with the immediate tendency to produce public unrest, or to breach the peace, where the words are spoken.⁴⁶ There was also by this stage a recognition that sedition might be more circumstantial – that is to say that it did not depend on the language used as such, but on the context, and that language or conduct which might be permissible under normal circumstances could become seditious in other conditions.⁴⁷

ii) Relation between actus reus and mens rea

There were two important issues here. First, the kind of act that was required, and second whether or not there was a need to prove seditious intent (or merely that

⁴⁵ At p.80. See also pp.85ff where he is explicitly critical of Hume’s definition.

⁴⁶ Cf Lobban, “From Seditious Libel” p.349.

⁴⁷ In Alison’s words, it would depend on the *mode* of bringing forward the measure, the *means* proposed to be adopted, and the temper of the times p.588. Cf English cases on audience: *Vincent* (1839) 9 C. & P. 91, 110; *Collins* (1839) 9 Car. & P. 456, 460. On the extent to which the particular characteristics of an intended audience might be considered, see *Burns* (1886) and *Aldred* (1909).

something was seditious). The first question concerned whether it was necessary that there be actual unrest for sedition to have been completed. On this point Hume is clear, arguing that the material act in sedition is the speaking or publication of the words.⁴⁸ In the case of verbal sedition an indictment would lie even though no tumult or violence takes place, because even a pamphlet or speech can disturb the tranquillity of the state. He thus argues that the printing or publishing of a discourse, or the holding of an assembly are already “a most material step or measure towards disturbing the tranquillity of the State.”⁴⁹

The second question proved to be more contentious, with the question of intention coming up in several of the cases in the 1790s, and being central to the Chartist case of 1848. The case of *Berry & Robertson* is a good example of how the question of intent arose in 1794. The prosecution was based on the fact that they had printed and published a seditious pamphlet, and it was argued on their behalf first that the pamphlet (or its author) had no seditious intent but was merely aimed at improving or reforming existing institutions. This was an argument that carried little weight.⁵⁰ More importantly, it was suggested that as publishers only of a work in pamphlet form that had previously been published in a newspaper, they had no seditious intent – and that it was necessary for the Crown to establish this.⁵¹ They went on to argue that a publisher (as distinct from an author) might publish a work without reading it carefully and so would lack the necessary *malus animus*. The court, though, found the indictment relevant taking the view that printing and publishing a pamphlet provides

⁴⁸ p.558

⁴⁹ P.558

⁵⁰ Based on the opinion of Lord Mansfield in *Woodfall (1770 V Barrow 2661)*. See also trial of Thomas Muir in which he tried to make the same argument about Paine’s *Rights of Man*.

⁵¹ Citing Ld Mansfield in the case of *Woodfall 1770*

prima facie evidence of the seditious intent of the printer. It was moreover held to be expedient that printers should be answerable for what they print unless they could show that their intentions were different. Hume, somewhat surprisingly, did not address the question of seditious intent, though in commenting on the case of *Berry and Robertson* he focused on the character of the writing and its seditious tendency, rather than any consideration of the *malus animus* or *dole* of the accused.

The question of intention was not addressed at any length by any of the writers until the case of *Cumming & Ors* in 1848 where it was one of the central issues and allowed the court to create distance from the trials of the 1790s and from Hume in producing a more modern definition of the crime. The issue in the case concerned whether it was necessary for the Crown to show that the language used by the accused was intended to incite popular disaffection or was merely calculated to do so – or indeed if there was any difference between the two.⁵² Undertaking a systematic review of the authorities, Lord Justice-Clerk Hope addressed the question of the kind of intention that was required, coming to the conclusion that this was not a specific intention to produce particular results, but rather a general intention to utter or publish words that had a seditious quality. This he argued was no more than general *dole* or malice that was evidenced by the conduct itself. However, if intention or seditious purpose could be proven with reference to the precise effects that the words were calculated to produce, then this would amount to an aggravated form of sedition.⁵³

This he contrasted with treason which required a direct object or intent to bring about

⁵² H.M. Adv. v *Cumming & Ors* (1848) Shaw 17 at pp.68ff.

⁵³ See Lord Cockburn arguing for a stronger subjective version of intention. Cf English case law on the same point from *Burdett* (objective fault) to *Burns* (1886) 16 Cox 355 intention to cause disorder, expressly relying on Stephen, HCL, ii, 339. See also *Collins* (1839) 9 Car. & P. 456; *Aldred* (1909) 22 Cox 1. However, see Stephen's Digest (3rd edn), Art. 94, which in effect makes the test objective through a presumption that a person intends the natural consequences of their actions

insurrection. This is then illustrated with an example of an orator at a meeting, who he says would be clearly guilty of sedition. Here, Lord Hope argues that he might be egged on by a boisterous crowd, he might want to surpass the previous speakers, that he is so familiar with violent and dangerous language that he does not think how this would affect others: “he is reckless as to what he says; thinks or cares little about it...; but all the while he may not desire or intend the precise effects which his words are calculated to produce”.⁵⁴ What is striking here is the clear separation of intention and act, but that he clearly sees guilt as resting in the power of language.⁵⁵

iii) Real and verbal sedition and the punishment of the crime

One of the oddities of the legal discourse around sedition is the distinction drawn in most of the writers post-Mackenzie between real and verbal sedition. While this appears to be a narrow legal discussion of little practical significance, it in fact became closely related to discussion of the nature of the crime (whether statutory or common law), what had been charged in any given case, and the legal justification of punishment.

There are two slightly different version of this distinction. Erskine, writing in 1781, saw it in terms of that between cases where no tumult and violence takes place (verbal) and those where it does (real).⁵⁶ That is to say that real sedition is manifested in action. Alison suggested a slightly modified version of this, arguing that every subject has a right to argue that the power of certain institutions has become overgrown, but that this becomes sedition if he then goes on to argue that power

⁵⁴ p.81

⁵⁵ He also cites the English case of *Burdett*, which also adopted this so-called objective test, as well as a number of English treatises. Cf the dissenting opinion of Lord Cockburn pp.111-21

⁵⁶ *Institution*, (1781) p.??

should be retrenched by illegal means.⁵⁷ He then goes on to follow Erskine, seeing this as verbal sedition, with real sedition bearing a close resemblance to riot.⁵⁸ Hume draws the distinction in a different way, seeing it in terms of “the nature and substance of the thing itself that is done”.⁵⁹ Verbal sedition is the expression of inflammatory sentiments without directly proposing any action; while real sedition involves the recommending of a course of action (e.g. recommending a course of measures for accomplishing change or reformation of the state).⁶⁰

The point generally arose in cases where there was dispute over the crime that was charged and the permissible extent of punishment. There were many statutory offences which had been created in times of unrest, which either criminalised conduct overlapping with sedition, or upgraded its punishment for sedition. As examples of the first, consider the Act of 1685 making it treason to take or defend the Solemn League and Covenant, the Unlawful Oaths Acts 1797 and 1812, the Seditious Meetings Act 1817 and so on. These were charged indiscriminately in Scotland, As examples of the second were the statutes mentioned above which raised sedition to treason. The penalties for sedition, though, were reduced by statute 1825 which removed transportation as penalty and purported to make the punishment of the crime the same in both Scotland and England.⁶¹ The existence and status of these statutes gave rise to considerable confusion and debate in the cases of the 1790s, but since the

⁵⁷ *Principles* p.581-2

⁵⁸ p.582

⁵⁹ i, 559

⁶⁰ Hume connected this to discussion of the cases seeing verbal sedition in the cases of Robertson & Berry and Stewart, but real sedition in the cases of Gerald or Thomas Fyshe Palmer – thereby also justifying the more severe punishment.

⁶¹ See Alison pp.588-9

use of the common law crime gave unlimited powers of punishment, short of death, the Court was generally able to avoid problems.

The existence of these created a great deal of uncertainty around the legal status of particular charges which defence counsel sought to exploit. In *Sinclair and Gerald*, the defence had sought to argue that verbal sedition was like leasing-making only punishable under the Act 1703 c.4 by fine, imprisonment or banishment (i.e. exile from Scotland).⁶² This was linked to a more general claim that sedition was not a crime at common law, and thus that its punishment would depend on the libelling of particular statutory powers to punish. Both points were, as might have been expected, dismissed by the Court. It was held that verbal sedition differed from leasing making in that the latter was narrower (verbal injury or slander against the person of the King). They also held that if sedition was a crime at common law then it might be punished by arbitrary pains as the court held an inherent jurisdiction to punish crimes at common law.⁶³ Hume later gave a further gloss on this arguing that the crime would exist at common law in any system of established government as it arises necessarily out of the existence of the institution of regular government “without the aid of any positive act or declaration of the legislature”.⁶⁴ However by following the Court in the view that sedition was common law in origin Hume also lines up against those such as Mackenzie and Erskine who had linked the origins of the crime to Roman law thus asserting the national origins of Scots law. Hume then uses this to

⁶² Discussed in Burnett p.249

⁶³ This was also traced to a statement in *Regiam Majestatem*, which was important for establishing the age of the offence.. See ???

⁶⁴ i, 554. Cf Cockburn, *Examination* p.217 who criticises Hume for misinterpreting the Act of 1816, allegedly giving the English courts the same penal powers as the Scottish courts

reinforce the new orthodoxy of the common law origins of Scots criminal law and of the powers of the court to respond to any criminal act.⁶⁵

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In summary, what we see in these discussions of the legal definition of sedition is the replication of a general trend that can be observed in most common law jurisdictions which is the initial definition and then a gradual ‘domestication’ of the crime, attempting to make it more suitable to the changing political situation. This is perhaps more marked in Scotland because of the novelty of the charge in the 1790s. First of all there is the attempt to mark out the distinct territory for the crime. This distinguishes it from treason. It is not only aimed against the person of the King, but at all institutions of government; and where the law of treason struggled with the requirement for an overt act, this could be found more readily in sedition where the act was the speech, writing or publication, which was easily proved and the focus was accordingly on the tendency of the language to produce disruption. However, this analogy with treason permitted the imposition of severe sentences, whereas in England seditious libel was prosecuted as a misdemeanour. Second, after this period of establishing the crime, its scope was narrowed to include forms of legitimate protest or attempts to secure reform through legitimate means, or through the identification of a more clearly defined mental element. This process, though, was conducted in way which sought to bring the trials of the 1790s and the writers who justified these crimes within a broader narrative of constitutional progress.

⁶⁵ See also Alison p.583

III. Sedition and Political Crimes.

According to Lord Cockburn there were only 23 trials for sedition in Scotland between 1703 and 1848.⁶⁶ After the trials between 1798 and 1802 of various members of the United Scotsmen, which again led to several lengthy sentences for transportation, there was a marked change of tone in the conduct of the trials.⁶⁷ Statements from the bench were more temperate, sentences were significantly shorter, and there was even the rare occurrence of an acquittal.⁶⁸ For Cockburn the conduct of sedition trials was a touchstone of the courts and their ability to remain above political conflict – a challenge that they signally failed in the 1790s. The problem was less the existence of the crime than the susceptibility of the courts to political pressure.⁶⁹ This became the settled position in Scots law by the mid-nineteenth century as sedition continued to be treated as a crime of central importance to the criminal law. In this final section then I want to look more broadly at the history of crimes against the state, and how this broad category changed over the modern period, so as to draw some broader conclusions about the history of sedition.

In order to address this question it is first necessary to look at the changing uses of the crime. It is now generally accepted that the law of sedition worked on the “principle of suspended terror”.⁷⁰ The law was broad in its terms and capable of catching many within its net. Throughout the eighteenth century it was used in England against the

⁶⁶ And only two more after this: John McLean 1920 and Guy Aldred 1921, neither of which were reported.

⁶⁷ There were six trials between 1798 and 1802, and a further four cases between 1817 and 1820. There were then two cases against chartists in 1948 before the final two prosecutions for sedition in Scotland in 1920 and 1921.

⁶⁸ In the case of Neil Douglas, May 1817.

⁶⁹ Examination p.73

⁷⁰ L Radzinowicz, *History of the English Criminal Law and Its Administration* (London, Stevens, 1948-1986) vol.IV, p.5

publishers of radical texts, or against those who spoke at small political meetings, with prosecutions based on the evidence of spies and informers. Problems began to arise both for the effectiveness and legitimacy of the law when forms of political expression and participation began to change, particularly in the wake of the French revolution. Most notable here was the growth of ‘mass platform’ meetings, where the concern for the authorities became that of controlling public order at the meeting itself. As Lobban has shown, this was addressed in two ways.⁷¹ First, in the wake of the massacre at Peterloo, where the army had charged at and killed protestors, there was a move to using professional police. And in the criminal law there was a shift from using the law of sedition, towards addressing the public order dimensions of the protest itself. Prosecuting for unlawful assembly brought the legal focus on to the lawfulness of the protest rather than the words, motives or political objectives of the speakers. As Smith has argued, “this registered a shift from denial of the legal and political legitimacy of public censure of Establishment institutions and advocacy of political alternatives, to a position where the prosecutorial focus became challenging the means by which such political attacks might be lawfully manifested.”⁷² The crime of sedition was thus redefined to focus less on the broader political objectives of the speaker, than on the tendency of the language to produce public disorder. The effect of this in the criminal law was to entrench the modern separation between crimes against the state and crimes against public order. These were increasingly seen as conceptually distinct.⁷³ The category of crimes against the state was as a result made

⁷¹ “From Seditious Libel”

⁷² “Securing the State” p.341

⁷³ Cf the survival of the crime in Canada and Australia where the codes were based on Stephen’s view of sedition. In Canada the crime of sedition was contained in ss.123-4 of the Criminal Code of 1892. In *Boucher* (1951) held that defendant must intend to incite violence or to create public disturbance or disorder for the purpose of disturbing constituted authority. In Australia it was made into a federal crime in 1914 and used to prosecute members of the communist party for, in effect, expressions of

more specific. A good index of this change is Sir James Fitzjames Stephen's analysis of this category in terms of treason, unlawful assemblies and riots, the unlawful possession of explosive substances and offensive weapons, and seditious offences.⁷⁴

We should finally note the conception of the state that were underlay the justifications of sedition. For Hume, as for Hobbes, sedition could readily be understood as a kind of sickness and the aim of the law was to protect the settled order of things. This view of sedition was based on an understanding of the state as a kind of personal bond of allegiance between sovereign and subject. But this was not based on an understanding of the subject possessing any kind of agency; they were rather supposed to trust in the sovereign and their representatives in government. This is clear in his sense of the people. For Hume the multitude or the people represented a potential threat, but lacked agency. Something was done to them by seditious language which stirred them up into unrest. Responsibility did not lie with the people to resist this, but rather with those political actors, who were assumed to come from a different class to moderate their language or to act responsibly at times of unrest so as not to disturb political order – or in the later conception of the crime, to channel their energies into legitimate (and permitted) forms of political action.⁷⁵ What this suggests is not merely that the crime of sedition is inconsistent with democracy, but more that it is so deeply tied up with this model of political order and fear of the dangers of language, that it is hard to see how it could be consistent with more modern understandings of the state.

disloyalty (Fighting Words para 2.36, though the law was amended in 1986 to include common law requirement of intention to create violence, public disturbance or disorder). Then revived and restated in 2005 to be consistent with counter-terrorism (see 2.46-9). The new offences though are specific in content – inciting political violence – and the ALRC accordingly recommended that the term sedition no longer be used as inappropriate.

⁷⁴ See General View. Subsequently reproduced in his draft code and the Canadian Criminal Code of 1892.

⁷⁵ It is interesting to note that Burnett suggests that resistance, including inflammatory libels or secret societies, is permissible but only in times of “real oppression” (p.261)

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