The Identity of Scots Law: Redeeming the Past

> [Scotland's] aims -- civic, social, ecological -- will have to be ambitious enough to comprehend a world situation fraught with more problems and crises than opportunities: a task much more demanding than obtaining *entré* to the club of well-doing European regions.
> (Harvie, 1991, 45)

> All continuities possess the paradox of being absolutely arbitrary in their origins, and absolutely inescapable in their teleologies.
> (Bloom, 1980, 33)

Paul Maharg

Reading identity

Legal identity is a highly contested notion. If we understand it to involve the relation between legal system and statehood then it is a relatively recent concept, perhaps as late as the seventeenth century, and theorizing about the relationship occurs much later (Harding, 2002; Glenn, 2007). The idea is fragile, relying on many networked concepts, and always shifting. The relationship of legal and historical racial identity in Scotland, for instance, is undergoing significant review, particularly in the medieval period. The distinctions between Celtist and Teutonic categories have been critiqued, together with the nineteenth century basis of this dualist categorization (Hammond, 2006; Kidd, 1999). Hammond in particular unearths the hidden assumptions within racial identities that affect our view of law's development, its texts, rituals, forms and power structures. A historian, he cites Susan Reynolds' acute observation that 'medieval historians today do not always seem to realize how many of their assumptions derive from arguments put forward by lawyers, historians and political writers of the eighteenth and nineteenth centuries whose preoccupations were totally different from those of anyone in the middle ages' (Hammond, 2006, 2, citing Reynolds, 1997, *xiii*).

The same point could be made about the development of legal identity in Scotland over the last three centuries. Throughout that time, particularly in the foundational work of lawyers and historians in the nineteenth century (frequently the same persons), there were articulated views of Scottish legal identity that shaped debates in the twentieth century. One such debate is the celebrated Cooper-Smith ideology. Formed out of the often overlapping concerns of Lord Cooper of Culross and Thomas Broun Smith, it was defined by Willock, and explored by later writers, notably MacQueen (Willock, 1976; MacQueen, 2005). Broadly speaking, the ideology understood Scots law as a mixed legal system, in which the Civilian base had been altered for the worse by the influx of English law, particularly during the nineteenth century, under the influence of government and legislation from the Westminster Parliament. As a result, Scots law was in danger of drifting from a mixed system (such as held in similar jurisdictions, eg Quebec, South Africa, or Louisiana) to become yet another common law system.

The ideology was not without its critics, but in recent years has been revived as part of the debate surrounding mixed jurisdictions and their futures. What is interesting, though, is how the term 'mixed' came to be redefined by re-readings of the history of Scots law. Lord Cooper, for example, through his study of the medieval sources of Scots law, gradually came to the realization that the mixed jurisdictional features of Scots law did not begin with the Civilianists, nor with Stair and other Institutional Writers. The process of borrowing from other legal cultures began much earlier. Rejecting the convergence view of late Victorian legal historians, Cooper developed a new identity, one of divergence and difference from a more powerful common law neighbour (MacQueen, 2005, 404).

But as MacQueen observes, Cooper's view of the past is strongly and transparently affected by his view of the present: concerned about the status of Scots law in the twentieth century, he reads parallels and continuities he finds in the past to an audience of Scots lawyers he wishes to persuade of the benefits of revitalizing a mixed jurisdiction. It is strongly teleological, consisting of redactions of medieval and civic humanist sources to normative values that foster an identity forged in difference. In this sense his legal identity has a dualist, almost a döppelganger aspect to it, stemming as it does from his research, his legal practice and the community of his peers in the legal profession. In truth legal identity is hugely pluralist, depending on which community, culture or organization within Scotland considers the issue. There are wider issues of allegiance to community and belief and politics that govern legal identity and which make it almost impossible to disaggregate from the whole.

How are we to read this coherently? Should we take the views of legal historians and jurists on canonical views of the tradition, and read these into the present and near future of Scots law? Or should we take a much broader, situated, and pluralist reading that takes account of perspectives across disciplinary and practice communities in Scotland, one that draws its method from ethnological, anthropological or other meta-sources? Perhaps it would be better to accept that there are no essential readings of identity, merely misreadings; and that we need to ask deeper questions about legal identity, how the canon of identity is formed and unformed, and how we come to misread it. The key question was formed by Harold Bloom: 'do we choose a tradition or does it choose us, and why is it necessary that a choosing take place or a being chosen?' (Bloom, 1980, 33). In this chapter we shall examine how the use of one approach from literature, namely Harold Bloom's theories of reading and influence, can help us question legal identity. We shall see how proto-anthropologists in the late nineteenth century investigated identity, and how two Scottish novelists, Walter Scott and Robert Louis Stevenson, both educated in the law, constructed identities for Scots law. Finally I shall suggest some extra-legal ways we can come to understand legal identity in Scotland.

Misreading legal identity

Harold Bloom's critical achievement has been to uncover the complex relations between authors, and to make us aware that, in the words of Borges, 'every writer *creates* his own precursors', and the effect that this has on a canon (Borges 1964, 201, cited Bloom 1970, 4). In his readings of literary canon Bloom's concept of misreading becomes a sophisticated and creative form of reading. Strong writers, he claims, struggle with their predecessors and the marks of the struggle remain in their texts. He stated that '[t]o deconstruct a poem is to indicate the precise location of its figuration of doubt, its uncertain notice of that limit where persuasion yields to a dance or interplay of tropes.' Tropes or literary devices and their interpretation are key to how misreading takes place: '[a] trope is a stance or a ratio of

revision; it defends against other tropes' (Bloom, 1974, 395)   Bloom goes on to give an example of just such a stance from the Hellenistic *rhetor* Hermagoras who, Bloom adds mischievously, 'taught misprision circa 150BC':

> Hermagoras perfected four stances: 1) the question, 'Did my client do it?'   2) the end, 'Was it a crime, anyway?'   3) the quality, 'Was it an act of honour, or of expediency?'   4) the metalepsis, 'It was all the victim's fault, anyway.'   (*ibid*, 395-6)

Against the proliferation of multiple tropes and their effects Bloom drew two broad categories – 'I think that there are only two fundamental tropes, tropes of action and tropes of desire.' (*ibid*, 401)   Bloom, however, goes further than definition of trope and application to poetic *oeuvres*.   He applies this definition to his conception of critical method itself, calling this 'a larger and deeper concept of trope, a misprision of trope' and stating 'I believe that every critic necessarily tropes the concept of trope, for *there are no tropes*, but only concepts of tropes or figures of figures'. (*ibid*, 393)   At first this would appear as if Bloom is caught in an infinite regress of figures here; but this is not necessarily so.   By turning the concept of trope upon itself Bloom manages to say something about the nature of critical method:

> Every notion of the will that we have is itself a trope, even when it tropes against the will, by asserting that the will is a linguistic fiction.   Consciousness and writing alike take us back to the will and what it intends, and however such intentions are viewed they are being troped ... (*ibid*, 394)

In a sense, Bloom can hardly avoid moving from a theory of misreading as this is enacted between strong poets to a theory of reading as this is enacted between strong critics.   The comparative or precedential reading process, after all, is fundamental to both groups – indeed Bloom went on to define tradition or canonicity itself as a trope within the map of misreading.   Tradition thus becomes the effect of misreading.[1]

In so doing he defines critical method as a process, a theory of crossings.   As well as crossing between texts (intertextuality), Bloom identifies meaning as wandering within a text, and 'its location by crossings ought to provide a perspective for interpretation that we haven't had before' (*ibid*, 400).   Crossings are dialectical, and meaning resides in the liminal movement between crossing points: '[b]etween theology (system of tropes) and belief (persuasion) there comes always the *aporia* (figuration of doubt, uncertain notice, mental dilemma, the necessity of misreading)' (*ibid*, 401).

Bloom's critique, though at first glance highly eccentric with its use of Gnostic and Kabbalistic terminology (even to literary critics inured to the arcane density of structuralist and deconstructionist criticism) functions in many respects as a watershed for late twentieth century criticism. What Timothy Beal pointed out with regard to Kristeva's intertextuality is also true of misreading: 'the basic force of intertextuality is to problematize, even spoil, textual boundaries -- those lines of demarcation which allow a reader to talk about *the* meaning, subject, or origin of a writing' (Beal, 1992, 22). Misreading, like intertextuality, opens up latent, marginalised or hidden textual meaning, and it is possible to use it to explain and engage with the ideological complexities of powerful texts and ways of reading within hegemonic legal traditions.

Bloom's concept of misreading and its constellated meanings has many uses in legal critique.[2]   It explains how Cooper, for instance, misreads medieval texts for a twentieth-century audience; it can explain the intentionality behind earlier misreadings by civilian legal commentators in the early modern period; and it can be applied to contemporary jurists in

Scotland today. It also can explain the remarkable anthropological turn in Scottish legal history at the end of the nineteenth century.

History, anthropology and legal identity

Veitch points out perceptively how nineteenth century constitutionalism is related to imperialism and colonialism (Veitch, 2008, 29). It is no coincidence, similarly, that the constitutional interest is shadowed in Scotland by an interest in mythic beginnings. Such an interest, as historians of the late medieval and early modern periods tell us, is not new. Scottish historiography is rich with such accounts (Mason, 1987; Samuel, 1995; Geary, 2002). In the middle to late nineteenth century, though, it is almost as if the absence of a distinctive Scottish constitutional praxis gives rise to an exploration of the development of both historiography and primitive society – at once an exploration of early foundations, and of fictitious constitutionality.[3]

In Scotland, law was both the source of analysts and a fertile field for analysis by others from other disciplines. Hume was Librarian of the Faculty of Advocates; William Hamilton trained as a lawyer, as did Walter Scott. One of the key figures in mid-Victorian historiography was Cosmo Innes, advocate and historian of early Scottish history at a time when the modern conception of history, drawn upon detailed interpretation of written and other records, was beginning to be developed in Scotland and beginning to distance itself itself from antiquarianism – the antiquarianism, for instance, of Walter Scott, who collected lists of facts and strings of words and phrases and inserted these into his novels rather like Mungo Park collecting customs in Nigeria and writing them into *Travels in the Interior Districts of Africa*, or as Haddon in the Torres Straits collected facts and words, and published these in *The Reports of the Cambridge Expedition to Torres Straits*.[4] If we remove Innes from the claims of history, and place him in a different discipline, we can see that he fits very well into the line of early anthropologists, and that his concerns, historical, legal and anthropological, are one more instance of the continuation and development of the Enlightenment historiograph.

As his *Lectures on Scotch Legal Antiquities* reveal, Innes was capable of commenting upon and setting records in contexts that illuminated their historical significances. Towards the end of the lecture course he explains that his reason for writing the lectures is to give his audience a guide to 'the original shape and first meaning of our laws and forms of process ... to show you these in their very earliest state, to lay bare the roots of our national institutions' (Innes, 2009, 285).[5] In doing so, Innes is a profoundly reflexive writer: he focuses not just on the object of discussion, but the means by which the object is known. He makes us aware, as readers, of the historiographical processes by which he has come to his knowledge of the historical event.

We can appreciate this if we compare Innes' *Lectures* with the English legal historian Henry Maine's, *Village Communities in the East and West* (Maine, 1871). Both texts are printed lectures, both delivered on the subject of historical and comparative jurisprudence. Each differs from the other, not just in subject matter but more importantly in treatment and discursive focus. A good example is the point in Lecture III of his book where Maine takes udal tenure as an instance of the ancient, pre-feudal teutonic tenure. This passage occurs after a long quotation from William Marshall on the 'commonable condition' of English agriculture. Maine then introduces a discussion of burgess and udal tenure with a passage from Lockhart's *Life of Scott*, namely from Scott's diary of his 1814 voyage with the Commissioners of Lighthouses around Scotland, in which Scott confesses himself puzzled as

to the nature of udal land rights. Both Marshall and Scott are introduced to reinforce Maine's points about the origin, nature and disappearance of the pre-feudal organisation of land-holding.

Maine's remarkable volume has its agenda, of course. He is writing the book, aware that in the 'East' of the title, India itself is gradually losing everything which is characteristic of it' (Maine, 1871, 24). Yet little of the means by which Main himself got his information; the nature of his sources, the interpretive function that Maine himself employs - little of this is apparent in his text. In a sense this may be a function of the different audiences the two texts have. As Cocks points out, texts such as *Ancient Law* (Maine, 1863) were written for an audience consisting of the informed public, lawyers and theorists, whereas Innes' book clearly addresses one highly specialist group only (Cocks, 1988, 53-6; 116). Nevertheless, the contrast is striking. Innes' text is full of narrative reflexivity. The book includes a synopsis of the discipline: the sense of disciplinarity and the type of method is part of the subject matter of the book. The arrangement of chapters reveal the plan. The text of *Lectures* starts with an 'Introductory' in which Innes examines the tradition of legal antiquarianism in Scotland. He does so by examining the achievements of a list of scholars, ending with Bolingbroke's famous advocacy of the study of history for lawyers if they are to rise above 'the little arts of chicane'. He ends his book with a lecture that contains a plea for the study of records; and what is in effect a bibliography with commentary. Two points are significant: Innes is aware of the historiographical background to his own work on legal history; and also of the importance of his historical work for the legal profession as a whole in the nineteenth century. Nor was he alone in this move: others were making this shift that had consequences for legal identity – James Lorimer, Regius Professor of Public Law and of the Law of Nature and Nations in the Law Faculty of Edinburgh University, for example. As the lectures in Lorimer's manuscripts reveal, the anthropocentric bias of nineteenth century natural law had a tendency to become anthropological. J.F. McLennan's *Primitive Marriage*, for example, was one of a group of contemporary Scottish anthropological texts which moved from natural law analysis to analysis of law in various societies.[6]

Anthropology and legal identity

It was a short but significant step to say that historiographical study was relevant not just to the legal profession but Scotland entire. In the later nineteenth century, a third discipline enters the field: anthropology. No account of legal identity in nineteenth century Scotland can be complete without taking this discipline into account. The tradition did not spring fully-formed in the later nineteenth century, out of contemporary historiography, Darwinist theory and antiquarianism. It was also partly a product of the enlightenment traditions of comparative history, whose own roots, as David Allan has comprehensively demonstrated, lie within the earlier legal and historiographical traditions of the sixteenth and seventeenth centuries.

John Ferguson McLennan (1827-81) was typical of the new science, an anthropologist of primitive society, whose article in the eighth edition of the *Encyclopaedia Britannica* on 'Law', as well as his book *Primitive Marriage* were written in part to counter Maine's views on the subject in *Ancient Law*. The *Britannica* article clearly owes debts to the Scots enlightenment tradition of historical and sociological enquiry – there are echoes of Adam Ferguson in its focus on the origins of civil society. *Primitive Marriage* became a seminal text, not only for other early Scots anthropologists such as Robertson Smith (who knew McLennan, and whose own *Kinship and Marriage in Early Arabia* (1885) is indebted to

McLennan) and J.G. Frazer, but for other early ethnologists such as Maine, William Tyler and Lewis Henry Morgan (Maharg, 2001, 145).

It was also a product of Victorian evolutionary theory. But while the early ethnologists concerned themselves with codifying symbols and rituals, the work of McLennan and Robertson Smith in particular differs from that of Frazer and others in the extent to which they were capable of acknowledging that primitive myths and rituals were sophisticated tools by which social behaviour was governed. Their densely-worked texts became explorations, projections, of how primitive societies worked in terms of kinship, power structures, belief systems (including seminal work on totemism) and gender relations. McLennan believed that all this could be recovered by linguistic and ethnographical study. As Rivière points out, McLennan's work was important for his contemporaries (and also for the development of law in social relations) because he focused on the sociological aspect of legal relations, where law is explained in terms of the inter-relationships of social institutions (Rivière, 1995, 296).

Yet once again, the concept of misprision is key to understanding the anthropological turn. Balanced against Evans-Pritchard's assessment of McLennan's work as the 'first really systematic attempt' to compare primitive societies (cited Rivière, 1995, 297) is Adam Kuper's view that 'in practice primitive society proved to be [the anthropologists'] own society (as they understood it) seen in a distorting mirror. ... They looked back in order to understand the nature of the present, on the assumption that modern society had evolved from its antithesis' (Kuper, 1988, 5). It is strikingly similar to the antithetical trope that Bloom maps in nineteenth century Romantic literature, as well as a form of the constitutional doctrine of *terra nullius*, where western civilisation exercises sovereignty over native culture. We can explore its tropes by comparing two authors, namely Walter Scott and Robert Louis Stevenson – one writing at the start of the nineteenth century, one prefiguring modernist literature at the century's end.

Legal-literary identity

Since the seminal work of György Lukács it has been axiomatic that Scott revolutionised our ideas about the writing of novels and the writing of history. Scott also - though this has been analysed much less - brought about a change in the way that law was dealt with in fiction. In Fielding, for instance, lawyers are archetypes of legal action; but in Scott, we have historical lawyers dealing with historical problems - the protagonist and lesser legal figures in *Redgauntlet*, for example; and the 'doer' in *St Ronan's Well*. Even the legal parodies in Scott's novels demonstrate this: Bartoline in *Heart of Midlothian* for instance.[7]

The necessity of charting historical development was noted fairly early by some commentators. Lord Kames, for example, asserted that law would become 'only a rational study when it is traced historically, from its first rudiments among the savages, through successive changes, to its highest improvements in civilized society'.[8] We can see this described in a famous metaphor by Scott in a passage from the Ashestiel Memoir where he expressed his admiration for Baron Hume. It is also a revealing description of Scott's view of Scots law, one of Proustian length, and deserving of full quotation:

> I copied over [Hume's] lectures twice with my own hand, from notes taken in the class, and when I have had occasion to consult them I can never sufficiently admire the penetration and clearness of his conception which were necessary to the arrangement of the fabric of law, formed originally under the strictest influence of

feudal principles, and innovated, altered, and broken in upon by the change of times, of habits and of manners, until it resembles some ancient castle, partly entire, partly ruinous, partly dilapidated, patched and altered during the succession of ages by a thousand attritions and combinations, yet still exhibiting, with the marks of its antiquity, symptoms of the skill and wisdom of its founders, and capable of being analysed and made the subject of a methodical plan by an architect who can understand the various styles of the different ages in which it was subjected to alteration. Such an architect has Mr. Hume been to the law of Scotland.... (Lockhart, 1842, 17)

In this passage the 'fabric of law', the text, once a cogent and principled structure, is now rambling, incoherent and, Scott suggests, it is in the nature of law to become so. The trope of law as a building is an ancient one, and Scott uses it here to emphasise the role played by the architect Hume who is able to draw up a plan precisely because he is historically aware of its 'various styles'.[9] Without such historical awareness, the building is a meaningless jumble to the eye. But a knowledge of styles does not describe all of what the architect does. There is also the aesthetic discrimination, the sense of judgment, which underlies knowledge of historical styles, and which is brought into play by the interpreter of law as much as by the novelist creating a palimpsest from a variety of sources. Such aesthetic apprising is close to Hutcheson's moral sense perception.[10]

The concerns of natural law jurisprudence have a central place in Scott's novel *The Heart of Midlothian*. There are clear jurisprudential positions and oppositions in the novel which are rooted in eighteenth century natural law discussions. Scott gives us notice of this in the opening pages of the novel, in the discussion between the lawyers, Hardie and Halkit, where law and literature are juxtaposed intertextually: '"[Y]ou will hardly visit this learned gentleman [Hardie], but you are likely to find the new novel most in repute lying on his table, -- snugly intrenched, however, beneath Stair's Institutes or an open volume of Morrison's Decisions"' (Scott, 1982, 21).

In the following conversation, Scott gives us in miniature the relations of law and literature in the novel. The forms of writing are literally adjacent: novels -- forms of utterance highly structured, elliptical, paratactic -- become imaginative equivalents of legal texts. With their references to *persona*, *res* and *actio* (that is, the jurisprudential triad of persons, things and legal actions), novels imitate legal texts such as Stair's *Institutions*, systems of meaning in which 'facts and patterns acquire a significance in terms of location and relationship' (Kelly, 1983, 662). Indeed, textual absence and presence are crucial in both domains. The very obliquity or opacity of meaning caused by the lack of specificity in early legal reports affects our reading of them in much the same way as indeterminacies do in novels (Watson, 1984, 74-5). And in Scott's novels there is a wealth of paratactical material that mimics in legal cases the powerful appeal to precedent, to previous cases and their narratives of fact and law.[11]

Scott pursues the contrast several pages on when Halkit protests at Hardie's appropriation of criminal records as the source of powerful narratives:

"And that's all the good you have obtained from three perusals of the Commentaries on Scottish Criminal Jurisprudence?" said his companion. "I suppose the learned author [*ie* Hume] very little thinks that the facts which his erudition and acuteness have accumulated for the illustration of legal doctrines, might be so arranged as to

form a sort of appendix to the half-bound and slip-shod volumes of the circulating library."

"I'll bet you a pint of claret", said the elder lawyer, "that he will not feel sore at the comparison." (*ibid.,* 23)

Yet if legal and literary texts interleave in Scott's novels, literature rarely critiques the law in any serious sense. In this alone there is a striking contrast between Scott and Robert Louis Stevenson as novelists. Stevenson was trained in the law, was taught by James Lorimer at Edinburgh University, was a practising Advocate (albeit very briefly), was well-read in Scottish Enlightenment historical and philosophical texts, and aware of the natural law background to much of Scots legal identity (Maharg, 1995).

We can discern in the literary texts Stevenson produced in his later life an urge similar to Scott's and Lorimer's to explore the relations between natural and positive law; but he went further, to analyse the imperialism of constitutional settlement that lay at the heart of legal identity. *A Footnote to History,* for instance, in which Stevenson narrates the contemporary colonial crises in Samoa, begins with a chapter that describes first the constitutional history of Samoan kingship, then the concept of property and forms of contract developed by Samoan society (Stevenson, 1923, XVI, 451-64). Moving from public and constitutional law to private, the chapter follows, in miniature, the traditional pattern of a nineteenth century student's general legal handbook. Stevenson even uses the terms and definitions of Scots law to describe unfamiliar Samoan concepts to his audience. At one point, for instance, he compares the return a beggar was supposed to make to a benefactor to 'the Roman contract of *mutuum*' (*ibid.,* 461). Stevenson's rhetorical intentions here are clear. By using the concepts of western legal and constitutional culture, Stevenson accords Samoans the status of a 'civilised' European nation. This strategy ensures that his audience cannot simply dismiss Samoan culture as savage, and thereby excuse European imperialist exploitation of the culture. At the same time, his management of the discourse is adroit, for he clearly appreciates the irony of his description. It is the Samoans who are portrayed as being aware of the international incident's conflict of laws, and who are considerate of European niceties as to the proper conduct of warfare: 'Thus after Mataafa [a Samoan chief] became involved with hostilities against the Germans, and had another code to observe besides his own, he was always asking his white advisors if "things were done correctly"' (*ibid.,* 458). Nor was Stevenson alone in his legal anthropological concerns here and elsewhere in his work. As the lectures in Lorimer's manuscripts reveal, the anthropocentric bias of nineteenth century natural law had a tendency to become anthropological. J.F. McLennan's *Primitive Marriage* for example was, as we have seen, one of a group of contemporary Scottish anthropological texts that moved from natural law analysis to analysis of law in various societies.

Similar concerns regarding the opposition of natural and positive law and its effect in society are present in Stevenson's last and most overtly 'legal' novel, *Weir of Hermiston*. Stevenson's characterisation in the novel is clearly influenced by his early saturation in legal culture. Lord Braxfield for instance is often taken to be the original of Hermiston, and is confirmed by Stevenson's letters.[12] But a strong case could be made for Lord President Inglis as a model for Hermiston. In his personal recollections of Inglis, William Knight quotes the observation of a contemporary of Stevenson, the advocate Alexander Taylor Innes -

> in real life [Stevenson] had held that the head of our Court in the Seventies was 'the greatest man in Scotland'; a man who in external aspect impressed both Stevenson and his brethren as (in the words of one of the cleverest of them)
> > 'The rhadamanthine, adamantine Inglis.'

So, when years after he drew the 'adamantine Adam' Weir, he made him a parishioner of 'that beautiful church of Glencorse in the Pentlands, three miles from his father's country house at Swanston', for the 'adamantine Inglis' was 'Lord Glencorse', taking his title, as so many of our judges do, from his lairdship there. Stevenson indeed *called* the parish Hermiston ... (Crabbe, 1893, 270)

Once we appreciate the parallel, the character of Weir can no longer be interpreted simply as a parodic version of Braxfield. It becomes a depiction of the corrosive power of positive law when it is detached from any natural law moral sense, a point Lorimer emphasised throughout his *Institutes*. Braxfield and Inglis were entirely different personalities and historical figures, of course: what unites them in Stevenson's fictional construct is the sense of absolute and chthonic power which, in the case of Inglis, many of his contemporaries remarked upon (Andorsen, 1949, 146-9). The nature of that power, its origins in personality and legal system and its effect on society fascinated Stevenson - as Christopher Harvie pointed out in an article on Stevenson's politics, 'Weir was an image of the power of that legal system which underlay the Scots enlightenment, yet which was drawn from a pre-existent social state not unlike that which Stevenson himself tried to recreate in Samoa' (Harvie, 1981, 124).

From the start in Stevenson's novel, we are within the territory of the anthropological concerns of McLennan. The novel begins with family and kinship, with a genealogy of the Rutherfords, and demonstrates the interest in kinship we find in the anthropological texts of the period. It also echoes the ancient device of the list of combatants or characters – a device that finds its source in Book 2 of the Iliad. A number of themes are then taken up: history, politics, the role of law. Throughout, the voice of the later Stevenson, who created a narrative voice in this novel that approaches Grassic Gibbon's fiction in its sense of place and dialectal grounding, uses history to reveal the closeness of political and legal identity. Witness the following passage:

[Jean Rutherford's] view of history was wholly artless, a design in snow and ink; upon the one side, tender innocents with psalms upon their lips; upon the other, the persecutors, booted, bloody-minded, flushed with wine ... Nor could she blind herself to this, that had they lived in those old days, Hermiston himself would have been numbered alongside of Bloody MacKenzie and the politic Lauderdale and Rothes, in the band of God's immediate enemies. The sense of this moved her to the more fervour; she had a voice for that name of *persecutor* that thrilled in the child's marrow; and when the mob hooted and hissed them all in my lord's travelling carriage, and cried, 'Down with the persecutor! down with Hanging Hermiston!' and mamma covered her eyes and wept, and papa let down the glass and looked out upon the rabble with his droll formidable face, bitter and smiling, as they said he sometimes looked when he gave sentence, Archie was for the moment too much amazed to be alarmed, but he had scarce got his mother by herself before his shrill voice was raised demanding an explanation: why had they called papa a persecutor? (Stevenson, 1995, 12)

Jean's answer is direct, in its way: '"this is poleetical. Ye must never ask me anything poleetical, Erchie" ... And so [she] slid off to safer topics, and left on the mind of the child an obscure but ineradicable sense of something wrong' (*ibid.)*

It is a remarkable piece of writing. Given the age of Archie, and that Hermiston is Lord Braxfield, we can date this episode of the mobbing to the sentences passed upon the

radicals Thomas Muir of Huntershill and Thomas Fyshe Palmer. Stevenson manages, in a very short space, by slipping between multiple viewpoints in a Jamesian fashion (Watt, 1960) - an ironic, knowing narrator, Archie's mother and Archie himself - to lay bare the link between criminal justice and political expediency in those notorious trials. It is significant that Stevenson chose to foreground the child as the accuser of Hermiston, not the mob outside the carriage. The effect is all the more powerful, for it focuses on the roots of judicial authority, rather than its display, and in Bloom's terms, makes the reader a 'strong' reader, one who is implicated in the meaning of the text. The reader, seeing the action through the innocent mind of the child, feels all the more that 'ineradicable sense of something wrong', a sense that haunts the rest of novel. Moreover, what we have here is the siting of the personal within the political: for Stevenson, the historical representation of the law enacts the political will to power. Frederic Jameson's comments on narrative are apt here:

> History is not a text, not a narrative, master or otherwise, but ... it is inaccessible to us except in textual form, and ... our approach to it ... necessarily passes through its prior textualisation, its narrativization in the political unconscious. (Jameson, 1981, 35)

But a fictional passage such as the above goes beyond personal, political and historical narrative. The novel also reveals the deeper purpose of the law to enact violence and terror. Robert Fraser quotes Wittgenstein on J.G. Frazer's anthropological text, *The Golden Bough;* and what Wittgenstein says is critical to Stevenson's portrayal of Hermiston and the identity of the law that he represents:

> When Frazer begins by telling the story of the King of the Wood at Nemi, he does this in a tone which shows that something strange and terrible is happening here. And that is the answer to the question "why is this happening?": because it is terrible.[13]

Stevenson returns again and again in his fiction to this legal moment, to describe the terrible power of law – the execution of James Stewart of the Glens; the figure of the hanged convict at the opening of *Catriona,* for example. The contrast between Scott and Stevenson is marked in this regard: where in *Heart of Midlothian* Scott gives us judicial explanations of law within a normative legal framework and reserves his compelling narrative voice for violence that occurs *against* the law (the actions of the Porteous mob, for instance), Stevenson never lets us forget the violence of law itself. The trial of Effie Deans in *Heart of Midlothian* is described by Scott in versions of formal legal narratives that serve to distance and explain the event. By contrast, in *Hermiston,* Stevenson gives us the trial of Duncan Jopp through the eyes of Archie, who is stunned by the event and his father's treatment of the pannell. During discussion later with his father we observe with him the 'abnegation of the man's self in the man's office' (*ibid.,* 37). Law erases personality, becomes an instrument of violence because it must, in order to sustain a culture and social order that expects it to happen thus.

Viewed thus, two perspectives come into focus. First, in appreciating Stevenson's view of law's violence, the distance from the primitive grove at Nemi to the eighteenth-century court in Edinburgh does not seem that far. Second, the recent literature on law's violence, and particularly the work of Robert Cover, makes clear how literature is capable of revealing such truth (Cover, 1986).[14] It was a concept could scarcely be discussed in the jurisprudential literature contemporary with Stevenson.[15] But it could be projected (in the psychotherapeutic sense of the word) in literature on societies that were safely described as 'primitive', and in fictional constructs such as Stevenson's novels. There, institutions, practices, and value conflicts that give identity to law could be explored for nineteenth

century readers, much as Innes or Cooper could read their own redactions of legal history and culture for their own audiences.

Law of course is not only force; but that it is so, and not merely in a coercive or punitive sense, is a reading that could be applied to legal identity and constitutionality in Scotland. If we are to take seriously the work of authors such as Stevenson, and the critical jurisprudence of Robert Cover, Sarat and others, how might we want to frame legal identity?

Misreading constitutionalities

Here Bloom's theory of influence and its tropes becomes useful yet again. Possibly the most interesting use of Bloom for legal identity in Scotland lies in the work of Boaventura de Sousa Santos. Santos takes Bloom seriously by misreading him: poems, he states, distort reality just as law does, and for similar reasons (Santos, 1987, 281). Santos uses Bloom to prise open pluralities in law, and his symbolic cartography is similar at many points to Bloom's revisionary ratios, those devices by which authors misread their strong predecessors.

For Santos much of law consists of 'porous legality or of legal porosity of multiple networks of legal orders forcing us to constant transitions and trespassings' (*ibid)*.[16] Santos refers here to the porosity of different legal orders within and around legal systems; but it is significant that his concept springs from his application of Bloom's literary critical theory of misprision (Bloom, 1974, 1975). Santos attempts to fashion a new ground for the sociology of law, and in the process to re-define legal pluralism. He takes a broad view of legal pluralism, incorporating myth and history into its structures.

The same could be argued as regards legal identity in Scotland. Constitutional arrangements, which are particularly porous, are always open to misprision: examples are the endlessly creative debates around the First Amendment in the USA – in Scotland, currently, the discourse of 'reserved matters' is another. As legal texts, constitutional documents tend to be more open to arguments of public policy and rights-based arguments. As such, they become shaping texts that, quite apart from the legislative authority they bear, are heavily symbolic of the self-identity of a community.[17] It is in this sense that the constitutional arrangements underpinning the Scottish Parliament will gradually but fundamentally alter our sense of what it is to be Scottish, in much the same way as did the Act of Union. But just as in Bloom's critique authors cover influences, or perform creative swerves around dominant predecessors in a culture of belatedness, so too does a constitution. Every constitution has a relationship to predecessors; and in addition to granting rights, it creates a normative mode of discourse that closes down future debate, prevents the development of new discourse, establishes its own autonomy. Bloom's work points out the rhetorical nature of constitutional discourse that has the force of law's violence; and Santos uses this to argue, particularly in his recent work, for a replacement of the 'canonic tradition of monocultures of knowledge, politics and law' by an ecology of knowledges, central to which is 'the distinction between conformist action and […] action-with-clinamen' (Santos, 2007, 85). Santos acknowledges Epicurus and Lucretius, but the term also derives in the modern period from Bloom, and Santos' use of it is typically Bloomian in his emphasis on the creativity of the clinamen: 'the *clinamen* does not refuse the past; on the contrary, it assumes and redeems the past by the way it swerves from it' (*ibid.,* 86).

In Scotland the identity of law, bound up with constitutionality and the new foundation of the Scotland Act, is in the process of slow but profound change. We are beginning to

explore the nature of that constitution within the larger polity of jurisprudential and public law debates. Our reconstruction of past legal identities are an important part of that project; but so too is the expansion of discourse, examples of which are given in this chapter, that enable us to investigate and interrogate law's identity in the present.

References

Andorsen, H. F. ed. *Memoirs of Lord Salvesen*. London, 1949.

Bachofen, J.J. *Das Mütterrecht*, Stuttgart, 1861

Bann, S. The sense of the past: image, text, and object in the formation of historical consciousness in nineteenth-century Britain. In Veeser, H. Aram, ed, *The New Historicism*, London and New York, 1989.

Beal, T. K. Glossary. In *Reading Between Texts: Intertextuality and the Hebrew Bible*, ed. Fewell, D. N., Louisville, Kentucky, 1992.

Blackstone, W. *Commentaries on the Law of England*. Ed. Stanley Katz. 1st ed., 1765-9, facsimile edition, 1979

Bloom, H. *Yeats*, Oxford, 1970.

Bloom, H. *The Anxiety of Influence*, Oxford, 1974.

Bloom, H. *Kabbalah and Criticism*, New York, 1975.

Bloom, H. *A Map of Misreading*, Oxford, 1980

Borges, J. L. Kafka and his precursors. In *Labyrinths*, New York, 1964.

Cairns, J.W. Faculty of Advocates, *The Laws of Scotland: Stair Memorial Encyclopaedia*, Edinburgh, 1992, 13, paras 1239-85.

Cairns, J. The influence of Smith's jurisprudence on legal education in Scotland. In Jones, P., Skinner, A.S., eds, *Adam Smith Reviewed*, Edinburgh 1992b

Cocks, R.C.J. *Sir Henry Maine: A Study in Victorian Jurisprudence*, Cambridge, 1988.

Cole, D., Agon at the agora: creative misreadings in the First Amendment tradition, *The Yale Law Journal*, 95, 5 (1986), 857-905.

Cover, R., Violence and the word, *Yale Law Journal*, 95 (1986),1601-52.

Crabb, J.W. *John Inglis, Lord Justice-General of Scotland: A Memoir*. Edinburgh, 1893

Crawford, R. *Devolving English Literature*, Oxford, 1992.

Ellerman, D.P. *Cultural Trespassing as a Way of Life: Essays in Philosophy, Economics and Mathematics*, London, 1995.

Ford, J.D. *Law and Opinion in Scotland During the Seventeenth Century*, Oxford & Portland, 2007.

Fowler, A. Genre and literary canon', *New Literary History*, 11, 1 (1979), 97-119.

Fraser, R. *The Makings of* The Golden Bough*: The Origins and Growth of an Argument*, London, 1990.

Fustel de Coulange, N.D. *La Cité Antique*, Paris, 1864.

Geary, P.J. *The Myth of Nations. The Medieval Origins of Europe*, Princeton, 2002.

Gewirtz, P., Remedies and resistance, *The Yale Law Journal*, 92, 4 (1983), 585-681.

Glenn, H.P., The national legal tradition, *Electronic Journal of Comparative Law,* vol. 11.3, 2007, http://www.ejcl.org

Hammond, M.H., Ethnicity and the writing of medieval Scottish history, *Scottish Historical Review*, 85, 1 (2006), 1-27.

Harvie, Christopher. The politics of Stevenson. In Calder, J., ed., *Stevenson and Victorian Scotland*, Edinburgh, 1981, 120-135.

Harvie, C., Legalism, myth and national identity in Scotland in the imperial epoch', *Cencrastus*, 26 (1987), 38-42.

Harvie, C. Nationalism, journalism, and cultural politics. In Gallagher, T. ed., *Nationalism in the Nineties*, Edinburgh, 1991.

Harding, A., *Medieval Law and the Foundations of the State*, Oxford, 2002.

Home, N., Lord Kames, *Historical Law-Tracts*. 2 vols. Edinburgh, 1758.

Hutcheson, Francis. *Collected Works of Francis Hutcheson*. 7 vols. Facsimile edition, ed. Fabian, B., Olms, 1969-90.

Innes, C. *Scotland in the Middle Ages. Sketches of Early Scotch History and Social Progress*, Charleston, South Carolina, 2009b.

Innes, C. *Lectures on Scotch Antiquities*, Charleston, South Carolina, 2009.

Jameson, F. *The Political Unconscious: Narrative as a Socially Symbolic Act*, Ithaca NY, 1981.

Kelly, Donald R. Hermes, Clio, Themis: historical Interpretation and Legal Hermeneutics'. *Journal of Modern History*. 55 (1983), 659-672

Kidd, C., *British Identity Before Nationalism: Ethnicity and nationhood in the Atlantic World 1600-1800*, Cambridge, 1999.

Kuper, A. *The Invention of Primitive Society: Transformations of an Illusion*, London, 1988.

Lockhart, J.G. *Memoirs of the Life of Sir Walter Scott*, Edinburgh, 1842.

MacQueen, H. Two Toms and an ideology for Scots law: T.B. Smith and Lord Cooper of Culross. In Elspeth Christie Reid, D.L. Carey Miller, *A Mixed Legal System in Transition: T.B. Smith and the Progress of Scots Law*, Edinburgh,

McLennan, J.F. *Primitive Marriage. An Inquiry into the Origin of the Form of Capture in Marriage Ceremonies*, Edinburgh, 1865

Maharg, P. Lorimer, Inglis and RLS: law and the kailyard lockup, *The Juridical Review*, (1995), 3, 280-291.

Maharg, P. Imagined communities, imaginary conversations: failure and the construction of legal identities. In Farmer, L., Veitch, S., eds, *The State of Scots Law: Law and Government after the Devolution Settlement*, London, 2001.

Maine, H.S. *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas,* London, 1863.

Maine, H.S. *Village Communities in the East and West: Six Lectures Delivered at Oxford*, London, 1871.

Mason, R.A. 'Scotching the Brut': politics, history and national myth in sixteenth-century Britain, in Mason, R.A., ed., *Scotland and England, 1286-1815*, Edinburgh, 1987.

Miller, J. Hillis. Laying down the law in literature: the example of Kleist. In Cornell, D. *et al.,* eds, *Deconstruction and the Possibility of Justice*, New York, 1992.

Reynolds, S., *Kingdoms and Communities in Western Europe, 900-1300*, second edition, Oxford, 1997.

Rivière, P. William Robertson Smith and John Ferguson McLennan: the Aberdeen roots of British social anthropology. In Johnstone, W., ed., *William Robertson Smith. Essays in Reassessment*, Sheffield, 1995, 293-302.

Santos, B. de Sousa, Law: a map of misreading. Toward a postmodern conception of law, *Journal of Law and Society*, 14, 3, (1987) 279-302.

Santos, B. de Sousa, Beyond abyssal thinking: from global lines to ecologies of knowledges, *Review*, 30 (2007) 45-90.

Samuel, R., British dimensions: 'Four nations history', *History Workshop Journal*, 1995, 40, 1, iii-xxii.

Schama, S. *Landscape and Memory*, New York, 1996.

Scott, W. *Heart of Midlothian* (1818). Lamont, C., ed., Oxford, 1982.

Smith, W.R. *Kinship and Marriage in Early Arabia*, Cambridge, 1885.

Stein, P. Law and society in eighteenth century Scottish thought. In Phillipson, N.T., Mitchison, R., eds, *Scotland in the Age of Improvement*, Edinburgh, 1970.

Stevenson, Robert Louis. *The Works of Robert Louis Stevenson*. Vailima Edition. 27 vols. London, 1923.

Stevenson, R.L. *RLS: Stevenson's Letters to Charles Baxter*, ed. Ferguson, D., Waingrow, M., New Haven, 1956.

Stevenson, R.L. *Weir of Hermiston*. Kerrigan, C., ed., Edinburgh, 1995.

Veitch, S. Authority, exploitation and the idea of public law. In Christodoulidis, E., Tierney, S., *Public Law and Politics. The Scope and Limits of Constitutionalism*, Aldershot, 2008, 27-33.

Watson, A. *Sources of Law, Legal Change and Ambiguity*, Philadelphia, 1984.

Watt, I. The first paragraph of *The Ambassadors*: an explication, *Essays in Criticism*, 10, (1960) 205-18

Willock, I., The Scottish legal tradition revisited. In J.P. Grant, editor, *Independence and Devolution*, 1-17.

Wittgenstein, L. *Remarks on Frazer's 'Golden Bough'*, trans. Miles, A.C., ed. Rhees, R., Retford, Notts, 1979.

Yoshino, K., What's past is prologue: precedent in literature and law, *The Yale Law Journal*, 104, 2 (1994), 471-511.

Endnotes

[1] Bloom, 1975, 97. As Alastair Fowler (1979) perceptively commented, there are a variety of canons existing within any single domain. He identified at least six.

[2] See for example Gewirtz (1983), Cole (1986), Yoshino (1994).

[3] Christopher Harvie (1987, 29-40) has pointed out how the Faculty retreated from constitutional issues in the late nineteenth century. For a contrary view, see Cairns, 1992, paras 1269-84.

[4] Stephen Bann has described this process well with reference to art history:

> art history, in defining itself as a discipline over against connoisseurship, understandably took over the positivist paradigm of nineteenth century archival research. But in doing so it also inevitably (though no doubt unconsciously) took over the prejudice which was so ingrained among archive-based historians against the serious historical value of artistic representations of history. (Bann, 1989, p. 104)

[5] This intention informed other works. At the end of the Preface to *Scotland in the Middle Ages. Sketches of Early Scotch History and Social Progress*, for instance, he declares he will write upon 'the old Scotch law of Marriage and Divorce' (Innes, 2009b, *x*)

[6] McLennan studied law, as did J.G. Frazer, and became an advocate. See also the anthropological investigations of Robertson Smith, and Lang. Crawford (1992, 151-75) has commented on the relation of literature and anthropology in these, and points out the connections between Walter Scott, Robert Louis Stevenson and Andrew Lang. For continental examples of contemporary legal anthropology see the work of Fustel de Coulange (1864), and Bachofen (1861).

[7] Critical commentary has assumed 'Bartoline' to be a parodic name redolent of the character's florid manner. In fact, Scott is alluding to the great Commentator Bartolus, whose Comments on Accursius' Great Gloss of the *Digest* were so important to later Roman law reception in Europe. It was, after all, the Commentator's law, not the *Corpus Iuris*, which was received in fifteenth and sixteenth century Germany, whereby popular custom was subordinated to the modernised civil law. Scott would have known this from his Civil Laws classes at Edinburgh University. To Scott's legal contemporaries, however, steeped as they were in the natural and positive law of the late Enlightenment, Bartolus was a crabbed Schoolman - hence the parodic use of his name.

[8] Home, 1758, v, *xi*, quoted in Cairns, 1992b, 182. Kames went on to approve Bolingbroke's opinion that lawyers would not 'deserve to be ranked among the learned professions' until they had abandoned the 'little arts of chicane' and turned to the 'vantage ground' of 'historical knowledge' (Home, 1758, *xi*) The strategy here adopted by Kames and Bolingbroke is an interesting one: the movement from low to high, from menial tricks to learned profession is in their view performed only with the aid of larger historical learning. Indeed, as Peter Stein has pointed out, '[w]hen Kames pleaded for reason, he was in fact pleading for a more historical approach' (Stein, 1970, 157).

Cairns points out that, in a similar strategy the Faculty of Advocates in 1760 recommended intrants to apply to the study of the law of Nature and Nations so that they would be aware of the effect that historical analysis was having upon civilian natural law traditions, particularly in the hands of philosophers such as Adam Smith (Cairns

1992b, 170). What had previously been a corpus of polite learning, a body of ahistorical rules -- law as stratigraphy -- was becoming critical, investigative -- law as archaeology.

[9] Compare Blackstone's description of the law's identity in England as 'an old gothic castle, erected in the days of chivalry but fitted up for a modern inhabitant' (Blackstone, 1979, 268). Scott returns to this trope a number of times in *Heart of Midlothian.*

[10] It is no coincidence that Hutcheson's most complex account of the moral sense arises from discussion of the aesthetics of beauty and virtue. As he points out in the Preface to *An Inquiry*, the '*moral Sense* of *Beauty* in *Actions* and *Affections* may appear strange at first View: ... [but there are] a great many *Senses, Tastes,* and *Relishes* for *Beauty, Harmony,* Imitation in *Painting* and *Poetry;* and may not we find too in Mankind a *Relish* for a *Beauty* in *Characters*, in *Manners*?' (Hutcheson, 1969-90, I, *vii-viii*)

[11] A point in which Scott, rather surprisingly, anticipates Hillis Miller (1992, 306)

[12] 'I have a novel on the stocks to be called The Justice Clerk [Weir of Hermiston]. It is pretty Scotch: the grand Premier is taken from Braxfield'. (letter to Charles Baxter, Vailima, 1 December 1892, Ferguson & Waingrow 1956, 314, n.6). In the postscript to this letter, Stevenson shows an awareness of criminal procedure and sources for this procedure in eighteenth century judicial literature.

[13] Fraser (1990, *xiii*), quoting Wittgenstein (1979, 1e).

[14] See for instance this passage:

> Legal interpretive acts signal and occasion the imposition of violence up others. A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. […] Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. This much is obvious, though the growing literature that argues for the centrality of interpretive practices in law blithely ignores it. (Cover, 1986, 1604)

[15] Though it was a subject that was discussed by other anthropologists and historians of art and society. Schama, for example, has pointed out how Warburg came to a radical re-interpretation of the place of myth in society:

> Instead of stressing the *separation* between primitivism and the modern condition, he implied its connection through what he called, perhaps for the first time, "the archive of memory" (*Archiv des Gedächtnisses*)' (Schama, 1996, 212).

[16] For an interesting account of trespassing as a method of cross-disciplinary research see Ellerman, 1995.

[17] See for example the texts quoted in note 2 above, all of whom use Bloomian categories in their analyses.