Bystanders in Edinburgh's High Street, 16 July 1875 were probably astonished by the sight of a thin young man in advocate's wig and gown riding in an open barouche, making formal bows and waving to them as he passed. The young man was Robert Louis Stevenson, celebrating his call to the Bar. In a life not short on dramatic gesture, this was a particularly symbolic act. It was a parody of the behaviour expected of a sober advocate, an ironic hail and farewell to a legal career, one in which he took four briefs and earned all of four guineas. Stevenson, of course, had little interest in pursuing a legal career. His suspicion of the Scottish business classes went beyond a youthful desire to épater le bourgeoisie; temperamentally he was unsuited to walking the floor of Parliament House and, above all, his health would not have withstood the rigours of legal practice. However, if Stevenson's practical law career never took off, the effect of his legal education is clearly there in his work, particularly the later novels. If we are aware of these references we can site Stevenson's texts beside other legal texts, and see them as contributions to the contemporary late nineteenth century debate regarding the place of law within Scottish history and culture. We can discern, too, elements of Enlightenment discourse in his novels stretching well beyond the eighteenth century, the vehicle of which, I would suggest, is Stevenson's familiarity with legal culture.

I Stevenson's legal education

Misunderstanding of the central place occupied by the law in Scots nineteenth century culture, and of the nature of Scots legal education have led commentators to misread the ways legal culture is deployed in Stevenson's work. It is typical that Emma Letley, editing Kidnapped and Catriona for OUP's World Classics series described him as being 'called to the Scottish Bar but does not practise as a barrister' (p.xxxiii, my italics). Stevenson became an advocate and did practise, albeit for two months only. Letley's slip is symptomatic of the general misunderstanding of this part of Stevenson's life, particularly among his English and American commentators. When they comment on it, it is usually to describe bohemian evenings spent in the Canongate, not his legal studies, or his knowledge of the legal profession; nor how this knowledge is deployed in his work.

It has been part of the RLS myth that he was far from a model student. As his latest biographer, Frank McLynn describes him, he attended classes intermittently, and only those in which he had some interest, and spent most of his time and effort in extra-curricular

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1 Lord Salvesen quotes Sir Edward Clerk who was asked what were the requisites for success at the Bar - "There are three things necessary, and the first is health, the second is health, and the third is health", Memoirs of Lord Salvesen, ed Harold F. Andersen, (Edinburgh, 1949), pp.45-6.
reading and writing. But the fact that he became an advocate at all shows a fair degree of legal knowledge; and if we look closely at Stevenson's law studies we can discern a pattern of interest which surfaces in his mature fiction. In his recollections of Stevenson, Lord Guthrie has outlined the legal courses Stevenson would have undertaken at Edinburgh University in the period November 1867 - July 1875. With no degree in Arts, Stevenson had to sit the Faculty examination in General Scholarship. He passed Latin, Ethical and Metaphysical Philosophy, Mathematics, French and German. He then went on to study Civil Law, Scots Law, Scots Conveyancing, Constitutional Law and History, and Medical Jurisprudence. He also passed the Disputatio Juridica, a public examination held in Latin, which by the late nineteenth century was more a passing-out ritual than an examination. As with all students, Stevenson had his favourite classes. In Civil Law he sat merely five of the twelve examinations, just enough for a certificate; although by the time of his final examination he was apparently complimented on his knowledge of Civil Law. But he showed considerable interest in Professor James Lorimer's class of Public Law, gained an 'honourable mention' and achieved third place in the class.

Stevenson's interest in this class is significant, particularly in the light of Lorimer's own approach to the study of jurisprudence, natural law, and legal history. Lorimer had been appointed in 1862 to the newly revived Chair of Public Law and the Law of Nature and Nations at Edinburgh University. His oeuvre constituted a distinctively Scots approach to these subjects and to jurisprudence, as he himself was aware:

Had those great thinkers who rendered the Scottish School of Philosophy illustrious set before them the task of placing Politics and Jurisprudence on a scientific basis, Political Economy might, long ago, have ceased to be the only practical science for which the world was indebted to a Scotch professor.

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5 Albeit he got merit certificates in Mathematics and Political Economy. Modern commentators and biographers take an unhistorical view of Stevenson's academic performance, and judge it by today's quite different standards. As Davie points out, 'merit certificates were publicly accepted among the Scots as a guarantee of merit and the possession of two of them by a student who did nothing else might be reckoned of equal value to the pocketful of DPs acquired as a result of completing the full course' ('The Importance of the Ordinary MA' Edinburgh Review, Issue 90, 'Democracy and Curriculum', p.65)
One of the remarkable circle of writers, scientists and philosophers influenced by Sir William Hamilton's renovation of the commonsense tradition in philosophy, Lorimer's education and personal inclination led him to reject most of contemporary English jurisprudence. He eschewed the utilitarianism of Mill as much as Austinian positivism and Sir Henry Main's comparative method. Instead, he declared his aim was 'to teach Natural Law', and he did so with a strong emphasis on the historical context of his subject:

From many specialist points of view, unquestionably an historical treatment seems to offer the proper propaedeutic to the study of a system wh: has been the result of human experience, and wh: has been forced upon mankind by events, to a far greater extent than it has been reasoned out from a consideration of abstract principles.

We do not have far to seek for the origin of Lorimer's historicism. Like many advocates of the period, he was familiar with the German historical school of jurisprudence, and studied under the post-Savigny generation - with Trendelenburg at Berlin and Dahlmann at Bonn. Lorimer's approach to the study of jurisprudence was eclectic within the discipline as well as across disciplines and periods of history. In his lectures he covered the history of international law from the pre-classical period to Grotius and beyond, and drew to the attention of his students non-European legal systems. One of his aims is clearly to introduce his student audience to the complex network of natural law debates; and in doing so he is often drawn into a description of the changing nature of contemporary historical awareness. In the introduction to one lecture he attempted to define the process of historical legal analysis:

We live in a 'historical age' as opposed to a philos, in an age, that is to say, in which the main guidance to wh: men look for the future consists in the information which they possess with reference to the results of former experience.

Citing the university of Göttingen as a paradigm of the contemporary trend, where 'the historical teaching of jurisprudence has entirely superseded the philosophical', he went on to comment that

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8 For a rejection of Mill and Austin, for instance, see The Institutes of Law, op.cit, pp. ix and 281 respectively.
9 'Lecture XVII, Feby 2 1865, Sketch of Int Law I. The Oriental or Ante-Classical period', MS, Edinburgh University Library, Gen 101. Beside this passage is a note in the margin - 'Criticise Maine's Ancient laws'. W. Galbraith Miller commented on this aversion, noting that Lorimer's position derived from Hamilton and Reid: 'examine any human relation, and you will find law is necessarily involved in it', Lectures on the Philosophy of Law (London, 1884), p.30
11 'The literature of India furnishes innumerable monuments of the care with which the principles of natural law were elaborated into practical rules and realized in all those departments of private law which, in a very general way, we are accustomed to group under the head of Status, as opposed to Contract. If you look into the laws of Manu, or into Sir William MacNaghten's Principles of Hindu Law, you will find that the whole of the Family relations are anxiously provided for.' (MS, Edinburgh University Library, Gen 101.)
12 Ibid
[a]s we have historians and philosophers, but scarcely philosophical historians or historical philosophers, so we rarely have generations which are in a condition to occupy both the philosophical and the historical points of view. Given the predominance of historical analysis, Lorimer defined the task of historical analysis as that of separating out the memorable in history; and he defined this as being what amounted to 'the necessary' in history as opposed to the merely 'accidental'.

There are distinct elements of German Romanticism in Lorimer's treatment of history and law here and in his published works. Like Fichte and Schiller, he viewed history as focused lines which converged upon the present. Like Savigny he sites in the 'common consciousness of the people' (gemeinsamen Bewusstseyn des Volkes) the ground of positive law which 'for the consciousness of each, is one and the same law, not accidentally but necessarily'. If indeed Stevenson was influenced by Lorimer, it was in the extent to which law's discipline and culture was presented by Lorimer as rooted in Scottish politics and history; and the extent to which, in German historical jurisprudence, law was an embodiment of the historical consciousness of the people. This was a lesson which, as we shall see, was put to use in Stevenson's later fiction.

II History and the lawyers in late nineteenth century Scotland

Lorimer's interest in the relations between history and law was by no means a unique one. Throughout later nineteenth century Scots legal literature there was present a concern to investigate the relationship between law and history: not only how law was taught or researched within a university, but the relevance of legal history to Scots history and to contemporary historiography and society. That there had always existed a strong link between law and history was more reason to analyse the matrix. In the eighteenth and nineteenth centuries a large proportion of historians and antiquarians were also lawyers. The nineteenth century clubs and societies initiating publication of their distinguished collections of historical documents were indebted to the backing of the legal establishment; and to an extent this was true of official publications as well. The figure of Sir William Fraser was a paradigmatic figure in this respect. A lawyer by profession, he made his fortune researching genealogies, and as Deputy Keeper of the Records at Register House he oversaw one of the most productive periods in the publication of historical and public records. He

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13 *Institutes, op. cit.*, p. 440, my italics. One might compare Lorimer's position here with that of Savigny in his declaratory article, 'Über den Zweck dieser Zeitschrift', which he published in the journal he co-edited with K.F. Eichhorn, *Zeitschrift für geschichtliche Rechtswissenschaft* (1815). Lorimer was aware of the subjectivity inherent in his definition of historical necessity:

It is a test, the legal application of wh: altogether excludes that picking and choosing of instances to suit their preconceived opinions, of wh: Savigny, not without reason, accused the apostles of the philosophers of history.

14 See *Institutes, op.cit*, p.440

15 A practical example of this was the current interest in codification in the area of commercial and business law see Alan Rodger, *op.cit.*

16 For example, Lord Hailes, Lord Kames, William Ttltler and Alexander Fraser Ttltler (Lord Woodhouselee), Sir Walter Scott, Lord Cockburn, Cosmo Innes, to name but a few.

17 See for instance Marinell Ash, 'Scott and Historical Publishing: The Bannatyne and Maitland Clubs', *Scots Antiquaries and Historians* (Dundee Abertay Historical Society, 1972, Publication no.16). These clubs and societies were inheritors of the Enlightenment encyclopaedic tradition.
also endowed the Chair of Ancient History (ie Scots history) and Palaeography at Edinburgh University.\textsuperscript{18}

But while the antiquarian research and publication of historical records was a considerable achievement in itself, all this worthy endeavour, as David Allan has pointed out, was 'a far cry from the speculative flights and all-encompassing interests' of Enlightenment lawyers.\textsuperscript{19}

In the later nineteenth century there appears very little historiographical analysis to match the riches of primary material being brought to light. The reasons for this are complex: the historiographical nexus is still problematic. According to George Davie, there was a 'failure of intellectual nerve':

at the very time when other neighbouring countries were becoming increasingly 'history minded', the Scots were losing their sense of the past, their leading institutions, including the Universities, were emphatically resolved - to use a catch phrase fashionable in Scotland of the early twentieth century - 'no longer to be prisoners of their own history'.\textsuperscript{20}

Others have supported his view, from a variety of cultural angles. Marinell Ash has described the state of historiography in later Victorian Scotland as 'a succession of historical kailyards', a view echoed by Michael Fry who, in criticising the Whig versions of Scots history promulgated by late nineteenth century historians, commented that their interpretations condemned Scottish historical culture to be 'locked for safekeeping in the kailyard'.\textsuperscript{21} Moreover, as Fry points out, these historians were eager to proclaim (pace Fukuyama) an end to Scottish political history, siting its demise at various high points of the Whig and Liberal ascendancy throughout the nineteenth century.\textsuperscript{22}

Nor did nineteenth-century English positivist historiography contribute much to the debate. T.H. Buckle's diatribe against Scottish intellectual history (\textit{History of Civilisation in England}, vol III, 1861) and in particular the culture of the seventeenth century was notorious, but his was merely an extreme articulation of a view of Scots history and culture common among English historians. In W.E. Lecky's \textit{History of England in the Eighteenth Century} for example, Scotland is used as an instance of a dependent country being civilised by a

\begin{thebibliography}{99}
\item \textsuperscript{18} Gordon Donaldson, \textit{Sir William Fraser, The Man and His Work} (Edinburgh, 1985), pp.63-4. There are many other examples. Apart from the important role played by Cosmo Innes, Aeneas Mackay, Professor of Constitutional Law at Edinburgh, was a founder member of the Scottish Historical and Scottish Texts Societies (Chris Harvie, 'Legalism, Myth and National Identity in Scotland in the Imperial Epoch', \textit{Cencrastus}, no.26, (Summer 1987), p.39
\item \textsuperscript{19} \textit{Virtue, Learning and the Scottish Enlightenment: Ideas of Scholarship in Early Modern History} (Edinburgh, 1993), pp.237-8
\item \textsuperscript{20} \textit{The Democratic Intellect: Scotland and her Universities in the Nineteenth Century} (Edinburgh, 1961), p. vii
\item \textsuperscript{21} \textit{The Strange Death of Scottish History} (Edinburgh, 1980), p.152; 'The Whig Interpretation of Scottish History' in I. Donnachie and C. Whately, editors, \textit{The Manufacture of Scottish History} (Edinburgh 1992), p.83. Fry quotes Henry Grey Graham, \textit{Social Life of Scotland in the Eighteenth Century} (1899); Peter Hume Brown, \textit{History of Scotland to the Present Time} (1911); and H.W. Meikle, \textit{History of Civilisation in Scotland} (1896), amongst others. See also Davie, \textit{The Democratic Intellect, op.cit.}, pp.328-32, for the part played by Edward Caird (appointed to the chair of Moral Philosophy at Glasgow in 1866) in supplying a philosophical basis, derived from Hegelian monism, for this historiographical position.
\item \textsuperscript{22} Fry, \textit{op cit}, pp.85-6
\end{thebibliography}
dominant one. Lecky described pre-eighteenth-century Scotland as a nation 'for generations ignorant, superstitious, intolerant and enslaved', and its eighteenth century history as one of those remarkable instances on record of the efficacy of wise legislation in developing the prosperity and ameliorating the character of nations. The 'wise legislation', of course, derived in his view from Scotland's political union with England.

If in historiography, then, Scotland produced little to support the wealth of primary evidence which was being amassed and did little to explain the shape of its contemporary institutions to itself, part of the answer would seem to lie in a trahison des clercs amongst those historians who were concerned to close down history and depoliticise politics. There were alternative discourses, however, which provided different constructions of Scots history, law and culture. Lawyers played an important role here, analysing the relations between history and law. Apart from the distinguished scholarship of Cosmo Innes in this respect, James Lorimer revealed the close links between the study of Scots law and history in his lectures and essays. As Professor of Public Law (albeit Innes held the Chair of Constitutional Law and History), Lorimer was clearly antagonistic to attempts by Whig lawyers and historians to narrow the field of historical inquiry. For him, the function of history in a university law faculty was 'to be taught in relation, not to the development of constitutional government alone, but to political and social life generally'. Lorimer recognised the contemporary relations between politics, history and law, and recognised the interdependence of all three. Indeed, he welcomed what he perceived as the 'growing clearness' between politics and the legal profession - 'I have been for many years a strenuous advocate for the development of our Faculty of Law in the political direction'. His own work, in the field of contemporary international law as well as national education and in several other areas was proof of the extent to which law could energise and enrich contemporary intellectual debate; while his concern to retain the close relationship between historical study and the legal profession is proof of his certainty that dialogue between the two was essential.

Other lawyers investigated questioned the nature of this dialogue. William Galbraith Miller, lecturer in Public Law at Glasgow University asked the pertinent question in his Lectures on the Philosophy of Law -

23 (London, 1878-92), II, 73-4; 92
24 See also Ash, op cit, pp.148-9
25 Studies National and International, Being Occasional Lectures delivered in the University of Edinburgh, 1864-1889 (Edinburgh, 1890), 'On the Sphere and Function of an Academical Faculty of Law', pp.12-13. See also 'The Faculty of Law', p.248. In his study of mid and later nineteenth century Scottish higher education Davie outlined the wider contemporary context to the educational debates, and pointed out the important part played by lawyers, and especially by Lorimer. It was the Faculty of Advocates' report on the education of lawyers which formed the basis for the Association for Extension of Scottish Universities, whose 'memorial volume' was Scottish Universities, Past, Present and Possible, written by Lorimer (an advocate, of course, as well as a professor). The Association was supported not merely by some of the greatest names in the academical world in Scotland...but also received notable backing from senior members of the legal profession, including, among others, Lord President Inglis. (Davie, op.cit, p.47)
R.D. Anderson, in Education and Opportunity in Victorian Scotland (Edinburgh, 1983), while criticising Davie's general conclusions, does not dispute this point.
Is there nothing more than [an] external connection of law and history? Is there no organic connection between them? This is a question of paramount importance, and deserves more than a mere passing notice. It is at present attracting much attention ...

His question had been answered, in part, by Lord-President Inglis almost twenty years earlier, in an address to the Juridical Society entitled 'Historical Study of Law' (May 1865). The address is in several respects a remarkable statement of the relations between history and law, and deserves more attention than it has received. Inglis, the dedicatee of Cosmo Innes' celebrated Lectures on Scots Legal Antiquities (1872), begins by approving Lord Kames' dictum that 'Law is taught, like Geography, as if it were a collection of facts merely; the memory is employed to the full, rarely the judgment', and goes on to comment that the history and jurisprudence of Scots law was insufficiently studied by Scots lawyers. Inglis argues for a greater knowledge of both, not only on the grounds that this would increase lawyers' professional effectiveness, but more interestingly, on account of their significant roles in society:

It has been said by one eminent writer, that the most important part of the history of any civilised nation is to be found in the Statute-Book, and by another that the true method of historical study is to elucidate and illustrate law by history, and history by law.

As Christopher Harvie points out, the context of the lecture is essential to an understanding of its meaning. It was given four years after the publication of Buckle's History of Civilisation in England, and can be interpreted as a robust critique of the view of Scottish culture contained therein. Buckle scarcely mentions law in his attack; but in his lecture Inglis rises to the defence of legal culture. His terminology ('civilised nation') and his analysis and praise of seventeenth century legislation in Scotland, 'unexampled either before or since' is a general riposte to Buckle. He then goes on in some detail to describe the Advocates' dispute of 1670, interpreting their stance as 'an attitude of firm and deliberate resistance to an act of tyranny and injustice'.

Inglis' address is significant for a number of reasons. He outlines for his audience a construction of Scots history and law which valorises that history contra Buckle. More interestingly, he argues that such constructions are impossible unless the foundational relations between political history and law are understood. In this context it is significant that he chooses to dwell upon an incident in which Scots lawyers resist the wishes of the political...

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27 (London, 1884), p.396
29 Ibid, p.378
30 Harvie, op cit, p.39
31 John Inglis, op.cit, p.379
32 Ibid, p.391
33 In this respect, his view of seventeenth century legal culture in Scotland had to wait over a century before it was matched by similar revisions by historians of the view that Scotland was a backward and violent society in the seventeenth. See for instance J.W. Cairns' subtle analysis, 'Institutional Writings in Scotland Reconsidered', in New Perspectives in Scottish Legal History, ed Albert Kiralfy & Hector MacQueen (London, 1984). For a polemical view, see C. Beveridge and C. Turnbull, The Eclipse of Scottish Culture: Inferiorism and the Intellectuals, (Edinburgh, Polygon, 1989)
administration. He does not draw direct political morals from his address - his description of the Advocates' dispute is certainly no call to the barricades, nor would one expect this from a high Tory who adhered firmly to the political creed of conservative 'lairds and law agents'.\textsuperscript{34} What he does do, though, is draw if not an organic connection then an implied sine qua non connection, one where a knowledge of history is an essential pre-requisite to understanding law, and one where lawyers as a class can uphold essential constitutional freedoms because of their historical awareness of the importance of these freedoms.

This historical jurisprudence was of direct interest to his audience. Inglis' view of the proper place of lawyers in society is a later nineteenth century version of an Enlightenment argument in defence of the Union of Parliaments, which allotted to lawyers the task of forming 'a patriot-elite which was wise and virtuous enough to be able to preserve [Scotland's] national interests within the framework of a new British polity'.\textsuperscript{35} Inglis himself provided such an example in his own life, for as Davie points out, he played a major part in the Royal Commission on the Scottish Universities (1858), and in drafting the subsequent Act which, according to Davie, did much to protect the character of Scottish higher education. Inglis' shrewd awareness of the political relations between history and law links him in a remarkable way with modern post-structuralist historiography:

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 unconsciousness.\textsuperscript{36}

Inglis' point is the ineluctably political context of law within history and the need for lawyers in particular to remember this; Jamieson's that the textuality of history is necessarily political: both converge in acknowledging the problematic and controversial nature of the relationships between law, politics and history.

\section*{III \hspace{1cm} Law, history and politics in \textit{Catriona}}

If modern critics have begun to recognise the complexity of the historiographical and literary nexus within which novelists and historians such as Scott and Macaulay wrote, the same cannot be said for the debatable lands between nineteenth century law and history and literature; and this is particularly true of Stevenson's \textit{oeuvre}.\textsuperscript{37} Literary critics have


\textsuperscript{35} N.T. Phillipson, \textit{The Scottish Whigs and the Reform of the Court of Session 1785-1830} (Edinburgh, 1990) pp. 179-80


contextualised his work within a late nineteenth century literary tradition, but little attention has been paid either to the legal context of his Jacobite novels or the changing nature of the literary canon within which Stevenson wrote. The historical novel in the late nineteenth century inhabited a much reduced estate compared to that of the Waverley novels. - indeed the contemporary diminishing reputation of the Waverley novels is a good indicator of this. Henry James, for instance, remarked that to read them 'we must again become as credulous as children at twilight'. The place occupied by Scott's novels was that allotted to historical fiction generally in the late nineteenth century hierarchy of literary genres: such novels were banished from the higher genres of domestic novel, or realist fiction. Stevenson, therefore, wrote in a tradition now serving children rather than the serious adult fiction reading population: it had become 'the category of the romantic, the superficial, and the naive'. This changed canonical status imposed its constraints upon Stevenson's writing, and we can see in Kidnapped and Catriona Stevenson outgrowing these constraints. Bound by stereotypes and working within a child-like, apolitical narrative at the start of Kidnapped, by the time he came to write Catriona he was clearly writing beyond the bounds of his child audience. Critics, however, have generally treated the novel as a univocal child's tale, and ignored or underplayed the dialogic complexity of its voices and legal references.

Noble, for instance, has dismissed Stevenson's Jacobite novels as 'Highland history moulded by Scott's fictional conventions'; but without mentioning the strikingly different ways both authors narrativise legal culture. Scott insisted publicly on the historical integrity of detail and description in his novels: there are introductions explaining the background; lengthy notes attached to the novels (added to the Magnum Opus edition), and within the texts narrators digress to explain customs, events, historical characters, and so on. Stevenson has no such pre-text material. Instead he creates elliptical narratives where events and political positions are outlined briefly, and where single quotations and phrases stand for much longer strings of argument. Far from Stevenson's narratives being moulded by Scott's literary conventions, we could, to quote Harold Bloom, see in Stevenson's use of legal culture a clinamen or creative swerve from precedent, a deliberate avoidance of the strategies and positions of his distinguished predecessor.

habit which his father sternly criticized' (p.119). Inglis reread Scott's Waverley novels annually.

40 An exception is Susan R. Gannon, 'Repetition and Meaning in Stevenson's David Balfour Novels', *Studies in the Literary Imagination*, XVIII, No.2. Mikhail Bakhtin's distinction between the dialogic text (in which there is an interplay of different voices, political, cultural and axiological) and monologic text (where a single voice controls and dominates the narrative) is applicable to Catriona. See Mikhail Bakhtin, 'Epic and Novel', in *The Dialogic Imagination*, translated by Caryl Emerson and Michael Holquist (Austin, University of Texas Press, 1981), p.33
41 *Ibid*, p.138
And yet we can discern in Catriona and other texts Stevenson produced in his later life an urge similar to Scott's to explore the relations between law and society. *A Footnote to History* for instance, in which Stevenson relates 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. 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 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*. Stevenson's rhetorical intentions in this text are clear: he counters his audience's implicit Eurocentric bias and denies them the opportunity to excuse European imperialist depredations by simply dismissing Samoan culture as savage. By using the concepts of western legal and constitutional culture, he accords Samoans the status of a 'civilised' nation such as Great Britain. At the same time, his management of the discourse is adroit, for he clearly appreciates the irony of his description: Samoans, (to those of his readers who were aware of the situation's conflict of laws), are portrayed as 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'.

Similar concerns regarding the nature of law and its effect in society are present in Stevenson's 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 model of Hermiston, and this is confirmed by Stevenson's letters. 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 ...

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 power wielded by individuals in the name of law and on behalf of society. Braxfield and Inglis were entirely different personalities, of course: what unites them in Stevenson's fictional construct is the sense of absolute and chthonic power which, in the case of Inglis, most of his contemporaries

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45 *Ibid*, p.461
46 *Ibid*, p.458
remarked upon. 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: a charismatic authority [which in Samoa was] being sapped by imperialist bureaucrats as much as by socialistic bureaucrats at home.

But it is in Catriona that we can see Stevenson engaging most clearly with the political context of legal history. The novel splits into two parts, the first much longer part dealing with issues of criminal justice and public policy, while the second treats of David's relations with Catriona and her father. In the first half Stevenson explores the legal issues of the novel, based as they are upon the murder of Colin Campbell of Glenure and its consequences. These issues centre, I would argue, upon an examination of the crucial relationship between politics and law in mid-eighteenth century Scotland. Stevenson himself was in no doubt about the book's main concern:

I have ... finished the chapter of the law technicalities. Well, these seemed to me always of the essence of the story, which is the story of a cause célèbre; however, they are the justification of my inventions; if these men went so far (granting Davie sprung on them) would they not have gone so much further?

The cause célèbre is of course the notorious trial and execution of James Stewart and David's failure to save an innocent man. This failure is central to the historical, legal and aesthetic structure of the novel. It is embedded in the narrative as the rhetorical trope of anti-climax: David's attempts to give testimony at the trial; the inconclusive duel; Alan nearing danger but escaping (twice); David neutralised on Bass Rock; the crucial evidence which remains unspoken; the entire absence of a trial narrative; the stalling love affair between David and Catriona; the law career abandoned (and the irony of David's real education in law in the novel's first half); the description of impotent Jacobite exiles abroad; the wry, self-deprecating ending. The trope of anti-climax, though, is only one of many rhetorical devices Stevenson uses. In this novel more than any other Stevenson worked within a style which focused intensely on the local and locale; one which through parallelism, dualism (for instance the complex balancing of pairs of characters across political divides - the principled Prestongrange and Alan over against the unscrupulous James More and Simon Lovat), allusion, ellipsis, irony, metonymy and anti-climax analyses the complexity of the relations between politics, law and society. If there was any English novelist akin to Stevenson in this respect, it was - paradoxically, given the opacity of his narratives - George Meredith, for whose fiction Stevenson had great admiration.

The result of the above rhetorical devices is a texture of prose in the Jacobite novels more densely referential and dialogic than appears at first glance. This is particularly evident in Stevenson's treatment of lawyers in Catriona. It is notable, first of all, that the honest and redoubtable Rankeillor is missing from the novel. There was ample opportunity to introduce him - on David's escape from the Bass Rock, for instance, in which he plays a part - so we

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48 See, for instance, Memoirs of Lord Salvesen, op cit, pp.146-9
may take his absence as deliberate decision by Stevenson, the reason for which we do not have far to look. In place of Rankeillor, scrupulous to a point, we have lawyers with a much more complex set of motives embedded in politics, clan bloodfeuds, personal ambitions and realpolitik: Stewart the Writer, deeply if reluctantly implicated in clan politics; the Lord Advocate, William Grant, Simon Lovat, and the self-serving advocates at the trial in Inveraray. Stevenson portrays the political heart of the legal establishment in mid-eighteenth century Scotland, and does so in the context of a case which was famous in its day for its political implications. Will the Crown adhere to strict rules of procedure and evidence, or will it bow to political pressure, from Argyll as well as London. Stewart the Writer is in no doubt- "This is not a case, ye see, it's a conspiracy" - and he is bitter at the injustices of the prosecution's actions: imprisonment of witnesses ("clean in the two eyes of the act of Parliament of 1700, anent wrongful imprisonment", (p.72)), and non-publication of the libel to the defence(p.74).

David performs a useful role here as the political naïf who, with vital evidence, throws himself upon the mercy of the Lord Advocate, and deepens that law officer's dilemma.51 That dilemma arises from a conflict between justice and politics. The case is thus not just one of criminal justice gone bad, but one where public justice is seen to be subservient to public policy and the demands of government. Prestongrange is frank about the conflict of interests he is faced with - 'patriotism is not always moral in the formal sense ... I regard in this matter my political duty first and my judicial duty only second.'(p.33) - and he reveals the doctrinal basis of his view:

'This is a political case - ah, yes, Mr Balfour! whether we like it or no, the case is political - and I tremble when I think what issues may depend from it. To a political case, I need scarce tell a young man of your education, we approach with very different thoughts from one which is criminal only. *Salus populi suprema lex* is a maxim susceptible of great abuse, but it has that force which we find elsewhere only in the laws of nature: I mean it has the force of necessity. '(p.32)

The arguments raised by Prestongrange here rest on the Ciceronian doctrine he quotes (*De Inventione*, I,ii,2; *De Legibus*, III, ii, 8). According to it, the public commonweal is the true historical legitimation of political authority. Cicero's argument was highly influential and regarded as authoritative by subsequent political, jurisprudential and historical commentators including John Mair, Boece, Suarez and Stair. Buchanan, for instance, declared that 'the people have the power to conferre the Government on whom they please'; Samuel Rutherford stated that government proceeded 'from God by mediation of the consent of a Communitie, which resignith their power to one or moe Rulers' and for the historian Robert Fleming, writing an anti-Jacobite tract in 1711, the 'Grand and Final end of all Government [is] the *Salus Populi* the good of the Community. So that God and Man agreed then, that this was

51 It is interesting to note that Stevenson portrays William Grant not as a Scottish minister, which is the role that Omond, writing his history of the office in the late nineteenth century, assigned to eighteenth century Lord Advocates (G.W. Omond, *The Lord Advocates of Scotland from the Close of the Fifteenth Century to the Passing of the Reform Bill*, Edinburgh, 1883). Rather, Stevenson shows us the uneasy position of Grant's office, caught between local politics and Hanoverian public policy, a position that accords with contemporary analyses - see *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh 1992), vol. 13, para 1269
Suprema Lex, the Fundamental Maxim of all Government'.

Prestongrange, therefore is merely one voice in a long political tradition; but the circumstances of the trial render his words ironic. Buchanan, after all, was criticising the Stewart state on account of its oppressive character. Prestongrange uses the doctrine to justify judicial injustice, and in his mouth the maxim speaks of a society whose fundamental legal rights are being abused for political ends. Furthermore, Prestongrange's appeal to necessitarian fatalism does not square with Cicero's vigorous civic activism. Rather, his appeal to 'the force of natural law' can be interpreted as the classic Whig claim to enjoy the favour of providential intervention, especially after the repeated failure of Jacobite invasions. Nor did this political argument lean only on classical precedent: legitimation was discovered in Biblical texts. Not for nothing in chapter 16 does Stevenson have the minister at the Inveraray assize comment on the apparent conflict of Romans 5 and 13, with the latter text traditionally one used to advocate religious and political conformism - 'the law itself must be regarded as a means of grace'.

Nor by any means had the relevance of the concept behind Cicero's maxim faded in the later nineteenth century. It is central to Stevenson's anti-imperialist writings on Samoa in A Footnote to History. It lies behind Inglis' address to the Juridical Society, and his vision of lawyers as guardians of constitutional freedoms. Lorimer, Stevenson's professor of Public Law at Edinburgh and to whose classes in natural law Stevenson paid particular attention, dwelt on the same doctrine:

No one attaches greater importance to opinion, or holds more firmly than I do to the maxim that all sovereignty, all real power, national and international, centres, necessarily and rightfully, in the general will. Deliberately expressed, and faithfully interpreted, the vox populi is, indeed, the vox Dei - it is the form in which the divine will expresses itself for the time being, with reference to passing events.

Lorimer, though, was well aware of the part interpretation played in determining the general will: 'though the general will cannot be resisted, it may be misinterpreted' as well as abused; and it is in comparing Lorimer's and Inglis' use of the doctrine with Prestongrange's that we can appreciate the real irony of the 'great abuse' of which Prestongrange speaks.

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52 George Buchanan, De Jure Regni Apud Scotos Dialogos (ed. and translated Philalethes [1], 1680, p.19, quoted in David Allan, Virtue, Learning and the Scottish Enlightenment: Ideas of Scholarship in Early Modern History, Edinburgh University Press, 1993, p.33; Samuel Rutherford, Lex Rex: The Law and the Prince London, 1644, p.5, quoted Allan op.cit, p.35; Robert Fleming, History of Hereditary-Right, London, 1711; both Rutherford and Fleming quoted in Allan, op.cit, p.35. Rutherford was cited by Lorimer in a list of commentators he lectured upon in the history of the law of nations - MS, Edinburgh University, Gen 101. Phillipson, op. cit., p.177, has also commented upon the 'interest of the Scottish enlightenment in a neo-Ciceronian concern with utilitas and the role of wisdom and virtue in shaping the civic mind and advancing the progress of liberty in a modern state'.

53 See De Officiis, I, 6, and Allan, op. cit, pp.82-5


55 James Lorimer, Studies National and International, op.cit, p.31. See also The Institutes of Law, op. cit., Book III, chapter IV - 'The Doctrine of the Necessary Sovereignty of the Rational Will of the Whole Community is in Accordance with the Common-sense of Mankind', pp.437-47. Lorimer focuses here on elaborations of the doctrine by Kant and Savigny.
Prestongrange's argument can also be set in the context of the Romantic historical jurisprudence Stevenson received from Lorimer. In his *Institutes of Law*, for instance, Lorimer rejected the jurisprudential distinction between perfect and imperfect obligations, 'of which the first are said to possess and the second to want, those inherent qualities which warrant the use of force to secure their fulfilment'.\(^{56}\) He emphasised instead the reciprocity and co-extension of rights and duties. David struggles with Prestongrange's sharp division between political and criminal cases, and his own allegiances, and discovers that, like Lorimer, he cannot draw 'an imaginary line which is supposed to mark off the sphere of ethics from that of jurisprudence'.\(^{57}\) David's purposefulness, his instrumentality, involves a moral choice: for him as for Lorimer and Stevenson, instrumental reason implies moral reason, and neither of these are divorced from political concerns. His predicament is a fine example of Savigny's doctrine of the origin of positivist law as being in the 'common consciousness of the people', the source equally of private and public law, 'for the generation of the state is, in a sense, the generation of the law'.\(^{58}\) Prestongrange's actions sin against David's concept of the law; for David seeks a solution which satisfies all the obligations within which he is latticed - those of friendship, law, political inclination, patriotic duty and self-preservation.

The irony with which Stevenson invests the character and argument of Prestongrange applies also to David. Critics have too often associated David's position with Stevenson's. David's choice is taken by commentators as a product of Stevenson's own conservative politics, and his refusal to question Scotland's place in the Union, or to answer the real issues of public policy which the trial of James Stewart raised.\(^{59}\) This equation is too simple, too univocal and ignores the dialogic and ironical distance between David and Stevenson. As Stevenson pointed out,

> till the day he died, Davie was never sure of what P. [Prestongrange] was after. ... But Davie cannot know; I give you the inside of Davie, and my method condemns me to give only the outside both of Prestongrange and his policy.\(^{60}\)

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\(^{56}\) *Op.cit*, p.282  
\(^{58}\) *Institutes of Law, op.cit.*, p.440  
\(^{59}\) As a Tory Stevenson supported the Union, but this support was lukewarm at best. I agree with J.C Furnas that Stevenson's Unionism was 'dabbling in contrast to the deeper commitments of his South Sea years', and probably influenced by W.E. Henley's unionist and imperialist politics. See 'Stevenson and Exile', in *Stevenson and Victorian Scotland*, ed Jenni Calder (EUP, 1981), p.138. Stevenson became highly critical of British jingoism, as of imperialism generally - see, for example, 'Protest on behalf of Boer Independence' - (Vailima Edition, vol 24, p.241), a letter to the press supporting the Transvaal rebellion of Paul Kruger.

It is interesting to note that while on holiday in the Highlands in 1880 Stevenson mentioned to Principal Tulloch his intention to write a history of the Union - see *Mother's Diary, op.cit*, p.336. Emma Letley points out that Stevenson planned to write on the murder of Colin Campbell as part of his application for the post of Professor of History and Constitutional Law at Edinburgh University. See also Richard Lodge, 'A Candidate for the Chair of History at Edinburgh University in 1881', *History in Scottish Universities*, vol. 4, (1930-1), p.101  
The inside of Davie is, after all that happens, a Whig laird loyal to the Hanoverian succession - it was by no means the inside of Stevenson, who was an equivocal Tory at best. David discovers that the politics of the law are deeply problematic: criminal justice, protected by the articles of the Union, is compromised by the necessity for private revenge and public example. Stevenson gives us David's dilemma without a solution in the realm of public policy. Instead, he manoeuvres the narrative subtly between Prestongrange's policy and David's dilemma so that the first part of the novel ends in stalemated failure. At the end of the day David gives no evidence. The first half of the novel, which has been leading up to his testimony, peters away in anti-climax. He remains frustrated in his aim, listening to the trial verdict from the justices' private room (p.148), that private room a parallel to his more spacious imprisonment on the Bass Rock and a precursor of the tenement room in Leyden where the whole of his legal studies shrinks to a single volume of Heineccius, to be flung on the fire. As a result of the trial, David loses faith in the efficacy of public life, and resolves to retreat to his own private enclave:

But I had had my view of that detestable business they call politics ... and I was cured for life of any temptations to take part in it again. A plain, quiet, private path was that which I was ambitious to walk in, when I might keep my head out of the way of dangers, and my conscience out of the road of temptation.

IV Law and the kailyard lockup

Douglas Gifford suggests that 'the first part of Catriona ends with what I read as a crucial abdication on Stevenson's part from involvement in "the condition of Scotland"'. David's analysis, it is true, rarely goes beyond defending his own position, caught between his Whig patrons and the self-serving advocates who are to represent his conscience at the trial. The political analysis is local and remains at the microcosmic level; the novel does not consider macrocosmic constitutional politics at any length. There are at least two reasons for why this is the case. First, Stevenson was uninterested in extended political analyses and he disliked the obvious fictional candidate for legal and political debate, the so-called 'condition of England' novel (represented, for instance, by Disraeli's novels). He was repelled by the realist novel, with its depiction of the dissolution of civil society, as in Zola, and its panoptic and densely figured plots. Instead, he created from the constraints of a children's genre a metonymic style of narrative, one just as allusive as Inglis' address, and as historically rooted as Lorimer's lectures, but one which was highly dialogic and presented a sophisticated debate regarding the function of law and lawyers in Scottish history and society.

Secondly, Stevenson is writing about the condition of law in Scotland. David's failure and James' death is not the result of political expediency alone, but also of the political will of those lawyers who operate the judicial system. Stevenson's ironical portrayal of the Lord Advocate's role in the affair as well as of the self-serving lawyers in Inveraray functions as a critique of the progressive Whig interpretation of history presented by Prestongrange.

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61 'Stevenson and Scottish Fiction', in Stevenson and Victorian Scotland, op.cit, p.67
62 Prestongrange's interpretation follows that of his political masters. Ernst Mayer, quoting H. Butterfield, points to the origin of the phrase 'Whig interpretation of history' and incidentally describes how Prestongrange views the '45 and its consequences -

'The expression 'whig interpretation of history' was proposed by the historian H. Butterfield to characterize the habit of some English constitutional historians of seeing
compare the novel to Inglis' address and Lorimer's lectures, we can discern its interest as a critique of legal values. Stevenson's novel presents an entirely different view of lawyers from that given in Inglis' address. Where Inglis portrays lawyers as the guardians of public and private right, in Catriona, the lawyers subvert and manipulate constitutional rights for their own political and personal ends. In Catriona the fiction's truly dialogic qualities arise from the nature of the relationship between criminal law and politics, between the Ciceronian values of ius and virtù, so much a part of Scottish Enlightenment discourse. Where Inglis traces these values through history and asserts their presence as a positive influence on the later nineteenth century legal establishment, they are revealed as deeply problematic in Catriona. Stevenson thus takes a much more pessimistic view of the role of lawyers in the post-Union settlement.

Some modern commentators have begun to analyse the role lawyers played in the later nineteenth century in terms similar to Stevenson. Harvie has described the late nineteenth century profession as retreating into 'legalism' and away from national and constitutional concerns at a time when these were becoming increasing important in other European jurisdictions. David McCrone has observed that as far as local politics were concerned, late nineteenth century Edinburgh provides an example where 'the lawyers and professional men withdrew from local political affairs, leaving the town council to be run by small landlords and shopkeepers'.

But if Inglis, Lorimer and Stevenson are divided in their analyses, all of them are agreed on the centrality of politics to law and its historical process. Their variety of texts are no kailyard lockups for Scottish history or politics. They are coherent and eloquent pleas for the historical relationship between politics and law in Scotland to be taken seriously.

their subject as a progressive broadening of human rights, in which good 'forward-looking' liberals were continuously struggling with the backward-looking conservatives' Ernst Mayer, 'When is Historiography Whiggish?', Journal of the History of Ideas, 51 (1990), p.301, quoting H. Butterfield, the Whig Interpretation of History, London, 1931. We could compare such 'progressive broadening of human rights' to the mocking irony of the description of the advocates at the Inveraray trial:

The Writer was led into some hot expressions; Colstoun must take him up and set him right; the rest joined in on different sides, but all pretty noisy; the Duke of Argyle was beaten like a blanket; King George came in for a few digs in the by-going and a great deal of rather elaborate defence

63 Cencrastus, op.cit, pp.39-40. Harvie's interpretation presents an interesting contrast to that of J.W. Cairns in his account of the Faculty of Advocates in the Stair Memorial Encyclopaedia, op.cit, vol.13, paras 1269-84.