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Penny Fielding
University of Edinburgh

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**BORDER POLICE: SCOTT'S MINSTRELSY OF THE
SCOTTISH BORDER, THE LAW, AND THE 1790s**

Penny Fielding

In the late 1790s both Walter Scott and William Wordsworth were employed on their first major works—both of them literary explorations of the Scottish and English border regions. Wordsworth's verse drama, *The Borderers*, was written in 1796-97 during the period when Scott was gathering material for the *Minstrelsy of the Scottish Border* and his 1805 narrative poem *The Lay of the Last Minstrel*. Later in life, Wordsworth would remember an exchange he had had with Scott about the material they had both looked at for their research:

As to the scene & period of action little more was required for my purpose than the absence of established Law & Government--so that the Agents might be at liberty to act on their own impulses. Nevertheless I do remember that, having a wish to colour the manners in some degree from local history more than my knowledge enabled me to do, I read Redpath's history of the Borders but found there nothing to my purpose. I once made an observation to Sir Walter Scott in which he concurred that it was difficult to conceive how so dull a book could be written on such a subject.¹

Perhaps Wordsworth, dictating this note on *The Borderers* to his friend Isabella Fenwick nearly half a century later, did not have a very precise recall of this conversation. Or perhaps Scott was simply being polite in the company of a fellow author, for it is quite difficult to reconcile a Scott who forces himself through a "dull" reading of George Ridpath's *Border-history of England and Scotland* (which was published posthumously in 1776) with the author of the carefully-researched historical notes and introduction to the *Minstrelsy of the Scottish Border*. Scott in fact had read not only Ridpath, but also Bishop William Nicolson's 1705 collection of treaties, the *Leges Marchiarum, or Border-laws*, together with a host of statutes, Acts of

¹ William Wordsworth, *The Borderers*, ed. Robert Osborn (Ithaca and London: Cornell University Press, 1982), 814.

Parliament, and many other state papers to garner the extensive legal information in his Borders writing. Scott's interest in the historical letter of the law was intense, and in this essay I want to think about the *Minstrelsy of the Scottish Border* in terms of its editor's interest in the state of the law and the law's functions in the Borders region. In the first part, I look at the relations of law and history in general terms, and then in the second part I go on to think more specifically about connections between the policing of the Early Modern Borders and the more recent history of the region at the time when Scott was working on the *Minstrelsy*. I will argue that Scott pulls each end of this historical narrative towards the other to establish an uneasy temporality in which neither the Early Modern past nor the (supposedly) Enlightenment present offer a single framework for interpreting the law. We will see how the "primitive," lawless border country of the earlier period takes on a surprisingly modern legislative character, while, in turn, the *Minstrelsy's* Early Modern historical context reflects the violent challenges of the 1790s back onto the seemingly "civilized" modern region of its publication.

Regulating the Early Modern Border

Scott's careful research into the legal history of the Scottish Borders prompts us to look again at some existing suppositions about his early work. It has become quite common now to think of the entirety of the Borders, not solely the particular district on the Western March to which the term originally referred, as a "Debateable Land" with no fixed identity.² It is certainly seductive to imagine Scott's Borders as a wild and lawless place of cross-border reiving and internecine quarrels in which violent and primitive passions held sway. But the mirroring of the political world in the psychological is more evident in Wordsworth's Borders than it is in Scott's literary region. It is Wordsworth who wanted to portray a space in which the absence of "established Law & Government" allowed the pure, primitive "impulses" of his characters to emerge.³ Scott, by contrast, was very interested indeed in established law and government, and the ways in which the Borders were controlled and policed. The Debateable Land was, we should remember, officially *debated*: its reputation for lawlessness did not

² For uses of the term, see Claire Lamont and Michael Rossington, "Introduction," in *Romanticism's Debateable Lands*, ed. Claire Lamont and Michael Rossington (Basingstoke: Palgrave Macmillan, 2007), 1-4. The Border region was legally delineated by three Marches, mirroring each other on each side.

³ Despite Wordsworth's stated intention, we can also read *The Borderers* as a work of its time: see Victoria Myers, "Justice and Indeterminacy: Wordsworth's *The Borderers* and the Trials of the 1790s," *Studies in Romanticism*, 40/3 (2001): 427-457.

depend upon the absence of laws, but on the way those laws were established, imposed, broken and contended. Scott reminds us of this legal framework when he refers us, in his introduction to the *Minstrelsy*, to the Royal Commission, jointly appointed by the English and Scottish monarchies, that was convened to draw up the border on the map. His introduction as a whole is scattered with references to the statutory governance of the Borders, as well as to the fates of those who broke the laws. Here is a typical example that describes the actions in 1561 of the Earl of Moray (later to feature as a character in the novels *The Monastery* and *The Abbot* of 1820) after the return of Mary Stuart to Scotland:

Upon the arrival of the ill-fated Mary in her native country, she found the borders in a state of great disorder. The exertions of her natural brother (afterwards the famous regent, Murray) were necessary to restore some degree of tranquillity. He marched to Jedburgh, executed twenty or thirty of the transgressors, burned many houses, and brought a number of prisoners to Edinburgh. The chieftains of the principal clans were also obliged to grant pledges for their future obedience. A noted convention (for the particulars of which, see *Border Laws*, p. 84) adopted various regulations, which were attended with great advantage to the marches.⁴

Here, Scott is so intimately familiar with the legal history of the Borders that he simply refers the reader to the relevant pages of the *Leges Marchiarum*, a copy of which he has to hand (his own copy remains in the Abbotsford Library). But his point is that order was restored to a troublesome region through legal means—not only by the violent retribution and executions he describes at the local judicial centre of Jedburgh, but also by force of a convention and thus compelled by written regulations.

Scott, himself a lawyer, is fascinated by precise legal details, and he continually provides examples not only of Border Laws in general but also of the written documents in which they can be found. In a typical move, he announces that “It is unnecessary to mention the superstitious belief in witchcraft, which gave rise to so much cruelty and persecution during the seventeenth century.” Yet it is not apparently completely unnecessary to mention the subject, as Scott cannot resist following up this remark with the detail that witchcraft was tried “not by the ordinary judges, but by a set of country gentlemen, acting under commission from the privy council” (1: xcvi) (adding a footnote telling us that he has seen a written record of such arrangements). Disorder existed on the border, of course, but Scott insists that local forms of restraining it were highly legally determined and documented. He writes: “By the same statutes [i.e. those of 1587 and 1594], the chieftains and landlords, presiding over border clans, were obliged to

⁴ *Minstrelsy of the Scottish Border*, 3rd edition, 3 vols. (Edinburgh: James Ballantyne, 1806), 1: xxxiv-v. Further references appear in the text.

find caution, and to grant hostages, that they would subject themselves to the due course of law" (1: lxxii).

Scott's fascination with the legal and juridical nature of the Borders asks us to reconsider his own repeated claim that their character in the pre-Union period was vastly different from their modern nature, and that, in the famous ending to the *Minstrelsy's* introduction, he seeks to preserve the antiquarian remains of his native region before these are entirely subsumed into modern Britain. Here we should not perhaps take Scott completely at face value. At least in terms of the law, the character of Borders society documented in the *Minstrelsy* is not simply a straightforward opposition between a politically homogenised modern state and a primitive, loosely regionalised country.

In fact, Scott's sense of the Borders' historical position seems to move between two different concepts of law. First is a stadial model that sees law itself as a concept that emerges through the gradual modernisation of society. Not all regions have laws; they are a product of historical progress. Scott explains this movement by asserting that the "barbarous" borderers are a primitive pre-Enlightenment people, governed by whim and superstition, and unable to form social contracts among themselves:

But the virtues of a barbarous people, being founded not upon moral principle, but upon the dreams of superstition, or the capricious dictates of antient custom, can seldom be uniformly relied on. We must not, therefore, be surprised to find these very men, so true to their word in general, using, upon other occasions, various resources of cunning and chicanery, against which the border laws were in vain directed (1: lxxi).

According to this model, law is an abstract principle that comes with civilization. The historical narrative argues that the Borderers lead lives prompted by impulsive revenge, blood feuds and pillage—characteristics that are to be found in Scott's historicist definition of "law." Yet, at the same time, Scott is drawn to another idea, made popular in the eighteenth century through the influence of Montesquieu. This is the idea that "law" is a structural foundation of *any* society, rather than something acquired during progressive history. In fact, it is a way of understanding society itself. According to Montesquieu, laws develop according to the local conditions and physical environments that they seek to govern. They are thus primarily geographically contingent rather than a product of temporal change. David Hume, though sceptical about Montesquieu's strict geographical determinism, concedes that "the laws have, or ought to have, a constant reference to the constitution of governments, the climate, the religion, the commerce, the situation of each society."⁵ That is to say, *all* parts of the

⁵David Hume, *An Enquiry Concerning the Principles of Morals*, ed. Tom L. Beauchamp (Oxford: Clarendon Press, 1998), 22.

globe have laws and we should understand them relatively rather than incrementally.

In this form of legal progress, the apparently antique Borderers are strikingly modern. Their laws and government have developed regionally and stem from the difficulty landowners confront in controlling production from their land. Scott argues that the Borders, particularly on the Scottish side, could not sustain a classic model of feudalism. Instead of feudal obligations based on land, where a peasant class is bound to a landowner, clan members would be contracted to the chief of another family through “bonds of manrent.” Such bonds were highly innovative in the organisation of flexible hierarchies across social groupings. The contract has been described as “a Scottish device, designed to solve a problem that existed in every state in Western and Central Europe in the later Middle Ages—that of how to provide a mutually satisfactory relationship between greater and lesser landowners when the classical ‘feudal’ bargain of land in return for specific obligations had outlived its usefulness.”⁶ The bond, a written document, was an agreement between clan chiefs in which a less powerful landowner would agree to assist a superior chieftain as required or when summoned. The expression of fealty usually took the form of the subordinate chief advising the recipient of the bond in his affairs, or lending followers to ride with him in his “quarrels.”

Scott’s analysis of this legal model (his account is characteristically scattered with specific examples of the way practice was enshrined in written law) is explicit about its sophistication in the face of more typically feudal models:

The immediate rulers of the borders were the chiefs of the different clans, who exercised over their respective septs a dominion, partly patriarchal, and partly feudal. The latter bond of adherence was, however, the more slender; for, in the acts regulating the borders, we find repeated mention of “Clannes having captaines and chieftaines, whom on they depend, oft-times against the willes of their landeslordes.”—*Stat. 1587, c. 95, and the Roll thereto annexed*. Of course, these laws looked less to the feudal superior, than to the chieftain of the name, for the restraint of the disorderly tribes; and it is repeatedly enacted, that the head of the clan should be first called upon to deliver those of his sept, who should commit any trespass, and that, on his failure to do so, he should be liable to the injured party in full redress. *Ibidem*, and *Stat. 1594, c. 231 (1: lxxi-ii)*.

The jurisdiction of the Borders of the *Minstrelsy*, then, is quite a complex affair. On the one hand it is a seemingly primitive, extra-legal system based on blood-feuds and resistant to any form of central national authority: “the

⁶ Maurice Lee Jr, review of Jenny Wormald, *Lords and Men in Scotland: Bonds of Manrent, 1442-1603*, *American Historical Review* 92/2 (1987): 402-03 (402).

men of the borders had little attachment to the monarchs, whom they termed, in derision, the kings of Fife and Lothian” (1: lxii-iii). But in another way of looking at this historical phenomenon, Scott is describing a much more modern balance between limited monarchical powers, a state legislature, and contractual agreements between members of the clans and their septs. A 1542 bond of manrent, reproduced by Scott, privileges the loyalty of one clan to another but makes exception for allegiance to the monarch—border laws are distinct but not separate from central national legislation. The Borders had a particular, local set of laws, but the Wardens who enforced them were appointments of the crown. We are used to foregrounding the violent rejection of a centralised role by the Border clans, but another way of thinking about this is as a delicate balancing act. Many of the characters who appear in the ballads are outlaws or “broken men,” but other ballads, such as “The Raid of the Reidswire,” focus on the Border Wardens and their efforts to keep the peace. Looked at in this way, the Borders of the *Minstrelsy* represent a surprisingly modern, secular civic society with a sophisticated legal system, within which sudden bursts of violence, superstition and lawlessness could erupt at any moment.

These Borders, in which antagonism to a central monarchy and challenges to the law are contained by laws that closely address their times and circumstances, have a bearing on the period of the *Minstrelsy*’s creation. The picture of the Borders of the *Minstrelsy* as a highly regulated and surprisingly modern region asks us to consider both the relevance of Scott’s portrait of the district as a historical stage, and his own role as an advocate, and from 1799 Sheriff of Selkirkshire, in the present. How, then, did Scott’s interest in the juridical history of the region express itself in relation to its modern counterpart?

Policing the Border in the 1790s

At first glance, the two periods would seem to have little in common. Scott famously ends his introduction to the *Minstrelsy* with a gesture towards his native country as a newly modern nation casting off its ancient ways, one “whose manners and character are daily melting and dissolving in those of her sister and ally” (I: cxxxi). In *The Lay of the Last Minstrel*, originally intended for the imitations section of the *Minstrelsy*, Scott explicitly distances his violent Borders from their modern condition and paints the countryside as peaceful and pastoral—the bugle of the moss-trooper is replaced by the shepherd’s pipe:

Sweet Teviot! on thy silver tide
 The glaring bale-fires blaze no more;
 No longer steel-clad warriors ride
 Along thy wild and willow’d shore;
 Where’er thou wind’st, by dale or hill,

All, all is peaceful, all is still,
 As if thy waves, since Time was born,
 Since first they roll'd upon the Tweed,
 Had only heard the shepherd's reed,
 Nor started at the bugle-horn.⁷

Scott clearly wants to distance his readers from the earlier period, and it is important to recognise the disjunctions between fifteenth- and sixteenth-century ballads and an early nineteenth-century literary market. Richard Cronin rightly emphasises the historical and economic distance between the readers of the *Minstrelsy* and the characters about whom they were reading: “In publishing *Minstrelsy of the Scottish Border*, Scott circulated within an economy powered by surplus capital and founded on trade, a collection of ballads which celebrated the exploits of those living within a subsistence economy founded on theft.”⁸ But, as I have outlined in the first part of this essay, Scott’s framing of the ballads preserves a complex interaction between the medieval and early modern past of the ballad world, and the self-conscious modernity of print capitalism. In this part of my argument, I would like to think about some ways in which the *Minstrelsy*, whose material was assembled throughout the 1790s, may speak to the concerns of that decade (and in particular, we might note how what Cronin calls an “economy founded on theft” raises some interesting echoes in Scott’s own political climate.)

In an important reading of the work, Susan Oliver identifies the *Minstrelsy of the Scottish Border* as an engagement with the political climate of the 1790s:

An increase in the visibility of dispossession and poverty was a feature of the substantial migration of the displaced and unemployed rural poor towards the cities. [...] The discontent of the poor in urban Scotland, accompanied by the rise of the Corresponding Societies and networks of radical activity, thus became all the more frightening to those of the middling and aristocratic sectors of society in the wake of the mobilization of the *sansculottes* in France. These fears are recognized by Scott, and are confronted within the

⁷ *The Poetical Works of Sir Walter Scott*, ed. J. Logie Robertson (London: Oxford University Press, 1908), 21. For *The Lay of the Last Minstrel* in relation to the politics of the 1790s see Penny Fielding, “Black Books: Circulation, Sedition and *The Lay of the Last Minstrel*,” *ELH* 81/1 (2014): 197-223.

⁸ Richard Cronin, *The Politics of Romantic Poetry: In Search of the Pure Commonwealth* (Basingstoke: Macmillan, 2000), 95. See also Anthony Jarrells’ account of the ways in which Scottish Enlightenment historians, and Scott himself, “theorized the modern world they wished to enter by displacing the violence that accompanied it into the dark ages of the past.” Anthony Jarrells, *Britain’s Bloodless Revolutions: 1688 and the Romantic Reform of Literature* (Basingstoke: Palgrave Macmillan, 2005), 155.

Minstrelsy from the safety and displacement of a historicized and contrastingly rural domain. The examples he posits, in the form of the ballads and their surrounding notes, evoke a period when clan loyalty and the unqualified acceptance of rank within feudal social structures prevailed.⁹

Oliver argues that, by comparison with the revolutionary ideas and political instability of the present, Scott's depiction of the Borders in the *Minstrelsy* is a retreat into a more secure social order of feudal certainties. I want to build on Oliver's insights and to add a further layer to her reading of the relation of the *Minstrelsy* to its period by offering a brief survey of some different ways in which Scott introduces historical parallels, or at least encounters, into the work. As we have already seen, Scott does not maintain a strict opposition between an ancient feudalism and a modern political economy, and we can add to this the idea that the policing of the border was a matter of considerable importance for him in both periods. The relationship between the *Minstrelsy*'s own time and the history it relates is bi-directional. By publishing the work, Scott does, as Oliver argues, confine its political turbulence to the past, but, at the same time, to publish just after the end of the 1790s also calls attention to those radical forces as an urgent question for the region both in the past and in the present.

Much of the text-collecting and the research for the *Minstrelsy* was carried out during the 1790s, so Scott was thinking about his ballad project during that radical, revolutionary decade. He does not say a great deal about it directly, and when he does so, his views, as might be expected, are implacably opposed to any radical cause. He attended the trials in Edinburgh of David Downie and Robert Watt in 1794 for high treason, and concluded that the proceedings "displayd to the public the most atrocious & deliberate plan of villany which has occurrd perhaps in the annals of G. Britain."¹⁰ Yet his poetry, collected, edited and composed during the 1790s and early years of the nineteenth century, has much more complex things to say about the political forces of his time.

First, the *Minstrelsy* can be seen to respond in general terms to its recent political contexts. Historians have noted the way in which Scottish radicals of the 1790s preserved memories of the seventeenth-century covenanting tradition and drew them into a new political discourse.¹¹ We need to make some careful discriminations here. As John Brims points out, organised bodies such as the Scottish Friends of the People were cautious about

⁹ Susan Oliver, *Scott, Byron and the Poetics of Cultural Encounter* (Basingstoke: Palgrave Macmillan, 2005), 26.

¹⁰ Letter to Christine Rutherford, *The Letters of Sir Walter Scott*, ed. H. J. C. Grierson, 12 vols. (London: Constable, 1932-37), 1: 34.

¹¹ See, for example, Liam McIlvanney, *Burns the Radical: Poetry and Politics in Late Eighteenth-Century Scotland* (East Linton: Tuckwell Press, 2002), 15-37.

“appealing to the example of a body of men who had rebelled against their kind and established a revolutionary government.”¹² From the point of view of government authority, however, all forms of political protest were liable to be couched in the composite terms of revolutionary violence. Henry Cockburn, looking back on the period, comments: “Jacobinism was a term denoting every thing alarming and hateful, and every political objector was a Jacobin. No innovation, whether practical or speculative, consequently no political or economical reformer, and no religious dissenter, from the Irish Papist to our own native Protestant Seceder, could escape from this fatal word.”¹³ Distinctions could be dissolved in a general climate of political anxiety following the French Revolution.

On a rhetorical level, we can see how connections emerge between the sixteenth- and seventeenth-century context and the revolutionary decade that culminated with the publication of the *Minstrelsy of the Scottish Border*. Scott classifies his texts, and it is interesting that he should choose as a subset of ballads in his “Historical Ballads” section examples of the seventeenth-century Covenanting ballads. His introduction to this section (added to the 1806 edition of the *Minstrelsy*) deals with the spread of religious violence, and in places reads very like a Burkean account of the French Revolution. On this view, an honest impulse for reform among the people is overtaken by a monstrous and corrupt “enemy,” the reforming clergy, who misuse their education to sever the ancient bonds of unspoken tradition that tie the people to the monarchy, and insidiously spread Republican ideas:

That the Reformation was a good and a glorious work, few will be such slavish bigots as to deny. But the enemy came, by night, and sowed tares among the wheat; or rather; the foul and rank soil, upon which the seed was thrown, pushed forth, together with the rising crop, a plentiful proportion of pestilential weeds. The morals of the reformed clergy were severe; their learning was usually respectable, sometimes profound; and their eloquence, though often coarse, was vehement, animated, and popular. But they never could forget, that their rise had been achieved by the degradation, if not the fall, of the crown; and hence, a body of men, who, in most countries, have been attached to monarchy, were in Scotland, for nearly two centuries, sometimes the avowed enemies, always the ambitious rivals, of their

¹² John Brims, “The Covenanting Tradition and Scottish Radicalism in the 1790s,” in *Covenant, Charter, and Party: Traditions of Revolt and Protest in Modern Scottish History* (Aberdeen: Aberdeen University Press, 1989), 50-62. See also Gordon Pentland, “The French Revolution, Scottish Radicalism and ‘The People who were called Jacobins’,” in *Reactions to Revolutions: The 1790s and their Aftermath*. ed. U. Brioch, H. T. Dickinson, E. Hellmuth and M Schmidt (Berlin: LIT Verlag, 2007), 85-108.

¹³ Henry Cockburn, *Memorials of his Time* (Edinburgh: Adam and Charles Black, 1856), 80.

prince. The disciples of Calvin could scarcely avoid a tendency to democracy, and the republican form of church government was sometimes hinted at, as no unfit model for the state (2: 3-4).

The *Minstrelsy* is a text that responds to the 1790s in other, more graphic ways. As Ian Haywood has shown, magazine and newspaper readers of the 1790s were treated to a continual feed of spectacular violence associated with the French Revolution.¹⁴ It is well known that this imagery finds its way into the Gothic novel, but Scott maintained throughout his literary career an interest in the force of violence as social and political spectacle. We might think of the severed hands of the Covenanters carried through the streets of Edinburgh with “the palms displayed as in the attitude of exhortation or prayer” in *The Tale of Old Mortality* (1816)¹⁵ or the Children of the Mist’s theatrical ways with disembodied heads in *A Legend of Montrose* (1819). As Ann Rowland points out, tales of fratricide, infanticide and family violence “were standard fare in ballad revival collections,”¹⁶ but Scott’s introduction to the *Minstrelsy* also dwells on graphic depictions of violence as *political* spectacle—scenes that would not be out of place in the Place de la Révolution. Here Scott paints a grotesquely violent canvas as he describes the re-taking of Fairmihirst Castle (he is quoting from the account of Jean de Beaugé, a French officer serving in Scotland):

Above a hundred Scots rushed to wash their hands in the blood of their oppressor, bandied about the severed head, and expressed their joy in such shouts, as if they had stormed the city of London. The prisoners, who fell into their merciless hands, were put to death, after their eyes had been torn out; the victors contending who should display the greatest address in severing their legs and arms, before inflicting a mortal wound. When their own prisoners were slain, the Scottish, with an unextinguishable thirst for blood, purchased those of the French; parting willingly with their very arms, in exchange for an English captive. “I myself,” says Beaugué, with military sang-froid, “I myself sold them a prisoner for a small horse. They laid him down upon the ground, galloped over him with their lances in rest, and wounded him as they passed. When slain, they cut his body in pieces, and bore the mangled gobbets, in triumph, on the points of their spears [...]” (1: xxx-xxx1)

Taken as a whole, the *Minstrelsy* situates itself between the causal sequence of stadial history and the more random accumulation of objects

¹⁴ Ian Haywood, *Bloody Romanticism: Spectacular Violence and the Politics of Representation, 1776-1832* (Basingstoke: Palgrave Macmillan, 2006).

¹⁵ *The Tale of Old Mortality*, ed. Douglas Mack (Edinburgh: Edinburgh University Press, 1993), 275.

¹⁶ Ann Weirda Rowland, “The False Nourice Sang,” in *Scotland and the Borders of Romanticism*, ed. Leith Davies, Ian Duncan and Janet Sorenson (Cambridge: Cambridge University Press, 2004), 225-44 (226).

that we associate with antiquarianism. The introduction traces forms of Enlightenment progress from primitive to civilized societies. But the antiquarian approach to the ballads allows Scott to draw in a fairly heterogeneous range of ideas and examples without having to pull them together into a clear historical narrative. Between these two forms of historicism, as we have seen, historical doublings and echoes can creep in. One of Scott's most prevailing interests throughout the *Minstrelsy* is the law of property and challenges to it. The introduction's repeated interest in the way different societies have different relations to property and to "theft" reminds us of the conversation in *Waverley* between Edward Waverley and Evan Dhu Maccombich, when the Englishman is unable quite to grasp Evan Dhu's outrage that a Scotsman engaged in the practice of "lifting" a herd of cattle might be called a "common thief."¹⁷

If the *Waverley* encounter between Edward and Evan Dhu is an example of uneven development, where two systems from different parts of the stadial structure meet in the same location, then the *Minstrelsy* contains a form of historical dislocation where the different periods produce the same debates. The question of theft is here also a contested one. Scott tends to locate the ballads in a period in which property laws differed from their modern counterparts, or in places where local forms of property rights applied. He writes of the Borderers:

Their morality was of a singular kind. The rapine, by which they subsisted, they accounted lawful and honourable. Ever liable to lose their whole substance, by an incursion of the English, on a sudden breach of truce, they cared little to waste their time in cultivating crops, to be reaped by their foes. Their cattle was, therefore, their chief property; and these were nightly exposed to the southern borderers, as rapacious and active as themselves. Hence, robbery assumed the appearance of fair reprisal (1: lvii-iii).

In the notes to the ballad "The Lochmaben Harper," Scott expands on a particular historical context to convey this linguistic fluidity in the matter of what one might call theft. In this case the subject is land. Although the ballad itself is about the theft of a horse, Scott contextualises it more generally; he describes in detail the practices of "an extraordinary and anomalous class of landed proprietors, who dwell in the neighbourhood of that burgh." This is the medieval class of "kindly tenants," who benefited from traditional but unwritten rights of tenure and low annual rents (such tenancies, Scott observes, survived longer in Lochmaben than in the rest of Scotland.) In the headnote to the same ballad Scott quotes a grant of land awarded to the

¹⁷ Walter Scott, *Waverley*, ed. Peter Garside (Edinburgh: Edinburgh University Press, 2008), 91.

captain of Lochmaben Castle: “Among others, the ‘land, stolen frae the king’ is bestowed upon the captain, as his proper lands.—What shall we say of a country, where the very ground was the subject of theft?” (1: 131).

Precisely what Scott wants us to say of such a country is not clear, as the note ends at that point, but the topic of ground as a “subject of theft” was highly politically-charged in the 1790s. Radical thinkers including Thomas Paine and John Thelwall were asserting that property in the form of land might be acquired through labour as well as through hereditary rights, and agrarian reformers such as Thomas Spence even argued for the redistribution of land.¹⁸ What in Scott’s note is a semi-joke—how can you steal something non-portable like the ground?—had a much more serious and radical resonance at the time of the *Minstrelsy*’s publication. The “kindly tenants” offer an example of the way the feudal/modern opposition breaks down on the border. In the ballad “The Outlaw Murray” they figure again in what Scott calls “a confusion of rights and claims” that compromises the authority of the monarchy by reducing it “to the humiliating necessity of compromising such matters” (1: 81). I am not suggesting a strict political allegory with the 1790s here, but rather pointing to the way in which the modernity of the ancient Borders introduces problems that were much debated in a decade that was itself characterised by a “confusion of rights and claims.” Scott evokes these matters as questions rather than articulating them as theories. In such a context, remarks such as Scott’s observation that the borderers believe that “property was common to all who stood in want of it” (1: lxvi) may take on unintended contemporaneous resonances.

Susan Oliver rightly points out that Scott seems to be constructing a “safe” version of lawlessness, in which the apparently unruly behaviours of the Borderers is contained within strict “codes of kin loyalty and communal custom.” The Lochmaben harper’s ingenious theft of a horse is, after all, only made possible through his own bardic status *as* a harper, the literary representative of his day, and his appropriation of the property of the Warden of the English Western March is safely confined in its antiquarian cultural context. But it is that very antiquarian apparatus that opens up the questions of the arbitrary nature of the law, and of challenges to “natural” property rights. In a sense, Scott is participating in a very modern recognition that law is contingent, not natural. One did not have to be a radical to recognise, with

¹⁸ See Thomas A. Horne, *Property Rights and Poverty: Political Argument in Britain, 1605-1834* (Chapel Hill, NC: University of North Carolina Press, 1990), 201-51. For Scott and the law of property, see Wolfram Schmidgen, “Picturing Property: *Waverley* and the Common Law,” *Studies in the Novel*, 29/2 (1997): 191-213.

staunch anti-Jacobin Henry Mackenzie, that “the idea of property made a crime of theft”¹⁹ and that crime itself is historically circumstantial.

In his opening up the idea of crime as relative and contingent, Scott quotes from his ancestor Walter Scott of Satchells’ seventeenth-century metrical *History of the Name of Scott*. Scott of Satchells is defending the Armstrong clan from the charge of theft:

On that border was the Armstrongs, able men;
Somewhat unruly, and very ill to tame.
I would have none think that I call them thieves,
For, if I did, it would be arrant lies. (I: lix)

This poem also contains some reflections, again quoted by Scott, on the social identity of a “freebooter”:

Near a border frontier, in the time of war,
There’s ne’er a man but he’s a freebooter.

— — — — —
Because to all men it may appear,
The freebooter he is a volunteer;
In the muster rolls he has no desire to stay;
He lives by purchase, he gets no pay (I: lx).

The Borderers’ livelihood is here described in military terms. A freebooter, or privateer, may seem to be like a volunteer, a usage that, in this period, implies both someone not conscripted into an army, and a soldier who fights without regular pay. The Borderers’ booty, or “purchase,” is associated with the plunder of armies. The term “volunteer” is then ironized—the border freebooter’s activities are a little too voluntary to fit into an army.

Here again Scott’s invocation of the military politics of the earlier period takes on a contemporary relevance and the question of what a “volunteer” might be had some very specific resonances in the Borders in the 1790s. The area around the towns of Selkirk and Jedburgh saw the first outbreak of violent protests against the Scottish Militia Act in 1797, a measure that imposed on Scotland a compulsory ballot for conscription for the war with France. The Act was unpopular for a number of reasons, but one was the fact that it disrupted the long-standing tradition of voluntary militias. A republican tradition, now most closely associated with Adam Ferguson, had argued that volunteer militias would strengthen the social bonds of a civic society.²⁰ By keeping militias local, natural bonds of kinship and sympathy could thereby strengthen the defence of a society in which soldiers were

¹⁹ *The Lounger* 20 (June 18, 1785) 78.

²⁰ For debates about the militia question, see Richard B. Sher, “Adam Ferguson, Adam Smith, and the Problem of National Defence,” *Journal of Modern History* 61/2 (1989): 240–68. The elderly Adam Ferguson, living in the Borders town of Peebles at the time of the Militia Act, had to witness his own son’s name going into the ballot.

citizens, where standing armies would foster corruption and subservience diminish the bonds of citizenship.

Although protests against the act were—invariably—seen as subversive and even seditious, opposition to it was sometimes couched in the terms of Enlightenment patriotism. The random mechanism of the ballot was seen as a betrayal of national unity and contractual forms of government, and one petition objecting to the Act asked: “why Drag them by the ballot after the Spirit they had shown to serve the Country, especially as they were still of the same mind.”²¹ Other arguments against the Act appealed to the family structure of work on local farms and industries and complained about the effects of removing sons from the local economy.²²

As Susan Oliver points out, Scott uses the *Minstrelsy* to reinforce his own patriotism, adding his own “War Song of the Edinburgh Light Dragoons” to the “Imitations” volume in 1803. Oliver argues persuasively that the *Minstrelsy* as a whole works to contain the radical energies of its period, but we might also think that Scott gives considerable space for the extra-legal freebooter (including his own distant relative Auld Wat of Harden, who appears in “Jamie Telfer”) to flourish. The *Minstrelsy* describes a state of warfare in which the relationship between a national army and a local militia is unpredictable. Although kinship structures work well to sustain local conflicts, they have the effect of operating against the principle of national recruitment. Regional partisanship will always take precedence over national patriotism. Scott comments that the Jardine family’s refusal to join Douglas at the Battle of Otterbourne was “the result of one of those perpetual feuds, which usually rent to pieces a Scottish army” (1: 78).

The modern Border, origin of the militia riots, is reflected back into the *Minstrelsy* when local affiliations cannot be easily mapped onto national concerns. The very subject of the Borderers, unwilling to submit to state enterprises, again raises topics of contemporary debate. How are men best motivated to fight? What is the relation of a conscripted army to the individual? Can modern civic society find a compromise between the voluntary willingness to fight and the excessive ties of kinship of the borderers on the one hand, and on the other the modern violence generated by mass conscription that broke up the family structure and harmed local economies?

Scott describes the Borderers’ “strange, precarious, and adventurous mode of life” as something that holds a peculiar fascination for “us” modern readers who may tire of the monotony of regulated society. He takes his cue

²¹Kenneth J. Logue, *Popular Disturbances in Scotland: 1780-1815* (Edinburgh: John Donald, 1979), 9-10.

²² See Logue, *Popular Disturbances*, 105-06.

here from Edmund Burke's views of French society in the aftermath of the Revolution:

Well has it been remarked by the eloquent Burke, that the shifting tides of fear and hope, the flight and pursuit, the peril and escape, alternate famine and feast, of the savage and the robber, after a time render all course of slow, steady, progressive, unvaried occupation, and the prospect only of a limited mediocrity, at the end of long labour, to the last degree tame, languid, and insipid (1: lxiii).

Scott here appears to be paraphrasing "the eloquent Burke," as he gives no reference, but in fact he takes this almost verbatim from Burke's "Letter to a Member of the National Assembly" of 1792. The lack of quotation marks, and the consequent writing out of any political implications, may deflect the reader from the rather different context in which Burke's remarks originally occur. In the "Letter," Burke is discussing the French Revolution as a "retrograde" state of society in which the "natural authority" of a conservative government has been supplanted by the false political education of the *philosophes*—the "flattery of knaves" as Burke calls it.

The wistful tone of the passage Scott quotes, with its appeal to the generalised "dispositions of mankind," is bookended by a much more specific political position in which this apparently "natural" recurrence of a primitive disposition must be set against the unnatural revolutionary politics of the day that Burke calls "the cheating lottery of plunder." For Burke, plunder is an unnatural or "cheating" social formation that is imposed from above—the "Letter" describes a fraudulent 'system of imposture.'²³ For Scott, on the other hand, to live "by purchase" was the prerogative of the Borderers themselves, a state of affairs born out of their independence and integrated throughout the structure of Borders society.

Scott's naturalising of Burke's politics, however, is a double sleight-of-hand. It is not simply that Scott excises the Revolutionary history—if we expand his textual context by a few more pages, we discover that Burke's political world-upside-down admits a carnivalesque troupe of characters whose subversive energies threaten the hierarchies of the state while at the same time exerting a seductive force that is more attractive than the existing bureaucracy:

I can never be convinced, that the scheme of placing the highest powers of the state in churchwardens and constables, and other such officers, guided by the prudence of litigious attornies, and Jew brokers, and set in action by shameless women of the lowest condition, by keepers of hotels, taverns and brothels, by pert apprentices, by clerks, shop-boys, hair-dressers, fiddlers, and

²³ Edmund Burke "Letter to a Member of the National Assembly," *The Writing and Speeches of Edmund Burke*, vol. 8: *The French Revolution*, ed. L. G. Mitchell (Oxford: Clarendon Press, 1989), 300, 301 and 299.

dancers on the stage, (who in such a commonwealth as yours, will in future overbear, as already they have overborne, the sober incapacity of dull uninstructed men, of useful but laborious occupations) can never be put into any shape, that must not be both disgraceful and destructive.²⁴

As David Simpson points out of this passage: “The irony is so strained as to become unironic, as if Burke cannot command a voice in which the outcasts and *Sans-Culottes* are not indeed more appealing than the virtuous men of substance they have replaced.”²⁵ So both Burke and Scott silently admit into the post-Revolutionary world of the 1790s a force that challenges the law, or that remakes it in a way that that absorbs the agency of shop-boys, brothel-keepers, theatrical dancers, outlaws, thieves and murderers. These energies have become in themselves a style or a discursive form that conservatism cannot entirely keep out. They remind us—in ways I do not have the space here to explore—that the *Minstrelsy* is a rhetorical as well as a documentary enterprise.

In an otherwise heavily annotated work, Scott’s vagueness about the exact location of his source material from Burke is instructive about the way the doubled political histories of the *Minstrelsy* operate in general. The reader is largely shielded from the political implications of writing about the history of the Borders in the aftermath of the revolutionary decade of the 1790s. Yet the radical forces of the 1790s Borders still circulate in the *Minstrelsy* in ways that Scott neither explicitly articulates nor represses. In assigning them to history, to antiquarian culture and to the past, Scott seeks to contain such energies, yet, at the same time, the overlaying of the two historical contexts gives a voice to what he acknowledges as the “peculiar fascination” of challenges to government. In the *Minstrelsy*, Scott’s act of antiquarian reconstruction brings the past into the present in ways that breathe into that past the questions and uncertainties of a strikingly modern political life.

University of Edinburgh

²⁴ *Ibid.*, 297.

²⁵ David Simpson, “Figuring Class, Sex and Gender: What is the Subject of Wordsworth’s ‘Gipsies’?” in Karl Kroeber and Gene W. Ruoff, eds, *Romantic Poetry: Recent Revisionary Criticism* (New Brunswick, NJ: Rutgers University Press, 1993), 140-54 (157).