

Scottish Devolution and Social Policy

Scottish Devolution and Social Policy:
Evidence from the First Decade

Edited by

Murray Leith, Iain McPhee and Tim Laxton

CAMBRIDGE
SCHOLARS

P U B L I S H I N G

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Dedicated to:

Jean L. and Rosie L.,
Two wonderful mum's,

and to Yolande C McPhee,
a wonderful partner and friend

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CHAPTER ONE

THE FIRST YEARS OF A NEW SCOTLAND

MURRAY LEITH

This book investigates one simple idea: has Scotland, a decade after the introduction of legislative devolution, or simply “devolution”, as it is more commonly referred to, actually delivered on the promise of a new Scotland? Can we stand back and say that, today, Scotland being governed through its devolved institutions has introduced distinct policies that are specifically “Scottish” solutions? The reason we pose this question is simple. When the drive for devolution began to bear fruit in the 1990s, after decades of campaigning by some groups, the idea that a Scottish Parliament and an executive/government would govern within Scotland was touted by the simple premise “Scottish solutions for Scottish problems” (Paterson et al. 2004). With 15 years between the referenda campaign of 1997 and the publication of this work, we can now look back upon a growing body of evidence and judge whether that is indeed the case.

This work examines a number of specific policy areas and outcomes within devolved Scotland and forms part of a wider examination becoming popular in academia. Legislative devolution in Scotland has prompted the development of a growing body of literature that considers the contemporary nature of Scottish society and policy, and the implications of the political changes wrought during the end of the 20th century.¹ When the Scottish Parliament came into being, the governance of social policy in Scotland, for a significant number of areas, was transferred into the hands of elected representatives from, and within, Scotland rather than being the object of administrative decisions directed by Westminster. However, after the first few years of devolved activity, questions remain as to the efficacy of policies and social change within Scotland (Mooney and Scott 2005).

Devolution, it was stated by supporters of the idea, would arguably allow for the emergence of “Scottish solutions to Scottish problems”, and politicians from across the political spectrum described Scotland as “unique” or “singular” and able to develop a particularly Scottish approach to social issues. Allied to this idea, and a consideration of which lies at the very core of this text, were the underlying principles upon which the Scottish Parliament was founded: power-sharing, accountability, access and participation, and equal opportunity. These principles were foundational to the parliament, and would, it was hoped by the framers of the constitutional settlement, inform and underlie future social policies in Scotland.

Therefore, through the analysis of a number of specific policy areas in Scotland and a consideration of wider social issues, we seek to examine the nature of devolved policy, and the changes produced during the first decade and more of devolution. The choice of focus was somewhat deliberate. Within the last few years there have been significant areas within which “flagship” policies have been developed and continue to be delivered. Free personal care for the elderly, for instance, is a “complex” policy “embedded in political debates about devolution and Scottish and UK governance [and] symbolises in many respects the ability of the Scottish Parliament to exercise power” (Bowes and Bell 2007, 443). Furthermore, this is perhaps the one social policy to which many individuals point when expressing the “difference” between Scotland and the rest of the UK, or the “success” of devolution. Others include “policies for teachers (for instance, the ‘McCrone deal’ on pay and conditions), on tuition fees, and ... generally higher levels of funding allocated to the National Health Service (NHS)” (Mooney and Poole 2004, 459). Yet it is not such oft discussed policy areas that we investigate here. We seek to widen the net, to consider some possibly less glamorous, but no less important, social issues. The issues of alcohol use and drug prohibition, two of the topics we consider here, remain areas that capture headlines and the public imagination, and upon which the SNP-led Scottish Government promised to legislate in 2011–12.

Therefore, the various chapters from our contributors look at a range of specific aspects of social policy in Scotland and we consider whether the founding principles of Scottish devolution have transferred from principles to policy. These themes all relate to the core ideas that underpin devolution and the creation of the Scottish Parliament. While policy areas are directly addressed within most chapters, others consider class, equality,

and the removal of the democratic deficit. Our work will end with a consideration of whether these have been addressed or remain outstanding within contemporary Scottish society. Before we turn to our consideration of Scotland today, however, we should consider how we arrived at a devolved Scotland, and what the implications of that journey are for our questions.

The Background

Legislative devolution was the culmination of decades of effort by various groups throughout the history of the UK that sought to provide Scotland with its own parliament or assembly, endowed with the ability to govern Scotland, from within Scotland (Harvie 1998). The National Association for the Vindication of Scottish Rights was founded in 1853, followed by the Scottish Home Rule Association in 1886. Such organisations sought to return political control, in various measures, to Scotland, and the British State was not deaf to such appeals. The Scottish Office was created in 1885 and the post of Secretary of State for Scotland soon followed, although it was initially dismissed by most contemporary politicians (McGarvey and Cairney 2008).

However, it was not until the 20th century that a Scottish nationalist and independence-focused political party would become politically and electorally effective. Formed in 1934, the Scottish National Party (SNP) did not achieve consistent political success until the late 1960s/early 1970s (Leith and Soule 2011), and it would take the initiation of legislative devolution before the party found itself firmly within the political mainstream (Mitchell 2009). Whatever the specific motivations of leading British politicians during the 1990s, it is clear that one of the major driving forces behind the creation of the Scottish Parliament was the existence of the SNP, and the support the Party gained at a variety of elections from the 1970s onwards. The continued sense of nationalism and strong sense of national identity of the Scottish people have ensured that the SNP could fill a niche that opened within British politics during that period (Miller 1981; Miller 2008).

It was the perceived political threat of the SNP (whose success in the 1974 elections stunned many within other parties) that brought devolution onto the parliamentary calendar in Westminster in 1977. The 1979 referendum within Scotland saw 32.9% of registered voters vote in support of a Scottish Assembly. This represented 51.6% of those casting votes in

the referendum; through a variety of parliamentary manoeuvres, however, this failed to meet the minimum threshold set out in the Cunningham Amendment to the legislation (and imposed upon the Labour Government by one of its own backbenchers); the fight for devolution was lost for that decade. In March 1980, barely months after that defeat, the Campaign for a Scottish Assembly was set up as a cross-party organisation, clearly demonstrating the tenacity of devolution supporters, as well as their strength of character. In 1989, the Scottish Constitutional Convention was created through the involvement of over fifty Labour and Liberal Democrat MPs from Scotland (Gallagher 2009). It would be this organisation's blueprints for an assembly that provided the basis for the Scottish Parliament of today.

The backdrop for all this activity, from 1979 onwards, was the continued electoral success of the Conservative Party at UK elections. Scotland consistently voted for other parties over the Conservatives, leading to their electoral support in 1992 dropping to only a quarter of the votes cast in 1979. During this period, the British Government was formed by a party that only ever held a minority of seats in Scotland. In 1979, there were twenty-two Conservatives elected from Scotland, but by 1992 this had halved to eleven. Yet the Conservatives decided policy at Westminster and, therefore, policy in Scotland. Thus the calls for a Scottish Parliament, one that would more accurately reflect Scottish voters' wishes, were continually fuelled by what many saw as a democratic deficit within the Union, which challenged the legitimacy of the UK system of government (Jeffery and Mitchell 2009). This is what fuelled support from the Unionist supporters within Labour ranks, and the federalist supporters of the Liberal Democrats. As Bromley et al. note, the nationalist (and social democratic) sentiment of the Scots could be met by devolution "within the framework of the Union" (2006). Scots – other than the SNP and their supporters – sought not independence but greater legislative control over "Scottish" affairs.

Throughout this period Labour had remained formally committed to devolution, even after the debacle of 1979; with their stunning electoral success at the 1997 General Election, at which the Conservatives failed to win a single seat in Scotland (or Wales), devolution appeared inevitable. In 1995, Labour were committed to a devolution referendum, and they actually held two, with a second question being posed concerning the authority of the Scottish Parliament to amend taxation in Scotland by plus or minus 3% (an ability it has never employed). Thus Scotland returned to

the polls less than two decades after it had narrowly “failed” to support devolution to address the question again. In September 1997, 74.3% of those voting in Scotland supported the establishment of a Scottish Parliament, with only a slightly lesser 63.3% supporting the tax-varying authority. Devolution was to become a reality, with the first elections to a Scottish Parliament and the seating of that Parliament in 1999. With the official opening by the Queen on 1 July 1999, devolution had finally arrived in Scotland.

The Principles of Devolution

There were founding principles involved in devolution that would heavily inform the Scottish Parliament created as part of that process. These were the ideas of shared power, accountability, participation and equal opportunities (Scottish Office 1999). These principles were supposed to inform strongly the policy-making process of the Parliament and provide aspects of the “Scottish” distinctiveness of policy outputs from that body. In fact, Bromley et al. (2006) saw this as one of the “key advantages” behind the idea of devolution. This was the changing face of politics – the new politics for a new Scotland. Instead of policy being made in London, and perhaps even by a government that failed to contain a majority of Scottish MPs, it would now be created in Scotland, by an assembly elected directly by the Scottish people, through a more proportional electoral system. Power would therefore be shared between the institutions of government, the Scottish Parliament and the Scottish Executive (soon to become the Scottish Government), *and* the Scottish people. The remote nature of politics would be banished. This would ensure the accountability of the system, with the government accountable to the Parliament and that body accountable to the people.

In addition, Scottish politics would be open and accessible to everyone. The Parliament would have a strong committee system, including a petitions committee to which any and all could submit their ideas for consideration, to be turned into legislation where suitable, and the whole system would “facilitate public involvement” (Lynch 2000). Expectations were high, perhaps too high, as Jeffery and Mitchell illustrate in their collected work considering the first decade of the Scottish Parliament (2009). Nonetheless, the Scottish people expected much from their parliament, which was unfortunate for the devolution experiment as the “scale of these expectations was never going to be met” (Hassan and Warhurst 2000, 5).

Nonetheless, even if we dismiss the high expectations of the Scottish public in the immediate aftermath of devolution it is clear that Scottish politics has not risen to the heights that it might have. Keating has argued that devolution has resulted in below par “policy debate and innovation” (2007) but even though this may be the case, we now have a different politics in Scotland and different policy ideas are percolating through the system (Keating 2010). It is this difference that brings us firmly back to the issue of social policy, and the contributions herein.

Structure of the Text

The following chapters provide the substantive analysis upon which we consider the evidence from devolution in Scotland. We begin with Eric Stoddart, who considers the issue of surveillance, and the impact it has had upon civil liberties in Scotland and England. It is perhaps fitting that this first specific policy area points to a very significant and clearly “Scottish” stance. His discussion and analysis illustrate that the personal backgrounds and experiences of Scotland’s MSPs, the Scottish Parliament’s institutional structure and Scottish civil society all come together to have an impact.

Sandy Hobbs and Jim McKechnie are less positive about the Scottish Parliament and Government when it comes to the area of child employment. They make it clear in their analysis that not only is Scotland failing to legislate properly in this area, but that existing legislation is not acted upon. They lay this charge equally and fully across all the various parties that have formed the Scottish Executive/Government and point to how Scotland, rather than forging ahead or leading in this area, has actually fallen behind when compared to what occurs in England.

Eileen Harkess-Murphy, John MacDonald and Judith Ramsay touch upon an area that seems to have had greater resonance for Scotland than other parts of the UK in recent years: that of self-harm and suicide. Their work is a sobering illustration of the depth of this problem within Scottish society and the need for action, in light of rates that are more than double the UK average. Their analysis of the action plans put in place through a combination of government action, alongside the activities of civil society, point to some significant progress since devolution, with clear activity on the part of the Scottish Parliament and Government. It seems clear that there is commitment to action in this area, but also that there is room for further improvement and activity. The need for greater and fuller public

involvement is made clear in this chapter, and the structure of Scottish politics, post devolution, would seem tailor-made for such a policy opportunity.

Fiona Edgar provides us with an investigation of a policy area that has captured headlines, and policy makers' imaginations, in Scotland and beyond. Alcohol policy has long been a part of Scottish politics, with alcohol abuse prevalent across all sections and groups within society. Focusing on the message that the Scottish Executive aimed at the female drinker, Edgar illustrates how Scotland has taken a lead in this area, forging ahead of England and the wider UK. Her analysis is not uncritical of government efforts, however, as she points out the ambiguity of governmental policy and the lack of clarity in policy efforts in this area. She also illustrates the problems in communication that exist between problem groups and policy makers, highlighting once more the need for a close connection between the government of Scotland and the people of Scotland.

Bringing into focus another area that has recently reignited and further highlighted tensions within Scottish society is Paul Coleshill and Tony Ozell's examination of being gay and out in Scottish politics. As Scotland grapples with the issue of gay marriage, their work focuses on the experiences of a number of individuals involved in local politics in Scotland. They highlight the fact that positive changes have occurred in the acceptance of being openly gay in Scotland and that devolution, and the introduction of a specifically Scottish administration, have been instrumental in this regard. Their work clearly indicates that this remains an area of active concern for policy makers and the Scottish public alike.

Taking in a wider spectrum of Scottish society, Gerry Mooney, Carlo Morelli and Paul Seaman examine the issues of inequality and social disadvantages in Scotland. They directly challenge Scottish Government policy in this area, dismissing it on the grounds that it will be unsuccessful in alleviating these long-standing social problems. They compare the policies of devolved Scotland with those of the UK Government and see little difference between the two. Despite different parties being in power, in two different political systems, they claim the policy direction is very similar. Within their analysis, they put to the test the progressive and social democratic nature of Scotland.

Iain McPhee, Steve O’Rawe, Tim Laxton and Anthony Sneider focus on drug strategy in Scotland. Their chapter examines the nature of the discourse involved in the creation and enforcement of Scottish drug policy. They point out that while clear policy similarities exist between Scotland and England, there are also clear differences in how that policy is interpreted and enforced. The authors challenge how the policy is enforced by the police and other authorities, and how they, rather than the Scottish Parliament or the Scottish Government, appear to command and control the drug issue in Scotland. Their work challenges assumptions about the nature of devolved policy making in this area, and the application of the principles of devolution itself.

Rounding out our collection of policy analyses is the focus on child poverty by John H. McKendrick and Stephen Sinclair. They highlight the large number of policies that have been created and employed by both local and central government within Scotland as each has sought to address this social issue. While there seems to have been a reduction in the number of children living in poverty in Scotland, McKendrick and Sinclair argue that such change is limited and often indirectly achieved. They point to the limitations of the devolution settlement on this front, and how some of the main mechanisms of governance (such as finance and tax-raising authority) are beyond the current competence of the Scottish Parliament and Scottish Government. Echoing and adding to themes found within the chapter by Mooney et al., they argue that greater change within the area of child poverty would be possible if there were greater change within the devolution settlement.

The examinations within this work then conclude with an overall consideration of the contributions, and the themes and ideas that emerge, by Tim Laxton and Murray Leith. They examine, in depth, the findings of each chapter and how these help illustrate the successes of devolution, and the areas within which progress still has to be made. They point out the new aspects of Scottish politics and policy making that have been brought about by devolution, as well as the old aspects that have survived the transition. They finish with an idea of hope, linked to a note of caution, emphasising that devolution is an ongoing process and that the future might take us along an old, easily recognisable path, or an altogether new one.

Notes

¹ G. Hassan and C. Warhurst (eds), *The New Scottish Politics: The First Year of the Scottish Parliament and Beyond*, The Stationery Office, 2000; L. Paterson, *New Politics?*, Edinburgh University Press, 2002; G. Hassan and C. Warhurst (eds), *Tomorrow's Scotland*, Lawrence & Wishart, 2002; L. Paterson, F. Bechhofer and D. McCrone, *Living in Scotland, Social and Economic Change Since 1980*, Edinburgh University Press, 2004; G. Mooney and G. Scott (eds), *Exploring Social Policy in the "New" Scotland*, Policy Press, 2005; J. Adams and K. Schmuecker (eds), *Devolution in Practice II: Public Policy Differences in the UK*, IPPR, 2005; C. Bromley, J. Curtice, D. McCrone and A. Park (eds), *Has Devolution Delivered?*, Edinburgh University Press, 2006.

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CHAPTER TWO

SCOTTISH SURVEILLANCE POLICY: HOLDING THE LINE

ERIC STODDART

Introduction

Scottish policy on surveillance has diverged from that developed by Westminster. This is most clearly observed in issues of retention of DNA samples and profiles obtained by the police and loaded onto the National DNA Databases. This chapter considers a number of narratives that have contributed to the shaping of policy with regard to both DNA forensic data and covert surveillance. Two inter-related themes, those of civil liberties and over-confidence in forensic science, are explored as evidenced in debate by the Scottish Parliament. A third narrative, that of MSPs' memories of themselves (or other activists) having been under surveillance, is also identified. To understand how the Scottish Parliament was, regarding this aspect of surveillance legislation, "holding the line" against London-New Labour emphases we turn to Lynne Poole's and Gerry Mooney's analysis of the questionable distinctiveness of Scottish social policy.

The "Dodgy-in-Waiting"?

Are we all "offenders-in-waiting"? This is the question at the heart of political debates surrounding surveillance policy and that of the National DNA Databases in particular. The context is the "new penology"; a shift from ideals of transformation of offenders to their identification and control within a broader discourse of managing risk (Feeley and Simon 1994) and, more directly, seeking to control risk (Mythen and Walklate 2006, 389). The policy in England and Wales was to retain indefinitely DNA profiles not only of those convicted but also of those arrested even if

not charged and if charged found not guilty. In Scotland, profiles of all but those convicted had to be removed from the DNA database (with, since 2007, the exception of time-limited retention for those charged with, but not convicted of, serious sexual offences). Whilst this has been a significant policy divergence it is not simply a matter of civil liberties. England and Wales envisaged offences committed in the past of which we might be found guilty – an unsurprisingly non-contentious position. We may have offended in the past but not been found out – again, a quite straightforward thesis. There might be offences that we are currently planning to commit; preventing our action is a goal of the police or security services. Here still there is no sign of devolved metaphysics. The divergence comes when we postulate that there are as yet uncommitted and as yet unintended offences that we might commit at some future time. Westminster opted to place its innocent citizens under proleptic suspicion. The result was a policy to retain DNA profiles on a searchable national database not only of those convicted but of everyone suspected of any offence.

“Not guilty” can, of course, only be declared when a specific charge has been unsuccessfully prosecuted. The change was not merely to recognise that some people are “dodgy” and either likely to have offended (but sufficient evidence to convict is lacking) or likely to go on to offend at some time in the future. “The probably dodgy”, “the guilty” and “the innocent” were the three categories used by the Bishop of Worcester in his pithy typology to challenge the government in the House of Lords in 2003 (Hansard, HL, 29 Oct 2003, c. 323). Although the Bishop crystallised the civil liberties issue arising around the retention policy of DNA profiles and samples of the time, this does not adequately capture the scope of suspicion. To deny the sad realities of some people’s behaviour would be dangerously naïve. Rather, the departure was the instantiating in legislation, in a wholly indiscriminate way, of such a diffuse social category as the “dodgy-in-waiting”: those not currently intending to offend but who *are now* suspected of future as-yet-uncommitted offences. The State turns its gaze towards its citizens as a whole, viewing them as potential offenders.

Holyrood legislators consciously eschewed a Westminster anthropology in resisting attempts to follow the latter’s retention policy more through experiential than abstract philosophical reasoning. Further, whilst it may be an interesting debate to some, this chapter makes no attempt to discuss the extent to which the notion of proleptic suspicion evinces a subtle, or otherwise, divergence in metaphysics between Westminster and Holyrood.

The path taken here is to consider the narratives that legislators have drawn upon during the debate over Scottish surveillance policy. The focus will be on the retention of DNA forensic data, but there will also be consideration of discussions over covert surveillance that arose around the Regulation of Investigatory Powers (Scotland) Bill. Civil liberties has, not unexpectedly, been the narrative at the forefront but alongside it have sat themes of over-confidence in science and politicians' memories of having been (or suspicions that they might have been) under surveillance for their nationalist or trades union activities.

The National DNA Databases – “Genetic Surveillance”?

It will be useful to explain briefly the technique and infrastructure of DNA forensics. A sample of biological material is used to produce a DNA profile consisting of twenty two-digit numbers. It is the profile that is loaded to a national computer database from where it can be cross-matched. The sample is stored for validation or perhaps further profiling as new techniques are developed. The SGM+ test currently used in the UK tests ten markers (short sequences of DNA that are repeated several times) and a sex marker. The number of repeats varies between individuals and is recorded to generate a profile consisting of twenty two-digit numbers. The probability of a chance match between unrelated individuals using this method is, on average, less than one billion (one thousand million) to one (Nuffield Council on Bioethics 2007, 6). Within the UK three databases are operated. The England and Wales database (in Birmingham), in addition to data gathered within its jurisdiction, has profiles loaded onto it from the one run by the Scottish Police Service Authority (in Dundee) and, since 2005, those held on the database operated on behalf of the Police Service of Northern Ireland (Semikhodskii 2007, 81). Of the total DNA profiles loaded as at 31 March 2007 (4, 428, 376), English data contributed 87.48%, with Wales providing 5.57%, Scotland 4.75%, Northern Ireland 0.88% and others 1.32% (NDNAD 2007, 26).

DNA samples are obtained from: (a) those arrested for any recordable offence; (b) victims, third parties or a member of a population identified for an intelligence-led screen, for elimination purposes in relation to the investigation of a specific offence (NDNAD 2007, 22); and (c) crime scenes. Williams and Johnson (2005, 546) helpfully summarise key points of policy debate in the UK. The benefits of a DNA database are presented as: speedy and robust identification of suspected offenders; confidential

elimination of innocent suspects; cost reduction of investigations; likely deterrence of potential offenders; and the possibility of increased public confidence in policing and judicial processes. The principal concerns focus on threats to the bodily integrity of those subjected to non-consensual sampling; denigration of rights to privacy; fears over the potential future misuse of samples that might include long-term bio-surveillance; and deception in investigations and prosecutions. Furthermore, witting or unwitting tainting of a sample with other DNA material can and does result in false positives, a trap that may close around an innocent party from which extrication becomes especially difficult in the context of a public narrative that holds “DNA evidence” to be “scientific” and therefore “indisputable”.

There is little appetite in the UK for a universal national DNA database and few concerns over the proportionate loss of DNA privacy for those convicted of an offence. This is despite high-profile advocacy, largely on grounds of equity of treatment, by Lord Justice Sedley (BBC News 2004, 2007b). The issue of retention of samples and profiles once an investigation has been completed and/or a conviction secured does, however, as we have seen, raise significant challenges. This is despite UK government assertions to the contrary:

To those who say that we are creating a “third class” of person, neither innocent nor convicted but merely “under suspicion”, I say that this is not the same. Where taking and retaining fingerprints or DNA samples is the norm, there is no stigma to the individual concerned and we would say no discrimination. These proposals are about having the means by which we can retain data not only to consider somebody if they have taken part in an offence, but to rule them out of offences that have been carried out Caroline Flint, Home Office minister, 18 November 2003 (Hansard, HC, 18 Nov 2003, c. 691).

In effect, the minister was saying that as long as we become accustomed to viewing people with proleptic suspicion then it is neither morally nor legally problematic. In other words, the government, through either naïve or obfuscatory reasoning, believed that not just two, but a multitude of wrongs makes a right.

DNA Profile and Sample Retention Policies

The Scottish DNA Database went live in 1995 (pre-devolution) and there was little initial difference from the UK policy until in 2001, when

the Westminster Parliament removed the requirement for the destruction of samples and profiles of those not subsequently convicted or cautioned (Criminal Justice and Police Act 2001). This led to the “indefinite genetic surveillance” (Williams and Johnson 2005) of anyone charged with an offence. Changes that came into force in April 2004 (Criminal Justice Act 2003) extended the database further to those arrested, not only those charged.

This change arose largely as a result of two cases (one involving murder, the other a rape). DNA evidence linked the defendants to the respective offences but, as the legislation stood at the time, those profiles, having been gathered in connection with previous investigations for which the defendants were acquitted, ought to have been deleted. The position in law was deemed unsatisfactory as it was left to the discretion of the trial judge whether evidence obtained as a failure to comply with the prohibition on using a sample from one investigation in another could be admissible (Re. Attorney General’s Reference (No 3 of 1999) [2001] 2 A.C. 91). As a consequence the government sought to put retention on a proper legal footing rather than having a situation that “might appear to encourage the police to retain DNA samples unlawfully” (Lord Bassam, Home Office Minister (Hansard, HL, 2 Apr 2001, c. 658)). The fear of missing an opportunity to link an individual with a crime scene continued and in a 2003 exchange with Simon Hughes, when the Lords attempted to return to the pre-2001 position (during a debate on the Criminal Justice Bill, 18 Nov 2003), Caroline Flint, then a Home Office minister, raised the spectre of 4,600 profiles of individuals (that would previously have been removed) “linked with crime scene stains”. Those offences included twenty-six murders, fifteen attempted murders and twenty-seven rapes (Hansard, HC, 18 Nov 2003, c. 690). It is not clear whether each “link” resulted in a successful prosecution although the minister appeared to so imply. As Johnson and Williams (2004) point out, Scotland had never experienced a case whereby an individual had been identified and convicted using a DNA profile match that had been illegally held.

A civil case was brought to the High Court in 2002 by two individuals who had been charged and had their DNA sampled, but were not subsequently convicted. Their request to have their profiles removed from the England and Wales National DNA Database had been denied by the Chief Constable of South Yorkshire Police. After this decision was eventually upheld by the House of Lords in June 2004 (R (on the application of S & Marper) v Chief Constable of the South Yorkshire

Police [2004] UKHL 39), the case was heard by the European Court of Human Rights (ECHR). In December 2008, the ECHR held that Westminster's retention legislation breached Article 8 of the European Convention on Human Rights (the right to respect for private and family life). The Court recognised that a balancing of interests was necessary:

The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime (...). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned (*S & Marper v United Kingdom*: Application nos 30562/04 and 30566/04 [2008] ECHR 103–4).

The ECHR found that the rights of privacy were being interfered with because there was a failure to differentiate the relative gravity of offences for which a person had been suspected; that retention of profiles and samples was indefinite; and that processes for seeking removal of one's profile and sample were limited and lacking in independent review (*S & Marper v UK* [2008] ECHR at para. 119). Of particular interest to us is the affirmation of the Scottish policy and the England and Wales (and Northern Ireland) policy being perceived as singularly draconian amongst the countries of the Council of Europe (*S & Marper v UK* [2008] ECHR at paras 109–10). Van Camp and Dierickx's research on regimes of suspects' sample destruction (as of early 2007) shows just how isolated England and Wales were, although their study did not pick up on the Scottish change to include those suspected of sexual or serious offences for a change that came into force in January 2007.

- Immediate destruction of all samples: Belgium, Germany, Lithuania, Sweden;
- Suspects' samples destroyed upon acquittal and convicts' samples destroyed after a certain period: Austria, Cyprus, Czech Republic, Finland, France, Hungary, Luxembourg, Scotland, The Netherlands
- Destruction of all samples after a certain period: Denmark, Latvia.
- Time of destruction not fixed: England and Wales, Estonia (*Van Camp and Dierickx* 2008, 609).

The UK government resisted making any policy change on retention until its hand was forced by the ECHR.

In May 2009 the Home Secretary responded to the ruling that the “blanket and indiscriminate nature” of the retention of DNA data breached Article 8 on the right to privacy. Consultation resulted in the Crime and Security Act (2010) that was to limit to six years the retention period of DNA data held regarding those not convicted of an offence. Until the New Labour legislation of 2010 the retention of volunteers’ samples also differed considerably between England and Wales and Scotland. In England and Wales a voluntary DNA profile (on either a mass-screening or an individual basis) would be taken with consent which could then not be withdrawn and the profile loaded onto the National DNA Database indefinitely. In Scotland, however, consent for retention can be withdrawn at any time and the profile removed from the database. Further, consent may be confined to the use of the DNA in the specific investigation and prosecution in connection with its initial provision (Criminal Justice (Scotland) Act 2003, sec. 56). As a result of Labour’s defeat in the General Election, the 2010 Act was not adopted. The Conservative-Liberal Democrat coalition government has, in May 2012, brought England Wales largely into line with Scotland in terms of DNA data retention through the protection of Freedoms Act.

Scotland had chosen not to follow the blanket retention regime of England and Wales when it was extended but had issued a consultation paper in June 2005 (Scottish Executive 2005), although this did not result in any legislative proposals as regards retention of samples. In 2006, however, Paul Martin MSP attempted to amend the Police, Public Order and Criminal Justice (Scotland) Bill to match English and Welsh policy on DNA profile and sample retention. Realising there was little appetite in the Parliament for this extension, Martin had withdrawn his amendment and had proposed a new approach that was subsequently accepted. Thus, on 1 January 2007 there came into force legislation in Scotland to permit the retention of DNA data of a person charged with, but not convicted of, either a sexual or serious violent offence. The initial retention period can be three years, with subsequent two-year periods being available on application to a sheriff (Section 18A of the Criminal Procedure (Scotland) Act 1995, inserted by Section 83 of the Police, Public Order and Criminal Justice (Scotland) Act 2006). It is to this retention regime that the ECHR referred with approval in December 2008.

The Nationalist Government undertook its consultation process on forensic data between September and November 2008 following the publication of its commissioned review by Jim Fraser (Fraser 2008). In

August 2010 the Criminal Justice and Licensing (Scotland) Act received Royal Assent and will apply the current extended DNA retention powers to fingerprint and other types of biometric data, extend the retention of fingerprint and DNA data obtained from children who have committed sexual or violent offences, and clarify the purposes for which fingerprint and DNA data obtained by the police might be otherwise used (for example, in research).

Scotland Holding the Line

It should be clear by now that Scotland was holding the line for a proportionate and differentiated approach to retaining DNA samples and profiles of those suspected but never convicted of offences. Three narratives would seem to have been in play. Two of these (civil liberties and over-confidence in forensic science) have been most immediately important in the debate over genetic surveillance through the National DNA Databases. A third (memories and/or suspicions of having been or having known people subject to police or security service surveillance) is more in the background. Memories of surveillance will return later in this discussion but the Stage Two debate over Paul Martin's amendment to the Police, Public Order and Criminal Justice (Scotland) Bill on 28 March 2006 encapsulates much of these first two interwoven (and often competing) narratives.

Martin (Labour) was convinced that extended retention policy in England and Wales had been a success in achieving more successful prosecutions. Referring to the Home Office's "DNA Expansion Programme 2000–2005: Reporting Achievement" (Home Office 2005) Martin adopted the spectre of missing opportunities that we have seen above:

I refer particularly to the section in that report that refers to 250 DNA profiles that would not have been retained had it not been for the provisions in the Criminal Justice Act 2003. The outcome of that retention was that the police were able to solve four murders and manslaughters, three rapes, six robberies, four sexual offences, five offences of supplying controlled drugs and 98 burglary offences (SP OR J2, 28 March 2006, c. 2181).

Martin was unmoved by concerns that these conclusions came without independent review. He was further persuaded that his proposal ensured that the victim's point of view was considered with only a modest

interference in the rights of those detained under suspicion – making direct reference to Lord Steyn’s ruling in the R. (S v Marper) appeal to the House of Lords. Martin’s third argument contended that this use of technology would release more police officers for beat duty:

I think that we must move with the times. We had a similar discussion when we talked about police officers on the beat. The websites of the three main political parties talk a good game about the release of police officers for beat duty, the best use of resources and investing in technology. I believe that DNA profiling provides a good example of the use of technology, allowing officers to be released for beat duty because of early detection. If we want to do more than just talk a good game, we must ensure that we deliver the most modern technology to allow that release of police officers. We must take on board what I believe is the powerful evidence that we received from Victim Support Scotland, ACPOS and many other organisations that support my amendment (SP OR J2, 28 March 2006, c. 2182).

To Martin, the issue was straightforward: interference in civil liberties was minimal; forensic science could bear the weight of our trust; and resources could be reallocated to forms of policing that the public likes.

Jeremy Purvis (Liberal Democrat), a member of the committee, was like many, unconvinced as to the England and Wales approach being proportionate and he was no more persuaded by the statistical evidence presented by the Home Office. GeneWatch representative Dr Helen Wallace had, the previous week, given oral evidence to the committee and raised serious questions of interpretation behind Home Office claims of success (see GeneWatch UK 2006). GeneWatch was contending that what the government presented as increased effectiveness in detection appeared to be a result of gathering many more crime scene samples, rather than increasing the number of individuals’ profiles being held on databases. Wallace made her doubts regarding the analysis and interpretation clear:

We looked at the Home Office report that was published in January and it is indeed difficult to unpick the exact consequences of the different changes that have happened as a result of the DNA expansion programme in England and Wales. We would therefore like there to be an independent assessment that tries to do that unpicking.

We found that there has been an increase in the number of detections as a result of more DNA being taken from crime scenes, but the increasingly large number of individuals who are being included on the database seems

to have had very little effect. We would expect the number of detections to rise as the number of crime scene samples that are taken goes up, but the detection rate—or the likelihood of finding the relevant individual—should go up if increasing the number of individuals on the database is important. However, that does not seem to have happened. The Home Office report says very clearly that the number of crime scene samples, rather than the increasing number of individuals, seems to be driving the success of the database (Helen Wallace, *GeneWatch: SP OR J2*, 21 March 2006, c. 2090).

Furthermore, Purvis was disturbed at the ethnic disproportion clearly visible in the England and Wales database:

The ballooning of the database in England and Wales has not produced a comparable increase in the detection and prevention of crime. What it has meant is that 32 per cent of all black men in England and Wales have their DNA sample and profile on a police database. That has an impact on community trust and faith in our justice system (*SP OR J2*, 28 March 2006, c. 2182).

The DNA Database Board acknowledge a disproportion but explain it as a feature of data coding rather than evidence of police discrimination or of a greater propensity to criminality by a particular ethnic minority (National DNA Database Board 2005, 10). Purvis could see the only logical outcome of Martin's proposal being the creation of a universal DNA database: "[T]he rationale behind Paul Martin's amendment would take us down a path that will end in every child being sampled at birth and that sample being retained on the national DNA database" (*SP OR J2*, 28 March 2006, c. 2183).

The exchange between Martin and Purvis illustrates two of the key narratives: civil liberties and scientific confidence, and, importantly, how they are interwoven. The civil liberties narrative presents attempts to triangulate the interests of a victim and his or her family, a defendant and the public. Proportionality lies at the heart of any such response but this is a qualitative conclusion to be reached, not a quantitative one. The interests of a victim and his or her family cannot be expressed in figures (although loss of earnings might be reasonably projected). Decisions as to compensation are necessarily subjective; neither a person's life nor the pain of an injury can be priced as if they were a commodity. The notion of "making him pay for his crime" is understandable but metaphorical; 18 months of imprisonment does not correspond to a particular level of fear or pain felt by a victim (even if these could perhaps be scientifically

measured). This is not in any way to argue against punishment or compensation but is to emphasise that our responses to one another are not reducible to quantification; our relations (including those between a victim and a defendant) are always qualitative.

It appears that Paul Martin, representing the UK Government's narrative, too easily elides the difference between the qualitative of civil liberties and the quantitative of statistical analysis. In other words, issues of proportionality are translated into questions of probability. Analyses of the "success" of the National DNA Database are represented in statistical terms (albeit disputed as to the assumptions and categories) which are then used to drive interpretations of proportionality of interference in civil liberties. As Carole McCartney concludes in her examination of the DNA Expansion Programme, "there is a risk that faith in forensic science has been too easily used to shore up falling confidence in police investigative competence without questioning the fallibility and shortcomings of applying the technique" (McCartney 2006, 189). A narrative of over-confidence in DNA profile matching as a scientific process compounds the elision of proportionality into probability.

It would appear from the committee debate on Martin's amendment that it is the credibility of the statistical analysis of the achievement of the DNA Database that is his opponents' main focus. They recognise that civil liberties and scientific (in this case statistical) analysis are being related but only question the robustness of the analysis rather than interrogating the nature of the inter-relationship of the two narratives.

These interwoven narratives of civil liberties and over-confidence in forensic science ought not to be considered in isolation from other dimensions. The financial position of DNA profiling in government spending priorities was much higher south of the border. The DNA Expansion Programme 2000–2005 invested over £300 million, approximately 0.7% of overall expenditure by police forces in England and Wales during that period (Home Office 2005, 4). Scotland's DNA Database received no such targeted support although small amounts were given to individual forces (for example, Strathclyde Police received £800,000 in 2001) (Johnson and Williams 2004). As we will see again later, the Blair Government had made law enforcement a significant plank in its election manifestos of 1997 and 2001. Within the managerialist, actuarial risk-management penology, crime and detection rates occupied the attention of the Home Office to an extent that, regarding the DNA

database, was not matched north of the border. Tacking into the wind of the right-wing press was not such an unremitting and pressing concern for Scottish ministers than it was for their Westminster counterparts although, it should be noted, Scotland has been unique within the UK in its development of a USA-style Drugs Enforcement Agency (formed in 2001 and renamed the Scottish Crime and Drug Enforcement Agency in 2006) that places a strong emphasis on performance indicators of drug seizures and related convictions.¹ The high-profile murders of Holly Wells and Jessica Chapman in Soham by Ian Huntly in August 2002 took on added poignancy when it was revealed that between August 1995 and July 1999 Huntly had come to the attention of Humberside Police in relation to a number of separate sexual and other offences, including being charged with rape (Bichard 2004, 24). This, perhaps much more so because of its contemporary and media-saturated coverage, played a significant role in the (over-)confidence in forensics narrative precisely because such data *could have* been available. Hugh Henry, Deputy Justice Minister, referred to the case during the Justice 2 Committee debate on the DNA database in March 2006:

I believe that Ian Huntly was charged in 2000 or 2001, but nothing happened thereafter. Under the rules that were in place at the time, his DNA could not be retained. One wonders whether, if it had been retained, the case could have been resolved much earlier and whether Ian Huntly might even have been deterred from committing the murders. We will never know (SP OR J2, 21 March 2006, c. 2109).

Henry seems to be wrong about the date but the Soham effect was not so strong here, not least because it did not happen in Scotland. The 2008 trial of Peter Tobin for the murder of Angelika Kluk in Glasgow included DNA evidence linking Tobin to the gag that had been placed over the victim's mouth (BBC News 2007a). It is invidious to speculate but had such a high-profile case occurred just before or during the debates on DNA retention in the Scottish Parliament they might have taken a different turn.

It should not be forgotten that Scotland had a Labour–Liberal Democrat coalition government from 1999 to 2007. The latter's focus on civil liberties, bearing in mind the composition of Holyrood committees, tends to suggest the possibility of different mood music north of the border. Lacking an overall majority, Scottish New Labour was required to adopt a more measured approach to the DNA Database than Blair's hegemony at Westminster.