

# Christianity and Criminal Law

This collection, by leading legal scholars, judges and practitioners, together with theologians and church historians, presents historical, theological, philosophical and legal perspectives on Christianity and criminal law.

Following a Preface by Lord Judge, formerly Lord Chief Justice of England and Wales, and an introductory chapter, the book is divided into four thematic sections. Part I addresses the historical contributions of Christianity to criminal law drawing on biblical sources, early church fathers and canonists, as far as the Enlightenment. Part II, titled Christianity and the principles of criminal law, compares crime and sin, examines concepts of *mens rea* and intention, and considers the virtue of due process within criminal justice. Part III looks at Christianity and criminal offences, considering their Christian origins and continuing relevance for several basic crimes that every legal system prohibits. Finally, in Part IV, the authors consider Christianity and the enforcement of criminal law, looking at defences, punishment and forgiveness.

The book will be an invaluable resource for students and academics working in the areas of Law and Religion, Legal Philosophy and Theology.

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# Law and Religion

The practice of religion by individuals and groups, the rise of religious diversity and the fear of religious extremism, raise profound questions for the interaction between law and religion in society. The regulatory systems involved, the religion laws of secular government (national and international) and the religious laws of faith communities are valuable tools for our understanding of the dynamics of mutual accommodation and the analysis and resolution of issues in such areas as: religious freedom; discrimination; the autonomy of religious organisations; doctrine, worship and religious symbols; the property and finances of religion; religion, education and public institutions; and religion, marriage and children. In this series, scholars at the forefront of law and religion contribute to the debates in this area. The books in the series are analytical with a key target audience of scholars and practitioners, including lawyers, religious leaders and others with an interest in this rapidly developing discipline.

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# Christianity and Criminal Law

Edited by Mark Hill QC,  
Norman Doe, RH Helmholz  
and John Witte, Jr

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*In Memoriam*

**The Right Honourable Sir John Laws**  
**Sometime Lord Justice of Appeal**  
**1945–2020**

Jurist, scholar and friend  
Husband, father and grandfather

*Requiescat in pace*



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# Preface

*Lord Judge*

The Temple, where the London symposium met to debate drafts of the chapters which follow,<sup>1</sup> is quite literally the very same ground trodden by King John, the Barons, loyal and rebel, Archbishop Langton and the Princes of the Church as they tried to negotiate a settlement, thrashing out a solution for the dispute between the King and the Barons and embodying it in a charter, which in the following June became the first clause of Magna Carta itself.<sup>2</sup> Our brilliant, emblematic Temple Church had only just been consecrated. The Temple was a place of sanctuary. To shed blood here would have been a sin imperilling the immortal soul. It was also somewhere the immortal soul – and the day of judgment was inevitable – would probably feel safe to negotiate.

And it is in this church that one of the great unsung heroes of history, William Marshal, was laid to rest, unsung although without him Magna Carta would have been a mere footnote in history, just one of many charters to much the same effect as those that were dished out by mediaeval European rulers.<sup>3</sup> We all know its provisions that justice was not to be denied or delayed or sold: but the charter also provided that people would not be at risk of any penalty unless they had contravened the law of the land – not some generalised law of God, but the law of the land. The judges were required to know that law and uphold it; and law enforcement officials, such as sheriffs and bailiffs, were not to act in a judicial capacity. Those principles stand today: quite what the law in 2018 orders and prohibits has become more convoluted. One simple phrase in Chapter 2 in this volume says it all: “Criminal law is a vast subject”.<sup>4</sup>

1 This Preface comprises the lightly edited text of the introductory remarks made by Lord Judge at the opening of the Christianity and Criminal Law symposium convened in Inner Temple, London on 13–15 October 2018.

2 See generally Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (London: Bloomsbury Press, 2014).

3 See various of the essays in Robin Griffith-Jones and Mark Hill, eds., *Magna Carta, Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2015).

4 Chapter 2, Brent Strawn, “Criminal Law in the Old Testament: Homicide, the Problem of *Mens Rea* and God”, p. 13.

Here in England, and no doubt elsewhere in what I shall describe as the Christian world, we are now inundated with prohibitions or directions which, disregarded, may produce a penalty. Where there were once Ten Commandments, we now have tens of hundreds, thousands of criminal offences, well in excess of five figures. They range from laws against driving at a prohibited speed, to a relatively recent law prohibiting anyone from causing a nuclear explosion.<sup>5</sup> Quite who will survive to investigate the crime, bring the perpetrator to whichever court has survived the explosion, and where the judge, the jury, the prison and prison officers to keep the defendant secure will be found are not explained. But one could argue that both speeding and causing a nuclear explosion are derived from continuing attention to the exhortation to us all to love our neighbour. With the distinction that in many situations, exhortation is no longer believed to be adequate and enforcement by criminal penalties is deemed necessary.

The following chapters represent a fascinating group of studies: stimulating, learned, provocative and profound. I have had the privilege of reading them. They make a scholarly read. My attention has been drawn to Aeschylus, war veteran of the Battle of Marathon, whose plays I tried reading at 17 years of age, and which I never did complete, to Kubrick's *Clockwork Orange*, which I never saw. I have noted *Bushell's Case*,<sup>6</sup> which I know well, and *Barnette's Case*,<sup>7</sup> of which I was ignorant. Today's world has been represented by commentary among many others on restorative justice and plea bargains and presidential pardons. We have been enlightened from Plato to the modern day via all the Fathers of the Church. Christianity is some 2000 years old, but its roots are found in mysticism from the Middle East, Greek philosophy, Roman law and, of course, Judaism. This history and these foundations and the inexorable revolution of time have commanded concentrated attention, and they have received it.<sup>8</sup>

Where to begin? As more than one of the chapters does, perhaps we should start at the very beginning, the Book of Genesis itself. The Garden of Eden, where the first crime was committed, the first trial took place and the first sentence was imposed. The defendants were not represented. If you were defending Adam and Eve, your mitigation plea would have proceeded along the lines that this was mere theft of an apple, no doubt one of many on the same tree, and unless eaten, an apple which would have become a wizened windfall by the end of the summer. This message was undoubtedly given to the defendants by the serpent, which it is not to be forgotten was itself part of God's creation. With forensic courage, the advocate might have asked why such an evil creature was created at all. In any event, the serpent was largely to blame for introducing the idea, offering the temptation and distorting their judgement. The Prosecution

5 Nuclear Explosions (Prohibition and Inspections) Act 1998.

6 (1670) 124 ER 1006.

7 *West Virginia State Board of Education v Barnette* (1943) 319 U.S. 624.

8 See e.g. Diarmaid MacCulloch, *A History of Christianity: The First Three Thousand Years* (London: Penguin, 2010).

argument would have been quite different. This was not eating any old apple. This was not a minor offence against property. This was eating an apple from a particular tree. It represented direct defiance of the only law in the Garden, a law of utmost simplicity, and constituted an irremediable breach of trust. The motive was shameful, seeking knowledge which would have made them almost Godlike. The offence constituted a terrible threat to the whole of His magnificent creation. Every judge trying criminal cases has listened to beguiling but mutually contradictory submissions of this kind. And must resolve how, justly, to balance them.

The sentence was expulsion from the Garden, with the additional physical punishment on Eve, extended to all her daughters for eternity. Beyond that, all children, every boy baby and every girl baby, were marked with original sin. All humanity's tribulations followed. The very next crime was fratricide, when one of their sons, Cain, killed another son, Abel. Was that not a direct consequence of the expulsion, just for eating an apple? Or was it an inevitable consequence of man's fall? Or both? So that raises the question whether the sentence for stealing an apple, even this particular apple from this particular tree, was excessive? Did it do any good? Should there have been a short period outside the Garden – to show the defendants what the world outside would be like? But would not any period outside have contaminated their innocence irretrievably? So, maybe a warning would have sufficed? In the High Court of Eden, mercy did not temper justice. So what was the point of the expulsion sentence? Was it simply the vindication of the law, a better society, with future generations understanding or having a clear understanding of the need to earn eternal life? Maybe a truly merciful sentence was not realistically available. Or again, maybe mercy was indeed shown. They were not executed. They were given the opportunity to earn ultimate redemption, assuming that is that they were not predestined to fail. Again, any sentencing judge will identify with these problems. And it can perhaps be argued that the fact that problems like these are identified daily in the criminal justice process, and are expected to be so identified, may itself be derived from the long history addressed in the following chapters.

In passing, I underline that there was no mitigation plea. The defendants were unrepresented. The judge who had laid down the law himself concluded that they were guilty and he himself passed sentence. In the Garden of Eden the trial process was unfair. It is perhaps too late for a prerogative pardon.

The story of the first crime provides a vivid illustration of the societal impact of crime. Every society, even the most primitive, has laws. And breaches of society's laws, even when based exclusively on religious belief, it was very quickly discovered, could not just be left to the hereafter. Even a theocracy enforces its laws on Earth. It does not leave what are asserted to be divine laws to divine justice, but rather purports to imbue the enforcing authorities on Earth with the investment of divine agency.

This volume directly addresses Christianity and criminal law. Today, Christianity includes numerous, not always consistent beliefs and traditions, which include, let us not forget, among others, the Coptic Church and the Greek Orthodox Church, and in the Western world not least Protestantism and Catholicism with

their different manifestations and beliefs. Men and women died horrible deaths because of their belief in or rejection of predestination, or the alternative belief, free will. In this history, the Reformation is really pretty recent, and over 20 centuries the authority of the Christian Church, or more accurately Churches, has varied within different societies, sometimes waxing, sometimes waning.<sup>9</sup>

The secular arm of the State and religious authority have at times been virtually indivisible, at others, at loggerheads. Usually that is a consequence of the struggle for power, political power, often dressed up as a religious issue, but sometimes the struggle for political power is directed to a moral issue. Was Henry VIII in breach of the law of God when he married his dead brother's wife, and so cursed? The short answer is that he cannot have been, because he became, and apparently always had been, the Supreme Head of the Church in England. So, it was just the marriage that was cursed. In passing, everyone ignores that his second marriage was equally cursed, because before he met Anne Boleyn, he had slept with her older sister; instead of dismissal suffered by Catherine of Aragon, Anne Boleyn faced trumped-up charges of infidelity. But Henry's struggle with the Pope, however dressed up in biblical texts, was about power. If the Pope would not provide him with the outcome he wanted, then that power should be placed where the desired outcome could be guaranteed.<sup>10</sup>

Every society has had to address the immediate problem, the daily problem, of the appropriate way to deal with the individual who has committed an offence. That responsibility is ultimately carried by judges, themselves fallible fellow human beings. With the possible exception of cases involving children, and the very rare cases involving life and death decisions, if you asked most judges to identify their most burdensome responsibility, it would rarely be the law, however complicated and difficult that may often be, but how to deal with the post-conviction decision. So many factors are in play. There is the crime itself and how contemporary society views the crime; there is the victim and the consequences for and impact of the crime on that individual, and sometimes on wider society; there is the defendant, with all their history, and their level of culpability and their intention at the time when the crime was committed; there is the future as well as the past. What is most appropriate, punishment or rehabilitation? This obligation to carefully balance many factors, some of which at least are in conflict (and I could give an entire lecture on the subject), is a responsibility shared by every judicial authority, the pagan and Christian, Mohammedan or atheist, whether society has or does not have a religious foundation, or indeed is a theocracy.

One of the constant themes in this volume is achieving the appropriate balance between justice and mercy. Assessing the proper balance between them is an awesome responsibility, and perhaps throughout these discussions we should bear in mind that in every Christian country, every day, every week, men and women will be exercising it. For them all, the Christian heritage does not diminish the

9 See e.g. Euan Cameron, *The European Reformation* (Oxford: Clarendon Press, 1991).

10 See e.g. Arthur Geoffrey Dickens, *The English Reformation* (London: Batsford, 1964).

burdens. I began practice at just about the time when the death penalty was abolished and went to the Court at Nottingham the day after one of the very last such sentences had been imposed. The atmosphere was bleak. The court where that sentence had been passed was shut. I was told that the judge, a member of the Anglican faith, was spending the whole of that day praying in the nearby church.

The story of sin and crime, and their possible overlap and the confusion between them has been a vivid aspect of history. To me, one of the most interesting aspects of studying the chapters that follow has been the distinction between the crimes which constitute offences against what might fairly be described as religious crimes (alleged to be against God in Heaven) and those which are crimes against the Church on Earth (for example, sacrilege), and the impact of the distinction on developing thinking. On a personal level, I remember with fondest love my Catholic grandmother, the most devout of women, with a burning faith and belief in the afterlife who would have been much more concerned about sin, which she would have seen as an offence offered to God, an insult to Our Saviour, who died on the cross to expiate our guilt, than about the place occupied by such a sin in the list of crimes. To her, I suspect, suicide was a sin, a mortal sin, and by comparison with mortal sin the question whether it was a crime or not, would have been trivial.

Largely, today, we live in a secular society in which that authority of the Christian Church has significantly diminished. Our beautiful churches, every single village offering testament to the worship and devotion of previous generations, are now largely empty. How many really believe, as my grandmother did, that this present life is a mere testing ground for eternity, with the immortal soul facing judgment by the Almighty, just as Adam and Eve did? The continuing role to be played by Christianity, or indeed any other faith, in the development of the criminal law will inevitably become less intense than it once was. Even if it were to diminish to extinction, even if we no longer believe in sin, as the following distinguished chapters demonstrate, Christianity's continuing influence on criminal justice in Western society will abide.

# Acknowledgments

This volume on *Christianity and Criminal Law* is one of several new introductions to Christianity and Law commissioned by the Center for the Study of Law and Religion at Emory University. Each volume is an anthology of some two dozen chapters written by leading scholars. The volumes contain historical, doctrinal and comparative materials designed to uncover Christian sources and dimensions of familiar legal topics. Each is authoritative but accessible, calibrated to reach students, scholars and instructors in law, divinity, graduate and advanced college courses as well as educated readers from various fields interested in what Christianity has, can and perhaps should offer to the world of law. Earlier titles in this series include *Christianity and Law* (2008); *Christianity and Human Rights* (2010); *Christianity and Family Law* (2017); and *Christianity and Natural Law* (2017). Other titles are forthcoming on Christianity and: Conscience, Constitutionalism, Economic Law, Global Law, International Law, Migration Law and Private Law. We aim, over time, to commission other such volumes on Christianity and bankruptcy law, education law, elder law, environmental law, health law, labour law, procedural law, remedies and other familiar legal topics.

This volume on *Christianity and Criminal Law* – together with the parallel volumes in press on Global Law and Private Law – was made possible by a generous grant from Fieldstead and Company, a private California foundation. We give thanks to the Fieldstead board and directors for their generous support, and to the programme officers, Dr Stephen Erikson and Dr Joe Gorra, for their wise counsel as we planned these volumes. We are deeply grateful to Dr Hester Higton for so generously sharing her superb editorial talents in copyediting this manuscript. We also express our warm thanks to Ms Anita Mann and Ms Amy Wheeler for their skilful administration of this and other scholarly projects.

It was a joy for us to work with such a range of leading scholars from North America and Europe who contributed fresh and perceptive chapters to this volume. Our collective efforts were greatly enhanced by the two round-table conferences held at Emory University in 2017 and in Mark Hill QC's Chambers at the Inner Temple, London, in 2018. Those intense discussions helped us identify the

major themes for this study of Christianity and Criminal Law, a topic which has not been well explored in recent scholarship. We give thanks to our Emory colleagues, Professor Rafael Domingo and Dr Justin Latterell, for their help in the first Emory conference, and Dr Robin Griffith-Jones, the Reverend and Valiant Master of the Temple, for his generous hospitality during the second symposium in the heart of legal London, not least for designing a splendid service of choral matins at which Professor Witte preached a rousing sermon.

The purpose of the round-table sessions was to stress-test the views expressed in a multi-disciplinary hot-house environment. Hence, the discussions were robust and demanding, not unlike doctoral defences. The idea was not to produce a comprehensive narrative of every conceivable interaction between Christianity and the criminal law. Such would be an impossible task. Each discrete subject is vast, subjectively understood and amenable to a range of interpretations. The hope was that by selecting leading experts in the field of Christian theology and criminal law and practice, each contributor would bring an insightful perspective on a particular matter, in territory which was often contested. Thus, this volume represents a gallery of individual canvasses, and not a complete holistic mural. In some instances, the chapters talk to one another both within and across the two principal disciplines. But each contributor brings his or her own voice such that the chapters can be read independently, unlocking one or more aspects of the rich and enriching world of Christianity and criminal law, and pointing the reader to further reading on the subject.

We are delighted to publish this volume and several others in Routledge's distinguished Law and Religion series edited by one of the world's preeminent scholars of law and religion, Norman Doe. Professor Doe and his many colleagues in the Centre for Law and Religion at Cardiff University have been vital trans-Atlantic allies with the Emory Center for the Study of Law and Religion. We are grateful for their leadership in this expanding global field of inter-disciplinary legal study, and for their partnership with the Emory Center in publishing this and parallel volumes on law and Christianity. We are also deeply grateful for the generous collaboration of Dick Helmholtz, the world's leading historian of English ecclesiastical law, and a scholarly giant in the study of legal history, and of law and religion on both sides of the Atlantic. His wise counsel and contributions throughout the preparation of this volume have greatly improved the pages that follow. The mundane but essential task of organising the round tables, managing the contributors and ensuring consistency of style throughout the manuscript fell on the lead editor, Mark Hill QC, a long-standing friend and collaborator. While this book was in production, he was made honorary chief of the Erinmo people in Nigeria by their king, The Elerinmo of Erinmo, and given the title *Bameto*, which translates as "an adept organizer with understanding of religion". Although with characteristic modesty he rarely uses his chieftain's title, it neatly encapsulates Mark's contribution to this and many other projects.

Finally, we express our warm thanks to Alison Kirk, Emily Summers and their colleagues at Routledge in taking on these volumes and applying their usual standards of excellence in their editing, production and marketing of this one in particular.

Mark Hill QC and John Witte, Jr  
Center for the Study of Law and Religion  
Emory University

Feast of the Epiphany, 2020



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# 1 Introduction

*Mark Hill QC*<sup>1</sup>

In the view of the famous student of comparative law Henry Sumner Maine (1822–88), the earliest days of European criminal law were marked by a decidedly religious character.<sup>2</sup> It was God who first instructed men that they were not to commit murder. It was God who alerted men to the dangers of perjury. If a king issued a similar law, he did so as God’s chosen ruler, giving specific form and force to what was at bottom a religious command. Maine was far from alone in this characterisation of religion’s early link to law. Indeed, variations of the theme of religion’s relevance to the growth of Western legal systems continue to appear in the works of modern historians.<sup>3</sup> Maine’s view also long held the field among European and American lawyers, theologians and historians. Brent Strawn’s chapter, which opens this volume, supports our recognition of Maine’s characterisation of the historical tie between law and religion. The law of crimes, Strawn demonstrates, is “profoundly godlike when seen through ancient eyes”.

Today’s law, however, appears to have lost this ancient character. Making a causal connection between our criminal law and religious commands is a habit we are widely regarded as having outgrown. Time and opinion move on. Religion now belongs within the private side of modern lives, not the public world of courts and crime. The Age of Enlightenment’s signal achievement was to break the existing link between law and religion. Heikki Pihlajamäki’s magisterial contribution to this volume explores the complexity of this subject. He shows that

1 This introduction is the work of several hands – those of Norman Doe, Dick Helmholz and John Witte, as well as my own. Not only have they brought into the light the points of continuity and similarity we had identified in planning this project, but they have also uncovered several additional connections which emerged from the revised drafts of the chapters. I am grateful for their help and for their company in completing this project.

2 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*, 1st ed. 1861, republished in Beacon Series in Classics of the Law (Boston: Beacon Press, 1963), 1–19.

3 See, by way of example, James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven and London: Yale University Press, 2008); Reinhard Zimmermann, ed., *Der Einfluss religiöser Vorstellungen auf die Entwicklung des Erbrechts* (Tübingen: Mohr Siebeck, 2012); Thomas Oakley, *English Penitential Discipline and Anglo-Saxon Law in Their Joint Influence* (New York: Columbia University Press, 1923).

religion did remain a force to be reckoned with even among most Enlightenment thinkers. Subject to this amendment, a significant one, Pihlajamäki's chapter does not deny the gradual impact of secularism on this subject. He would agree. To many recent commentators the Christian religion appears to stand as an obstacle in the way of reaching desirable goals within their own systems of criminal law. Religious history – replete with witch hunts and incineration of heretical dissenters – is thought to be ample evidence of the wisdom of religion's relegation to the sidelines of public life and penal law.

Why, then, does it make any sense to produce a volume devoted to investigating the relationship between Christianity and the criminal law? And once produced, why should anyone read it? Answers to this objection are found in the chapters which follow, but it is worthwhile identifying some of the threads that tie them together. Several good reasons exist for undertaking an investigation into the connections between crime and religion. Different sorts of readers will take an interest in the subjects found in this book's chapters. Some of these interests will seem immediately obvious to most of us. Others require more thoughtful consideration of religion's legitimate role in modern criminal law. While more challenging, they are also the more deserving of scholarly attention and thought.

### 1.1 The immediate interests of the subject

Several groups of potential readers will profit in an immediate way from the essays in this volume. The first is made up of the men and women whose professional careers intersect with its subjects – religion and criminal law. The clergy are the most obvious members of this group. Virtually all Churches – Catholic, Protestant and Orthodox – have canons. They contain rules and legal principles touching offences and offenders.<sup>4</sup> They establish court systems, enact procedural rules and provide definitions of both wrongful conduct and available remedies and penalties. Norman Doe's chapter draws upon his own pioneering spade work in exploring this subject,<sup>5</sup> and several other chapters in the volume add to what he has done. The chapter by R.H. Helmholz on the mediaeval canon law's treatment of criminal law provides an historical example. A good number of basic Western criminal law concepts of *mens rea*, *actus reus* and causation, as well as basic crimes against persons, property, religion and morality have roots in the mediaeval Christian sources and their antecedents in the first millennium.<sup>6</sup>

A real need exists today for greater knowledge of this subject among the parochial clergy. Few would dispute that this knowledge is too often slight or even non-existent, and Doe's chapter provides an attractive starting point. Not only

4 See, e.g. Mark Hill, *Ecclesiastical Law*, 4th ed. (Oxford: Oxford University Press, 2018).

5 See most recently Norman Doe, *Christian Law: Contemporary Principles* (Cambridge: Cambridge University Press, 2013).

6 See, e.g. R.H. Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: University of Georgia Press, 2010).

that. The book's utility may prove immediately useful to the clergy in several ways. For instance, it provides an abundance of material that is of potential use to the clergy in their capacity as preachers. Some of it will enliven their sermons. John Stinneford's chapter, to take just one example, includes the fascinating showing that today Adam might have been convicted of the English offence of "scrumpling" (taking fruit from a common orchard or garden). This is, at most, a misdemeanour, a minor infraction of the law, but the story in the Book of Genesis reminds us that God's commands go beyond simple obedience to existing law. A comparison with Adam's action and the modern law of scrumping will bring that point into dramatic focus. His fate will confirm the preacher's point. This book is full of such treasures.

Another group of professional men and women who will profit in an immediate way from the essays that follow are lawyers – lawyers whose practice includes disputes in matters connected to religious life. This has been a perennial field of contention, and it remains an area of litigation to this day. It sometimes seems to be growing in frequency and importance. The laws of most Western countries guarantee religious freedom to its citizens. What, then, happens when that freedom comes into conflict with secular laws? This is not a new question. It has a long history. Consider, for instance, the example and the effects of the fourteenth-century English statutes of *Praemunire*.<sup>7</sup> They sought to curtail the Church's freedom of action by restricting rights of appeal to the papal court. Nathan Chapman's chapter on crimes against the State addresses similar large questions which laws like this one now raise. It is a continuing problem, one that involves conflicting but legitimate loyalties. His analysis begins, as does that of several other of the present authors, with the writings of St Augustine. The treatment of this subject by the ingenious Bishop of Hippo is not identical with what today's analysis will yield, but the chapter demonstrates both how old the question is and how varied Christian responses to it have been. Augustine also still has something of value to say about the legal treatment of the conflicts that arise, and this volume provides a ready entry into his thought on the subject.

A further group of readers who will find subjects of immediate utility in this volume's chapters consists of the students and teachers in universities and law schools that offer courses and seminars in law and religion. This has become a growing field of study. The current *Directory of Law Teachers* in the United States lists 104 teachers of courses and seminars on the subject, and the Association of American Law Schools' section on law and religion claims more than 450 members.<sup>8</sup> Academic centres devoted to the study of law and religion have also sprung

7 25 Edw. III, st. 3, c. 22 (1351); 27 Edw. III, st. 1, c. 1 (1353); 16 Ric. II, c. 5 (1392). See also W.T. Waugh, "The Great Statute of *Praemunire* of 1353", (1922) 37 *English Historical Review* 173–205; E.B. Graves, "The Legal Significance of the Statute of *Praemunire* of 1353", in Charles Taylor, ed., *Anniversary Essays in Mediaeval History by Students of Charles Homer Haskins* (Boston and New York: Houghton Mifflin, 1929), 57–80.

8 See *The AALS Directory of Law Teachers 2017–2018* (Washington, DC: West Publishing and Foundation Press, 2018), 1567–8.

up to become established institutions at several American universities – Emory, Brigham Young, Pepperdine, St John’s in New York, Notre Dame and Villanova, for example. Since 1998, Cardiff University in the United Kingdom has had a successful Centre for Law and Religion, and other centres have popped up on the Continent, in South Africa, Southeast Asia and Australia. There is now an International Consortium for Law and Religion Studies, together with various regional consortia. Several of the chapters in this volume will help students in these institutions go beyond a concentration on the constitutional disputes that test the limits of religious freedom. The breadth of its essays, including both history and future possibilities for change, will help lawyers and theologians gain an inside look at the character of religious law itself. Such a look will also take them well beyond the current case law. It will put current controversies into a larger perspective.

A still further group of readers who will find material of interest in this book’s chapters is that made up of men and women who take a serious interest in their own religion. Although there has been an apparent decline in the size of this population over the last 50 years, the professedly Christian share of the population in the United States is still over two-thirds.<sup>9</sup> How many among that number take a serious enough interest in the faith they profess, to prompt them to take up and read a volume about law and religion is anyone’s guess. No surveyor’s list attempts to distinguish between the nominal and the serious. The latter cannot be an empty category, however, and the chapters that follow will interest its members in several ways. Lord Judge’s Preface to this volume is testimony to the interest the contents of this volume have had for him, and his is only one example among many. There are readers who have found and will find interest in the intersection of past and present thought about crime and religion. What is laid out in the books of the Bible and is explored in the works of interpreters of Scripture is capable of deepening the faith of religious men and women. Likewise, the second of Nathan Chapman’s chapters, which concludes the volume, raises questions over the participation of Christians in matters of governmental judgment, firm in the faith that God uses human judgment. What better note on which to finish but to return to the profoundly theological questions which are ever-present in the intersection of Christianity and the criminal law, which will continue to be asked in the current and future generations.

## **1.2 The wider interests of the subject**

The worth of this volume’s chapters is more than a matter of immediate utility. They provide a good deal of food for thought, thought that both can and should have real consequences. Law and the Christian ministry are learned professions.

<sup>9</sup> In 2014, it stood at 70.6%; see the statistics compiled by the Pew Research Center, “America’s Changing Religious Landscape”, 12 May 2015, <https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape>.

To be complete, even to be respectable, each field of inquiry requires some familiarity with history. Several aspects of current criminal law are hard to understand without it. Theology is also shallow and unconvincing if its history is ignored. The nature of both professions thus invites attention to basic questions of legal theory. It is natural for us to ask why certain acts deserve to be condemned and punished while other apparently similar acts do not, and religion always requires thinking seriously about the basic problems of right and wrong. This volume helps in the process of giving serious consideration to the future possibilities of present actions. Richard Garnett's thoughtful and fascinating study of today's law dealing with attempts to commit criminal acts provides one example. In fact, several of the book's chapters also illustrate the possibilities for profiting from the subject's past, as well as shedding light on some questions of current moment and dispute. Three particular themes, found in several of the following chapters, demonstrate the volume's value.

The first of the three is the ubiquity of concern in the chapters for questions of criminal law in the works of the great theologians of earlier centuries. A concern for law and crime appears in the works of virtually all the greatest Christian thinkers. The treatment of crime in the works of St Augustine, Thomas Aquinas, Martin Luther, John Calvin and many other theologians from the past figures prominently in several of the chapters. As a matter of course, these theologians dealt with crimes against God and the Church, religious matters such as simony, blasphemy and heresy. That coverage was almost as a matter of necessity. The need is made explicit in Jeroen Temperman's chapter on the subject. He shows how inevitable and valuable criminal law's inclusion in the thought of Christian theologians and canon lawyers has always been. The questions they touched on ranged widely, well beyond subjects intimately tied to the immediate interests of the Churches. For instance, most crimes were also sins. Their inclusion in manuals used to direct human beings' conduct in the world was only to be expected. It is also worthy of particular note in the Protestant tradition. The great reformers discussed in the volume's pages were not antinomians. Even Martin Luther, whose scathing remarks about lawyers and Christianity are sometimes quoted to demonstrate his antipathy towards law, actually had useful and positive things to say about law's value, not excluding its criminal side.<sup>10</sup> As the volume's chapter by Mathias Schmoeckel convincingly demonstrates, Luther differed from his Catholic opponents about the proper forum for administering a public regime suited for the detection and punishment of criminals. He did not differ with them about its necessity.

Perhaps the most thought-provoking examples of the volume's utility for serious thought are those chapters that discuss aspects of the modern criminal law that have their origins in Christian law and thought, but which in their modern form have largely lost touch with those origins. We have forgotten

<sup>10</sup> See also John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002).

where they came from. A person's right to remain silent in the face of a charge of criminal conduct, a privilege enshrined in the Constitution of the United States, found initial support in the mediaeval Church's laws. *Nemo tenetur prodere se ipsum* (no-one is bound to betray himself):<sup>11</sup> confession of one's private sins was owed to God, but not to one's temporal governors – just one of the several similar examples brought forward and discussed in Peter Collier's helpful chapter in this volume, in which the practical experience of recently serving judges and practitioners augments the high-vaulted scholarship of the academy. Nor has this connection entirely disappeared from modern law. David McIlroy's chapter on the historical influence of Christianity on the development of *mens rea* as a requirement for punishing criminals provides a clear example, even though modern criminal lawyers rarely recognise the connection.<sup>12</sup> Chloë Kennedy's essay also demonstrates that many parts of modern criminal law have their roots in traditional Christian beliefs. What she calls the "tenacity of Christian norms" is illustrated by the modern resistance to permitting assisted suicide. Suicide (self-murder according to mediaeval ways of thought) is no favourite of our own legal systems. Few of us living today would wish to see a stake driven through the heart of the man or woman who has committed suicide, but we still punish anyone who drives the stake at the request of a volunteer. Similarly, David Etherington's chapter, which deals with several aspects of our law's treatment of offences against the person, opens up a subject of continuing importance by exploring its roots in its Christian past.

A second long-term appeal of this volume, one touched upon by several of its contributors' essays, is the help Christianity provides in the evaluation, criticism and reform of modern systems of criminal law. Not all imperfections of the past have disappeared, and the Bible itself invites the justified criticism of some of today's practices, as Markus Bockmuehl's chapter demonstrates in scholarly detail. The trial of Jesus provides the most prominent of the several examples upon which his essay touches. Condemnation at the behest of a mob is a stain upon the administration of justice in any age, and Pilate's capitulation to one stands as a warning against it. The possibility has not gone away. The "War on Crime" that was declared by American President Lyndon Johnson in 1965, and re-voiced by Prime Minister Tony Blair in the 1990s, as a way of combatting urban unrest may have had some positive results, but it also went too far by a large margin. Too often, people have been imprisoned for trifling offences. Today, the United States imprisons the same number of people with criminal records as it has four-year college graduates. Nearly half of black American

11 See *Decretales Gregorii IX* (the *Liber Extra* of 1234), at X 5.1.14 (*Veniens ad sedem*), in Aemilius Friedburg, ed., *Corpus iuris canonici*, 2 vols. (Graz: Akademische Druck- und Verlagsanstalt, 1959), 2:col. 737.

12 See Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (Cambridge: Cambridge University Press, 2019).

men have been arrested for criminal activity by the age of 23.<sup>13</sup> At bottom, the dramatic overcrowding and inhuman conditions in American prisons that have followed this Declaration of War have been the unfortunate aftermath of a surrender to the crowd. The chapter by Sir John Saunders gives a detailed account of the current intent of the English system of parole, whereby offenders are rehabilitated into life outside the overcrowded and under-funded prison regime.

A particularly telling criticism of the misuse of a religiously inspired institution is also found in Albert Alschuler's exploration of the current exercise of the pardoning power vested in the American president and also in the governors of most U.S. states. Mercy in the exercise of jurisdiction over crime is a part of the inheritance of Christianity. There is little doubt about that. Jeffrie Murphy's authoritative chapter explores the benefits which the Christian duty of showing mercy brings to all those who administer the criminal law. The law itself can sometimes go very wrong when this duty is forgotten or ignored. The example of Jesus' treatment of the woman taken in adultery is one example among many. God himself is merciful (Deut. 4:31). "Blessed are the merciful, for they shall receive mercy" (Matt. 5:7). The Christian roots of the modern pardoning power, the power to temper justice with mercy, are evident in its history.

However, as the chapters also demonstrate, these are powers that can be misused. Alschuler shows that in the United States today they are being misused. The power to pardon was meant to be a force for good. It was designed to remedy individual injustices. Instead, recent American presidents have employed it to reward those who have made large monetary contributions to their own political and personal funds. Pardons, like mediaeval indulgences, seem to be for sale. As his chapter demonstrates, the biblical records make it clear that Jesus "would have disapproved of partisanship towards the rich and powerful in granting clemency". An analogy with the sin of simony – the payment of money for obtaining a spiritual office – also provides a telling argument against the modern misuse of a religiously based institution. The connection between law and Christianity provides a way, perhaps the best way, of demonstrating that the right to pardon was not meant to be converted into a fund-raising technique.

A third source of interest in the contents of this volume inheres in Christianity's power to generate new ideas and institutions in the administration of criminal law. Daniel Philpott's chapter is particularly eloquent on this score. It shows the utility that initiatives based on the Christian duty to forgive have served in the commissions established in the wake of transitions from dictatorships to democratic regimes. South Africa's Truth and Reconciliation Commission led by Archbishop Tutu is the most celebrated of these transitional bodies. There

13 See Matthew Friedman, "Just Facts: As Many Americans Have Criminal Records as College Diplomas", 17 November 2015, <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.

have been a surprising number of them, as Philpott's chapter demonstrates, and a connection with the Christian religion has been a feature of many of them. He treads on solid ground in finding the inspiration for their establishment in "God's willingness continually to restore his covenant with the people of Israel". Both institutions have within them a similar mixture of mercy and practical sense. The commissions not only promote forgiveness and reconciliation, but they also call for the public recognition of past wrongs on the part of the perpetrators of those wrongs. This requires an open admission of guilt, wherever it is feasible, by the men who have done wrong. It is not "cheap grace". Open repentance is required. These commissions provide an example of Christian principles being put to a novel and profitable use.

John Witte's chapter on what he calls "sex crimes" provides an equally fascinating example of religious law's capacity for new uses. Adultery, sodomy and the like were long public crimes in Western law, acts condemned and punished in the courts of both Churches and kings. The justification given for their criminalisation is spelled out in his chapter's exploration of the thought of Thomas Aquinas, who stated it clearly and connected its purposes with the law of nature. Somewhat surprisingly, Aquinas also provided a partial justification for permitting the practice of prostitution. Attempts to abolish it, he held, and the consequences would be worse. "[T]he carnal appetite is always alive" and "prudential and practical concerns" must be considered in shaping the law designed to govern human conduct. In recent centuries, as Witte recognises, the "modern secular State" has undone most of the traditional criminalisation of sexual offences, including most aspects of prostitution. But his chapter also shows that this development has not rendered Christianity irrelevant. The Churches have a responsibility to promote a higher standard of behaviour than does much of our criminal law. Their members should not be silent simply because a question of criminal law has arisen which conflicts with religion. There are also contentious modern questions of public law where the voice of Christianity still needs to be heard. The question of polygamy's possible legalisation in Western law, a question once thought to have been settled in the negative by its conjunction with the growth of the Church of Latter Day Saints in the nineteenth century, is bound to arise again. Witte's contribution calls for Christian voices to be heard when it does.<sup>14</sup>

### 1.3 Conclusion

Each chapter in this collection of essays is followed by a list of books and articles which provide fuller treatments of the themes covered in the chapter itself. In a few cases, they lead to fuller treatments written by the authors of the chapters themselves. In all cases, they amplify and refine what is found in each of the texts that precedes them. These references are well worth following up. Taken

<sup>14</sup> For fuller treatment, see John Witte, Jr., *The Western Case for Monogamy over Polygamy* (New York: Cambridge University Press, 2015).

all together, they demonstrate that this volume is more than the sum of its parts. Virtually all of its subjects demonstrate that the connection between law and religion, one akin to the connection that Henry Sumner Maine perceived so many years ago, is worth study today. Christianity's place in the criminal law has been diminished. But it has not been wholly lost.

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