The Secularization of Ecclesiastical Privileges in Medieval England and Their Subsequent Adoption and Use in Colonial America 1066-1766

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Abstract

This thesis demonstrates that I have provided a sustained, original, coherent, and significant contribution to scholarly research on benefit of clergy as it transitioned from ecclesiastical use to temporal during the late middle ages and how once secularized was subsequently adopted and used in colonial Virginia and Massachusetts.

The Introduction argues that whereas benefit of clergy existed in the English-speaking world for almost fifteen hundred years it has been largely dismissed as evil, a farce and a queer old legal anomaly. At its worst it permitted members of the church immunity from prosecution before secular courts for the crimes of murder, robbery, rape and a suite of other felonies. At its best it saved women, children and the poor from the gallows for the most minor of thefts. I argue that the life and history of benefit of clergy is a fascinating and important insight into the development of the common law and the relationship that members of the church had with the society they served. Over time the benefit became available to first time offenders regardless of their station in society in exchange for a sentence of transportation to the American colonies. The criminal courts of England attached an indentured servitude to benefit pleas resulting in thousands of men and a few women and children being sent to Virginia to service the labor pool needed to make Virginia the financial success its London backers had hoped for. Within a short period of time benefit of clergy became an established part of the legal system of the colony to the extent that it was possible to claim benefit of clergy in Virginia and be transported away to the West Indies. Further north the motivation for colonization differed. The early arrivals to Massachusetts were familiar with benefit of clergy but their enthusiasm for wholesale adoption of English common law was tepid. Notwithstanding these reservations the practicality of having a mitigatory plea that was known to all members of the community meant that the written law could appear to embrace religious severity but in practice could be applied with leniency when appropriate.

The Critical Essay demonstrates my contribution beyond what has previously been offered. Prior to my works there was one scholarly book dedicated to the topic of benefit of clergy. Leona Gabel's 1923 doctoral thesis was published in 1928 as *Benefit of Clergy in England in the Later Middle Ages*. Since her work there have been a couple of dozen scholarly articles and an entertaining unreferenced read by George Dalzell, *Benefit of*

Clergy in America published posthumously in 1955. I have made a unique contribution in bringing the related legal options to claim sanctuary, abjuration, exile and outlawry into the benefit of clergy discussion. Also, I have argued that it is vital to an informed understanding of the uptake and use of benefit of clergy in colonial America that the history of the arguments that took place in England during the twelfth, thirteenth and fourteenth centuries are explored to appreciate why transported felons would adopt and apply *clericus* in such different worlds as existed in Virginia and Massachusetts.

The Critical Essay does not attempt to explain or utilize primary sources in theology. Nor does it seek to interpret theoretical canon law from the period. Through the use of case examples my work takes a case based approach to describe the social setting of benefit of clergy throughout this period of history. By examining examples of benefit of clergy use and abuse a better understanding may be gained of the socio-legal world of the late Middle Ages which will help locate *privilegium fori* as an organic privilege that shifted from ecclesiastical exclusivity to secular adoption. It attempts to explain that benefit of clergy, though much and inexcusably abused, was not exceptional, rather the opposite. Clericus began as a plea available to a few select men who had a particular status in society. This of itself is not unusual. Over time the advantages of having immunity from certain sanguinary remedies became clear to an audience far greater than just England's clergy. Defending benefit of clergy as an exclusive ecclesiastical privilege became impossible because of its wholesale abuse. Eventually it would have to have been rescinded by the secular law or adopted. It was modified, adopted and then lived on for another five hundred years in consistently changing applications. A life of five hundred years is much more than a legal farce. It is a statement of societal growth. Of the *clericus* plea there is little scholarly pusillanimity but it tends to follow one track; benefit of clergy was a farce, a legal fiction. I reject this interpretation and my Critical Essay provides an alternative and plausible history.

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Contents

Introduction

The chapters presented in this thesis are drawn from two books, *Getting Away with Murder: Criminal Clerics in Late Medieval England* (2017) and *Benefit of Clergy in Colonial Virginia and Massachusetts* (2015*).* [1] Each covers different periods of history that are linked together through the use and adaptation of the legal provision known as benefit of clergy.

Benefit of clergy was a legal mechanism that permitted clerics suspected of committing a felony to have their case transferred from the courts temporal to the courts Christian in order that they have the opportunity to purge themselves before their ecclesiastic peers.

Publication 1, *Getting Away with Murder: Criminal Clerics in Late Medieval England* examines the use and abuse of the benefit of clergy plea in England from around the time of William's invasion in 1066 to the eventual secularization of *clericus* in the mid-fourteenth century. This period is particularly important in understanding benefit of clergy as it demonstrates the gradual but persistent growth of abuse of the plea by England's clerics alongside the erosion of the Church's authority over a number of legal matters; it also marked a general change in the perception that society held towards clergyman as reading, satire and a merchant class stimulated a more questioning and less forgiving pubic. (Publication 1 Chapters 6, 7, 8 and 10).

Having investigated the pressures that caused an ecclesiastical privilege to become available to all Englishmen (and eventually women and children) publication 2, *Benefit*

[1] Peter Johnstone, *Getting Away with Murder: Criminal Clerics in Late Medieval England* (Dubuque, IA: Kendall Hunt, 2017) 344 pages. Peter Johnstone, *Benefit of Clergy in Colonial Virginia and Massachusetts* (Dubuque, IA: Kendall Hunt, 2015) 338 pages.

of Clergy in Colonial Virginia and Massachusetts, is an exploration of the development of Transportation and the uptake and differential use of the *clericus* pleas in two colonies, Virginia and Massachusetts. Transportation developed in seventeenth-century England as a mechanism for supplying Virginia with convict labor. Manipulating benefit of clergy to open up transportation was an attractive option for judges, juries, the crown and the general public.[2] Between the years of 1655 and 1699, 4431 convicted benefit felons were pardoned and transported.[3] To continue the use of the *clericus* plea within the legal system of the colony seemed a natural progression for those living there, many were personally familiar with the benefits of the plea and once 'localized' it proved to be a valuable legal provision for the first one hundred and fifty years. (Publication 2. Chapter 3).

The second colony to be formed in North America established a form of government by consent that differed greatly from the regime in Virginia. Many of the northern colonists were personally familiar with the role of the ecclesiastical courts in England and the dominant part they played in the moral life of its citizens. Those who emigrated to Plymouth and Massachusetts were intent on transferring the entire jurisdiction of the courts Christian to the secular forum as soon as possible.[4]

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[2] Transportation was not the only departure from branding or hanging. For alternatives: John Beattie, *Crime and the Courts in England 1660-1800* (New Jersey: Princeton University Press, 1986) pp. 470-471.

[3] Abbott Emerson Smith, 'The Transportation of Convicts to the American Colonies in the Seventeenth Century', *The American Historical Review,* 39, No. 2 (Jan., 1934), 232-249 (p. 238). It is of note that this timeframe covers not only the restoration of the monarchy, Charles II, in 1660 but also the period of the Lord Protector(s) 1653-1658, indicating that the utility of transportation and the established basis of benefit of clergy was appreciated by both the monarchy and the short duration commonwealth. Taken from Johnstone, *Benefit,* chap. 2. pp. 32-36.

[4] For a discussion about the move to avoid a courts Christian see: Julius Goebel Jr, 'King's Law and Local Custom in Seventeenth Century New England', *Columbia Law Review,* 31. No. 3 (Mar., 1931), 416-448. Esp. p. 425 note. 16 that contains numerous further references. Also, George Haskins, 'Codification of the Law in Colonial Massachusetts: A Study in Comparative Law', *Indiana Law Journal*, 30. No. 1 (Fall, 1954), 1-17 and Johnstone. *Benefit,* chap. 3

Egalitarianism was a key feature of the Body of Laws and consequently there is no mention of benefit of clergy in the code.[5] This does not mean, however, that the clergy plea did not exist. As was common practice in colonial Virginia it was possible to incorporate *clericus* through judicial discretion and sentencing procedures.[6] (Publication 2. Chapter 5).

Benefit of clergy was one of four provisions that existed in medieval England alongside sanctuary, abjuration and outlawry. Together they permitted most felons to select the most beneficial mitigatory option available to them and apply it to circumvent criminal culpability. The transition to secularization of one of these pleas, benefit of clergy, is an important example of the lessening of the impact of canon law in England and a clear illustration of two legal systems, canon and common law, merging with secular becoming the dominant by the mid-fourteenth century. The mechanism for this was in part established through the lines of demarcation created by Innocent III in 1215, but with time they became malleable, not exclusively or even principally through legislative provisions but through the practice, adaptation and integration of low level clerics in and amongst the society they served.[7] Throughout the thirteenth and fourteenth centuries the

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[5] 1641 The Massachusetts Body of Liberties. 1648 The Laws and Liberties of Massachusetts. <http://www.commonlaw.com/Mass.html#HE46> [Accessed 28 January 2014]. 2014Kathryn Preyer, 'Penal Measures in the American Colonies: An Overview', *The American Journal of Legal History*, 26, No. 4 (Oct., 1982), 326-353 (p. 333) and note. 12.

[6] A particularly interesting particularly interesting example took place in 1686-1687 when the Assistant's Court permitted the use of *clericus* pleas by two women defendants, Charity Williams and Mercy Windsor. Both women were branded. Johnstone. *Benefit,* chap. 6. p.136.

[7] There are numerous specific provisions that demonstrate the division of ecclesiastical and secular legislation but equally there are many examples of the courts, Christian and temporal, applying both canon and common law especially in matters over dispute of title and landownership. C.f. Comments, 'The Regression of Ecclesiastical Jurisdiction', *The Yale Law Journal,* 32. No. 6 (Apr., 1923) 594-602, pp. 600-601, and Richard Helmholz, 'Conflicts Between Religious and Secular Law: Common Themes In The English Experience, 1250-1640', *Cardozo Law Review*, 12, (1990-1991), 707-728 and Richard Helmholz, 'Scandulum in the Medieval Canon Law in the English Ecclesiastical Courts', *Zeitschrift der Savigny-Stiftung fůr Abteil;ung, Rechtsgeschichte. Kanonisteische* 96, No. 127 (2010), 258-274.

numbers of the lower ranks of secular clergy grew considerably and the vast majority of these men were unbeneficed. It is not surprising that in the face of a life of meager existence many of them resorted to crime at the same time as remaining associated with the Church.[8] In my work I use a greater number of cases than have been discussed in any work previously: while Gabel utilizes two thousand cases, I have used more than four thousand, and I have incorporated cases that have never been discussed previously in the context of benefit of clergy whereas Gabel restricted her study largely to the rolls for three geographical centers and Newgate.[9] My work has drawn upon English lawsuits from William I (1066-1087) to Richard I (1189-1199), the available Eyres of Bedfordshire, Berkshire, Cornwall, Kent, Northamptonshire, Shropshire, Staffordshire, Surrey, Yorkshire, and London, Select Ecclesiastical Cases 1272-1307, Select Cases from the Ecclesiastical Courts of the Province of Canterbury 1200-1301, Calendar of Patent Rolls 1216-1452, Essex Sessions of the Peace, 1351, 1377-1379, Select Cases from the Coroners Rolls 1265-1413, The Year Books of Edward I (1272-1307), Newgate Gaol Delivery Edw II-Edw III, Northamptonshire Coroners Rolls 1323, Select Cases from the King's Bench Edward I and Edward II, The Assize Rolls for Northamptonshire and Lincolnshire and the Registers of bishops Ralph, Wickwane, de Sutton, Giffard, Martival and archbishop Melton.[10] In Colonial America my work uses cases from the Bristol Assizes, Essex County

[8] Alain Boureau, 'Privilege in Medieval Societies from the Twelfth to the Fourteenth Century, or: How the exception proves the rule' in *The Medieval World*, ed. by Peter Linehan and Janet Nelson (London: Routledge, 2001), pp. 621-634.

[9] Leona Gabel, *Benefit of Clergy in England in the Later Middle Ages* (New York: Octagon Books, 1969), p. 2 Yorkshire, Devonshire, Middlesex and Newgate. Total number of cases 2001. Appendix A. Gabel may not have had access to a number of post 1923 sources as cited in my bibliography (Publication 1) pp. 295-301.

[10] Van Caenegem, Raoul, ed. *English Lawsuits from William 1 to Richard 1, Vol. 107 (I and II)* (London: Selden Society, 1991), The Roll and Writ File of the Berkshire Eyre of 1248, Roll of the Shropshire Eyre 1256,, Eyre of Kent 6 and 7 Edw II, Rolls of the Justices in Eyre for Lincolnshire 1218-1219 and Worcestershire 1221, Cornwall Eyre 1302 20 Nov 1301-19 Nov 1302, The Earliest Northampton Assize Roll A.D. 1202 and 1203, Lincolnshire Assize Rolls A.D. 1202-1209, The 1263 Surrey Eyre, Calendar of Patent Rolls 1216-1452, Sayles, G.O. (ed) *Select Cases in the*

Court, the Lower Norfolk Court, Massachusetts Court Records, Minutes of the Council and General Court (Mass), Minutes of the Council and General Court of Colonial Virginia, the Records of Accomack-Northampton, the Richmond Court Proceedings, Suffolk County Court (Mass), the Superior Court Records (Mass) and York County Court Judgments and Orders (Mass).[11] The value of these case studies is that they provide specific examples of the range of crimes committed by members of the clergy which I use to form the basis for an explanation as to why *clericus* changed over time; why it prospered in the face of clear examples of abuse and why it transitioned to be standard procedure in all felony trials in the courts secular. There is no work in print that explores such a number or diversity of cases to explain the laicization of the *clericus* plea. [12] (Publication 1. Chapters 6 & 7).

Court of the King's Bench Under Edward I, Vol. 1 (London: Selden Society 1936), Sayles, G.O., (ed) *Select Cases in the Court of the King's Bench Under Edward II,* Vol. 74 (London: Selden Society, 1955*), Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1200-1301*, Furber, Elizabeth.C. ed. *Essex Sessions of the Peace, 1351, 1377-1379,* (Colchester: Essex Archeological Society Occasional Publications 3, 1953), Northamptonshire Coroners Rolls, August 9, 1323, *The Register of William Wickwane: Lord Archbishop of York*, *1279-1285*. 1907. Reprint. (London: Forgotten Books, 2013), Willis, J.W., ed. *Register of Godfrey Giffard. Bishop of Worcester 1268-1302*, (Oxford: Worcester Historical Society, 1902), *The Rolls and Register of Bishop Oliver de Sutton, 1280-1289*. 6 Vols. Hereford, Lincoln Record Society, 1948-49, Elrington, C.R., ed. *The Registers of Roger Martival, Bishop of Salisbury, 1315-1330,* Vol. 2, (Oxford: Oxford University Press, 1963), Scott, T. ed. *Register of Ralph of Shrewsbury, Bishop of Bath and Wells, 1329-1363*, f. 288 (London: Somerset Record Society, H.M.S.O., 1896), Timmins, T.C., ed. *The Register of William Melton, Archbishop of York, 1317-1340,* Vol. V. The Canterbury and York Society, (Woodbridge: Boydell Press, 2002).

[11] Lower Norfolk County Minutes Book 1637-1648 (Va), Minutes of the Council and General Court of Colonial Virginia 1622-1632, 1670-1676 With Notes and Excerpts from Original Council and General Courts Records into 1683, Now Lost, Richmond, VA. 1924. (Va), Records of Accomack-Northampton 1640-1645. (Va), Richmond Court Proceedings 1723/24. (Va), Bristol Assizes, October 1739. (Mass), Essex County Court 1670. (Mass), Mass. Recs. I. 264. (Mass), Massachusetts Court Records. M.C.R. Vol. 1. (Mass), Massachusetts Superior Court of Judicature, Special Courts, 1686-1687. (Mass), Minutes of the Council and General Court 1622-24. (Mass), Suffolk County Court. 1672. (Mass), Superior Court Records Minute Book 1686-1687. (Mass), Superior Court Records, 1730-1733. (Mass), Superior Court Records, 1739-1740. (Mass), Superior Court Records 1754. (Mass), York County Judgments and Orders 1753. (Mass).

[12] The secularization of benefit of clergy is evident in legislation that made certain offences non-clergyable such as: (1496) 12. Hen. VII, c.7. Petty treason, (1512) 4. Hen. VIII, c. 2., Murder in churches or highways and (1531) 23., Hen. VIII, c. 15, sec. 13, willful murder, except to clerks in orders (note the distinction 'in orders') and the formal requirement for compurgation in 1576, 18. Eliz. C.7. sec. 2,3. Extension of the privilege to peers in 1547, 1 Edw. VI. C. 12. Sec. 14, to women in 1692, 3 W. & M. c.9. sec. 5,6 and the reading test was fully abolished in 1705, 5 Anne,

When researching for the first book (publication 2) I found that I had many questions unanswered that related to how was it that a clerical privilege should become a standard feature in secular English law, and where did this particular provision sit alongside pleas such as abjuration, exile and outlawry. I needed to know what had happened to what many authors have dismissed as a mistake of law, an evil that permitted criminals to avoid any culpability. To me the position taken by commentators such as Maitland, Cross, and Gabel, seemed rather simplistic.[13] If the clergy plea was such a mistake then why did it survive, why did it transition from Church law to secular and why did it continue in use for so long? And why did it feature as such a prominent and important part of early colonial law, especially in Massachusetts, where the colonists were striving to leave behind religious suppression and yet they incorporated former canon law into their new world legal system. No existing work attempted to look at these questions, but my 2015 monograph does. (Publication 2 Chap. 5).

Until now what little commentary there has been on the topic of benefit of clergy in England has been largely restricted to brief discussion of the development of the plea in history and criticism of its perpetuation as some kind of embarrassment that expired in the nineteenth century. (Publication 1. Chapter 10).

Works on the use of the plea in colonial America are even rarer than those about the topic in England and in the main they too amount to a brief history of the development of the plea in England.[14]

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c.6, sec. 6. Taken from Johnstone, *Getting Away with Murder: Criminal Clerics in Late Medieval England* (Dubuque, IA: Kendall Hunt, 2017), pp. 27-28.

[13] Frederick Maitland, 'Henry II and the Criminous Clerks', *The English Historical Review*, 7. No. 26 (Apr., 1892), 224-234. Arthur Cross, 'The English Criminal Law and Benefit of Clergy during the Eighteenth and Nineteenth Centuries', *American Historical Review*, 22. No. 3. (Apr. 1917), 544-565. p. 565. Gabel, p. 126.

[14] George Dalzell, *Benefit of Clergy in America*, (Winston-Salem, NC: Blair, 1955), pp. 9-27. Lawrence Friedman, *Crime and Punishment in American History,* (New York: Basic Books, 1993), p. 43 cited in Johnstone, *Benefit,* p. 35.

Just as *clericus* was modified across England by juries, judges and the crown so too it was adjusted to suit local needs in Virginia and Massachusetts. Benefit of clergy existed in Virginia because it helped the fledgling legal system gain momentum and direction; it came as part of the baggage the colonists brought with them and was never the source of ideological rejection it was to the northern settlers. Massachusetts utilized the clergy plea, by inference, as early as 1632 but did not enact binding statutory provisions until 1691.[15] Once the clergy plea was openly available, it was adapted for local use; adultery had never been a capital offence in England but was deemed so in Massachusetts as early as 1648; bigamists too were now added to the list of unclergyable felons by legislation introduced in June 1694.[16] Massachusetts followed English law and eliminated the reading requirement in 1706.[17] It was the first colony to abolish benefit of clergy; Virginia was to follow with abolition for free persons in 1796 but not until 1848 for slaves.[18]

To make sense of the use of the *clericus* plea in English and Colonial courts during the seventeenth and eighteenth centuries it is necessary to understand the transition of the plea itself from a religious right to temporal remedy; to achieve this the process of laicization must be examined. The objective of publication 2 therefore, is not to revisit

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Note. 84., Beattie, p. 479, William Nelson, *The Common Law in America. Vol. 1. The Chesapeake and New England 1607-1660,* (Oxford: Oxford University Press, 2008), pp. 125-132, Jeffrey Sawyer, 'Benefit of Clergy in Maryland and Virginia', *The American Journal of Legal History*, 34. No. 1. (Jan., 1990), 49-68.

[15] The case of Richard Hopkins, Mass. Court. Recs. M.C.R. Vol 1 (Mass). 1632. p. 99. Hopkins was convicted of selling powder shot to Indians. He was branded in the cheek. Under the legislation of 1691 that incorporated the King William Charter, The Avalon Project: The Charter of Massachusetts Bay-1691 < http://avalon.law.yale.edu/17th_century/mass07.asp > *[Accessed 14 November 2013].*

[16] 1st session. Province Laws 1694-95. < http://archives.lib.state.ma.us/actsResolves/1694/1694acts0005.pdf.> [Accessed 22 November 2013].

[17] 5. Anne. c. 6. 1706. Taken from Johnstone. *Benefit*, chap. 5.

[18] It was abolished in Massachusetts by U.S. Congress April 30, 1790. For the history of abolition in Virginia see: Arthur Cross, 'Benefit of Clergy in the American Criminal Law', *American Historical Review*, Third Series, 61. (Oct., 1927-Jun., 1928), 153-181. p. 166.

what Leona Gabel has covered or review opinions as to the egregious nature of the provision; it is to set benefit of clergy into the position it warrants in the discussion of life, society and law of medieval England and as a vehicle to explain how the provision survived and prospered into use in Colonial America.[19]

Previous commentary on the topic of benefit of clergy at English common law has focused on the criminal actions of clerics and the apparent ease with which they were allowed to avoid meaningful punishment for felonies. In publication 2 I have suggested that many more factors are relevant than have been previously introduced into the discussion. These factors do include criminal clerics who abused the law and an increasingly impotent Church protecting its own regardless of the depravity of the cleric's crimes. But these are only a partial explanation for the perpetuation of the plea. The broader discussion brought to the topic is the social setting for the privilege; one that would facilitate acceptance and greater use and eventually one that would be used as a mechanism to turn felons into a workforce.

[19] Gabel is the leading authority on the topic and author of one of two monographs in the English language. Of the shocking approach and commentary examples include: Charles Firth, 'Benefit of Clergy in the Time of Edward IV', *The English Historical Review*, 32, No. 126 (Apr., 1917), 175-191 (p.191) referring to the benefit said 'Clerical immunities in the fifteenth century give a clear example of that straining at a gnat and swallowing a camel, which has been in all ages the peculiar temptation of an official hierarchy'. Newman Baker, 'Benefit of Clergy-A Legal Anomaly', *Kentucky Law Journal*, 15. No. 2 (Jan., 1927), 85-115. p. 100 called it a 'farce'. Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I*, 2nd edn. (Cambridge: Cambridge University Press, 1968), p. 435 refer to it as a 'fiction', Friedman, supra, p. 43 refers to that 'curios legal fiction' as one of the 'quaintest habits of the common law' and Austin Lane Poole, 'Outlawry as a Punishment of Criminous Clerks' in *Historical Essays in Honour of James Tait*, ed. by John Edwards, Vivian Galbraith, Ernest Jacob,(Manchester: Manchester University Press, 1933), p.245 wrote that "Compurgation was like the ordeal "little better than a farce" and Edward White, ' Benefit of Clergy', *The American Law Review*, Vol. 46, No. 78 (1912), 78-94. p. 78 viewed it as nothing but mere 'fantastic quibble'. Arthur Cross, 'The English Criminal Law and Benefit of Clergy during the Eighteenth and Early Nineteenth Century', *The American Historical Review*, Vol.22. No. 3 (Apr., 1917), 544-565. p. 553 called it 'That queer old exemption' and a 'blasphemous farce. In 1765 Massachusetts Chief Justice Hutchinson referred to the ability of a defendant to use the *clericus* plea in a first conviction for manslaughter as the "benignity of English law." Dalzell, p. 192.

Taken together my publications make an original, coherent and valuable contribution to our understanding of the benefit of clergy plea, how and why it became available to the laity of England and what purpose it served to the fledgling societies of two different but united colonies in North America. Both of my publications challenge existing commentary, sparse though it is; they refute the simplistic view that *clericus* was an abomination and instead propose that a complex range of societal factors came together to force change. They are also an important contribution to recognizing that the *clericus* plea did not function in isolation but that it was an integral part of a range of options available to felons, clerical and lay, which together articulate the similarities between the murky world of criminals and the abundant sanguinary legislation of medieval England and colonial America.[20] Prior to my two publications there are no comprehensive attempts to resolve why it is that explanations of the clergy plea have been disregarded for so long. Taken together my monographs represent the most comprehensive discussion about *clericus,* from laicization to transportation and eventual abolition, that are currently available.

The Historiography of Benefit of Clergy

Commentary on the interrelated issues of benefit of clergy, sanctuary, abjuration and outlawry have largely been located within a traditional approach based upon

[20]Interestingly this made some crimes that were clergyable in England unclergyable in Virginia; for example, adultery and incest now attracted the death sentence. It would have been remarkably hard to commit these crimes since the first immigrants were exclusively male. As Dalzell comments these instructions might well reflect the view that James I was ‘The wisest fool in Christendom’ Dalzell, supra. p. 95 cited in Johnstone, *Benefit,* p. 42.

interpretation of law and dates. Over the course of the past thirty years a more nuanced, thematic, approach towards the study of history has gained momentum and credibility. Today much historical research has a tone and level of rhetorical analysis that articulates precision of thought drawn from a wider pool of societal events and actors than have been traditionally considered. Through the work of commentators such as Hudson, Baker, Helmholz and Duffy it is now possible to gain a greater understanding of the place that law held in the social, religious, intellectual and political life of the periods my work considers. It is possible to grasp a better and more insightful appreciation of the vitality of the events that came together to stimulate the use, abuse and modification of *clericus* into a course of events that led to the uptake of benefit of clergy into Colonial America.

What follows is in two parts: the first section is a commentary on the important works by scholars who have taken a traditional approach towards a discussion of the *Excusory Quartet*. This is followed by a critique of those works written by academics who have sought (most successfully) to engage their readers in a thematic evaluation of facts as they apply to a larger narrative. These works represent to me a connectivity of events over time that provides the mechanism for my own work to be contextualized and brought to life.

The historiography of benefit of clergy reflects the lack of attention the topic has received. There are two monographs[21] and a handful of nineteenth and twentieth century articles, many of which introduce *privilegium* as a sidebar conversation as part of a larger exposition of the Church in society throughout the middle ages, or, as in the case of Cross,

[21] Gabel and Dalzell.

(1917) as a legal fiction, 'that queer old exemption, benefit of clergy'.[22] Cheney writing in 1936 is the only author to comment on *clericus*, sanctuary, abjuration and outlawry in the same article.[23] Maitland's *Henry II and the Criminous Clerks* (1892) deals with the event and impact of the Becket affair of the 1160's – when king and archbishop clashed over the rights and privileges of the clergy in England- on *privilegium fori*; Henry's self-assessment of himself as a restorer of *custumals* (a medieval document that defined social and legal customs of an English manor), rather than a legal innovator, is not questioned at length by Maitland.[24] The contribution remains historically informative and throws fresh light on the interpretation of Clarendon but delves little further into the contextual impact of Becket's martyrdom and the long-term effect this had sustaining benefit of clergy. Blackstone (1789) devoted one chapter to *privilegium clericus* as did Maitland (1911), principally as an ideal expounded from Roman origins that culminated in the great row of the twelfth century between Henry II and Beckett.[25] After which, having established the basis for the division between common and canon law the ensuing centuries are a battleground of literal as well as legal attempts at domination by, and for, the clergy over the secular law. I agree with Maitland's interpretation of the struggles for ownership of secular law and the fractious nature of the relationship between English

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[22] F. Donald Logan, *A History of the Church in the Middle Ages* (London: Routledge, 2002) provides quality coverage of the role and function of the Church throughout the period of study. He also deals with the challenging question of when do the Middle Ages end? He suggests 1492. p.351. Cross, p. 565.
[23] Charles Cheney, 'The Punishment of Felonious Clerks', *The English Historical Review*, 51. No. 202, (Apr., 1936), 215-236.
[24] Frederick Maitland, 'Henry II and the Criminous Clerks', *The English Historical Review*, 7. No. 26 (Apr., 1892), 224-234.
[25] William Blackstone, *Commentaries on the Laws of England A Facsimile of the First Edition of 1765-1769 Volume IV of Public Wrongs (1789)* (Chicago: The University of Chicago Press, 1979). Chapter 28. Frederick Maitland, *The Collected Papers of Frederic William Maitland*, Vol. 2, ed. by Herbert Fisher (Cambridge: Cambridge University Press, 1911).

Church and state however I feel he places the emphasis rather late, circa 1170 onwards. [26] I have suggested that William I's influence was significant and he implemented measures to divide the roles of laws secular and canon at an early stage.[27]

Writing in 1869 Lea informs the reader it is pointless to supply evidence of ecclesiastical compliance with secular authority and monarchical supremacy as the king was recognized as the 'fountain of justice'.[28] This is one of the few works that contains an entire chapter dedicated to benefit of clergy. Writing with a particular bias he concludes that Rome looks back with fond regret upon the halcyon days of Innocent III. As my work *Getting Away with Murder: Criminal Clerics in Late Medieval England* demonstrates this is not the case. Clerical violence during the papacy of Innocent III was a significant contributory factor in the diminution of the gravitas of the Church[29] and whereas the ability of the crown to tax the English Church is significant, so too are the many examples of English monarchs working with the Church to progress legal harmony that I have provided. [30]

Disparaging views of the clerical benefit were expressed by Andrews (1909): 'Obviously any such test would be quite impossible now, even if the age had not outgrown so ridiculous a statute'.[31] In my work *Benefit of Clergy in Colonial Virginia and Massachusetts* I propose that once the colonies of America had codified its laws the need

[26] Johnstone. *Murder*, pp. 23-28, 107-108, 111. Johnstone. *Murder.* chap. 3. 'Dissention, Discord and Double Jeopardy'. pp. 59-76 and pp. 98-99 *Gravamina.*
[27] Johnstone. *Murder*, p. 31, pp. 41-46.
[28] Such that the pope invoked papal decree. Henry Lea, *Studies in Church History*, (London: Sampson Low, 1869), p. 182.
[29] Johnstone. *Murder*, p. 14. Note. 34 and p.15. Note 36 and pp. 16-17.
[30] On taxation Johnstone. *Murder*, p.23 and Note 51. For examples of English monarchs actively working with the church, Johnstone. *Murder*, p. 57, 61, 73, 84-85, 97, 101, 223 and the fluidity between laws canon and secular over the use of sanctuary, abjuration before the coroner and exile. Chap. 6.
[31] William Andrews, *Old Church Life* (London: Andrews & Co, 1909), p. 14.

for *clericus* ended. I do not accept that it was ever ridiculous. *Clericus* contributed to Constitutional guarantees, the right to a fair trial, double jeopardy and the right to certainty before the law.[32]

Writing in 1912 American Edward White proposed that many procedures of medieval common law were little more than 'fantastic quibbles'; benefit of clergy was the vehicle he chose to employ for the purposes of his expounding this message.[33] The article covers a broad swathe of the life of clergy including a brush with Ben Jonson (Johnson) and Shakespeare.[34] White finished his contribution with a single line entry relating to the absorption of *privilegium fori* into Colonial America. White really does little justice to an important part of American Colonial legal history in his dismissive treatment of the *clericus* plea. Also written in 1912 a strongly religious and nationalistic position is taken by Arthur Ogle.[35] He deals with *privilegium fori* in six pages and relies heavily upon Maitland in particular.[36] Although tucked away among general commentary importantly Ogle recognizes *privilegium fori* in the broader context as an interpretation of *Jus Commune*, a theme that Helmholz addresses in depth in 2001.[37]

Another American lawyer took up discussing benefit of clergy in 1927 (a time at which Gabel must have been close to publication of her seminal work). In the *Kentucky Law Journal* Newman Baker provided informative coverage of the history of the privilege and some commentary upon the two great institutions of the middle ages, the Church and

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[32] Johnstone, *Benefit*, chap 7. pp. 162-164.
[33] White, pp. 78-94.
[34] White, p. 90.
[35] Arthur Ogle, *The Canon Law in Medieval England: An Examination of William Lyndwood's "Provinciale" in reply to the late Professor F.W. Maitland* (London: John Murray, 1912).
[36] Ogle, pp. 54-59.
[37] Ogle, p. 57. Richard Helmholz, *The Ius Commune in England: Four Studies* (Oxford: Oxford University Press, 2001).

the State.[38] Understandably he devotes part of the discourse to the Becket saga but also provides a number of illustrative cases. For Baker the anomaly is that utilization of clergy did little to alleviate the capricious nature of English criminal law; the English legal system applied sanguinary laws unpredictably and *privilegium* did little to address this situation; in fact it supported it by allowing some, but not all, to avoid culpability before the courts temporal. I agree with this piece of his commentary. The fact that *privilegium* was only available to clerics is the very reason why it had to become laicized; because the flagrant abuse of the privilege no longer supported the continuation of such a unique privilege. The pinnacle of abuse is discussed in my publication 1 (Chapter 7 'Outlaws and Gang Members') where it is shown that in some cases ordained priests spent a lifetime as criminals and still retained a benefice. In Baker's view the English medieval legal system was a farce that generated 'scorn and detestation' towards both courts spiritual and secular.[39] In chapter 10 'Immunity for All' I clearly demonstrate that it is a broad range of changes within society that contributed to the evolution of a coherent legal system. This is an important development in the discussion of the *clericus* plea and one that has been avoided by all authors to date. There are many works that explore the social context of the middle ages but no attempt has been made to explain *clericus* within this framework and there are no works that include the other mitigatory pleas, the *Excusory Quartet,* into this commentary. In writing both publications I have challenged the dismissive tone taken by previous authors and have provided a plausible and coherent explanation for the secularization of the *clericus* plea, this approach has not been attempted previously. The

[38] Baker, pp. 85-115.
[39] Baker, p. 114.

result is that my work represents the only complete contemporary commentary on benefit of clergy across England and Colonial America.

In 1928 Leona Gabel produced what remains the most influential scholarly monograph on benefit of clergy. (Perhaps Maitland's *Henry II and the Criminous Clerks* stirred in Gabel an interest that I too now find infectious). [40] In her book she raises the level of the discussion from observational and 'in passing' commentary to a thorough and original exploration of the topic. Addressing the second edition[41] at her alma mater some forty years later she attests to the paucity of scholarly attention the privilege has attracted since her doctoral thesis; 'nothing comparable has appeared to date on *privilegium clericale* since the original publication'.[42] Throughout her book Gabel consistently maintains that clergy was an evil and a negative impact upon the secular law. Her objections to the privilege are based upon the fact that known criminals were able to avoid culpability through clerical purgation and that once introduced the reading test was an abuse of secular judicial procedure since establishing clerical authenticity was vested in the secular courts determination of ability to read; this too had little relationship with justice, she contends.

For all its strengths, Gabel's work is not without fault. Many of the topics she does not address form the focus of my publications on benefit of clergy. What Gabel does not introduce to the topic is the connectivity between the *clericus* plea and sanctuary, abjuration and outlawry. She treats benefit of clergy as a topic in isolation which it is not. And, in my view, she does not place sufficient emphasis on the role of priestly gangs in

[40] Maitland, 'Henry II and the Criminous Clerks', pp. 224-234.
[41] Gabel.
[42] Gabel, 1969. p. iii.

forcing the secularization of *clericus*. My third criticism is that she concludes her work by suggesting that by the mid-fourteenth century use of the *clericus* plea was diminishing. I have found no evidence to support this. What does change is that with secular use and better court records the real employment of defendants is being recorded whereas in previous centuries what the courts secular recorded was the submission of a *clericus* plea on the basis that all claimants were actual clerics. As my work demonstrates (Publication 1. Chapter 8) it was always the case that bogus clerics used the *clericus* plea what changes is that after mid-fourteenth century there is no need to enter a fictional entry of cleric against a felonious tradesman or farmer. Gabel concludes that *privilegium clericus* was beneficial to both spiritual and secular justice. The abuses it spurned are to her a symptom not a cause of the disintegration of medieval polity. Gabel recognized there was much more to be said on the topic of benefit of clergy and yet curiously she chose not to investigate the subject further herself. The limitations of Gabel's work are the narrow construction she gives to interpreting the dynamics of change taking place across England during the period she studies. She focuses far too much on the application and horrors caused by clerics who hide under the banner of benefit of clergy and in doing so she misses the opportunity to consider whether the use of the plea was understandable if not acceptable. I am left with the feeling that Gabel despised benefit of clergy and her emotions overshadowed her impartiality. I have dealt with these shortcomings repeatedly in my work and I emphasize that although I do not support or condone the criminality recorded in the cases I use I do offer a comprehensive explanation for the secularization and subsequent continued use of the plea; I also take the conversation considerably further than Gabel *et al* in that I bridge the gap between secularization in the fourteenth century and adoption and use in Colonial America during the seventeenth and eighteenth centuries. During the intervening years between her work and mine there are no major works published that fill the void she referred to. Those that do exist deal with one specific aspect of the privilege; most commonly the competing realms of the privilege's legality.

Following the trend to treat benefit of clergy disingenuously Austin Poole (1933) also regarded the privilege as little better than a 'farce'.[43] As his chapter title indicates the subject matter is clerical outlawry; *privilegium fori* is necessarily introduced in recognition that medieval clerics had a range of options that could provide an alternative to outlawry. Poole's work represents one of the few attempts to link benefit of clergy with clerical outlawry.[44] What Poole does not deal with are the important areas of clerical sanctuary and abjuration and how these too were used and abused by England's clergy. In order that a complete discussion of benefit of clergy is provided I cover these topics in Publication 1. Chapter 6 through the use of a number of case examples drawn from *Select Cases from the Coroner's Rolls A.D. 1265-1413*, The *Register of Walter Giffard*, Lord Archbishop of York, *The Eyre of London 1231 and 1321,* the *Yorkshire Eyre 1231* and the *Proceedings of the Eyre of Oxfordshire 1285.*[45]

Cheney followed in 1936.[46] His contribution relied heavily on the description of the practice of *privilegium* as described by the medieval law book written by Bracton, and upon the limited number of clergy cases known to exist at the time. From these 'scraps of evidence' he proposes that *privilegium fori* was 'generally observed in the punishment of felonious clerks' and the secular courts respected the Church's interpretation of

[43] Poole, p. 245.
[44] Until my work, Johnstone. *Murder*, Chapter 7 'Outlaws and Gang Members'.
[45] Op.cit. Note. 10.
[46] Christopher Cheney, 'The Punishment of Felonous Clerks', *The English Historical Review*, 51. No. 202, (Apr., 1936), 215-236.

privilegium clericus.[47] The cases re-analysed in my work prove that this is more complex than portrayed here. During the twelfth and thirteenth centuries Cheney is correct. However, over the course of the thirteenth and early fourteenth centuries the pattern changes and there is evidence supplied in my work (Publication 1. Chap. 8) that demonstrates the secular courts taking a far greater role in the determination of the legitimacy of the *clericus* claimant as well as greater cooperation between the two systems to assist in bringing defendants before the appropriate tribunal.[48]

There follows more than a decade-long gap in any contribution to the benefit of clergy discussion. The silence is broken by Powicke in 1953 when he writes, somewhat in the face of the flow of commentators on the Becket debacle, that records suggest the tension between clerics and the laity over benefit of clergy was neither particularly 'hot or violent'.[49] My research in Chapter 1 of *Benefit of Clergy in Colonial Virginia and Massachusetts*[50] and Chapters 7 & 8 of *Getting Away with Murder: Criminal Clerics in Late Medieval England* introduces far more to the discussion and proves, through cases and legislation that were introduced at the time, that Powicke has underestimated the volume of conflict between the English church and state at this time. I have accessed the same sources as Powicke and do not come to the same conclusions as he does.[51] It is somewhat surprising that Powicke pays such little attention to *clericus* in the body of his work and yet makes clear recognition of the importance of the topic on page 463, note 2.

[47] Cheney, p. 235.
[48] E.g. In cases of apostasy where the secular authorities arrested the errant monk and brought him before the abbot, pp. 212-214 and *Clericis laicos*. Johnstone. *Murder*. chap. 8 p. 207 and individual case examples pp. 212, 213, 223, 231, 232, 234, 235.
[49] Maurice Powicke, *The Thirteenth Century 1216-1307* (Oxford: Oxford University Press, 1953), p. 462.
[50] E.g. p. 2. Note 7. p. 3. Note 12. Odo, Bishop of Bayeux, p. 15. Note 15. Morris and 'prolonged struggles'. p. 5. Note. 18, p.11, p.15. Note 54.
[51]Johnstone, *Murder,* pp. 23-26, p.43, p.46, p.47, p.54, p.57, pp. 67-68, p. 111-112, p.115.

Exploring the competing realms of the legal systems ecclesiastic and temporal, are the subject of one full chapter in Powicke's (1962) second edition of *The Thirteenth Century* in which he examines the role and function of the Church in attempting to mold the clergy into a compliant, educated and responsible workforce informed in its actions by papal decretals that reign supreme over secular legislation and practices.[52] It is interesting that a twentieth century author of such gravitas as Powicke limits *privilegium fori* to a single comment; that it had been acquired, 'with few exceptions, in the twelfth century'.[53] As my works show the *clericus* plea has a long and complex history spanning fifteen hundred years. It is not possible to condense the development down to a single century and of all those available the twelfth century is by far the least spectacular.

The relationship between Church and state as it applied to working clerics is explored in Jones' article published in 1969.[54] He launches into a defense of the term 'state' immediately as he challenges the notion of 'anachronistic nonsense'[55] and clarifies his view that Church and state confrontations were unavoidable. Central to my work is the idea that working clerics were those most likely to succumb to criminality due to the often-meagre lifestyle they had, particularly if not beneficed.[56] The cases cited in *Getting Away with Murder: Criminal Clerics in Late Medieval England* (Chapters 6 and 7) confirm this; the vast majority of *clericus* claimants were from the lower orders, support for these men inevitably brought prelates and crown into conflict. The focus of Jones' article are the two laws, canon and temporal and he argues that the differences between

[52] Powicke, pp. 445-509.
[53] Powicke, p. 462.
[54] William R. Jones, 'The Two Laws in England: The Later Middle Ages', *The Journal of Church and State*, 1. No. 1, (1969), pp. 111-131.
[55] Referring to the term as it was employed at the inaugural lecture delivered by Walter Ullman at Cambridge University 1966. Jones, p. 111. note 2.
[56] Johnstone. *Murder*, pp.18-19, pp.25-26.

these laws were a primary reason for the disputes the period experienced. I recognize and comment upon these and the conflict between them throughout Publication 1. However, in my work I use a far greater number of case examples drawn from works that were also available to Jones to highlight these differences and in doing so I suggest that the differences in legal system was important but not the defining feature. Beyond where Jones leaves the discussion I articulate the importance of these other factors such as: social mobility, changes in the use of language, education and wealth and a general demise in the status of the clergy in the eyes of the English laity (Publication 1, Chapter 10) which combined moved the legal position from one jurisdiction to another.

Those commentators that have provided a more integrated thematic approach towards the study of historical events are discussed from this point forward and are placed together in themes of study they have undertaken relevant to my own research and not in a chronological order.

It would be difficult to imagine a discussion around the development of English law without considering the works of Hudson, Baker or Helmholz. Hudson (2012) provides a comprehensive commentary on English law from 871-1216.[57] He argues that legal continuity was provided throughout this period through the (increasing) power of the crown, for example, the establishment of the shire and hundred courts which remained largely unchanged from formation by Alfred the Great (871-899) to the Conquest.[58] Hudson's comments on the diminishing influence of episcopal power -from the high points around Edgar (959-975) and Stephen (1135-1154)- are convincing and

[57] Hudson, J., *The Oxford History of the Laws of England, Volume II: 871-1216,* Oxford, Oxford University Press, 2012.
[58] Hudson. supra. pp.42-49.

support my own take on this discussed in publication 1.[59] He further proposes that the common law started with the strong legal traditions and the massive increase in the production of legislation started by the Anglo-Saxons which were then successively built upon by the Normans and Angevins, *ipso facto* the root of the common law is Anglo-Saxon.[60] His work, understandably chronologically ordered, is a fascinating exploration of the power of the upper levels of society to extend influence upon the developing English legal system. In particular Hudson evaluates what he views as the period of 'royal experimentation' when procedures were teased out in the courts that later became effective established practice. The work is divided into a series of thematic sub-sections that deal with topics such as the crown and law, goods and chattels, marriage and family and criminal offences relating to property and assaults. One criticism of the work is the absence of an historiography. It remains a landmark and very readable text.

Baker's contribution to *The Oxford History of the Laws of England* (2003) is legal transformation through the combined forces of great social, political and intellectual change.[61] He effectively argues that these forces had major impacts upon the law and legal procedure. His comprehensive research results in extensive commentary of the law during the early Tudor period. This volume is indicative of how the study of history has evolved since the work of many black letter lawyer historians in the nineteenth and early twentieth centuries to where it is now almost common practice to utilize a wide range of sources such as manuscripts, unpublished sources and readings (of the Inns of Court in

[59] Hudson, 'The Place Of The Late Anglo-Saxon Period In The Development of English Law'. pp. 48-49 and 492-494. Johnstone, supra. 'Immunity for All'.
[60] Hudosn. supra. p. 44.
[61] Baker, J., *The Oxford History of the Laws of England, Volume VI: 1483-1558,* Oxford, Oxford University Press, 2003.

this instance). Baker also gives considerable weight to developments outside of the law which impacted upon the development of the law. His work can be viewed as central to the thematic approach towards history now followed by many contemporary historians. Baker argues that previous commentators from the more traditional school of legal history have wrongly suggested that areas such as chancery relied upon Civil and canon law to a far greater extent than in reality they did. Through his inclusive approach Baker has opened the field of legal history. This is achieved most effectively during his discussion of the early Tudor period and his treatment of the role of juries and judges. Baker's work confirms my own findings expressed in publication 1, chapter 10 which are that legal systems transform gradually over time as a result of numerous and complex factors; societal, political and legal.

Helmholz (2004) provides comprehensive cover of the growth and changes to canon law and ecclesiastical jurisdiction circa 597-1640. It is a remarkable work that provides far more than a chronology of the law. In particular he has taken those records that exist from the ecclesiastical courts from the thirteenth through to the early seventeenth centuries and provided extensive commentary on these. Having evaluated these archives he then provides a contextual setting for them against the literature of the period and that written more recently. The contents of this volume are delivered in a traditional chronological format to start with and then at the conclusion of each major period of development he provides a detailed and elegant commentary on topics including some pertinent to my research such as; churches and the clergy and crimes and criminal procedure. Helmholz weaves the relevant secular law into his discussions, he explains what is happening at the developing common law and how it operates alongside the laws Christian. With a timeframe so great as that undertaken in this volume Helmholz has had to make decisions about which controversial issues best represent the growth and contraction of canon law, he has had to decide what new material –he uncovered- will be included and which omitted. This is a dichotomy most researchers face and one I grappled with in the chapters submitted for this thesis. Helmholz made a masterful job of the task and the work is an engaging, illuminating and thoroughly enjoyable read with a considerable amount of formative material relevant to my own work. As he states 'Popularity is a strange bedfellow for a system of public courts in any case; litigants invoke them for many reasons'[62] The volume also contains an extensive and most helpful bibliography.

The focus of Lambert's (2017) work is also Anglo-Saxon England.[63] During this time there were two approaches taken towards wrongdoing- open offences, those that involved individuals and resulted in feuds or compensation and secret offences that attracted punishment. Secret offences included crimes such as religious misconduct. Lambert convincingly argues that from these beginnings traditional legal divisions developed.[64] He further proposes that it was not so much that kings shaped society but rather more that societal influences upon law and order shaped the monarchy. I believe he is correct and it is one of the themes of my own work; societal developments impressed change upon the secret offence -felonies attracting benefit of clergy- resulting in secularization followed throughout the ensuing three centuries by royal proclamations and statutes that legitimized the use of the plea by secular felons. Furthermore, if the

[62] Helmholz. supra. p. 284 and cited in Donahue, C., 'R.H. Helmholz, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640's, Oxford History of the Laws of England 1,' *Law and History Review,* Spring 2007. Vol. 25. No. 1. pp. 216-219 at p.219.
[63] Lambert, T., *Law and Order in Anglo-Saxon England*, Oxford, Oxford University Press, 2017
[64] Lambert. supra. p. 35.

nature of open offences resulted in an attack against the highest-ranking member of society, the king, then presumably the amount of compensation payable would be linked to the office a person held. This is true and is demonstrated in my work where we see that the compensation payable to a wronged bishop is considerably greater than that payable to a village priest and when a prelate or cleric sought to purchase a royal pardon this too was set at law and again reflected the status of the petitioner. Although my work does not investigate Anglo-Saxon law to any great degree Lambert's work is of significance as it provides a rich and detailed investigation into those pieces of ancient legal history that impacted upon subsequent laws that today we associate with defining moments in the creation of common law. Lambert concludes that 'The legal shifts of the century that followed 1066 are so fundamental and our evidence for law between Cnut's reign and Henry II's are so fraught with difficulties that securely identifying the later consequences of these early eleventh-century changes is probably impossible'[65] In my case I feel that assessing the enormous range of socio-legal influences that caused the *Excusory Quartet* to change and then flourish will always be limited by my own cultural definitions. Perhaps Lambert is correct, it is probably impossible, but we should continue to try. Lambert also provides a comprehensive bibliography.

A second work of Helmholz's I have used is his 2001 book. It reflects the maturation of thought that accompanies many leading authorities.[66] A prodigious legal historian his work was produced as result of his interest in the topic of sanctuary. The 'four studies' lead the reader through the relationship between the canon law and Roman law content of *ius commune*. The significance for the scholar of medieval English law is

[65] Lambert. supra. p. 358
[66] Richard Helmholz, *The Ius Commune in England: Four Studies* (Oxford: Oxford University Press, 2001).

that of the canon law, *corpus iuris canonici,* and its role within the larger picture of how English laws fit into the *ius commune,* for example that sanctuary at English law was a secular custom later embraced by ecclesiastics as one manifestation of a number of immunities and privileges adopted by the Church.[67] My chapter on sanctuary (Publication 1. Chapter 6) explores the development and use of this immunity and investigates the complicity of the church in permitting its use by clerics contrary to canon law. In my study I take the discussion beyond Helmholz's by connecting sanctuary to abjuration, exile and *clericus* and I demonstrate through my references to all available coroner's rolls (240) that clerics of all ranks were complicit in ignoring canon law, harbored felonious clerical sanctuarians and worked with the coroner to facilitate their abjuration contrary to established canon law. In keeping with the belief I hold that history is best discovered through context and a range of societal factors rather than singular events I argue that sanctuary was never a singular immunity but one used in conjunction with any available legal excuse to avert a felony trial. The cases cited attest to this.

Legalist John Bellamy (1984) has made many valuable additions to our understanding of the canon law. He dedicates one chapter to the topic of benefit of Clergy in *Criminal Law and Society in Late Medieval and Tudor England*.[68] Principally through the use of statutes Bellamy reveals how the Church attempts, with increasing futility, to regain some ground it had lost during the early Middle Ages, a 'pre-emptive strike to confound any further attempts at aggrandizement by the secular judges and their governmental masters'.[69] Bellamy portrays a realism of the Church's position that is

[67] Sanctuarial liberty of churches was strenuously defended by English primates. Johnstone, *Murder*, chap 3.
[68] John Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984), 'Benefit of Clergy in the Fifteenth and Sixteenth Centuries' Chapter 6. pp. 115-172.
[69] Bellamy, p. 163.

similar to Firth; there was an inevitability about the loss of power to adjudicate over certain crimes. My conclusion is drawn from a wider pool of evidence than either Bellamy or Firth as I look at the changes in societal structure, architecture, wealth and urbanization in addition to the direct confrontations between Church and emerging nation states.

Medieval Canon Law by Brundage (1995)[70] provides a broad sketch of the growth of canon law from beginnings to the late Middle Ages. The sole reference to *privilegium* alerts the reader to the fact that medieval canonists treat privileges and dispensations as 'further sources of law, alongside customs and decretals';[71] of relevance to my study is the chapter on canonical courts and procedure.[72] His chapter *Canon Law and Private Life* takes into account the efforts by churchmen and canonists, over time, to exert authority over numerous felonies outside of the limited scope of moral crimes. Examples of this are seen in practice in my work (Chapter 5 Benefit of Clergy in Massachusetts) where biblical crimes such as adultery and idolatry are fused into secular law alongside murder, conspiracy and kidnapping. All are held to be capital offences.[73] *Medieval Canon Law* is a helpful overview of the workings of the medieval church; the commentary on ecclesiastical privileges is limited and although his chapter on canon law and private life introduces the inequalities that existed within the system of benefices as potential stimuli to clerical criminality this is not explored in depth. I supplement Bellamy's observations with specific case examples drawn from a range of sources which although previously available under topic headings not such an extensive list has been provided in one

[70] James Brundage, *Medieval Canon Law* (London: Longman, 1995).
[71] Brundage, p. 160.
[72] Brundage, pp. 120-153.
[73] Johnstone, *Benefit,* p. 111.

commentary previously. In terms of the actions of criminal clerics the number of cases supplied in my work exceeds any one source that I have been able to locate. (Publication 1. Chapters 7 & 8). Of criminal gang clerics hired by abbots and bishops to acquire greater parochial wealth I provide more than twenty examples which confirm (with graphic clarity) the extreme lengths prelates would go to extend their wealth and power and lower order clerics would descend to in order they retain a benefice.

It is hard to imagine that anyone will write a book about religion in English society during the 15th and 16th centuries in greater depth than 'The Stripping of the Altars: Traditional Religion in England c.1400-c.1580' (2005). Duffy's book is really two; Part 1 'The Structures of Traditional Religion' comprises of ten chapters and Part II, 'The Stripping of the Altars 1530-1580', a further seven.[74] Of most relevance to my work is Part I in particular chapter 4 'Corporate Christians'. The general focus of the 'first book of two books' is the religion of the lay parishioner, it is not about religious orders or much at all about the clergy itself. It is about the 'popularity and durability of late medieval religious attitudes and perceptions'.[75] A consistent theme of his work is that during the late middle ages there was a significant degree of 'religious and imaginative' homogeneity across the social spectrum', a sharing of beliefs and expressions of religious engagement that bridged social differences and class distinctions -such as those who were literate and those not. He views the changes taking place within religion in England to be a confirmation of the vitality and popularity of religion. My own findings expressed in publication 1 chapter 10 "Immunity for All' recognize these important signs, I too argue that the dynamic

[74] Duffy, E., *The Stripping of the Altars Traditional Religion in England 1400-1580*, 2nd edition (New Haven, CT, Yale University Press, 2005).
[75] Duffy. supra. p. xvi.

environment of change across society during the late 14^{th} century was not a rejection of traditional religion it was a re-casting of the place religion held in people's lives set against the diversions of new wealth, literacy, social mobility and societal marginalization.[76] Duffy proposes that the church was not divorced from these moves in its role as 'a highly successful educator' it was central to them.[77] I agree and the amalgam of forces and visual displays of change I discuss in the concluding chapter to publication 1 confirms and builds upon the range of examples that Duffy supplies. Further on he is concerned that perhaps too much reliance has been placed upon societal differences between those with traditional wealth and literacy and those not -benefactions to the church may have been dominated by the rich but they were occasional. One convincing point of argument is that contrary to what some authors have suggested there is considerable evidence that it was new gentry and parish gilds that often paid for vestments, vessels, sepulchres and 'junketings'.[78] Many gilds were indistinguishable from the parish itself. They were organic. I too point out lavish gifts and ornate church furnishings were by no means the exclusive preserve of medieval nobility.[79] Important to my own arguments are those contained within Duffy's chapter 4 'Corporate Christians'. In this part of his work he provides numerous further examples to support his assertion that collective worship was not substituted by individual devotion in the later middle ages. It is here that he expands upon the examples previously cited to cement his argument –collective devotion *was* mainstream medieval church- the overwhelming level of (financial) support for the

[76] Further evidence is elegantly put in Bernard, G.W., chapter2 'The Monarchical Church', *The Late Medieval English Church: Vitality And Vulnerability Before The Break With Rome* (New Haven, CT, Yale University OPress, 2013) pp. 17-48.
[77] Duffy. supra. p.7.and see chap. 2 'How The Plowman Learned His Paternoster' pp. 53-87 and chap. 6 '"Lewed and Learned": The Laity And The Primers' pp. 210-232.
[78] Duffy. supra. p. 137.
[79] Duffy. supra. p. 122.

English church came from local parishioners. 'Maybe as many as two-thirds of all English parish churches saw substantial rebuilding or alteration in the 150 years before Reformation'.[80] Bernard's study (2013) covers much of the same period as Duffy and he too provides a comprehensive bridge between where my work ends in the fourteenth century and picks up again in the seventeenth. He convincingly charts the gradual shift towards a 'monarchical church' through examples such as increasing royal patronage of benefices and clerical appointments, the creative use of *praemunire* to transfer cases from the church courts to the King's Bench, the continual tightening of the limits of the clericus plea in the build-up to the break with Rome.[81] These are compelling arguments and provide additional examples of the changing nature of the role of the church and the lessening grip it had on the areas of my focus; the clergy plea, sanctuary, exile and outlawry. Religion was and remained a public and corporate enterprise throughout the period of my study. And because it was so embedded, so fundamental to everyone, the abuses that I write about were clear and offensive to everyone. Societal change in the middle ages did not challenge the continuation of the clergy plea it endorsed its secularization.

Duggan (2004) spent her entire academic life studying Thomas Becket.[82] The theme of her 2004 book is an exploration of how authors have treated Becket's life and death over the centuries (1170-1900) and at times misinterpreted facts to suit an agenda. It is, as she describes, a 'construction and deconstruction' of the saint's reputation.[83] Great attention is paid to the causes of rift between Henry II and Becket and of particular

[80] Duffy. supra. p. 132-133 'The purchase of paradise'.
[81] Bernard, supra. pp. 25-31.
[82] Duggan, A., *Thomas Becket* (London, Bloomsbury, 2004).
[83] 'The Image Constructed and Deconstructed' pp. 224-252.

relevance for my study Duggan gives extensive coverage to the *Constitutions of Clarendon*, immunity and jurisdiction. She also explores how the debacle impacted upon church and crown relations not just inside England but also across Europe. What strikes me most about this work is the approach Duggan takes. She is unashamedly a fan of Becket but she does not allow this to cloud (too frequently) her objectivity.[84] There are dozens of books on the life of Becket. Many tend to fall either on the secular side of the rift or those who see it from the Church's perspective. Duggan's work takes a different approach. She seeks to help students understand more of the man (She has translated all 329 of the archbishop's letters) and how Becket shaped history rather than how history shaped Becket. Duggan is a leading authority on Thomas Becket and her work is fundamental to understanding the genesis of the clergy plea divide. She does not venture into a discussion on the diminishing lack of influence that Becket's stance against regal episcopal appointments had upon Richard I (1189-1199) and John (1199-1216) which tends to confirm her bias towards the sainted archbishop.[85]

It is not just the content but also the approach taken towards the events around the history that makes this collection of nine essays edited by Webster and Gelin (2016) such an evocative read.[86] Any student of Becket and the impact that his murder had on responses to this event by the Church, the English crown and English society should read these diverse and stimulating essays. The Introduction written by Paul Webster gives thorough coverage of the astonishingly rapid following that Becket's martyrdom stimulated across Christendom. Beyond the genre of the many biographies that exist this

[84] Duggan. supra. pp. 86,129,154,196.
[85] By contrast see Webster, *infra.* pp. 149-154.
[86] Webster, P. and Gelin, M., (eds*) The Cult of St Thomas Becket in the Plantagenet World c. 1170-c.1220* (Rochester, New York, Boydell Press, 2016).

work explores the nature of cult following and the themes that link Becket's posthumous fame to those already established pilgrim sites in continental Europe.[87] This work also investigates the impact of the martyrdom not only in the context of Henry II and the common law but also positive aspects that are not always taken into consideration such as the wealth his pilgrim site stimulated -perhaps one hundred thousand attended the jubilee of St Thomas- and how images of Becket became fashionable items for the laity (*ampullae*) as well as clergy.[88] This has not changed and today it is possible to make similar purchases, on-line of course. Not surprisingly soon after Becket's glorification the number of miracles and martyrdoms across Europe increased too. Capturing fully the diversity of contributions to the 'thematic contexts in which cult can be studied' is beyond the scope of this historiography -it is a most valuable resource and should be considered by anyone interested in a refreshingly new approach towards the Becket discussion.[89]

In 1974 the Right Reverend William Stubbs and agnostic William Maitland were united together in the work of legalist Charles Donahue.[90] His article explores the authority of Roman canon law in England as interpreted by Stubbs and Maitland. His conclusion is that the 'binding quality' of papal law in England is cast against the institutions that are being assessed; the period in time that is being considered and the individual type of case being evaluated. I agree that the influence of canon law should not be underestimated, nor should it be overestimated. By the time secularization of the

[87] Webster, P., 'Crown Versus Church After Becket: King John, St Thomas and the Interdict' Chapter 8. in *The Cult of St Thomas Becket in the Plantagenet World c. 1170-c.1210.* pp.147-149.
[88] Webster. supra. pp. 5-6.
[89] Webster. supra. p. 11.
[90] Stubbs, Anglican Bishop of Oxford and Regius Professor of Modern History at Oxford and Maitland, Downing Professor of Laws, Cambridge University. Charles Donahue. Jr, 'Roman Canon Law in the Medieval English Church: Stubbs v Maitland Re-Examined after 75 Years in the Light of Some Records from the Church Courts', *Michigan Law Review*, 72. No. 4 (Mar., 1974), pp. 647-716.

clericus plea occurred in the mid-fourteenth century much of the power Rome held over the laity was in retreat and the ability of the pope to influence the development of secular law was not so much 'binding' as diminishing. In my work (Publication 1. Chap. 10) I agree with Donahue but take the discussion further than he does and I rely upon a range of sources that have been available individually but not harnessed together previously into one coherent argument. In my work I argue that events such as the promulgation of the *Statute of Provisors*, the growing reliance upon secular law officers to apprehend apostates, the request by English bishops that the crown assist in recovery of delinquent taxes from clerics and Edward III's *Statute of Praemunire* are all direct evidence of the power of the monarch to infiltrate into laws Christian regardless of whether or not the Church acquiesced. Donahue appears to believe that the Church was a willing partner in the transition of jurisdictional authority (in some matters) from ecclesiastic to temporal.[91] I argue that the Church had little choice, so it stopped resisting.

The second edition of Hudson (2017) further compliments the large number of works that investigate the establishment of the common law.[92] The value of Hudson's approach is that he skilfully meshes the development of law with the changes taking place in society at the time. Some of the most interesting parts for me were within chapter 9 where he seeks to expand upon the narrow construction of Magna Carta and ask whether or not a real common law existed by this time. He sets the argument against the nature and form of royal justice in England contrast with that in France and Scotland. Although not fully explored by Hudson the answer in part may have been that waning support for

[91] *Ordinance and Statute of Praemunire* 1353, 27 Edw. III. s. I.
[92] Hudson, J., *The Formation of the English Common Law: Law and Society in England from King Alfred to Magna Carta* 2nd edition (London, Routledge, 2017).

the excommunicated king John was such that many judges and noblemen who undertook a judicial function may have been cool to the idea of a legal system that was inherently royal. The great value of this work is the clarity Hudson brings to the complex and confusing world of discussions that surround the birth of common law and the manner in which he articulates the variety of interactions that developed along the way. Chapter 2 is most relevant to my work. It contains a clear and concise overview of the role of the ecclesiastic courts. The Introduction is full of useful commentary on the variety of terms employed to define law, laws and rights. The book contains helpful suggested Further Reading.

Thomas Green's book (1985) comprises of eight essays written by him over the course of thirty years.[93] It is an in-depth and fascinating exploration of the development and use of jury nullification. Of most interest to me are the first three essays which together form Part 1. Green undertakes his research from a variety of approaches as he feels that when historians limit themselves to a single approach they may 'fail to exploit their subjects fully'.[94] I totally agree. Rather than attempt a definitive list of the literature he recognises that this is a constantly changing field and therefore his approach, as is my own, is to chart the main texts and then cite the most recent works that 'bear most importantly' on the history of the topic of jury nullification.[95] The first three chapters cover jury nullification during the middle ages and the important (and neglected) area of the relationship between law and society viewed through the lens of how juries operated and were able to divert the severity of sanguinary punishment in those instances they

[93] Green, T., *Verdict According to Conscience: Perspectives on the English Criminal Jury Trial 1200-1800* (Chicago, University of Michigan Law School, 1985).
[94] Green. supra. p. xv.
[95] Green. supra. p. xv.

deemed it appropriate; in many instances because they knew the defendant and recognised that the crime was not planned and heinous but rather more what today would be construed as manslaughter or minor theft. He concludes this part of his work with the proposal that the changed status of the jury trial at the conclusion of the middle ages was not dramatic but gradual -it had undergone a process of democratization in much the same way as I view the clergy plea. Since his work involves the secular jury there is little need for specific reference to benefit of clergy. He covers the topic over three pages and his thoughts appear to be drawn from the established sources, Gabel and Maitland. It seems that he believed that the plea was only available to ordained clerics but later he confirms statutory recognition of clergy for all 'literate' men'. The important message that comes through from this book is that the tradition of jury nullification represented a level of community participation that became difficult to control.[96]

A Companion to Britain in the Later Middle Ages (2009) covers the period from 1100-1500. [97] Robert Palmer traces the development of irregular rules and customs from the early middle ages into what became a coherent body resembling a legal system by 1176.[98] He argues that legal historians have typically favored either the 'law and society' approach or the 'process of legal change' approach.[99] He argues that contemporary scholarship is perhaps not so prescriptive and it is both possible and acceptable to recognize the importance of legal rules and their development alongside the less formal and somewhat chaotic idea that chance and circumstance may too be a significant

[96] Green. Supra. p.102.
[97] Stephen Rigby, (ed*) A Companion to Britain in the Later Middle Ages* (Chichester: Wiley-Blackwell, 2009).
[98] Robert Palmer, 'England: Law, Society and the State' in *A Companion to Britain in the Later Middle Ages*, ed. by Stephen Rigby (Chichester: Wiley-Blackwell, 2009). Chapter 13. pp. 242-260.
[99] This requires the scholar to follow either F.W. Maitland, arguably father of English legal history as a topic or since the 1950's S.F.C. Milsom, who is of the view that the law developed by mistake; intention and result are 'normally very different'. Palmer, p. 242.

ingredient in the creation of a legal system.[100] I agree and confirm in my work (Publication 1. Chapter 10) by using as a case study, benefit of clergy, that there is a clear transition between the early attempts to formalize a status into a rule and what became over time a quasi-mitigatory plea used and abused by clerics (loosely defined) in response to changing pressures legal, societal and ecumenical. But as Palmer points out, the relationship between the crown and Church was not entrenchment and conflict but coordination; after all the bishops were most often holders of senior royal appointments as well as valuable dioceses; as an institution of society the church was one of the wealthiest and most influential bodies of the medieval world.[101] I accept that the wealth of the Church was considerable and that for much of the first part of the middle ages bishops in England were also secular lords but when this altered, as it did, the impact was significant.[102]

David Lepine's concern with the study of the medieval Church is that it has tended to be backward looking, that is from the Reformation and not towards it; vitality and development in the twelfth century, stagnation in the fourteenth and fifteenth and then, inevitable reform.[103] Lepine contends the contrary; the cause of the Reformation was external; the Church was in relative good health and stable, heresy and anti-clericalism were isolated and efforts to improve status and morals largely successful. The local clergy was administered by a cadre of educated, career bureaucrats, many of whom held dual ecclesiastic and secular high office. Authority was maintained through a system of

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[100] Johnstone. *Benefit*, chaps 3 & 5.

[101] Palmer, p. 255 makes the most interesting observation that bishops were less inclined to pursue litigation at common law and favored chancery in the fifteenth century when compared with their lay counterparts. Prior to the fifteenth century 'ecclesiastics litigated vigorously at common law'. p.256.

[102] In 1317 Pope John XXII (1316-1334) commented that the 'liberty of the church was more crushed in England than anywhere else' Johnstone. *Murder*, p. 23 citing Lepine. *Infra.*

[103] David Lepine, 'England: Church and Clergy' in Rigby, Chapter 18. pp. 359-380. The importance of the ecclesiastical discussion is reflected in the number of chapters assigned to the Church; Five of the total twenty-eight.

hierarchical courts. This is accurate, as part of a picture, but it is not all. It could be said that the height of papal influence eclipsed with the excommunication of King John in 1213, and subsequent internal (papal) disputes made the build-up to the fourteenth century a period of crises for the Church. The Great Schism of 1378 significantly weakened the stature and role of the pope in England and subsequently the English crown asserted more and more influence over the appointment of bishops and archbishops.[104] In my work I argue that during the late Middle Ages it was not the spiritual influence of Rome and its local prelates that was in doubt, rather more it was the ability of the Church and its local representatives to control and influence the everyday lives of its parishioners.[105]

As Palmer and Lepine convincingly explain the medieval English Church had to transform and it did; monasticism decreased in place of formal education, papal in-fighting had created a lasting cabal that decreased its credibility and domestic royal control expanded.[106] Ultimately all these factors were absorbed to help shape the modern English Church of the late middle ages in a world where language would transition from Latin and French to English, the administrative bureaucracy of the church would attempt to emphasize the standards of conduct and moral turpitude of its clerics and Englishness would become a feature of politics, religion and society. In my work (Publication 1. Chapters 8 & 10) I have taken these themes and expanded on them to support my argument that laicization of *clericus* was a fundamental part of a natural development in the fast-paced changing world of the late fourteenth century. I have used examples of the introduction of legislation such as *The Statute of Westminster II*, 1285, *The Ordinance of*

[104] Lepine, p. 377.
[105] Johnstone. *Murder,* chap. 10.
[106] Rigby.supra.

Trailbaston, 1305, *Statutum pro clero*, 1352 and *Statutum de cibariis*, 1363, specifically aimed at increasing the capacity of government to curb the behavior of the laity and clergy to support my contention that a combination of legislation and societal influences shaped the nature and form of privileges that eventually resulted in the uptake of *clericus* in Colonial America.[107]

In 1981 New Zealander Raymond Firth introduced his American audience to the concept of the 'canopy syndrome'.[108] He suggested that the ability of religions to endure, erect defense mechanisms, adapt themselves and modify has been exceptional. His point, though not located specifically within the *privilegium clericus* discussion, has potential application to our contemporary understanding of benefit of clergy; the strength of conviction expressed by numerous popes and bishops throughout the Middle Ages for the retention of *privilegium* is arguably representative of a pliable and adaptable institution. Conversely it is demonstrative of intransigence and a superior attitude that pervaded the thinking of the Christian church during the eleventh and twelfth centuries until such time that the growth of nation states and individual monarchs forced the Church to adopt a more accommodating position. I believe it is some of each. In chapter 1 of *Benefit of Clergy in Colonial Virginia and Massachusetts* I chart the development of the plea and the willing acceptance of it into developing secular laws by looking at a range of commentary, Lea, Boyd, Pollock and Maitland and Murray as well as legal sources such as *Laws of the Holy Roman Emperor Frederick II*, *The Ecclesiastical Edicts of the Theodosian Code*, the *Third Council of Orleans*, the *Edict of Paris*, the *Laws of King*

[107] *Statute of Westminster 1285*, 13 Edw. I. St. I, *The Ordinance of Trailbaston 1305*, *Statutum pro clero 1352*, 25 Edw. III. St. 6. C. 4; and c. 9., *Statutum de cibaris* 1363, 11. Edw. III. 37 Edw. III. c. 1,3-19.

[108] Raymond Firth, 'Spiritual Aroma: Religion and Politics', *American Anthropologist*, 85 (1981), pp. 582-601. Johnstone. *Murder,* chap. 10.

Alfred and the *Assize of Northampton*.[109] By the early eleventh century the absolute right of the Church to determine a range of criminal laws is being tested. By chapter 8 of *Getting Away with Murder: Criminal Clerics in Late Medieval England* the situation has changed dramatically from one where the Church makes the demands to one of making (polite) requests of the secular lawmakers. The transition from domination to subservience may, as Firth implies, be a reflection of adaptability. A less forgiving interpretation could be that the Church wanted to survive and retain whatever stake it could in the influence of the lives of its faithful.

John Aberth authored *Criminal Churchmen in the Age of Edward III The Case of Bishop Thomas de Lisle* in 1993.[110] This is a refreshingly new approach towards the study of one manifestation of benefit of clergy; a bishop who was undoubtedly also a recidivist felon. Aberth took the approach of looking at de Lisle, bishop of Ely 1345-1361, within the context of the times in which he participated in wide scale criminality. I agree with this approach and have taken the same line with my own work. I have further extended the commentary beyond Aberth's to include other examples of clerics involved in systemic criminality. (Publication 1. Chapter 9). In doing so I provide more evidence of the scope of criminal actions undertaken by regular and secular clergy. This reinforces my argument that *clericus* should be viewed as a progression of secular legal development alongside a diminution of the role and gravitas of canon law as the volume of felonies committed by all ranks of the clergy diminished the standing of the Church in people's lives.

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[109] William Boyd, *The Ecclesiastical Edicts of the Theodosian Code* (New York: AMS Press, 1969), Pollock & Maitland, Alexander Callander Murray, 'Immunity, Nobility and the Edict of Paris', *Speculum*, 69 No. I (Jan., 1994), pp. 18-39. Assize of Northampton 1176, < http://www.constitution.org/sech/sech_032.htm> [Accessed 21 July 2014].
[110] John Aberth, *Criminal Churchmen in the Age of Edward III. The Case of Bishop Thomas de Lisle* (University Park, PA: Pennsylvania State University Press, 1993).

McHardy (1995) considers the mechanisms in place for the church courts to deal with criminous clerks, specifically the bishops' registers; she draws extensively upon the materials provided by the Canterbury and York Society and the Lincoln Record Society. The result is a comparative exposition that builds upon Gabel's and provides a rich resource particularly in respect of the issue of the use of bishop's prisons and canonical procedure with regard to purgation and the Christian courts trial. In her conclusion she observes that the clash between the competing twelfth century criminal jurisdictions is surprising as 'both powers wanted a decrease in violence and a rise in respect for legality'.[111] I agree in part, secular punishments were sanguine and represented the primary basis for the objections of 1215 and removal of the clergy from temporal trials.[112] However, unlike McHardy my research has led me to an alternative conclusion. The collision between laws canon and temporal were inevitable because of the large characters involved. As I argue (Publication 2. Chapters 1 & 2) yes, there is evidence of both jurisdictions wanting respect for legality and a decrease in violence but the disagreements between the Church and emerging nation states that started in the twelfth century were based upon a very large number of factors including some major individual egos, the criminal behavior of clerics, the emergent dominance of the secular clergy over regular and the slow decrease in importance of the church in the eyes of the laity.[113]

Van Caenegem (1981) challenges the view that medieval laws ever were a monolithic continuum.[114] Following the direction taken by commentators in the 1960s to

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[111] Alison McHardy, 'Church Courts and Criminous Clerks in the Later Middle Ages' in *Medieval Ecclesiastic Studies in Honour of Dorothy M. Owen*, ed. by Michael Franklin (Woodbridge, Suffolk (UK): Harper-Bill, 1995), pp. 165-183. (p. 182).
[112] McHardy does mention this difference in the final paragraph. pp. 182-183.
[113] Johnstone. *Murder,* chap 8 and *Murder,* chap. 10.
[114] Raoul Van Caenegem, 'Law in the Medieval World', *The Legal History Review*, 49. No. 13 (1981) pp. 13-46.

look at the person in the event, rather than the event and its people, Van Caenegem posits the idea that legal developments do not occur in a vast vacuum of organic processes but rather more a complex combination of social, political, economic and individual human influences; this debate that was in its infancy thirty years ago and continues today and one that I bring into my own conclusions.[115]

An edited collection of essays produced in 2001 provides an array of medieval history commentary by contemporary academics.[116] Boureau deals with *privilegium* and asks 'So what is the relevance of the central Middle Ages to this question of the historical meaning of privilege?'[117] His discussion is located within the broad expanse of privilege across Europe and in this endeavour he takes the reader towards a horizontal construction of the material; privileges become established norms for medieval societies. This is an important discussion about sovereignty and emerging citizenship; it does not greatly progress the judicial use of *clericus* in England.

In 2008 Harris and Grisby edit and contribute to thirty essays.[118] The general theme is that contemporary medievalists are charged with not only identifying the text but also 'what are you doing with the text?' They argue that historians are in the noticeable shift towards narrative and commentary.[119] Their work is an example of this shift and exemplifies the lack of confidence now held for immutable facts in exchange for critical

[115] He cites the example of how during the Middle ages people disagreed on the very concept of criminal law; kings viewed crime as an assault upon their person that resulted in bloody reprisals whereas towns and villages viewed crime as a local disturbance to be remedied by local means by the culprit's peers. Van Caenegem, p. 42. I have not explored this position in my work. I conclude in *Murde*r Chap 10 that a combination of social, Christian, secular, legal and political changes came together in a way that has not been explored by previous Benefit of Clergy commentators.
[116] Paul Linehan & Janet Nelson, eds. *The Medieval World* (London: Routledge, 2001).
[117] Boreau, pp. 621-634.
[118] Stephen Harris & Bryon Grigsby, eds. *Misconceptions About the Middle Ages* (London: Routledge, 2008).
[119] Harris and Grigsby, p. 3.

commentary and a tacit acceptance of the confusion and uncertainty of history.[120] In my work (Publication 1. Chapter. 10) I address this fractious situation and use contemporary historical techniques to prove that the manner in which the English church acquiesces to the use of the Excusory Quartet demonstrates a dynamic, organic medieval English Church that defines 'church' as *clericus* and laity; both of whom move in and out of ecclesiastical privileges, such as clergy and sanctuary, alongside canon and common law legal accommodations of purgation, abjuration and even outlawry.[121]

Blockmans and Hoppenbrouwers (2014) discuss medieval urbanization and the establishment of the town.[122] They argue that in many respects this placed the clergy closer to the laity during their everyday lives and made divisions between clergy and laity more porous as clerics interacted with artisans, merchants, the sick and the poor on a daily basis, not just in rural villages but also the burgeoning towns.[123] They argue that as this occurred the role of the traditional (regular) clergy in a rural monastery setting declined in place of the urban cathedral, hospitals and religious schools enclosed within city walls. In the main I agree in my publication 1 Chap 10. I also believe that the role of the clergy itself warrants greater commentary though as the cases introduced in my work *Getting Away with Murder: Criminal Clerics in Late Medieval England Chap 6 & 7* show a very active criminal element within both regular and secular clergy that must have

[120] By contrast, *inter alia*, for example Henry Charles Lea writing in the late nineteenth century and his almost mythical perpetuation of the Inquisition, Frans Van Liere, F., 'Was the Medieval Church Corrupt?' in Harris and Grigsby, 31-39. p.33.
[121] Johnstone. *Murder*, chaps 6 & 10.
[122] Wim Blockmans and Peter Hoppenbrouwers, (Translated by Isola van den Hoven), *Introduction to Medieval Europe, 300-1550* (London: Routledge, 2007). Between 1300 and 1500 the numbers of towns grew exponentially even though the total population census decreased due to plague and war. What this means is that the attraction of towns increased throughout the period even when population numbers depleted, p.217. Also, Blockmans, pp. 274-276 and the impact of the Black Death where between 10 and 20 per cent of the population of Europe succumbed to the epidemic and the subsequent Neomalthusian interpretation of its effect, p. 277.
[123] See Blockmans, pp. 220-221 and p. 222 re *coniurationes,* urban privileges and Johnstone. *Murder,* chap. 10.

contributed significantly to the demise of the clergy in the eyes of the laity. It is the combination of these factors taken together in my work that are missing from previous commentary.

It is challenging to assess the historiographical developments of benefit of clergy in England or Colonial America. New insights are rare in an area of scholarly neglect but there are some. Gabel comes to the fore in almost every example. Without her thesis benefit of clergy may have languished for even longer somewhere between the common law of England, the civil law of Europe and American common law. Much early commentary suggested an unequal interaction between laity and clerics, an abuse of office and social standing. This is an oversimplification of a complex relationship between and across actors who inhabited both the spiritual and temporal world; interaction that invited tensions; conflict, acquiescence, intransigence and cooperation. The past forty years have experienced some attention to the subject at its edges; sanctuary, abjuration and outlawry are revisited or extended. Commentary on the impact of the clergy plea in the United States has been so rare to the point that drawing meaningful comparisons between works becomes almost impossible.

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Critical Essay

The works presented in this thesis cover two fascinating periods of use of the clerical privilege known as benefit of clergy. Publication 1, *Getting Away with Murder: Criminal Clerics in Late Medieval England* deals with the transition of the *clericus* plea in England from ecclesiastic exclusivity through to secularization during the mid-fourteenth century. Publication 2, *Benefit of Clergy in Colonial Virginia and Massachusetts* explores the use of the plea as a mechanism for sending convicted felons to Colonial Virginia and its adoption into the legal system of that colony. The second part of this work then examines the use of the *clericus* plea in Massachusetts. Early arrivals to this colony were familiar with the *clericus* plea but enthusiasm for wholesale adoption of English law was reserved. Notwithstanding these concerns it was practical and efficient that a mitigatory plea known to the entire community was utilized. The result was a written code that could appear to embrace religious severity but in reality could be applied with leniency when appropriate. Together these works bring to the fore a compelling reason to reconsider the importance of benefit of clergy and in doing so encourage researchers to investigate this area of social and legal history in more depth.

The first chapter submitted is taken from Publication *2 Benefit of Clergy in Colonial Virginia and Massachusetts,* Chapter 1. 'The Privilege: Legitimate Immunity or Legal Farce'.

This chapter is an account of the early development of the benefit of clergy plea, its adoption and use in England up until what could be viewed as the zenith of Church authority, The Fourth Lateran Council of 1215. In many ways the early middle ages represents a period of transition; imperial legislation was subordinate to ecclesiastic for much of the first millennium and ownership of clerical privileges was firmly and consistently confirmed by the Church. It is also a time when clerics were involved in secular tribunals they were providing confessional services to convicted felons, sanctuary (church asylum) to a wide array of felons and food and shelter to those awaiting abjuration and exile. As Boyd noted clerical involvement in public life meant that clerics were exempt from giving evidence in secular court trials.[124] In 1072 William I changed much of this by separating the courts temporal and spiritual. Gabel points out that "William's commentary on the earlier English practice as he found it supports the assumption that no clear distinction had hitherto been made between the spiritual and temporal jurisdictions in criminal matters'.[125] Ogle noted that in introducing his *Ordinance* William caused a significant shift in the balance of power between the church and state, one that had been brewing since Anglo-Saxon times.[126] In my chapter through the use of legal texts, custom law and early legislation I have proven that a core issue directly linked to the *clericus* plea was the matter of the forfeiture of goods and chattels.[127] Prior to the increase in secular clergy and friars as distinct from monks the issue of benefit of clergy was relatively minimal.[128] Convicted felons unable to prove they were clerics by the process of tonsure, habit and monastic appointment were not permitted to retain any goods and chattels and these reverted to the crown. As the wealth of secular clerics (particularly bishops) grew and the use of the *clericus* plea by legitimate and bogus clerics

[124] Boyd, p. 100.
[125] Gabel, p. 11.
[126] Ogle, p. 23.
[127] Johnstone. *Benefit,* pp. 5-6.
[128] Early construction of clergy was narrow; those tonsured and perhaps nuns. Johnstone. *Benefit,* pp. 7-9.

increased the crown began to view abuse of benefit of clergy as a significant loss of revenue. Since the loss of potential revenue to either the Church or monarch was at stake establishing genuine clerics from bogus rapidly became a key issue.

The next section of my chapter charts the attempts by a number of England's monarchs (and the counter efforts by the Church) to limit the use of benefit of clergy to those holding high orders only. Gabel devotes a chapter to this discussion.[129] I have limited my study to four pages as the large volume of cases used throughout my two books make clear the opportunity for abuse that early terminology facilitated and I supply a number of specific examples of where the courts secular grapple with what *clericus* means. I do agree with Turner though, *clericus* is a 'maddeningly imprecise term'.[130] Importantly the opportunity to illegally claim clerical status meant that with time tonsure needed to be substituted for a more reliable test. The exact date that a reading test was implemented is unclear. Gabel notes that the change in court records towards the end of the fourteenth century; actual occupations of *clericus* claimants were now being entered, as evidence of wide scale use of a reading test.[131] Bellamyasserts that the reading test was in exclusive use by mid-fourteenth century.[132] In publication 2 chapter 1 I show that the legislation introduced in 1351, to extend benefit of clergy to all laity, is evidence of the final stage of secularization of the *clericus* plea and adoption of the literacy test in the courts temporal.[133]

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[129] Gabel, Chapter III 'The Term *Clericus*', pp. 62-91.

[130] Ralph Turner, 'The *Miles Literatus* in Twelfth-and Thirteenth Century England: How Rare a Phenomenon?' *The American Historical Review*, 83. No. 4 (Oct., 1978), 928-945 (p. 930).

[131] Gabel. pp. 75-76.

[132] John Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984), p. 116.

[133] Johnstone. *Benefit*, p. 13.

My first chapter concludes with a discussion of the Becket debacle and the importance of this event in the development of the clergy plea and the subsequent actions of Innocent III. The basis for the disagreement between Henry II and Becket was the contents of what Stubbs has described as 'a legal document of the greatest importance to our legal history, and must be regarded as introducing changes into the administration of justice which were to lead the way to self-government at no distant time'.[134] Through the *Constitutions of Clarendon* (1164) Henry sought to curb abuse of benefit of clergy. Becket interpreted this measure as double jeopardy.

There are no specific references to benefit of clergy in the decretals of the Fourth Lateran Council and at this point secularization of clerical privileges may have seemed far off. The criminal actions of clerics over the following two hundred years, perhaps bolstered in part by over confidence of immunity, led to the slow but progressive erosion of *privilegium*. I have pointed out in my research that Maxfield estimated 26,500 men were ordained priests and a further 132,500 to 159,000 men and women were eligible to claim clerical status during the early thirteenth century.[135] This represents in the region of 2% of the population of England. If one per cent of this number were engaged in felonies, as Cox later estimated, there would have been in the region of one thousand successful *clericus* pleas each year.[136] As I have argued such levels of criminality could not go unnoticed by the crown or commoners and secularization of the plea was certain. Once

[134] Ernest Flagg Henderson, *Select Historical Documents of the Middle Ages* (London: George Bell & Sons, 1896), p. 3.

[135] David Maxfield, 'St. Mary Rouncivale, Charing Cross: The Hospital of Chaucer's Pardoner', *The Chaucer Review*, 28, No. 2 (1993), 148-63 (p. 150).

[136] Charles Cox, *The Sanctuaries and the Sanctuary Seekers of Mediaeval England* (London: G. Allen & Sons, 1911). p.33.

firmly in the hands of the temporal justice system implementation of the *clericus* plea as a means of providing the colony of Virginia with indentured servants was inevitable.

The second chapter submitted is taken from Publication 1 *Getting Away with Murder: Criminal Clerics in Late Medieval England*, Chapter 6. 'Sanctuary, Abjuration and Exile'.

In this chapter I explore two mitigatory pleas associated with benefit of clergy that have rarely been discussed in association with *clericus*; sanctuary, and abjuration and exile.[137] As my research shows these are important topics because they are used by clerics alongside and in conjunction with attempts to claim the *clericus* plea. As such they add considerable weight to my argument that during the middle ages felonious clerks used all and any mitigatory pleas available to them to avoid culpability for their crimes. Previous authors have not made these links and have treated benefit of clergy in apart from the other pleas. In my view to treat the *clericus* plea in isolation does not fully explain the dynamics of the evolving temporal justice system in England as it matured through the late middle ages and in particular it fails to take into account the sophistication of the criminal actors as they manipulated gaps in the justice system to avoid conviction. In my chapter I have noted Logan's comment that 'despite the formal abolition of sanctuary in the seventeenth century the 'spirit of sanctuary' lived on through benefit of clergy as a way of mitigating the severity of the secular law'.[138] I agree and suggest that the practice of

[137]Poole and Cheney who disagree on a number of points relating to Benefit of Clergy (Gabel, supra. p.i) are the two authors who discuss the *clericus* plea as it relates to outlawry and ecclesiastic penalties of *clericus* claimants.
[138] Wayne Logan, 'Criminal Law Sanctuaries', *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 38 (Summer, 2003) pp. 321-391. p. 329. Cited in Johnstone. *Murder,* p. 142.

Transportation and the use of the plea in Colonial America is the manifestation of these sentiments.

Poole's discussion around the issue of benefit of clergy and outlawry moves into an overview of exile as well.[139] He covers the period immediately after Becket's murder in 1170 until the end of the thirteenth century. Poole argues that a cleric who failed to purge himself before the bishop's court was liable to degradation and exile. In my work (Publication 1. Chapters 6 & 7) I make a clear distinction between all four mitigatory pleas. What is not apparent in Poole's work is that the Church viewed outlawry in the same way as excommunication. As I have written the recipient of one was dead in the eyes of the church and in the other dead at civil law.[140] As such any attempts to control abjuration by secular society are an abuse of Church authority. Cheney also disputes Poole's interpretation and questions whether degradation included another punishment. I have investigated both positions in my work and found that until 1261 bishops were permitted to impose sentences of exile and outlawry upon clerics.[141] After this time it was contrary to canon law for any cleric to take sanctuary, abjure or become an outlaw. As the cases used in my chapter demonstrate this was frequently ignored and there are numerous examples of clergymen using the secular options of sanctuary and abjuration and if these failed they either self-imposed outlawry or attempted to claim their clergy. Logan points out by the late twelfth century abjuration was regularly associated with sanctuary and as my chapter demonstrates the process of abjuration was controlled by the crown through the office of coroner.[142]

[139] Poole.
[140] Johnstone. *Murder*, p. 145. Note 45.
[141] Johnstone. *Murder*, p. 133.
[142] Logan. p. 327.

Despite the illegality of clerics claiming sanctuary and then swearing an oath of perpetual exile before a secular officer, the instances of the Church stepping in and preventing the proceedings are extremely rare. As I have commented in this chapter this is a curious situation because the Church viewed perpetual exile as a form of punishment and since it was administered by the crown enforced banishment amounted to a secular sentence; a fundamental effrontery to the principles that Becket sought to uphold. In the main though the Church remained silent and passively accepted the loss of a cleric to exile. As Helmholtz has suggested 'in this area coroner and bishop cooperated to administer a range of immunities that transcended life secular and Christian'.[143] Jordan suggests that in those cases where a cleric took sanctuary and abjuration was granted the ecclesiastical authorities were repudiated by the courts temporal.[144] I have provided a number of cases drawn from *Select Cases from The Coroners' Roll A.D. 1265-1413*, the *Eyre of London, 14 Ed. II, 18 Roll of Felonies and Misadventures 1281, Proceedings of the Eyre of Oxfordshire, 1285* and the *Staffordshire Eyre, 1293,* (Publication 1. Chapter 6.) that confirm (and expand upon) Helmholtz's assertions.[145] I found no evidence to support Jordan's contention that prelates were disowned by the secular authorities in cases where felonious clerics took sanctuary and the oath of abjuration.

I conclude this chapter with another example of the erosion of church law seen through the introduction of *Articuli Cleri* in 1315. S.15 permits clerics to abjure. Edward II does however appear to give a passing nod to recognition that clerics are different; if a

[143] Richard Helmholtz, *The Oxford History of the Laws of England. Volume I The Canon Law and Ecclesiastical Jurisdiction from 597-1640's* (Oxford: Oxford University Press, 2004), p. 62. Note. 173. Cited in Johnstone. *Murder*, p. 137.
[144] William Jordan, 'Fresh Look at Medieval Sanctuary' in *Law and the Illicit in Medieval Europe*, ed. by Ruth Karras, Joel Kaye and Ann Matter (Philadelphia: University of Pennsylvania Press, 2008), pp. 17-32 (p. 21. Note. 16).
[145] Case sources Op. cit. Note 10.

layman abjures and returns from exile without a pardon he 'wore the wolves head' but for clerics the 'Immunity or Privilege of the Church and Spiritual persons may be saved and unbroken'.[146]

The third chapter submitted is taken from Publication 1 *Getting Away with Murder: Criminal Clerics in Late Medieval England*, Chapter 7. 'Outlaws and Gang Members'.

Summerson's work on the Statute of Winchester (1285) gives the example of the failure of the secular law to bring felons to justice in one example, Gloucester, more than three hundred murders were recorded yet more than one hundred suspects either failed to appear or were sentenced to outlawry.[147] Popular fiction has often glamourized outlawry whereas in my research it is clear that this is a last resort for the courts, when imposed, or as a personal choice when self-inflicted. At canon law clerics were prohibited from the sentience of outlawry. As many cases in the chapter show this was not adhered to by the courts secular or individuals. Stewart suggests in her work that outlawry was a punishment for felony.[148] Poole implies that in one case a cleric was degraded and then sentenced by the courts but again the defendant did not appear and as was most frequently the case the outlawry was proclaimed in absentia.[149] In my view there is an alternative construction which challenges the ideas of Stewart and Poole. Outlawry was a declaration of status; a felon was at large and 'bore the wolves head'. It was not a sentence

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[146] Johnstone. *Murder*, p. 178.
[147] Henry Summerson, 'The Enforcement of the Statute of Winchester, 1285-1327', *The Journal of Legal History,* 13, No. 3 (1992), 232-250.
[148] Susan Stewart, 'Outlawry as an Instrument of Justice in the Thirteenth Century' in *Outlaws in Medieval and Early Modern England: Crime, Government and Society, c. 1066-c.1600,* ed. by John Appleby and Paul Dalton, (Farnham: Surrey, Ashgate, 2009), pp. 37-54.
[149] Poole, p. 244.

as the felon concerned failed to appear and therefore no trial had ever taken place. This is confirmed in my research; civil law outlawries are recorded in the Plea Rolls CP40 and criminal in Eyre Rolls. This is further confirmed by Woodbine 'Henceforth they bear the wolf's head and in consequence perish without judicial enquiry'.[150] Hunnisett and Stewart agree that reversal of outlawry required personal appearance before the Court of Common Pleas or the King's Bench.[151] For members of the clergy declaration of outlawry was a dangerous move as the cleric no longer had the protections of his bishop. In reality this was not always the case; the cases cited in my chapter show a number of instances where the process of degradation never took place and when the felonious cleric later returned to appear before secular justices they appeared in clerical attire and successfully claimed their clergy.

In this chapter I emphasize that the majority of outlawed criminal's clerics had fled the crime scene and, in doing, so self-imposed outlawry. This represented one aspect of crime committed by clerics. Of far greater concern to the monarchs of late thirteenth and early fourteenth century England were gangs employed by clerics or with clerics as members. Throughout this chapter I argue that the ease with which clerics could circumvent prosecution before the temporal courts made a lifetime of serious and organized crime most attractive. The research I conducted for this chapter was influenced by Stones, Bellamy and Harding's work on Trailbaston courts, which led me to explore a large number of court cases related to gangs.[152] Patronage of gangs, rather than

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[150] George Woodbine, ed. Samuel Thorne, trans. *Bracton on the Laws and Customs of England* (Cambridge, MA: Harvard University Press, 1968-1977). 4 Vols. Vol. 2. p. 357.

[151] Roy Hunnisett, *The Medieval Coroner* (Cambridge: Cambridge University Press, 1961). p. 68. Stewart, pp. 42-43.

[152] Edward L. G. Stones, 'The Folevilles of Ashby-Foleville, Leicestershire, and Their Associates in Crime, 1326-1347', *Transactions of the Royal Society*, 5th Series, 7. (1957), pp. 117-136, John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London: Routledge, 1973) and Bellamy. 1984, Alan Harding, 'Early Trailbaston

membership, required wealth, authority and rank; Bellamy makes reference to this but it is Summerson and Fryde who introduced me to the work of criminal barons and organized crime groups comprising of clergymen. I then reexamined their work by returning to, *inter alia*, original materials published in *Pipe Rolls*, *Roll and Writ Files* and *Selected Cases K.*[153]

Gabel pays no attention to the role of gangs in her discussion of the *clericus* plea. In my view this omission leads her towards the statement that generally there is no evidence of 'true spirit of reform either in the Church or among lay authorities in their efforts to grapple with abuses acknowledged by all'.[154] As this chapter shows this is not the case. Specific legislation was introduced because of the high levels of concern over gang activities which bishops and the crown knew included members of the clergy.[155]
My discussion of gangs of criminal clerics taking advantage of legal lacunae is important because it supports a position rarely explored previously; criminous clerks used all four mitigatory pleas during the late middle ages regardless of laws canon or secular and the volume of these crimes being committed was such that the general public could not fail to notice the disparity of esteem that the laws countenanced. Simply put, they too wanted these chances to avoid the gallows. This is vividly demonstrated in this chapter with my discussions of the Folevilles and Coteralls. Gabel's weakens her overall argument by omitting a discussion around gangs and outlawry.[156] As the examples introduced

Proceedings from the Lincoln Roll of 1305', in *Medieval Legal Records Edited in Memory of C. A. F. Meekings* eds. Roy Hunnisett & J. B. Post (London: H. M. S. O., 1978), pp. 144-168.

[153] Bellamy. 1984, p. 17. Henry Summerson, 'The Criminal Underworld of Medieval England', *The Journal of Legal History*, 17. No. 3. (1996), 197-224. Natalie Fryde, 'Medieval Robber Baron: Sir John Molyns of Stoke Pages' in Hunnisett and Post, pp.197-221.

[154] Gabel. p. 6.

[155] Johnstone. *Benefit*, p. 179 *Statute of Winchester 1285.*

[156] There is a single reference to the outlawry of clerks. Gabel, p. 121.

throughout my chapter show the move towards laicization of the *clericus* plea was greatly enhanced by the actions of priestly organized crime groups during the late thirteenth and early fourteenth centuries.

Swanson's study of religion and devotion confirms my conclusion in this chapter; that clerics were just men; men of this world not another.[157] For Church and bishops to contend otherwise was increasingly unsustainable. I produced this chapter because I believed that it was significant to a broader discussion of the clergy plea. It also helped me come to a place where I could agree with some of the ideas of the blasphemous farce contingent 'In the end though it would not be self-inflicted injury or the inability of the clergy to behave fittingly but the slow, subtle forces of social change that would secularize an 'evil' church anachronism'.[158]

The fourth chapter submitted is taken from Publication 1 *Getting Away with Murder: Criminal Clerics in Late Medieval England*, Chapter 8. 'From Tonsure to Reading, From Demands to Requests'.

My basic theme throughout this thesis is that secularization of the clergy plea was not one event, the Reading Test, but many. In this chapter I argue that despite Edward II's (1307-1323) weak monarchy the last-ditch attempts by the Church to retain exclusive jurisdiction over its felonious clerics failed. Evidence of these attempts is shown by examining Denton's work on Winchelsey, Heath's *Church and Realm* and Logan's

[157] Robert Swanson, *Religion and Devotion in Europe, c.1215-c.1515* (Cambridge: Cambridge University Press, 1995).
[158] Cross. p. 553.

Runaway Religious in Medieval England.[159] In my chapter I have taken their work and used case examples to prove that the divisions between Church and state had broadened despite the apparent concessions contained within *Clericis laicos* and the volume of remonstrations by senior churchmen in England progressively dissipated. In taking this approach my chapter demonstrates that the pattern of growth and the transition of *clericus* documented throughout my books support a natural, organic history framed by social, legal and political developments not a brutal, blunt instrument of decaying religious superiority.

As Heath shows the role of parliament had increased progressively throughout the twelfth, thirteenth and early fourteenth centuries alongside a decrease in the participation of the lower orders in decision making. Authority to decide matters previously exclusively spiritual were confirmed secular by acts such as the *Statute of Provisors* (1351). I bring further evidence to greater secularization within the Church by analyzing the decline in the number of regular clergy and the increase in Apostacy by those who remained regular. As Logan shows the number of men abandoning the monastic life increased greatly between 1331 and 1371.[160] In every case when the Church sought the return of these men it was secular society that provided the judicial means. Through a range of case examples not considered previously (nor viewed as an example of cooperative working relationships across religious and secular society) I argue this is further evidence of the 'blurring' of lines of demarcation between laws canon and temporal.[161]

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[159] Jeffrey Denton, *Robert Winchelsey and the Crown 1294-1313: A Study in the Defence of Ecclesiastical Liberty* (Cambridge: Cambridge University Press, 1980). Peter Heath, *Church and Realm 1272-1461 Conflict and Collaboration in an Age of Crisis* (London: Fontana, 1988). F. Donald Logan, *Runaway Religious in Medieval England c. 1250-1540* (Cambridge: Cambridge University Press, 1996).
[160] Logan. pp.66-96.
[161] Johnstone. *Murder*. pp. 212-214.

Heath points towards the changes in the curriculum of England's two universities as an example of the gradual ascendancy of the crown over Church.[162] Pike and Gabel build upon the class divisions that university stimulated and suggest that lower order clerics were often in the middle of this complex scenario and this may have stimulated greater criminality by them.[163] I feel that class struggles, few opportunities for lower order clerics to increase their financial situation and balancing the competing demands of bishop with parishioners may well have caused clerics to live on the margins of a number of societies. But the cases I have cited throughout my chapters also show that many clerics, in particular those examples drawn from chapter 7, chose a life of crime. Organized crime groups made up of clerics were not one-off criminal events stimulated by hunger these were orchestrated major crimes. When in 1358 Thomas de Nesbitt, a priest, agreed to murder judge Thomas Seton inside his home in London for payment this was a contract killing, not a slip into criminality by a poorly educated parish vicar who was short of food.[164] When in 1303 Richard Pudlicott, a tonsured cleric, assisted by monks from Westminster Abbey, stole the king's jewels and a large quantity of silverware valued at £100,000 this was organized crime not opportunist pilfering.[165] When the canons of Lichfield hired the Coteral gang to evict Walter Can, vicar of Bakewell this was conspiracy and robbery and when Richard de Folevile was killed while trying to escape justice after a lifetime of murder, extortion, kidnapping, theft and arson it was to his own parish church

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[162] Heath. pp. 157-187.

[163] Luke Pike, *A History of Crime in England illustrating the changes of the laws in the progress of civilization* (London: Smith Elder, 1873), Vol. I. pp. 296-297. <https://openlibrary.org/books/OL23378300M/A_history_of_crime_in_England> [Accessed 28 August 2013], Gabel, p. 117.

[164] Johnstone. *Murder.* p. 181.

[165] Johnstone. *Murder.* pp. 120-121.

in Tiegh, Rutland than he ran for sanctuary. Richard was a member of the notorious Folevile gang. These gangs, the Coterals and Foleviles, are well known, but their activities have not been analysed before in relation to developing use of the *clericus* plea.[166]

Sexual misconduct by clerics was also a significant factor in the demise of clerical privileges. Little is made of this by Gabel whereas Logan in his discussion around the matter of aspostacy cites a number of cases where monks fled the monastery to pursue a sexual relationship.[167] As part of this research I established that abduction of nuns by monks and priests was of such concern in the thirteenth century that legislation was enacted to curb the practice.[168] Between 1250 and 1435 the English Church sought help from the crown to arrest more than sixteen thousand apostates. What these factors suggest to me is that many monks were keen to leave the monastery and (as my cases confirm) would resort to crime to do so. It also confirms the strong reliance the church placed on the assistance of secular justice in capturing and returning apostates; something unique to England. The first of these adds weight to the view that the average citizen held regular clergy in diminishing esteem, one which the advent of literacy soon turned to satire. And it suggests that the divisions between church and state were not acute but soft in places such that the eventual ascendancy of the crown in criminal matters was less painful than previously portrayed. I conclude this chapter with one poignant example of this; cleric Guy Mortimer cut off the lip of a parishioner during an argument. He was brought before the secular tribunal and claimed his clergy. The justices accepted his claim but altered the charge to trespass, an unclergyable crime. Mortimer was then

[166] Johnstone. *Murde*r. p. 193. When one of the canons, Robert Bernard, was arrested for his part he successfully claimed his benefit of clergy.
[167] Logan. pp.66-96.
[168] Johnstone. *Murder,* p. 211. Note. 18.

convicted by the temporal court and fined £100. Pike points out this would not have happened one hundred years previously as the power of the Church had not diminished to the point that it had during Mortimer's trial.[169] I agree, it is inconceivable to think that during the reign of Edward I (1272-1307) England's prelates would have not contested the authority of the secular courts to remove jurisdiction of a cleric from the courts spiritual.

The fifth chapter submitted is taken from Publication 1 *Getting Away with Murder: Criminal Clerics in Late Medieval England*, Chapter 10. 'Immunity for All'.

In this chapter I emphasise the range of evidence that exists to support my conclusion; secularization of *clericus* was not due solely to the graphic examples of criminality conducted by every rank of the clergy. Yes it included the grotesque manipulation of canon and secular laws and forum shopping by clerics but it is only part of the picture. As part of the research for this book I looked at many hundreds of court cases from across England drawn from William I (1066-1087) until the close of the fourteenth century. This supplied me with a view of the volume and types of crimes clerics committed. The number of cases where low order clerics were committing subsistence crimes is few; the instances of violence, theft and sexually motivated crimes are high. This led me to speculate that as England moved towards greater literacy, wealth and social mobility if crimes committed to sustain existence were of the majority they would decline. There is no evidence of this; in fact once the *clericus* plea was available to all Englishmen criminality progressively increased to reach the crisis situation that resulted in

[169] Pike. p.82.

Transportation. What had happened was that the Church acquiesced in the transference of criminal justification over *clericus* so that it too was now within the temporal jurisdiction of mitigatory pleas I have termed the 'Excusory Quartet'.

Kowaleski described the defining events of the late middle ages as genesis of 'A consumer economy'.[170] I observed that 'the vulgarity of brandishing personal wealth had arrived'.[171] Cantoni and Yuchtman describe how guildhalls and municipal buildings start to vie with churches in grandeur.[172] I reference Crossley's commentary on the development of the English 'Decorated style', fan vaulting and perpendicular architecture and provide further examples that demonstrate the growth of secular affluence.[173] Until now I had failed to recognize the important statements made by monarchs about their ownership of the Church as they paid for major ecclesiastic building projects or erected palaces such as Ormrod termed Windsor "the Versailles of its age', secular buildings that shouted authority, stature and power.[174]

Alongside these changes greater literacy emerged. Matthews, Nichols and Clanchy have all contributed to my understanding of the changes that developed in literacy and the impact these had on shaping the shifting views and attitudes that the English laity held for its clerics.[175] The clergy responded to this by preaching in English and this no

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[170] Maryanne Kowaleski, 'A Consumer Economy' in *A Social History of England 1200-1500,* ed. by Rosemary Horrox, & W. Mark Ormrod (Cambridge: Cambridge University Press, 2006), pp. 238-259 (p. 246).
[171] Johnstone. *Murder*, p. 281.
[172] Davide Cantoni & Naom Yuchtman 'Legal Institutions, Medieval Universities, and the Commercial Revolution', *NBER Working Paper*, No. 17979 (Apr. 2012) <www.nber.org/paper/w17979 > [Accessed 14 October 2015].
[173] Paul Crossley, 'Architecture' in *The New Cambridge Medieval History Vol. VI, c. 1300-1415*, ed. by Michael Jones (Cambridge: Cambridge University Press, 2000), pp. 234-256.
[174] W. Mark Ormrod, *Edward III* (New Haven: Yale University Press, 2011), p. 274.
[175] William Matthews, 'Inherited Impediments in Medieval Literary History' and Stephen Nichols, 'Ethical Criticism and Medieval Literature: Le Roman de Tristan' in *Medieval Secular Literature*, ed. by William Matthews, UCLA Center for Medieval and Renaissance Studies Contributions, (Berkeley: University of California Press, 1967), pp. 47-681. Michael Clanchy, *From Memory to Written Record England 1066-1307*, 3rd edn. (Chichester: Wiley-Blackwell, 2013).

doubt brought them closer to their parishioners but it also exposed them to the view that they were simply men and the lofty pedestal the church had erected for its clerics was fragile. The exposure of clergymen's humanity was also an exposure of their vulnerability; if they were so human then surely they should be held accountable by humans.

But this time of growth and prosperity did not reach all levels of society equally. Contempt for the clergy was manifest in criminality directed towards them and the church. As Bishop records churches, abbeys and chapels were subject to ransacking on a scale not witnessed before.[176] This led me to consider that this was a time when parish clerics could demonstrate compassion and priestly attributes in the face of complex changing times. Two hundred years of struggling with murder, corruption, bribery and extortion by clerics of all ranks had become too great a task for the Church to control. If the courts secular were content to permit exile as a result of sanctuary why would a bishop resist? If the temporal criminal process was content to declare a cleric as an outlaw this was one less concern for a bishop. It the secular courts had assumed the right to determine a cleric's authenticity through his ability or not to read a psalm why should the bishop further concern himself. Lepine, Given and Crossley all reinforced my view that a complex range of subtle changes, when combined together, began to give an accurate picture of the shift from ecclesiastical dominance to secular across English society.[177] A new class of freeman was emerging and monasticism had changed. The number of secular clergy had grown enormously and they were serving a different population. The laity was more engaged and questioning and there was no justification for the continuation of a privilege

[176] Morris Bishop, *The Middle Ages* (Boston/ Mariner Books, 2001), pp.174-175.
[177] David Lepine, 'Church and Clergy' in Rigby, pp. 359- 380, James Given*, Society and Homicide in Thirteenth-Century England* (Stanford: Stanford University Press, 1977), pp. 66-90, Crossley, pp. 234-256.

that was used contemporaneously with three other judicial privileges that were within the secular domain.

Between the conclusion of my publication 1 and the third quarter of the fifteenth century benefit of clergy has attracted very little scholarly attention. 25 Edw. III c.4. (1327-1377) confirmed temporality of the clergy plea through the substitution of clerical attire for reading and it is not until the arrival of Tudor monarchs that the scope of the plea was revised. Henry VII (1485-1509) limited the plea to singular use and subsequent attempts to claim *clericus* were denied.[178] Under Henry VIII (1509-1547) first time offenders were branded in the left thumb to prevent further claims.[179] This provision was rescinded by his son in Edward VI (1547-1553) in his first parliament (1547) other than for the 'atrocious crimes' of murder, poisoning, highway robbery, burglary and sacrilege.[180] In 1512 Henry VIII restricted the plea to 'felonies without benefit of clergy'.[181] This move was rejected by Pope Leo X (1513-1521) and was instrumental in the eventual break from Rome in 1532. In 1536 benefit of clergy was denied to any defendant who refused to enter a plea.[182] Elizabeth I (1558-1603) further modified benefit of clergy so that all claimants were tried in the secular courts and then after conviction, but prior to sentencing, permitted to enter the clergy plea.[183] What this achieved was a clear display of regal mercy whereby the convicted felon was granted branding and possibly incarceration rather than execution. She also extended the reach of the secular law by denying clergy to cut-pursers, horse thieves, kidnappers and anyone foolish enough to 'slander against the queen'.[184] By

[178] 4. Hen VII. c. 13.
[179] 32 Hen. VIII. c. 3.
[180] 1. Edw. VI. c. 10.
[181] 4. Hen. VIII. c.2.
[182] 28. Hen. VIII. c. I.
[183] 18. Eliz. I. c.7.
[184] 18.Eliz. I. c.7.

the close of the century benefit of clergy had been removed for all offences of murder, rape, poisoning, petty treason, sacrilege, witchcraft and burglary.

Kesselring[185] provides the most comprehensive commentary to date on the use of and reforms to the *clericus* plea during the Tudor period. Her work is themed around evidence of the growing use of pardons by the Tudors as a mechanism to confirm the authority of the centralized state. She tracks the regular changes to the criminal law introduced by Henry VIII-and to a lesser extent his children-to create a persuasive account of how legislation can provide a broader understanding of social events and functions in the time and place being considered. As she states law is important to social interactions and as I argue in my work the adoption of Transportation as a manifestation of pardons facilitated the exile of felons who did not merit execution but were too dangerous to be simply returned to society. I agree with Kesselring that in many respects the development of penology through pardons (and I add mercy Transportation) suggest that alternative methods of punishment started long before the late 18th century.[186] Her work is about more than mercy and pardons it is a commentary on the power of governance in driving social and legal discussions around the early modern state.[187] Kesselring is also one of the few scholars who includes a discussion around sanctuary and exile as well as benefit of clergy in the same work.[188] I argue throughout both my publications that the *Excusory Quartet* were used indiscriminately. Kesselring is of this opinion also and she provides valuable statistical evidence to support this. I found it particularly interesting that during Elizabeth's reign 48.6% of male convicts on the Home

[185] Kesselring, K.J., *Mercy and Authority in The Tudor State*, (Cambridge, Cambridge University Press, 2003).
[186] Kesselring. Supra. p. 6.
[187] Kesselring. Supra. p. 11.
[188] E.g. pp. 48-57.

Circuit obtained their benefit of clergy and overall 57% of all males used benefit of clergy or obtained a pardon. [189] Her conclusion, that 'participation of individuals from all social ranks in the systems of law and governance shaped the abilities of the state' are echoed in my own final chapter of publication 1. A multitude of connected events and activities across a broad spectrum of society all contributed to the changes resulting in secularization and subsequent transportation. Yet 'Separated from these events by an even greater distance of time, we too are left with inconsistencies'.[190] Kesselring is right traditional arguments about the power of a particular pope or state to exert extreme influence need revision, so that we can better understand how power developed outside of these institutions. What interests me is that although authority to grant transportation in place of execution was vested in the elite of England for many years in Colonial America a more cohesive group of citizens, with broadly shared social values, stimulated abolition of laws created by and for established authority many decades before England seemed capable of.

McSheffrey's (2017) book is the first for many decades that explores the development and use of sanctuary during the fifteenth and first fifty years of the sixteenth centuries.[191] Very little has been said about the extent of the use of sanctuary during the reign of the Tudors and her important contribution brings to life this neglected discussion. As McSheffery points out sanctuary should have died out, it did not (Although the lack of attention the topic has received might suggest some scholars thought it had). In no small part sanctuary continued due to the vigorous manner in which the early

[189] Kesselring. Supra. pp. 212-214
[190] Kesselring. Supra. p.202
[191] McSheffrey, S., *Seeking Sanctuary: Crime, Mercy, and Politics in English Courts, 1400-1550* (Oxford, Oxford University Press, 2017).

Tudors sought out treasonists and instituted extensions to sanguinary legislation. McSheffery and I are in agreement over the lacuna in research dealing with sanctuary (actually all the *Excusory Quartet)* between 1400-1550. Fortunately for students of this period her work now makes a major contribution to help fill the void. This book is important too because it goes far beyond that recently provided by Jordan; she has reviewed all available legal records for the period 1400-1550 and provides specific information on all variations of sanctuary and the important distinction between sanctuary and abjuration.[192] The book is presented around events not dates; Richard Southwell, the Evolution of Sanctuary, the Politics of Sanctuary, Mercy, Justice and Jurisdiction, sanctuary in London and sanctuary in other parts of the realm. Her work is particularly useful as a bridge between where my discussion of sanctuary leaves off-during the middle of the fourteenth century-and where I pick again in Colonial America. Areas that still warrant scholarly attention are the fifteenth century until abolition in 1624, in particular the rogue sanctuaries such as Southwark and Whapping Mints.

Following the work of Kesselring is an important contribution by Skousen.[193] She leads the reader through a comprehensive discussion about the changes to clergy introduced by the 16th century Tudor monarchs. Her emphasis is on the 'gracious nature' of the laws introduced that sought to highlight the mercy shown by the crown throughout this period. Skousen is of the view that 'benefit of clergy stands as a microcosm through which major issues of English history can be viewed from 1455 to 1540'.[194] She concludes

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[192] Jordan, W.C., *From England to France: Felony and Exile in the High Middle Ages* (Princeton, NJ, Princeton University Press, 2015).
[193] Skousen, L., *Redefining Benefit of Clergy During the English Reformation: Royal Prerogative, Mercy, and the State.* MA Thesis. University of Wisconsin. 2008. (Unpublished).
[194] Skousen. supra. p. 112.

that 'Parliament's decision to retain the lesser lay version of benefit of clergy instead of abolishing it with the other clerical privileges would continue to affect the realm, and even the Empire, on multiple levels for the next three centuries'.[195] I entirely agree. It is the history, the uptake and the manipulation of this that I consider in the context of the American colonies of Virginia and Massachusetts in the following pages.

The sixth chapter submitted is taken from Publication *2 Benefit of Clergy in Colonial Virginia and Massachusetts,* Chapter 3. 'Benefit of Clergy in Colonial Virginia'.

My research on the nature and form of criminal law in colonial Virginia confirmed the findings of Nelson and Scott.[196] Following Richards I also included the duality of jurisdictions in that drunkenness was dealt with by church authorities on the first occasion and the courts on subsequent.[197] I also pointed out that extended periods of servitude were applied as a criminal sanction and religious laws were wrapped into a general code and a number of offences subject to the death penalty were penalized by mutilations in order that the fragile workforce was not further depleted. As my chapter demonstrates the legality of Virginian statutory interpretation was never fully tested in Virginia and subsequently the law comprised of an assortment of provisions that were based upon English common law but had a number of local interpretations. I argue that this was both understandable and pragmatic given the precarious nature of life I the

[195] Skousen. Supra. p. 119.

[196] William Nelson, *The Common Law in Colonial America. Volume 1. The Chesapeake and New England, 1607-1660* (Oxford: Oxford University Press, 2008), Arthur Scott, *Criminal Law in Colonial Virginia* (Chicago: University of Chicago Press, 1930).

[197] Jeffrey Richards, 'Samuel Davis and the Transatlantic Campaign for Slave Literacy', *Virginia Magazine of History and Biography*, 111. No. 4. (2003), 333-378. p. 358.

colony and the need for certainty among a group of predominantly male convicts. Hoffer and Scott pointed out that the difference in the two laws was that whereas in England the jury was involved in the manipulation of the benefit plea (most commonly by downgrading the monetary value of stolen property to ensure clergyability) in Virginia judicial discretion was expressly permitted.[198] I have confirmed this by referencing a range of examples, legislative and court records and provided specific examples of the fluid interpretation of English law among the colonists and the workings of the criminal courts.[199]

In this chapter I explore the application of *clericus* as a mechanism to generate income for the English crown and how familiarity with the plea then translated into an established part of the criminal law of Virginia. Early transportation discussed by Hatch and Chittwood led me to explore Old Bailey and Richmond, Virginia court records to uncover further examples of recorded cases of transportation and use of the *clericus* plea.[200] For all practical purposes benefit of clergy was never viewed as a punishment in England as once convicted the defendant entered the *clericus* plea and was branded or transported. The merciful king having granted a felon the opportunity to retain his neck then sold the rights to purchase the convict as an indentured servant. What I did not anticipate were the long-term benefits that transportation had in providing funds to the cash strapped monarch James I (1603-1625). By 1605 James had personal debts of

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[198] Peter Hoffer & William Scott, eds. *Criminal Proceedings in Colonial Virginia [Records of] fines, Examination of criminals, Trials of slaves, etc., From March 1761[1711] to [1754] [Richmond County, Virginia],* American Historical Association, (Washington, D.C.: University of Georgia Press, 1984), p. 37.

[199] Johnstone. *Benefit*, pp. 38-45.

[200] Charles Hatch, *The First Seventeen Years: Virginia 1607-1624* 10th Print (Charlottesville: University of Virginia Press, 1957), Oliver Chittwood, *Justice in Colonial Virginia* (New York: Da Capo, 1971), The Project Gutenberg E Book. <www.gutenburg.org> [Accessed 23 August 2013].

£80,000 and Queen Anne owed £40,000 for her wardrobe. The success of the entrepreneurs in Virginia was paramount to the monarch; increasing the labor force was an efficacious quick fix and it rid London of felons. By 1670 any English convict that refused transportation hanged.[201]

Having argued the value of transportation I explore the adoption and use of *clericus* in Virginia. Other than Dalzell there is little written on this and what has been said does not explore in any depth the social environment in which *clericus* was applied.[202] In my work I address this. The accused felon was secure in the knowledge that he would be granted his clergy upon first conviction and rather than deplete the workforce by transporting the felon (again) he was sentenced to corporal punishment. As my research shows the application of transportation was exceptional (Jonathan Button, found guilty, acquitted and banished).[203] I conclude this chapter by introducing a theme largely unexplored, the uniformity of accountability for criminal conduct across all levels of society. Through the Richmond Court Proceedings I have shown that the courts of Virginia were far more than a means of redress for wrongs, they were 'a social center point of social life that brought stability and obedience to society as a whole', something that was to occur as well in Massachusetts and would eventually lead to abolition of *clericus* in America many years before the legislature of England followed.[204]

[201] Johnstone. *Benefit,* p. 48. Note. 48.
[202] Dalzell.
[203] Johnstone. *Benefit,* p. 44.
[204] Johnstone. *Benefit,* pp. 55-56.

The seventh chapter submitted is taken from Publication *2 Benefit of Clergy in Colonial Virginia and Massachusetts,* Chapter 5. 'Benefit of Clergy in Massachusetts'.

In discussing the Mayflower Compact, Coquillette and Hall demonstrate how the document can be viewed as an early constitution.[205] As I have noted benefit of clergy is not expressly included in the charter of laws but it was soon adopted by implication. I argue that many of the early settlers shared the same heritage and their exposure to the common law in England made them nervous of a powerful state machinery. I have noted the contrast between Goebel and Chapin and have come to the view that the notion that Massachusetts was a Puritan oligarchy is severe.[206] I draw my conclusions from the evidence of an active and open local magistracy that involved the community in collective decision making (in the early years).[207]

Departure from English law took place in Massachusetts as it did in Virginia. The framework for the differences was religion. In the north adultery, idolatry, blasphemy and bearing false witness all attracted the death sentence. This was a significant departure from English law albeit, as I have noted in the chapter, during the Interregnum a range of provisions legislated in Massachusetts were considered for adoption in England; the death sentence for adultery and abolition of benefit of clergy were two of the most

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[205] Daniel Coquillette, ed. *Law in Colonial Massachusetts 1630-1800,* A Conference held 6 and 7 November 1981 by The Colonial Society of Massachusetts (Boston: The Colonial Society of Massachusetts, 1984), Introduction. pp. xxi-lxiii, William Wiecek & Paul Finkelman, *American Legal History: Cases and Materials* (Oxford: Oxford University Press, 1991), p. 11.

[206] Julius Goebel, Jr, 'King's Law and Local Custom in Seventeenth Century New England', *Columbia Law Review,* 31. No. 3 (Mar., 1931), 416-448. Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens, GA: University of Georgia Press, 1983). Concluding chapter, pp. 143-150.

[207] Johnstone. *Benefit,* pp. 112-113.

significant.[208] I followed Preyer's interpretation and have commented that the adoption of the Code in 1641 took Massachusetts further away from English law generally and what would have been viewed as heresy in previous times was now formalized; marriage and divorce was sanctioned by the governor of the colony.[209]

My views on the rapid development of societies expressed in chapter 10 of *Getting Away with Murder: Criminal Clerics in Late Medieval England* are repeated in this chapter. When primitive and rural settlements develop into urban conurbations rapidly legal and social growth needs to be flexible and responsive. The early settlers to Virginia and Massachusetts took what they viewed of value from established English law and they modified it to suit local needs. In many respect this follows the path of benefit of clergy in medieval England. The plea was of value, it provided a mechanism to circumvent excessive sanguinary legislation. What was inherently unfair was the exclusivity of the plea and consequently in the face of dynamic change the plea was secularized. So too in the fledgling colonies of America benefit of clergy was viewed as useful until such a time as a suitable alternative could be implemented.

The eighth chapter submitted is taken from Publication *2 Benefit of Clergy in Colonial Virginia and Massachusetts,* Chapter 7. 'Abolition of Benefit of Clergy in America'.

This chapter draws together the final stages of the use of the *clericus* plea in the American colonies. Throughout the chapters on colonial Virginia and Massachusetts

[208] Johnstone. *Benefit,* p. 111. Note 17.
[209] Kathryn Preyer, 'Penal Measures in the American Colonies: An Overview', *The American Journal of Legal History*, 26, No. 4 (Oct., 1982), pp. 326-353.

primary sources have been legislation and court records, both have been used again in this final chapter as a means for me to draw together my own thoughts on the last stages of the *clericus* plea.[210] Due to the shortage of contemporary commentary on this topic I have relied principally upon my interpretation of the works of Dalzell, Cross, Chapin, Nelson and Preyer.[211]

Massachusetts abolished the plea first. Perhaps this is no surprise as it was always less enthusiastic about integrating English common law than Virginia (and far more erratic in its application). In Virginia the judiciary promoted use of *clericus*. In researching the court records I found no instances of a judge in Massachusetts publicizing the availability of the plea. I agree with Preyer (and have confirmed this through available court records) in that once the English monarch stopped the legislative freedom that had grown across Massachusetts the use of the *clericus* plea increased and started to resemble how it was being applied in England.[212] By contrast Nelson has written that in Virginia there was a general 'reception' of English law.[213] I would not use this term as it could

[210] These include: Essex County Court 1670. (Mass), Mass. Recs. I. 264. (Mass)., Massachusetts Court Records. M.C.R. Vol. 1. (Mass)., Massachusetts Superior Court of Judicature, Special Courts, 1686-1687. (Mass)., Minutes of the Council and General Court 1622-24. (Mass)., Suffolk County Court. 1672. (Mass)., Superior Court Records Minute Book 1686-1687. (Mass)., Superior Court Records, 1730-1733. (Mass)., Superior Court Records, 1739-1740. (Mass)., Superior Court Records 1754. (Mass).,York County Judgments and Orders 1753. (Mass).,1641 The Massachusetts Body of Liberties, 1648 The Laws and Liberties of Massachusetts. <http://www.commonlaw.com/Mass.html#HE46 > [Accessed 14 January 2014], 'May 1650: An Act for suppressing the detestable sins of Incest, Adultery and Fornication.', *Acts and Ordinances of the Interregnum, 1642-1660* (1911), pp. 387-389. URL:< http://www.british-history.ac.uk/report.aspx?compid=56399> [Accessed 16 January 2014], Colonial Laws of Massachusetts. Sumptuary Laws. 1651, Act of 19th August, 1704, <http://www.lib.muohio.edu/multifacet/record/mu3ugb3382745.> [Accessed 16 January 2014], Province Laws. 1736-37. Chapter 10, 1784. Chapter 56. January Session. Senate and House of Government of Massachusetts. Bristol Assizes, October 1739. (Mass) < http://archives.lib.state.ma.US/actsResolves/1736/1736acts0009.pdf >[Accessed 17 January 2014].

[211] All cited throughout this essay.

[212] Preyer. pp.339-340.

[213] Nelson. p.3.

mislead. My research has led me to believe that English law integrated into the fabric of the legal system from the outset. I am supported in my view by Preyer who points out the trend towards harsher sentencing in Virginia during the first quarter of the eighteenth century; one-third of all felony convictions in the colony resulted in dismemberment, had started in London.[214] Throughout my chapter I have cited further examples of the closer proximity of the laws in Virginia and England than between Massachusetts and Virginia or Massachusetts and England.[215] I do not argue that translated into parity in sentencing with England, in either colony.

Commenting on the use of benefit of clergy across seventeenth century New England Goebel observed that for the Puritans *clericus* was morally and ideologically objectionable.[216] My investigations for this book lead me to agree. I believe that the northern colonists found using *clericus* distasteful but it was familiar and the best available legal tool in the short term as they worked their way through the complexity of enforced English provisions alongside local aspirations and needs. Taking benefit of clergy to Virginia was never as offensive to the Virginians as it was to the Puritans and non-conformists.

It is possible that some might question why I would invest so much of my time on a legal anomaly. My response is that since I first read about benefit of clergy it seemed to me it had been mispresented. This work is an attempt to bring fresh discussion and evaluation to the topic. Examining cases of benefit of clergy, sanctuary, abjuration and

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[214] Preyer. p.326.
[215] Johnstone. *Benefit*, pp. 159-161.
[216] Goebel. pp. 416-448.

outlawry exposes more than the extent of clerics involved in crime, it provides a window into the life of England's clerics and the society around them. To understand what tensions drove the transition to secularization of *clericus* is crucial to contextualizing its uptake and use in the first one hundred and fifty years of colonial America, but this is something that had not been done. Without the history of the arguments that took place in England during the twelfth, thirteenth and fourteenth centuries it is not possible to appreciate why transported felons would adopt and apply *clericus* in such different worlds as existed in Virginia and Massachusetts.

Benefit of clergy has been described as 'evil', a 'legal farce', or simply 'bad', dismissed by commentators as a 'curiosity'. Far from a mere curiosity the environment that stimulated the movement of *clericus* into mainstream secular law was complex, relevant and progressive. It may only represent one manifestation of the numerous changes taking place across society in the later middle ages but it is an important one and one that managed to traverse the Atlantic to Colonial America and the Caribbean as well as remain active under English statutes until the nineteenth century.

In 1623 women were permitted their clergy in cases of theft of goods valued at less than ten shillings. In 1691 women were granted clergy on the same basis as men. In 1706 the Reading Test was abolished in England and benefit of clergy became automatic for all felonies other than those deemed 'non-clergyable'.[217] In 1718 the *Transportation Act* was promulgated. This law permitted the transportation of benefit of clergy claimants to the

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[217] In effect by 6. Anne, c.9 (1707) (Also cited as 5. Anne. c.6 1706) commonly known as the Benefit of Clergy Abolition of Reading Test Statute, all crimes that carried the death penalty in England were now 'clergyable' (unless specifically designated otherwise) to all men and women. The legal implications of this legislation may not have been appreciated to the full at the time but in many respects being able to mitigate a death penalty felony on the basis of simply claiming an immunity without proof and making it available to men and women was ostensibly both a pre-cursor to plea bargaining and the substitution of capital punishment for alternative correctional measures.

American colonies. Branding of benefit of clergy claimants (to prevent using the plea twice or more) ended in 1779. Benefit of clergy was abolished in England in 1827.[218]

[218] Johnstone. *Murder*, Chap. 10.

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