These debates continue in legislatures, synods, universities, the press and wider society. Witte's book merits reading by all participants in these debates, whether politicians, clerics, academics or indeed any person of good will.

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Ecclesiastical Law, Clergy and Laity: A History of Legal Discipline and the Anglican Church

Neil Patterson
Routledge, London and New York, 2020, 194 pp (paperback £30),
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It was 950 years ago, in 1072, that William the Conqueror decreed that no matters relating to 'episcopal law' should thereafter be tried in secular courts but that 'anyone cited under the episcopal laws in respect of any cause or fault shall come to the place which the bishop shall choose and name, and there he shall plead his case, or answer for the crime'. That resulted in matters pertaining to the discipline of clergy and laity in the Church in England being dealt with thereafter in the church courts and in accordance with the law of the Church. The church courts developed an extensive jurisdiction that bore heavily on the lives of English clergy and laity and covered many areas of life, including what happened when a cleric strayed in their thinking or behaviour from what was deemed to be acceptable to the Church.

It is this history that Neil Patterson explains and explores in his book which began life as an Oxford BD thesis. He is more concerned with the disciplining of what people believe and how those beliefs are expressed in liturgy and worship than in the discipline of moral conduct, although in order to expound his argument about the discipline of belief he does deal with the history of behavioural discipline to an extent, particularly where there was an argument that the behaviour complained about was not wrong per se. However, it should be noted that the work was first published in 2019, which predates the Independent Inquiry into Child Sexual Abuse and also predates the work that has been done in the last three years to review and potentially to replace the Clergy Discipline Measure 2003. However, as Patterson's main thrust is to focus on discipline of beliefs, and as the current procedures for dealing with doctrine, ritual or ceremonial matters are contained in the Ecclesiastical Jurisdiction Measure 1963, which is likely to remain untouched by any new Discipline Measure, his underlying argument is unaffected by these more recent developments.

That argument is that for several hundred years the Church has been unable to exercise any effective discipline over laity and clergy in relation to their unorthodox beliefs. This 'weakness' Patterson describes as 'a distinctive and valuable mark of the Church of England'. He attributes this to what he describes as 'a happy accident' and argues that it is an 'unintended consequence' of the passing of the Toleration Act 1689 without the simultaneous passing of the Comprehension Bill, which was intended to amend the formularies of the Church and its liturgies so as to make them more acceptable to dissenters and to maintain one church, although of a broader compass. He identifies the real issue about comprehension then as being whether it should allow differences within or without the Church, which he says remains an issue today. He welcomes what he describes as the resultant 'legal liberalism' of the Church of England.

Patterson notes what followed the 1689 Act: Convocation lost its voice as a key player in the bringing of any discipline, being shut down by government when it attempted to take a line against Benjamin Hoadly. From that time on the number of cases passing through the church courts declined significantly. He believes that he is filling a gap in previous research, saying that much of the attention in previous study of the nineteenth-century doctrine and ritual debates has focused on the theological issues and not really taken on board the context of the decline of the ecclesiastical courts and previous failures in attempting to discipline both clergy and laity. The question he ultimately poses and which is clearly driving his work is whether this will continue and if so how it will be worked out in arguments about same-sex relationships, the author making no secret about his personal interest in that issue.

Tracing the historical development of the law, Patterson recites many cases, some of which we know well and some of which are less well known. His recitals tell us not only the story of each case but for many of them how they arose and what followed after the decision was delivered. He also regularly gives us insight into the key people involved behind the scenes, identifying several bishops and judges who were to play prominent roles in a number of these cases. Furthermore, in relation to more recent cases he has been given access by litigants to previously unpublished papers and personal correspondence which gives us a fresh insight into them.

Patterson lays out a number of underlying themes as he develops his argument. Perhaps the most significant of these is the conflicting approach of those, including Edmund Gibson, Edmund Wood and more recently Garth Moore and Eric Kemp, who were committed to the *jus commune* as the ground of ecclesiastical law, against those who adopted an Erastian approach where the law as laid down in Parliament and as applied by the king's courts prevailed. He also notes that, with a few exceptions, having had their hands burned

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and wallets emptied by attempts to discipline clerics in the ritualist cases at the end of the nineteenth century and more recently in *Bland* and other cases under the Ecclesiastical Jurisdiction Measure 1963, bishops on the whole have adopted a policy of not going down a litigious route.

The detailed account works through the gradual loss of control over the behaviour and belief of both laity and clergy. At a time when there are increasing calls for the Church to bring back discipline over the laity, particularly in cases where church officers and others weaponise the Clergy Discipline Measure against clergy and where laity attempt to bully their clergy, it is interesting to see how that discipline fell away. The increasingly voluntary nature of the membership of the Church of England, coupled with the fact that the only real penalty was the requirement to do penance, arising from the underlying principle that the purpose of discipline was *pro salute animae* (for the good of the soul), meant that there was no effective sanction and certainly no deterrence against offending. Patterson's accounts of the last instances of penance being imposed, for cases of defamation in Fen Ditton and Wakefield, where the whole process was held up to ridicule by the thousands who attended to witness the penance, show a system that was far from fit for purpose. In the middle of the nineteenth century the jurisdiction of the Church over defamation and marriage law was ended and with it any effective discipline of the laity for their moral behaviour through the church courts. He also describes how the more recent attempts to deal with laity through restricting the right to baptism or by 'fencing the table' against those considered to be 'open and notorious evil livers' have failed. The huge cost of bringing discipline cases, with the quite complex processes which regularly resulted in appeals, often at several stages, led to a reluctance to commence proceedings. The case of *Dr Free* is fully and colourfully described as illustrative of that.

But it is the cases that related to the errant beliefs of clerics that Patterson focuses on. His reflections on the cases of *Gorham* and *Denison* are that they show us that attempts to exclude particular beliefs (the denial of baptismal regeneration and the affirmation of the Real Presence respectively) failed because the courts held that there was no substance in the laws of the Church of England to sustain such exclusions. It was this that meant it was necessary to set up a specific court to deal with the ritualism controversy in the nineteenth century. This was a court with a defined process and also working to a clear definition of what was not permitted and would therefore constitute an offence. But even when a dedicated court with a sympathetic judge was introduced, the willingness of a few to be martyrs for their beliefs and to undergo imprisonment produced public sympathy and caused the bishops for the most part to back down and to veto further cases.

Against that historical backdrop it is Patterson's attempt to peer into the future that is most intriguing. Replacement of the Clergy Discipline Measure

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is on General Synod's current agenda but that was not anticipated when he was researching and writing. The indications so far are that in the future misconduct will not be defined by reference to particular ecclesiastical 'offences' but by taking account of a number of factors which will be identified in guidance documents. Given the current episcopal toleration of same-sex relationships as evidenced in the several letters of advice to offending clergy that Patterson has been given access to and from which he quotes, it is difficult to see 'legal liberalism'– which he has identified as the prevailing mindset and culture of the Church of England – being upset.

All in all, this is a well-written account with an abundance of well-researched material which gives real insight into cases old and recent. Of particular value is Patterson's putting into the public domain material which has hitherto been unavailable. Although he is driven by an acknowledged personal agenda, his arguments are all well made.

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Tying the Knot: The Formation of Marriage 1836–2020

REBECCA PROBERT

Cambridge University Press, Cambridge, 2021, xii + 283 pp (hardback £85), ISBN: 978-1-316-51828-1

Readers of this *Journal* will already be familiar with Professor Rebecca Probert's recent work, from her paper at the Ecclesiastical Law Society's 'Solemnization of matrimony: past, present and future' day conference in 2021 and her subsequent article, 'Getting married: the origins of the current law and its problems'.[3] Probert is the leading scholar on the history of marriage and family law and her previous significant works include *Marriage Law and Practice in the Long Eighteenth Century* and *The Changing Legislation of Cohabitation*.[4] She is also a specialist consultant to the Law Commission on their current Weddings Project. The commission's final report and recommendations for reform of the law on how and where couples can get married is expected this summer. The commission's consultation paper observed that the current law 'restricts how couples are permitted to celebrate their weddings, for historical rather

3 (2021) 23 Ecc LJ 255–266.
4 R Probert, *Marriage Law and Practice in the Long Eighteenth Century: a reassessment* (Cambridge, 2009); R Probert, *The Changing Legislation of Cohabitation: from fornicators to family* (Cambridge, 2012).