Visiting Professor at Queen Mary University. His reference to Augustine's sermon on James 5:12 (p. 131), which established not only the importance of mens rea but also the need for mens rea to be combined with actus reus, not only took me back to my first week studying criminal law, but also caused me to ponder the law of attempts and attempting the impossible when considering the references to the "accidental false swearer" and the "accidental true swearer".

I was amused by the fact that the expulsion of Adam and Eve was used to illustrate different points. Lord Judge, former Lord Chief Justice, in his Preface (on p. xvii) refers to the fact that at the moment of expulsion "the defendants were not represented" and imagines the plea in mitigation that might be made on their behalf. Sir John Saunders, a retired High Court Judge and a member of the Parole Board, in his chapter on "Parole, Risk Assessment of Offenders and Christianity" refers (on p. 304) to the requirements of fairness set out in *R. v Chancellor of Cambridge, Ex parte Bentley* (1748) 2 Ld. Raym. 1334 and Fortescue J.'s statement: "even God himself did not pass sentence upon Adam before he was called upon to make his defence".

I should record that there is much of interest for criminal practitioners. For example, in the chapter by Sir John Saunders there is information which it is not always easy to find. This includes the facts that there were 8,000 oral Parole Board hearings a year (p. 301); and two-thirds of prisoners who request an oral hearing get one (p. 302). The most interesting figure was the percentage of those who commit a further serious offence within three years of release by the Parole Board, which is less than 1 per cent.

This book is one of the introductions to Christianity and Law commissioned by the Center for the Study of Law and Religion at Emory University, Atlanta, US. It is well worth reading.

Sir James Dingemans
Lord Justice of Appeal, England and Wales

Accessorial Liability After Jogee. Edited by Beatrice Krebs. [Oxford: Hart Publishing, 2019. xiv + 272 pp. Hardback £70.00. ISBN 978-1-50991-889-8.]

A case as significant as the Supreme Court decision in *R. v Jogee* [2016] UKSC 8, [2016] 2 W.L.R. 681 (consolidated with the Privy Council appeal of *Ruddock v The Queen (Jamaica)* [2016] UKPC 7) deserves its own book, and *Accessorial Liability After Jogee* does not disappoint. The introduction in *After Jogee* shows that it seeks to answer the question of "What, if any, impact will *Jogee* have, prospectively, on the law of accessorial liability?" (p. 2). The academic and practitioner backgrounds of the authors give the discussion a thorough grounding in both theoretical and pragmatic aspects to secondary liability and consider the implications of the case both in theory and in practice. In particular, Felicity Gerry was lead counsel for Jogee, Catarina Sjölin junior counsel, and Beatrice Krebs and Matthew Dyson provided considerable academic research for his defence. Their involvement in *Jogee* provided an extra dimension to *After Jogee*'s analysis of the case and its implications.

At first sight, perhaps *Jogee* was not the best case to go to the Supreme Court because the case did not raise issues such as fundamental difference and withdrawal, which have caused so much controversy, so these issues could not be decided. However, as shown in Chapter 11 by Gerry, Jogee's case was an example of going beyond parasitic accessorial liability (PAL), where if two parties embarked

on crime A the secondary offender would also be liable for crime B if they had foreseen the possibility of the principal offender committing crime B. Jogee was found liable for crime B, which was murder, without a crime A having first being identified, as at most he had stayed outside the house and waved a bottle while the principal offender was inside the house committing murder. One of the potential justifications for PAL is that the secondary offender has changed their normative position by committing crime A so they can be liable for the principal offender committing crime B. By not committing a crime A, Jogee had not changed his normative position as to crime B. *After Jogee* gives more facts about the case than those which are summarised in the judgment, explaining counsel's submission that this should not have been a PAL case as there was no crime A. From reading *After Jogee*, I can see that the Supreme Court could have taken the less controversial road, by containing PAL and distinguishing *Jogee*, by insisting that for PAL the crime A must be shown, in a similar way to the House of Lords in the *English* appeal in *R. v Powell; R. v English* [1999] 1 A.C. 1, where the fundamental difference exception was cemented into secondary liability. This would have resolved the miscarriage of justice for Jogee, but would have made little impact on secondary liability in general.

After Jogee considers issues such as fundamental difference, causation and withdrawal which, while not directly relevant to the facts of *Jogee*, remain important issues for secondary liability. Sjölin in Chapter 4 examines the development and criticisms of the fundamental difference exception, where the secondary offender would escape liability if the principal offender killed using a more dangerous weapon than they knew about, referring to this as a kind of weapons "top trumps" (p. 71) of deadliness to relieve the harshness of PAL. Her analysis of the flaws of the fundamental difference exception, acting as an all or nothing defence to homicide based on the dangerousness of the principal's weapon rather than the secondary offender's moral culpability, shows that the Supreme Court in *Jogee* was right to remove the fundamental difference exception rather than modify it. Sjölin goes on to explain how the different approach of the Supreme Court to secondary liability, where the secondary offender encourages or assists a crime rather than the particular method of committing it, has rendered the fundamental difference exception irrelevant. Sjölin also considers the back door left open in *Jogee* where the principal offender has committed an overwhelming supervening act of such a nature to relegate the secondary offender's act to history, and predicts that secondary offenders, trying everything possible to escape a murder charge, will try and persuade the courts to use this as the old fundamental difference exception. Sjölin analyses this overwhelming supervening act as an issue of causation, considering policy behind the already existing law on causation. It would have been helpful of Sjölin to suggest a scenario where a defendant may be successful in showing there had been an overwhelming supervening act, something which case law and literature has yet to do.

After Jogee also considers causation, again not directly relevant to the facts in *Jogee*, with Sjölin in Chapter 4 and Williams in Chapter 2 engaging in an in-depth analysis of causation in secondary liability. Their analysis provides intriguing contributions to the debate on how to justify secondary liability based on the secondary offender's causal impact on the principal offender's crime. Sjölin uses both case law and hypothetical examples to show how we punish secondary offenders beyond those who can be shown to have caused the principal offender to commit the harm. She calls this the "x factor" (p. 78) which she sees as a causal link between the secondary offender and the principal offender's crime in secondary liability. Williams considers causation and authorisation as the main candidates for the underlying theoretical basis for secondary liability. Although both authors provide a good

analysis of causation in secondary liability, highlighting the lack of consensus in both the judiciary and academia, they contribute to the debate rather than conclude the debate because, like the judiciary, they do not identify the *wrong* in secondary liability.

The Supreme Court in *Jogee* stated that the law had taken a wrong turn by equating foresight with intention. Then, interestingly, it stated that conditional intention is sufficient, and that foresight can be evidence of conditional intention. So, is conditional intention merely foresight by another name, thus undermining the change? In Chapter 3, Cowley approaches the issue of conditional intention by considering the difficulty in justifying it theoretically, both in the traditional single person theft scenario and its use in *Jogee* for secondary liability. He uses the two hypothetical scenarios given in *Jogee*, the bank robbery where the principal goes on to kill and the indifferent weapons supplier, and the facts of *Jogee* itself, to show that conditional intention is not as simple a concept as the Supreme Court made out when giving those examples. If one of the aims of the Supreme Court in the judgment was to introduce the concept of conditional intent into secondary liability, Cowley's analysis shows that *Jogee* was not the right one to do so because the facts did not involve the question of whether Jogee had conditional intent that the principal offender commit at least really serious harm. Cowley shows through these examples that conditional intent is not really intent, but a type of recklessness which contradicts the overall direction of *Jogee* where the Supreme Court tried to establish intention as the mens rea requirement. He does not conclude, however, that conditional intent is foresight by another name, and this can be seen in cases decided since *Jogee*, where neither intention nor conditional intention were found and the secondary offender was instead convicted of manslaughter. The newer cases are showing a move away from foresight by another name which we initially saw in out of time appeals where murder convictions based on the secondary offender's foresight allowed the appeal court to draw the conclusion that the secondary offenders had the conditional intent that the principal offender commit at least really serious harm. Requiring intention or conditional intention also prevents the unfair situation identified by Lord Mustill in *Powell; English*, where a secondary offender who tried to dissuade the principal offender from committing murder would still be liable as a secondary offender for murder as they had foreseen the possibility. Since *Jogee,* however, this would instead be evidence that, despite their foresight, they lacked intention and conditional intention to kill. This point is taken up by Krebs in Chapter 6, where she explains that, although *Jogee* now allows secondary offenders to escape liability for murder by trying to dissuade the principal offender from killing, they will not be able to avoid liability for manslaughter so they will still be liable for the death.

Of particular interest is the final chapter where Gerry gives a personal recount of her six year journey, defending Jogee up to the change of law in the Supreme Court. It is fascinating to see how many people from different legal professions were involved; from practitioners, academics and pressure groups who collaborated to give this appeal its best chance of success. Also highlighted is the important role of academics, in particular Krebs and Dyson, in analysing the history of secondary liability to show that the foresight test was a wrong turn in the law that should be corrected by the judiciary. This was shown to some extent in the Supreme Court judgment in *Jogee*, but Gerry's chapter goes further in recognition of the academics who carried out the research. The courts had been rejecting appeals to correct the wrong turn for decades. Even when *Powell; English* reached the House of Lords, rather than taking the opportunity to correct the wrong turn, the fundamental difference exception was cemented into the law. This provided an arbitrary way to relieve

some of the harshness for secondary offenders who had not realised that the principal offender had brought a more dangerous weapon, but also resulted in injustice for the families of the victims where those few who came within the arbitrary fundamental difference exception escaped all liability for the death. In Chapter 11, Gerry explains how her team had to do something different, to go beyond the other rejected appeals, and shows how it was done and credits those involved. This chapter also emphasises that cases are not just legal precedents but involve real people, including victims, defendants, their families, witnesses, campaigners (such as JENGbA), practitioners (some of whom work without remuneration), and academics who become invested in correcting miscarriages of justice, not just for the defendant involved, but for all defendants convicted of murder for very little conduct at all.

One thing that this book does not cover is the potential for statutory intervention for further reform. Sullivan in Chapter 1 briefly touches on it, calling for legislation to impose a manslaughter conviction on secondary offenders where their encouragement or assistance raises a threat of serious harm to others and the principal offender kills. Krebs in Chapter 6 also shows her dissatisfaction with how constructive manslaughter is applied to secondary offenders who lack intention. A particularly disturbing point she raises is that in *Jogee* it was stated that the secondary offender's knowledge of the principal offender's propensity for violence can be used as evidence, which would expand the already broad offence of manslaughter.

After Jogee sought to answer the question of "What, if any, impact will *Jogee* have, prospectively, on the law of accessorial liability?" (p. 2). Does it answer the question? It does not because it cannot. The facts of *Jogee* meant it was not an ideal case through which the Supreme Court could change the law, and the Supreme Court left some issues unconsidered or unanswered. In *After Jogee*, rather than giving their "best guess" at the answer, the contributions are sufficiently thought provoking to entice the reader to consider their own perspective, assisted by useful references to other sources. The range of different perspectives offered by this collection of distinguished academics and practitioners shows that the law of secondary liability is not settled, and that there are differing views on what the law should be. *After Jogee*, a valuable text for both academics and practitioners, shows that the decision in *Jogee* is another chapter in determining the law of secondary liability, rather than determining it once and for all.

MEGAN PHILLIPS
UNIVERSITY OF LEICESTER

An Expressive Theory of Possession. By MICHAEL J.R. CRAWFORD. [Oxford: Hart Publishing, 2020. xxii + 208 pp. Hardback £58.50. ISBN 978-1-50992-992-4.]

Possession, they say, is nine-tenths of the law. For a concept so central to property law, however, it has rarely been the sole focus of scholarly works, Pollock and Wright's *Essay on Possession in the Common Law* (Oxford 1888) being the notable exception proving the rule. Crawford's work is a welcome focus on this foundational concept.

Crawford's central argument is that possession is much simpler than lawyers are led to believe. Although possession, to the lawyer, is construed as a troublesome, incoherent concept without settled and exhaustive meaning, laymen apply the concept effortlessly, without entangling themselves in doctrinal debate. Possession, for