

**RICHARD COSIN AND THE REHABILITATION OF THE CLERICAL
ESTATE IN LATE ELIZABETHAN ENGLAND**

James E. Hampson

**A Thesis Submitted for the Degree of PhD
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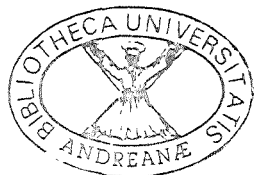
Richard Cosin and the
rehabilitation of the clerical estate
in late Elizabethan England

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This thesis is submitted for the degree of Doctor of Philosophy

University of St. Andrews

February, 1997



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Abstract

The royal supremacy established by Henry VIII was never fully defined or resolved. Was it an imperial kingship or a mixed polity — the king-in-parliament? Professor G.R. Elton's theory of parliamentary supremacy has been accepted for many years, but more recently this theory has come under attack from Professors Peter Lake, John Guy, and Patrick Collinson. They have shown that it was not strictly the case that either the royal supremacy or the ecclesiastical polity of the Tudors was a settled issue; there was a tension and an uncertainty that underlay both the Henrician break with Rome in 1534 and the Elizabethan Settlement of 1559, yet this tension was not brought to surface of Tudor political debate until the latter part of Elizabeth I's reign. What brought the issue to the fore was the controversy between the puritans who opposed Archbishop John Whitgift's subscription campaign and the 'conformists' who sided with Whitgift's demand for order and congruity in the young Church of England.

Part of this controversy was carried out in a literary battle between one of Whitgift's protégés, civil lawyer and high commissioner Richard Cosin, and puritan common lawyer James Morice. The debate focused on the legality of the High Commission's use of the *ex officio* oath and eventually came to hinge on the question of Elizabeth's authority to empower that commission to exact the oath by virtue of her letters patent. If the *ex officio* oath was strictly against the statutes and common laws of the realm, was the queen authorised to direct the commission to exact the oath anyway — over and above the law? To answer yes, as Cosin did, was to declare that the queen's royal supremacy was imperial and that her ecclesiastical polity was essentially theocratic. To answer no, as did Morice, was to assert that there were certain things that the queen could not do — namely that she was not empowered to direct the High Commission to contravene statute law, even in the name of ordering and reforming the church.

Cosin's legal arguments for the imperial supremacy of the monarch were powerful, but his writings were steeped in a form of political rhetoric that was quickly coming into fashion in the late sixteenth century: the 'language of state'. The language of state was essentially an abandonment of the classical-humanist vocabulary of 'counseling the prince' for the sake of 'virtuous government' in pursuit of a 'happy republic'. This new political language used by Cosin

and other conformists justified itself on the premise that the state was so thoroughly endangered by sedition and instability that an urgent corrective was needed: not wise or virtuous counsel but strict obedience to the laws that preserved civil and religious authority.

With the threat of presbyterianism at the doorstep of the English Church, Cosin — protected and encouraged by the powerful Whitgift — was free to employ both his legal and his rhetorical skills in an effort to reinvigorate the English clergy by enhancing their jurisdictional status over the laity. By the time James VI and I began his systematic revitalisation of the clerical estate in 1604, the vocabulary that would justify it had already been created. The influence of Cosin demonstrably permeated the early years of the Stuart Church suggesting that Cosin might provide a link between the vague uncertainties of the Elizabethan Settlement and the stark realities of the Caroline Church.

Preface

This thesis is dedicated to my wife, Jane, who loved me enough to marry me and come to Scotland while I finished my Ph.D course. Hopefully, this final product of my research will adequately reward her patience with me. I would also like to thank my two colleagues, Stephen Alford and John Cramsie, for their close companionship and helpful advice throughout our common trials. Acknowledgements also are due to Drs. Brown Patterson, Andrew Pettegree, and Roger Mason for reading various drafts of my work and offering their insights and suggestions.

The greatest thanks go to my supervisor, Professor John Guy. Besides being Head of the School of Modern History and International Relations my first year and Provost of St. Leonard's College the last two, he somehow managed to see each of his Ph.D. students at least once every two weeks, often for an extended sitting, giving a new definition to the term 'attentive supervision'. His unfailing confidence in my project, timely (and extensive) advice, and regular treatment of all his research students and staff as honoured friends I will not soon forget.

All of my research exists primarily in electro-magnetic form on a Macintosh PowerBook 160 which has served me flawlessly these three years, and the thesis was formatted using the indomitable Microsoft Word. Thanks to Apple Computer and Microsoft which facilitate massive powers of organisation and information retrieval, the study and writing of history can remain the *art* it should be, rather than being relegated to the *science* of sorting index cards and collating written notes into file boxes by hand.

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Abbreviations

APC Acts of the privy council

BL British Library

CPR Calendar of patent rolls

DNB Dictionary of national biography

HMC Historical Manuscripts Commission

LPL Lambeth Palace Library

OED Oxford English dictionary

SR Statutes of the realm

Introduction

From the perspective of late Elizabethan England the Henrician break with Rome in the 1530s seemed like a clean sweep: a new theory of kingship both secular and theocratic was secured, the church was freed from the control of foreign powers, and there was a newfound sense that England was and always had been an empire in its own right. 'Where by divers sundry old authentic histories and chronicles', it had been declared 'that this realm of England is an empire', 'governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same', Henry VIII's faithful subjects owed him no less than a 'natural and humble obedience' seeing that he was endowed by God with 'whole and entire power, preeminence, authority, prerogative and jurisdiction to render...justice and final determination' to all people of the realm.¹ But how far did Henry's *imperium* truly extend? Parliament had affirmed that the king was imperial in his own realm in both church and state but had not defined what 'imperial' meant. In theoretical terms the break with Rome was vague. For fifty years legal opinion regarding the royal prerogative remained more or less ignorant of the specific political powers allotted to the king by the reformation acts, mainly because there was no compelling reason to discover them.

The tension in the royal supremacy was inherent from the beginning. One of the early defenders of Henry's supremacy, bishop Stephen Gardiner of Winchester, acknowledged in his *De vera obedientia* (1535) that there was a distinct English church and that the king was its head — not only by divine law but also by the authority of Parliament which represented the people. In attempting to cover all his bases by justifying the supremacy on principles of *ascending* as well as *descending* authority, Gardiner had worked himself into a contradiction. He could not have it both ways, for if the king was the head of the English church by divine law, then Parliament's ratification of this truth (and thus its role in the supremacy) was meaningless. But if Parliament's endorsement of the supremacy had somehow been necessary, it was disingenuous to claim that the king was imperial by divine law.²

¹ Excerpts from the preamble to the Act of Appeals (24 Henry VIII c. 12). *The Tudor constitution*, ed. G.R. Elton (second edition; Cambridge, 1982) 353.

² John Guy, 'Scripture as authority: problems of interpretation in the 1530s', *Reassessing the Henrician age: humanism, politics and reform, 1500-1550*, ed. Alistair Fox and John Guy (Oxford, 1986) 206-8. For a discussion of the disagreement about the meaning of *imperium* in the 1530s, see Graham Nicholson, 'The nature and function of historical argument in the English Reformation', Cambridge University thesis, 1977, 92-110.

Yet this uncertainty was inconsequential until the closing years of Elizabeth's reign. Part of the reason for this was because Henry's royal supremacy was marked by a peculiar disparity between language and practice. Statutes of the 1530s had proclaimed that the king of England 'oweth to be the supreme heed of the Church of England', his people 'recognysyng noo superior under God but only your Grace'.³ But the daily execution of the supremacy bore little resemblance to this high-flown language. Henry VIII, though the most theocratic of the Tudors, still ruled through Parliament for the most part. He did not tax the people without its consent, and he did not order his ecclesiastical commissions to fine or imprison men at their discretion.⁴ The reigns of Edward VI and Mary and most of Elizabeth's reign were marked by an even greater reliance on Parliament as well as the privy council for the day-to-day workings of government.⁵ The language of imperial monarchy continued in Elizabeth's Act of Supremacy (a near copy of the Henrician act) but the reality was still much closer to an aristotelian mixed polity, where the sovereign's power was balanced against aristocracy and democracy.⁶ This incongruity between theory and practice helped conceal the ambiguity in the royal supremacy for many decades. Advocates of a mixed form of government could be pacified by the reality of Tudor government, while partisans of imperial government could take comfort in the rhetorical *imperium* expressed in statutes, royal proclamations, and letters patent.

But while this arrangement survived for two generations in Tudor England, by the 1580s it was no longer possible to ignore completely the glaring tension in the royal supremacy. The rise of puritanism, coupled with a Genevan-influenced clamor for further reformation, produced calls for a learned ministry, an end to pluralities, a curbing of abuses in the church,

³ *SR*, III, 492, 464. The quotations are taken from the Act of Supremacy (26 Henry VIII c. 1) and the Submission of the Clergy (25 Henry VIII c. 19) respectively.

⁴ Imprisonment at the discretion of ecclesiastical commissioners was not used until the reign of Edward VI, and discretionary fining was not authorised until Mary's reign. R.G. Usher, *The rise and fall of the high commission*, ed. Philip Tyler (second edition; Oxford, 1968) 45.

⁵ See J.J. Scarisbrick, *Henry VIII* (London, 1968); Diarmaid MacCulloch, *The reign of Henry VIII* (London, 1995); Jennifer Loach, *Parliament and the crown in the reign of Mary Tudor* (Oxford, 1986); John Guy, *Tudor England* (Oxford, 1988); Patrick Collinson, 'The monarchical republic of Queen Elizabeth I', *Bulletin of the John Rylands University Library*, 69 (1986-7) 394-424; Patrick Collinson, *Elizabethan Essays* (London, 1994).

⁶ For a discussion of the aristotelian or polybian mixed polity, see Markku Peltonen, *Classical humanism and republicanism in English political thought, 1570-1640* (Cambridge, 1995) *passim* but especially 9-10, 47-8, 179-80, 181-5, 188-9, 269-70, 309; Collinson, 'Monarchical republic', 394-424; John Guy, 'The Henrician age', *The varieties of British political thought, 1500-1800*, ed. J.G.A. Pocock, (Cambridge, 1993) 35-44.

and more importantly — freedom of conscience with regard to the prayer book, the Thirty-Nine Articles, and other lesser liturgical matters that were supposedly *adiaphora*.⁷ Fearing the undoing of his authority by radical forces unable to unite or agree amongst themselves, Archbishop Whitgift became convinced of the necessity of increased central authority, both in church and state. He drew up what became known as the Articles of Subscription in 1584 in an effort to impose some standard of uniformity in religion on the English clergy. These articles required an oath of allegiance to the queen and acceptance of the Thirty-Nine Articles and the Book of Common Prayer, but they were unpopular with most clergy for two reasons: for the matter they contained and for the high-handed way they were forced on all practising ministers.⁸ The enforcement of these articles in combination with Whitgift's deployment of the high commission (a collective term for the sporadic ecclesiastical commissions whose duty it was to visit, regulate, and order the church)⁹ for disciplinary purposes elicited the most serious opposition the established church had faced in decades.

The puritans, outraged at this 'popish' new test of orthodoxy, began to claim that the new archbishop had no such power to enforce articles of subscription which were not binding statute but only the whim of one man. They likewise denied that the high commission could use disciplinary tactics contrary to common law. Whitgift was fully supported by Queen Elizabeth, however, and made clear the fact that his authority derived directly from her. Thus the question of the royal supremacy was finally called: could the sovereign, who since the late 1530s had ruled in cooperation with parliament as the head of a mixed polity, suddenly govern her church without its consent? Could she regulate and order the church contrary to common law? The multi-faceted religious disturbances of the 1580s all touched on these questions to some degree. Those who wished for further reformation in the church saw the queen and Whitgift as roadblocks to their intended reforms. Such men thus found in the 'mixed polity' view of the royal supremacy a theory of government suitable to their own political ends. Similarly, the 'conformists' who feared the destabilisation of the church through

⁷ Patrick Collinson, *The Elizabethan puritan movement* (London, 1967) 243-62.

⁸ Collinson, *Elizabethan puritan movement*, 244-8.

⁹ There were branches of the high commission in all dioceses, and act books survive from many of them, not just York but also Canterbury, Chester, Durham, Exeter, Gloucester, Norwich, Peterborough, Salisbury, and Winchester. R.H. Helmholz, *Roman canon law in Reformation England* (Cambridge, 1990), 46-7.

too much popularity conveniently embraced the imperial version of the queen's supremacy. There needed to be a final determination, for without one the future of the English church and its government would be in grave doubt.

This political debate, which has usually been seen merely in terms of parliamentary struggle, religious doctrine, and court intrigue, actually contained another pivotal element which was the thread that united the others: the role of language and rhetoric.¹⁰ Political discourse took many forms: printed books, university debates, parliamentary bills, court counsel, and theological arguments being some of them. But all discourse, whether civil or religious in nature, was exercised through a medium of public dialogue, as much shaped by the art of classical and humanist rhetoric as by the political exigencies of the moment. It is essential to examine this angle of Tudor history as well as the others in order to arrive at a truer understanding of the complex issues involved in assessing the problem of the royal supremacy.

The problem that Whitgift faced was, in its most basic form, a problem of authority. The presbyterians called for an end to episcopacy, and it was believed that they denied the queen's supremacy in the church, despite protestations to the contrary by Thomas Cartwright, leader of the English presbyterian movement. This threat coexisted with a different but equally powerful one: common lawyers, representing a variety of interests,¹¹ increased their attacks on ecclesiastical jurisdiction, hammering away at the high commission's use of procedures unfamiliar to common law and which many deemed contrary to the laws of the realm. Both of these movements eventually clashed with Whitgift and the government over the legitimacy of canon law. Whitgift and his polemicists such as Richard Cosin, the highest ranking civil and canon lawyer in England, based their judicial authority primarily on the royal prerogative but secondarily on the canon law, identifying it as part of the 'queen's ecclesiastical laws'.¹² But had not the canon law been at least abridged if not abolished when the pope's

¹⁰ Quentin Skinner, *Reason and rhetoric in the philosophy of Hobbes* (Cambridge, 1995); Peltonen, *Classical humanism*; J.S. Benger, 'The authority of writer and text in radical protestant literature, 1540-1593', Oxford University divinity thesis, 1989.

¹¹ Their motivation was a loose alliance of professional self-interest, anticlericalism, moderate puritan sentiment, and presbyterian reformism, but primarily the first two.

¹² Richard Cosin, *An apologie for sundrie proceedings ecclesiasticall* (second edition; London, 1593) (STC² 5821), III, 56-7.

authority was finally expelled in 1536? The puritans certainly thought so, but the question was much more complicated than it seemed, and men such as Richard Cosin exploited confusion on the subject.

To discover what happened to canon law in England it is necessary to look back to 1532 to a document drafted by the house of Commons called the Supplication against the Ordinaries.¹³ This was a complaint by the Commons against certain practices of the clergy, namely, that through Convocation they put into practice customs and procedures that were repugnant to the laws of the realm. One of the primary complaints in the Supplication was against *ex officio* procedure, which was a canon law custom in which ecclesiastical judges initiated cases personally by citing defendants to appear in court and answer questions administered in an inquisitorial fashion. The Commons complained that by this procedure men were tricked into accusing themselves, though there was no plaintiff to accuse them publicly.¹⁴ The clergy responded to the Supplication with a defence of their former ways, with the exception that charging excessive fees and summoning out of the diocese were acknowledged by Archbishop Warham who promised imminent reforms. There was no recantation of *ex officio* procedures but only a promise to eliminate corruption from them.¹⁵ The Supplication was not enacted and by the time of the next Parliament in 1533, Henry's divorce had become the primary matter to be dealt with, and the Supplication was forgotten. But in 1534 the Commons returned to the document and reshaped it, eventually drafting one bill to reform the heresy laws and another called the Act for the Submission of the Clergy. This act declared three things: first, that all canons derogatory to the royal supremacy or the laws of the realm were to be abrogated; second, that the king's assent was required for church

¹³ Professor Elton's thesis that the supplication was a government device, created by Cromwell and representing the government's position was vigorously attacked by J.P. Cooper who claimed that Elton's theory rested on discrediting the evidence of Edward Hall, the chronicler who was a member of the 1532 Parliament. Cooper alleged that it was not at all clear that the government was even in favour of the supplication and in fact may have opposed it, and that it was more likely that the Commons, even against the wishes of the crown, drafted it themselves. J.P. Cooper, 'The Supplication against the Ordinaries reconsidered', *English Historical Review*, 72 (1957), 616-41. The surrender of the clergy to this encroachment on their traditional legislative authority has for centuries been overrated. Michael Kelly has shown that the clergy in fact stood resolute against royal infringement until 1532 when, after constant rebuffs and intimidation from the king and anti-clerical royal counsellors, they failed to maintain a united front of defiance. The submission passed in Convocation, he asserted, only by a narrow margin and with a high absentee rate. Michael Kelly, 'The Submission of the Clergy', *Transactions of the Royal Historical Society*, fifth series, 15 (1965) 97-119.

¹⁴ There were other complaints in the supplication such as that the canons were not printed in English, thus preventing men from being able to avoid the penalties of transgressing them, that men were cited out of their diocese to appear in a faraway courts, and that the clergy charged excessive fees for a variety of services. Elton, *Constitution*, 333-5.

¹⁵ Henry Gee and W.J. Hardy, *Documents illustrative of English church history* (London, 1896) 160-6.

councils to be summoned and for new canons to be put in use; and third, that all existing canons were to be reviewed by a committee of thirty-two.¹⁶

The committee of thirty-two was to be drawn from the Lords, Commons, and clergy, and was to review canon law¹⁷ and make the necessary changes to reform it and bring it in line with the new supremacy.¹⁸ In 1534, 1536, and 1544 Parliament reaffirmed the principle and intent of this plan, but the committee was not formed.¹⁹ Henry never strove particularly hard to establish this body, although he requested help on two occasions in appointing commissioners (27 Henry VIII c. 15 and 35 Henry VIII c. 16). There were scattered attempts to gather canons together for consideration, but this was as far as it went, and the canon law remained unreformed at Henry's death in 1547.²⁰

The review of canon law did not occur until the reign of Edward VI and was not completed until 1552. The final product, entitled *Reformatio legum ecclesiasticarum*, was 269 folio pages.²¹ The committee included an interesting array of theologians and laymen (among them William Cecil), but the major players in drafting the *Reformatio* were Thomas Cranmer, Peter Martyr Vermigli, Martin Bucer, and Matthew Parker. Vermigli's and Cranmer's corrections and additions in particular are all over the manuscript.²² The *Reformatio* was presented to the House of Lords by Cranmer in 1553, in hopes that it would

¹⁶ The demands of the supplication were not enacted in 1533 for one or more of these reasons: 1) the plague which hit London that year, 2) opposition from the Lords, or 3) the clergy had already agreed to submit. Cooper, 'Supplication', *English Historical Review*, 72 (1957), 616-41. See also Sir Thomas More, *The complete works of Sir Thomas More*, ed. John Guy, Ralph Keen, Clarence H. Miller, and Ruth McGugan (London, 1987) X, introduction.

¹⁷ Bishop William Lyndwode published his *Provinciale* in 1430 which dealt with constitutions enacted by Convocation between 1222 and 1416. Also, John of Ayton wrote a commentary (called the *Legatines*) between 1333 and 1348 on the constitutions enacted by English legatine councils presided over by Cardinal Otho (1237) and Cardinal Othobon (1268). Ayton's volume was published in Paris 1501. In 1534 there appeared a joint publication of these works translated into English, though the Englished versions did not include the original glosses. It was these two books that constituted the 'received' canon law in England and the coupling of them together in one book in 1534 may have indicated that they were the canon law texts targeted for review. Incidentally, Professor Spalding gives some interesting reasons for suggesting that Richard Taverner was the translator of this 1534 edition. James C. Spalding, *The reformation of the ecclesiastical laws of England, 1552* (Kirkville, Missouri; 1992) 19, 21 footnote 32.

¹⁸ Gee and Hardy, *Documents*, 177. In 1546 Thomas Cranmer mentioned a 'book' which was thought by recent historians to have been a collection of canons slated for review. This collection was found in 1974 and is presently stored in the British Library, Additional MS 48040, fos. 13-102v. (This collection, at one time in the possession of Sir Robert Beale, was formerly called Yelverton MS 45.) Although the collection is undated, there is internal evidence to indicate it was compiled between 1535 and 1539 but probably closer to 1535. External evidence also points to this date. F. Donald Logan, 'The Henrician canons', *Bulletin of the Institute for Historical Research*, 47 (1974) 99-103.

¹⁹ Norman L. Jones, 'Fine-tuning the reformation', *Law and social change in British history*, ed. J.A. Guy and H.G. Beale (London, 1984) 86.

²⁰ John Guy, 'The Elizabethan establishment and the ecclesiastical polity', *The Reign of Elizabeth I: court and culture in the last decade*, ed. John Guy (Cambridge, 1995) 146 footnote 77.

²¹ The manuscript can be found in BL, Harley MS 426. Spalding, *Reformation*, xi.

²² Spalding, *Reformation*, xi-xiii, 37-8.

form a three-part foundation for the new Church of England along with the Forty-Two Articles and the second Edwardian Book of Common Prayer. (In fact, many of the participants involved in the drafting of the articles and the prayer book were also part of the committee of thirty-two for the *Reformatio*.)²³ The Lords rejected the *Reformatio*, however, unpersuaded that the changes were for the better. An attempt was made to revive the committee of thirty-two in a bill introduced on 27 February, 1559, but the bill, though passed by the Commons, was snuffed by the Lords where there was still a catholic majority. The issue was raised one final time in 1571 but was never brought to a vote.²⁴ Canons were drawn up in 1604 (of which there were one hundred and forty-one) which reorganised the old canons and made new ones, but there was still no weeding out of the unreformed canons.²⁵

Considering that the legal status of canon law was never satisfactorily established after the break with Rome, it is easy to see how this question emerged from nowhere during the tumultuous last decade of Elizabeth's reign. The 1534 statute confirming the Submission of the Clergy had declared many canons repugnant to the royal prerogative and the laws of the realm but postponed the actual dismantling of those canons until it could be done effectively. The postponement turned into inertia and at length the intended reform was put aside. Writing in 1584 Richard Cosin stated that it was virtually impossible to reform canon law simply because of the hugeness of the task.²⁶ The authority of canon law in England therefore was unresolved, but it was imperative that the issue be clarified since canon law was the immediate basis of Whitgift's disciplinary policies: he declared that the queen, being supreme governor of the church, was authorised to empower the high commission to order and regulate her church, and one of the means by which the commission chose to regulate the church was via *ex officio* procedure, a decidedly continental, canonical procedure in origin, dating back to the twelfth century.²⁷ The puritans rejected both the validity of canon law and the queen's

²³ Spalding, *Reformation*, xi, 1.

²⁴ Jones, 'Fine-tuning the Reformation', *Law and social change*, ed. Guy and Beale, 86-7; Spalding, *Reformatio*, 45. John Foxe appropriated the original manuscript of the *Reformatio* plus another one (now lost) which belonged to Archbishop Parker and compiled a printed edition of the *Reformatio* in 1571. (This edition with a few corrections was reprinted in London in 1640 and 1641.) Spalding, *Reformation*, xi.

²⁵ Leonard Levy, *Origins of the Fifth Amendment: the right against self-incrimination* (New York, 1968) 203.

²⁶ Cosin, *An Answer to the two fyrst and principall treatises of a certaine factious libell* (London, 1584) (STC² 5819.7) sig. A4v-A5r.

²⁷ For a history of *ex officio* procedure see below, 43-51.

supposed prerogative to empower the commission contrary to English statute and custom. The entire jurisdiction of the commission itself thus became suspect, and by the early years of James' reign some of the puritans were beginning to claim that it was not even a valid court of law.²⁸

Perhaps as a result of the uncertainty surrounding the post-Henrician status of canon law, there was also widespread confusion about the precise origins of the high commission. Late in the sixteenth century it came to be thought by both puritans and conformists, though wrongly, that the commission had been 'created' in 1559 by the Act of Supremacy. By the early seventeenth century this was practically a universal belief. Even the conformist civil lawyer John Cowell erroneously asserted in his legal dictionary *The interpreter* (1607) that the high commission was founded on the Act of Supremacy.²⁹ Before this confusion set in, however, Elizabethan conformists believed that the commission had been founded in 1536 when Henry VIII empowered Thomas Cromwell, as vicegerent, to appoint commissions.³⁰ This was also the opinion of Professor R.G. Usher, who has done the only major study of the high commission, but his account of the commission's origins 'was confused and sometimes contradictory.'³¹ The commission was not in fact 'founded' in any sense of the word but rather evolved over many centuries. The puzzle might be clearer if the high commission's records were still available to us,³² but the recent discoveries of the act books of the northern commission at York have revealed nothing of the origins of the Tudor high commission.³³

The most useful place to begin in examining the origin of the commission is actually the fourteenth century. The heresy statute of 1388 conferred authority on the crown to appoint ecclesiastical commissions to determine heresy, try heretics, and have them punished. The

²⁸ Nicholas Fuller stated this opinion in his Star Chamber trial of 1609. Usher, *Rise and fall*, ed. Tyler, 32-3.

²⁹ John Cowell, *The interpreter* (Cambridge, 1607), reprinted by Scolar Press (Menston, 1972) sig. Q4v.

³⁰ It has traditionally been assumed that Cromwell became vicegerent in 1535, but in fact he only possessed visitatorial powers in that year. It was not until 1536 that he was fully invested with the vicegerency in spirituals. F. Donald Logan, 'Thomas Cromwell and the vicegerency in spirituals: a revisitation', *English Historical Review*, 103 (1988) 658-67.

³¹ Usher, *Rise and fall*, ed. Tyler, xxi-xxii.

³² It is possible that the records were destroyed in the Great Fire of London which incinerated all documents kept at St. Paul's Cathedral. But Usher noted that it appears the records were already lost by 1645. In 1640 Laud complained about the fact that they had been seized by his enemies, and at his trial he asked that they be produced, since he believed they would vindicate him. But the records were never heard from again, which suggests that the Long Parliament ordered all documents relating to the commission to be destroyed. Usher, *Rise and fall*, ed. Tyler, 38-9.

³³ In fact, the York records revealed no new information on the workings of the southern commission either, and thus Professor Tyler notes that no information has come to light on the southern commission since 1913. Usher, *Rise and fall*, ed. Tyler, i, ii, xii.

ecclesiastical commissions of Richard II bore some resemblance to Henry VIII's commissions in that they were both empowered by the crown, were composed of clergy as well as laymen, and had similar discretionary powers. But it was a clear infringement of the rights of the church, claims Professor Tyler, thus to deal in the determination of a spiritual matter.³⁴ This encroachment of the secular arm of government into the realm of the spiritual was noted by Christopher St. German in his 1533 treatise *Salem and Bizance*, in which he claimed that the crown's prerogative to take cognisance of and punish heresy was a direct violation of the canon law *Extra de haereticus*.³⁵ Nevertheless, it was established by the fourteenth century that the English crown was authorised to regulate and govern the church via specially appointed commissions. With minor variations these commissions continued down to the Tudor era, but the empowering principle behind the high commission was not the royal supremacy but the king's ancient prerogative to reform and redress errors in the English church.³⁶

Despite the savage reputation imputed to the high commission in the late Elizabethan and early Stuart years, it seems to have been much more arbitrary during the reigns of Edward VI and Mary. Its license to imprison offenders at will was no invention of Whitgift's conformity campaign but first appeared in the letters patent of Edward VI.³⁷ Professor Usher related the case of a puritan named Carew from 1583 or 1584 which he used to contrast the commission's procedure in Elizabethan times with its Edwardian and Marian progenitors. Some of the relevant details: Carew was asked to take the *ex officio* oath (a promise to answer any and all questions put to him), which he did, and he was then charged with certain crimes but was not allowed to see a written copy of the charges. In the course of his trial he was suspended from preaching but went home and preached despite the suspension. John Aylmer, the bishop of London, asked the commissioners that Carew be arrested by means of a writ of

³⁴ Usher, *Rise and fall*, ed. Tyler, xvii-xviii, xxi.

³⁵ The law stated 'that all powers and all lords temporal and rulers be prohibited, that they shall not in any manner take knowledge or judge upon heresy, since it is merely spiritual.' But St. German remarked that if this was true, all justices of the peace were excommunicate, since they had been authorised by the king's commission and by parliamentary statute to enquire of heresies. Christopher St. German, *Salem and Bizance* (London, 1533) reprinted in More, *Works*, ed. Guy, Keen, Miller, and McGugan, X, 368-9.

³⁶ Queen Mary's own letters patent show that her commissions reflected 'the crown's influence in doctrinal matters [which] had not been excluded as a result of the reconciliation with the Papacy [in the 1554 Act of Repeal]'. In fact, 'the similar wording of the letters patent issued by all Tudor sovereigns, whether Catholic or Protestant, prove that each based the powers, jurisdiction, and procedures of his or her courts on the precedents provided by earlier rulers. There was no break in the sequence of commissions from 1539 to 1641.' Usher, *Rise and fall*, ed. Tyler, xxii-xxiii.

³⁷ Usher, *Rise and fall*, ed. Tyler, 45.

attachment. No such writ was issued, however, since (as Carew's lawyer argued) a man could not be arrested by a writ of attachment unless he had first refused to answer a summons to appear in court. Carew had not yet been cited to appear a second time before the commissioners, so the proper procedure should have been to issue a citation rather than an attachment. Usher pointed out that no commission in the 1540s or 1550s would have tolerated this kind of proceduralism. The high commission had unlimited powers of discretion and visitation and would have attached and imprisoned Carew anyway. The Elizabethan commission's acknowledgment that they could not legally attach Carew showed that it had become a court of law rather than simply a discretionary commission of visitation.³⁸

But the Elizabethan high commission was not so much a slave of procedure as it was a master of procedure. It may have settled into a fixed court with fixed procedures but it made powerful use of its own rules. For example, Robert Cawdrey, the famous puritan from Rutland deprived for defaming the prayer book, wrote to Lord Burghley in 1588, complaining of expenses incurred by his many trips to London. He had been summoned nine or ten times and been kept there for six weeks at a time, 'almoste to asmuche charge and hinderance, nowe these two yeaes laste paste, as yf my lyvinge hadde beene taken from me at the firste.'³⁹ In a letter of 1591 he asked for Burghley's assistance to relieve his poverty, complaining that in the four years and seven months since he had fallen into trouble, he had been forced to make twenty-one trips to London, most recently being in attendance at court for thirteen solid weeks.⁴⁰ Hence, one of the advantages of procedure was the commission's ability to use attrition as a device to wear down recalcitrant defendants.

Strangely, the Elizabethan high commission took its final shape during Mary's reign. The letters patent of 1557 outlined the main duties of the commission as the following: to suppress heresies, seditions, and conspiracies as well as false rumors. It explicitly empowered the commission to exact the *ex officio* oath, and the commissioners were also to receive the

³⁸ After he was cited a second time, Carew refused to answer all the charges against him and was imprisoned in the Fleet for contempt. Usher, *Rise and fall*, ed. Tyler, 77-8.

³⁹ BL, Lansdowne MS 58, doc. 20.

⁴⁰ BL, Lansdowne MS 68, doc. 57.

assistance of temporal officials in rounding up offenders. In the execution of these duties, the commissioners were bound to follow the express instructions laid out in their patent, ‘any of our laws, statutes, proclamations, or other grants, privileges, or ordinances, which be, or may seem to be contrary to the premises, notwithstanding.’⁴¹ Elizabeth’s first patent, issued in July, 1559 was practically the twin of Mary’s patent of 1557. Only four of the seventeen articles in Elizabeth’s patent were new, and only one of those new clauses was significant. The professional makeup of the two commissions was also quite similar and there were several judges who were continued from one commission to the next. There was, therefore, nothing significant about the accession of Elizabeth with regard to the evolution of the high commission. The real change in the operation of the commission came in 1583 with the elevation of John Whitgift to the see of Canterbury.⁴²

The high commission first referred to itself as a ‘court’ in 1586, though it had already been more of a court than a commission for the last several years. It became more sophisticated and complicated than before, employing more lawyers and relying on knowledge of civil, canon, and common law, including statutes.⁴³ Though a court in its own right by the 1580s, it was difficult to state just where the commission belonged in the judicial hierarchy. Writing in 1591 William Lambard, a member of Lincoln’s Inn, put ‘the Court of high commission’ third in rank beneath the spiritual synods of Canterbury and York (second) and beneath Convocation (first), and immediately above the Court of Delegates.⁴⁴ In the mind of its opponents, however, the commission was seen as the most powerful ecclesiastical court in England. This view was strengthened throughout the 1580s and 1590s as the commission continued its controversial practice of using *ex officio* procedure, the centerpiece of which was a forced oath which obliged the defendant to answer any questions the judge saw fit to ask — even if they caused the defendant to incriminate himself or his friends and neighbours.

⁴¹ Although many of these powers were implied in the previous commissions under Edward VI, here they were declared outright and constituted a greatly extended commission from the last one. Usher, *Rise and fall*, ed. Tyler, 23-5.

⁴² Faith Thompson, *Magna Carta: its role in the making of the English constitution, 1300-1629* (Minneapolis, 1948), 206; Usher, *Rise and fall*, ed. Tyler, 27-8, 40.

⁴³ Helmholz, *Roman canon law*, 119-20.

⁴⁴ William Lambard, *Archion, or a comentary upon the high courts of justice in England* (London, 1635) (STC² 15143) 11-3. Lambard dedicated this work to Sir Robert Cecil.

The practices of the high commission were stoutly defended in 1593 by Richard Cosin, vicar-general of Canterbury and a commissioner himself, in a massive treatise entitled *An apologie for sundrie proceedings ecclesiastical*. In the *Apologie* Cosin refuted claims of the puritans that *ex officio* procedure was contrary to the laws of the realm and that the queen could not empower the commission to exact the oath. In doing so, he enunciated a theory of the royal supremacy that attributed to the queen absolute imperial power to govern her church according to her wisdom. The *Apologie* was met with revulsion by Cosin's puritan adversaries, but with the protection of Whitgift Cosin was effectively the voice of the government, articulating a new definition of the royal supremacy that was not meant to be debated or questioned.

The significance of Cosin's recasting of the royal supremacy in imperial language, which will be the focus of chapter eight of this thesis, is that it sheds new light on the historiography of the Tudor period. The prevailing view of Elizabeth's reign throughout most of the twentieth century has been that she ruled with and through Parliament. Sir Geoffery Elton, one of the chief pioneers of this theory, stated that 'the developments of the sixteenth century made Parliament (the king-in-Parliament) a supreme legislator'.⁴⁵ A closer student of Elizabeth's parliaments, Sir John Neale, had less excuse to misunderstand the change that occurred in the government of the English church towards the end of the century. Though his examination of Elizabethan political documents was extensive and admirable, his conclusions in no way followed from the research. He failed to recognise that a major coup had occurred in the 1580s and 1590s, authorised and allowed by Elizabeth, engineered by Whitgift, and articulated by Richard Cosin — a coup which exploited the ambiguities in the original royal supremacy, fashioning in turn a newer, stronger vision of the queen's *imperium* specially demanded by the crisis of authority that enveloped the decade. In the cold realities of the 1590s in which one rival interpretation of the crown's prerogative was bitterly put down by another, Neale saw only 'the inflexible determination' of Elizabeth and the 'rigid character' of Whitgift who by 'skilful exploitation of propitious circumstances' were able to finagle victory

⁴⁵ G.R. Elton, *The Parliament of England: 1559-1581* (Cambridge, 1986) 39.

from a feisty Parliament.⁴⁶ Like Elton, Neale refused to extricate himself — despite the evidence of his own research — from the belief that Elizabeth participated only within the framework of a mixed polity. Perhaps his obsequious devotion to Elizabeth was partly to blame for this, but the evidence (reviewed in chapter eight) is clear that Elizabeth and Whitgift imposed their will on the English church entirely without Parliament and against its will.

While the old Eltonian model of a mixed polity remains valid for the majority of Elizabeth's reign, it cannot be seriously maintained in assessing the years 1584-1603. The work of revising late Elizabethan political historiography has been begun by Patrick Collinson, John Guy, and Peter Lake who, contrary to Neale's view that Elizabeth and Whitgift acted as restraining influences on Parliament, have suggested that they were actually a disruptive force in English politics, taking the helm of government in their own hands and steering it on a new course. The evidence presented in this essay tends to support this hypothesis, revealing the role of Richard Cosin as a key player in the late Elizabethan shift in the government of the church from a queen-in-parliament arrangement to a centralised, imperial monarchy and acknowledging the significance of his contribution to the development of the English church.

⁴⁶ J.E. Neale, *Elizabeth I and her parliaments, 1584-1601* (London, 1957) 436. This assessment comes from Neale's concluding remarks on the 1593 parliament — a remarkable piece of historiographical distortion. Neale glossed over the serious fractures in that parliament with a make-believe happy ending well summed up by Christopher Haigh: 'how Peter Wentworth and Francis Walsingham would have laughed!' *The reign of Elizabeth I*, ed. Christopher Haigh (London, 1984) 11.

Chapter 1

Richard Cosin and James Morice

Richard Cosin was born in the north of England during the reign of Edward VI in Newhall, Durham 1548.¹ His father, John, died at about the same time, and the young Cosin was raised by his mother, Margery, who was from Bolton, and her new husband, a certain Medhope. He was educated at Skipton and later at Trinity College, Cambridge, matriculating as a pensioner² at the age of twelve in Michaelmas Term, 1561. A scholar by 1563, Cosin took his B.A. in 1566 (becoming a fellow the same year) and his M.A. in 1569. His tutor at Cambridge was John Whitgift, soon to become Master of Trinity³ and in 1583, Archbishop of Canterbury.

Cambridge in the 1570s was strongly associated with puritanism and was the site of the famous Admonition Controversy, a series of debates on ecclesiastical government between Whitgift and the presbyterian Thomas Cartwright, Lady Margaret Professor of Divinity. After Cartwright's expulsion from Cambridge in 1571, new university statutes were enacted that gave the heads of the colleges more power in electing proctors, a duty traditionally held by the regents. The proctors themselves were stripped of much of their old powers and were made wholly subordinate to the vice-chancellor. This shift away from a representative structure to a more authoritarian one was seen as an innovation at Cambridge and was not popular. A petition of remonstrance against the new statutes was compiled and one hundred and thirty-four members of the university signed it. One would expect the list to include mostly men of puritan sympathies, but, ironically, the list contains a sizeable number of future conformists in the church of England, among them Richard Bancroft and Cosin himself.⁴ It seems unlikely, however, that under Whitgift's tutelage Cosin ever became too enamoured with puritan ideas or strayed far from the conformist tendencies that marked his later career.

There is little evidence available to us on Cosin's career during the 1570s. He seems to have become a minister for some time, receiving letters patent in February of 1578 for a

¹ It is not known whether Cosin was related to the early Stuart bishop John Cosin, but P.W. Hasler suggests it is likely as John Cosin was also from Durham. P.J. Hasler, *House of Commons, 1558-1603* (London, 1981) I, 660.

² The middle of three ranks of matriculation.

³ Whitgift's tenureship began 4 July, 1567 and ended 30 May, 1577. Cambridge MS Mm.II.25 (Baker D) #9.

⁴ J.B. Mullinger, *The University of Cambridge from the royal injunctions of 1535 to the accession of Charles the First* (Cambridge, 1884) II, 230, 235-6.

vicarage in Sharnebrook in the diocese of Lincoln.⁵ But Cosin's talents as an academic rather than a minister were confirmed by one further degree, LL.D., from Cambridge in 1580. Thereafter Cosin's professional advancement was rapid. In February 1581 he was admitted to the Court of Arches and became a practising civil lawyer.⁶ Three months later he was given a grant for the presentation to the next vacant canonry or prebend in Worcester cathedral where Whitgift was bishop.⁷ In January 1583 he became the chancellor of Worcester and accompanied Bishop Whitgift on visitations for the reformation of the cathedrals of Lichfield and Hereford.⁸ But Cosin's new obligations were not without compensation. Whitgift leased to him a fine manor with several meadows in Alvechurch, Worcester in summer 1583.⁹

Shortly after Whitgift was translated to the archbishopric in November of the same year, he appointed Cosin dean of the Arches and vicar-general of Canterbury, posts which he held for the rest of his life.¹⁰ As dean of the Arches, Cosin was the most prominent civil and canon lawyer in England.¹¹ Besides Whitgift and the bishop of London, John Aylmer, Cosin was the only person authorised to call the southern high commission to session.¹² Cosin's involvement in the commission was constant and assiduous, as a wealth of Tudor historical documents testify. While there were many commissioners at any given time, most of them only sat for judicial business by invitation. Cosin, however, was a regular fixture on the court who along with Whitgift, Aylmer, Richard Bancroft, and Edward Stanhope, formed the commanding inner circle.¹³

⁵ CPR, VII, 438. This probability is strengthened by Sir Robert Beale's irascible sketch of Cosin in 1593, 'who sometymes was a preacher and minister, then a Criminall and bloodye Iudge, and now an Irregular, a non resident rayler against most of the reformed Churches in Christendome.' BL, Lansdowne MS 73, fo. 11r.

⁶ G.D. Squibb, *Doctors' Commons: A history of the College of Advocates and Doctors of Law* (Oxford, 1977) 163.

⁷ CPR, IX, 280.

⁸ LPL, Cartae Miscellaneae II, 79; PRO, SP12/160, doc. 6.

⁹ LPL, Cartae Miscellaneae II, 22.

¹⁰ The destruction of most of the Court of Arches' records by the Great Fire of London, 1666, prevents us from knowing a great deal more about Cosin's involvement with that court.

¹¹ Although canon law was not taught at English universities after 1535 when Cromwell ended the practice, a statute of Henry VIII (37 Henry VIII c. 7) had authorised civilian faculty to take on the study and function of canon lawyers. Furthermore, since medieval times there had been a good deal of borrowing of principles and procedures one system from the other, as canonists and civilians usually had training in both disciplines regardless of their primary vocation. Professor Helmholz remarks, 'the two laws were so interdependent by 1600 they could scarcely be pulled apart.' Collinson, *Elizabethan puritan movement*, 39; Dorothy Owen, *The medieval canon law* (Cambridge, 1990) 1; James A. Brundage, *Medieval canon law* (London, 1995) 96-7; Helmholz, *Roman canon law*, 151.

¹² Usher, *Rise and fall*, ed. Tyler, 258.

¹³ Usher, *Rise and fall*, ed. Tyler, 71.

In October 1585 Cosin became a member of the London-based Doctors' Commons, a prominent society of civil lawyers, after Whitgift had requested his admittance.¹⁴ In 1588 Cosin became a master in Chancery and was further appointed to the offices of auditor and official principal by Whitgift,¹⁵ and in 1590 he became president of Doctors' Commons, remaining in that office until his death. But Cosin's horizons stretched beyond academic and professorial life. He sat in three successive parliaments (for Downton in 1584 and 1589, Hindon in 1586) the foremost of which furnished him with the subject matter for his first published work.

An answer to the two fyrst and principall treatises of a certaine factious libell (London, 1584)¹⁶ was a rather lengthy riposte to a puritan treatise attributed to William Stoughton entitled *An abstract of certain proceedings of parliament*, which had sought in print to give force to puritan arguments in the 1584 parliament for the reform of clerical abuses. Cosin's *Answer* was dedicated to confuting Stoughton's claim 1) that a learned ministry was commanded by law, and 2) that dispensations for benefices were unlawful. The book was marked by a wariness and guarded distrust of those wishing to bring in a presbyterian system of church government, though Cosin balked at outright anti-puritanism. Five years after the *Answer* Cosin first sketched out a curious work that systematically depicted — in flow-chart tables — the hierarchical structure of authority in the English church. The charts remained unpublished during Cosin's lifetime, but they were printed by John Norton in 1604 under the title *Ecclesiae anglicanae politeia* (*The polity of the Church of England*) and dedicated to the new king, James I.¹⁷

Two years after drafting the *Polity*, Cosin was commissioned by Whitgift to produce a response to the puritans who had recently generated a flood of treatises and essays impugning the legality of various ecclesiastical procedures. The result was *An apologie of and for sundrie proceedings ecclesiastical*,¹⁸ a two-part treatise that aimed not only to discredit the puritans'

¹⁴ Squibb, *Doctors' Commons*, 39, 116.

¹⁵ LPL, Cartae Miscellaneae I, 25.

¹⁶ STC² 5819.7.

¹⁷ See Appendix 3 for an examination of the *Polity*.

¹⁸ STC² 5820. For a discussion of the differences between the text of the 1591 and 1593 editions of the *Apologie*, see Appendix 4.

claims but systematically to justify and defend the entire gamut of ecclesiastical jurisdiction. Aside from being the only late Elizabethan defence of the established church from a legal standpoint, the *Apologie* had the important effect of validating Whitgift's campaign for conformity.

In 1592 Cosin produced his third published book, *Conspiracie for pretended reformation*.¹⁹ This work, easily his most pretentious, was dedicated to exposing a 'plot' by three madmen, William Hacket, Edmund Copping, and Henry Arthington to reform the Church of England along radical puritan lines. Drawing entirely from their letters, writings, depositions in court and those of others, Cosin attempted to portray these men as influential and seditious puritans who represented a widespread movement that threatened the stability of the church. The *Conspiracie* was a short work (only a hundred pages) and in producing such a purely declamatory, non-academic tract, Cosin was clearly out of his element. In the following year, 1593, which saw the publication of many important conformist writings, the *Apologie* was revised and expanded to answer two recent puritan tracts, *A briefe treatise of oathes*²⁰ and 'Notes to proove the proceeding ex officio against the word of god'.²¹ The second edition of the *Apologie* was over double the length of the first, containing a prodigious third section devoted to the legality of the *ex officio* oath which had lately been an issue of public debate in the parliament of 1593.

After the watershed year of 1593,²² Cosin's main contribution to late Elizabethan conformism was complete. Aside from representing the Arches in a rent dispute in the same year,²³ he continued in his various offices, most importantly as an ecclesiastical commissioner, without controversy for the last four years of his life. He died unmarried at Doctors' Commons in London at the age of forty-eight on 30 November 1597, leaving two recently purchased properties in Oxfordshire and a grant of the parsonage at Folkestone.²⁴ His will

¹⁹ STC² 5823.

²⁰ James Morice, *A briefe treatise of oathes* (probably Middelburgh, 1592 or 1593) STC² 18106. Reasons for the uncertainty on printing location and date are explained below on 53-4.

²¹ Sir Robert Beale was the author of this unprinted treatise which is unfortunately lost or not extant. It was written around 1588 or 1589 but may not have reached Cosin until after the 1591 *Apologie* was already out. BL, Lansdowne MS 73, fo. 7v. See below, 74 footnote 4, for more information about Beale's writings.

²² The importance of 1593 in the English church is discussed below in the eighth chapter, 228-56.

²³ BL, Lansdowne MS 77, docs. 11-3.

²⁴ His death is given in error as '1598' in a biographical memorandum in BL, Lansdowne MS 982, doc. 143.

showed a strong sentiment for Trinity College to which he made several bequests, including a portrait of Whitgift.²⁵ In the year after his death a collection of memorial poems by Cambridge scholars was compiled by William Barlow,²⁶ the later bishop of Lincoln who had funded Cosin's education and who was one of the chroniclers of the Hampton Court Conference.²⁷

One of the remarkable features of the life and career of Cosin is his long relationship with Whitgift. Beginning at Trinity in his teenage years, their friendship led Cosin to Worcester, Canterbury, and finally to London. Cosin, more than any other single person perhaps, arguably even Bancroft, was Whitgift's most valuable protégé. He served his mentor in all endeavours and was sometimes the only person who could provide him with the crucial resources he needed: by producing treatises that provided a legal justification for his governance of the Elizabethan church, by enforcing his policies of conformity through the high commission, and by providing the arguments that enabled the government to construct charges against religious nonconformists like Cartwright who threatened the peace of the church. When Cosin's death in November 1597 finally concluded his industrious and distinguished career in the service of the archbishop, his body was borne from Doctors' Commons across the Thames to Lambeth Palace where he was buried on 7 December.²⁸ If anyone had lived and died at Whitgift's elbow, it was Cosin.

Like many notable professional relationships, such as William Cecil's with Queen Elizabeth and William Laud's with Charles I, Cosin's relationship with Whitgift was both reciprocal and complementary. He provided his master with justification and vindication, receiving in return protection and preferment. After Lord Burghley complained to the archbishop in 1584 about the severity of the articles of subscription which employed the *ex officio* oath, Whitgift (who once confessed that he himself knew nothing about the legality of the oath),²⁹ wrote two letters back to Burghley defending the use of the oath. The letters were

²⁵ Hasler, *Commons*, I, 661.

²⁶ *Vita et obitus ornatissimi celeberrimiq; viri Richardi Cosin*, William Barlow (London, 1598) (STC² 1460).

²⁷ See also below, 251.

²⁸ Hasler, *Commons*, I, 661.

²⁹ When the common lawyer James Morice informed the archbishop in early 1591 that the *ex officio* proceeding was intolerable, Whitgift replied that though he had no knowledge of the law himself, he had approved of and promoted its

delivered personally to Lord Burghley by Cosin,³⁰ and one can hardly avoid the conclusion that Cosin was essentially delivering his own letters. With Whitgift's encouragement and perhaps more, Cosin waded into the thick of late Elizabethan politics, ultimately playing a central role in the government's campaign against presbyterianism and puritan anticlericalism, though this has never been adequately recognised by historians.

Censorship of the press had been an early concern of the Elizabethan high commission, with at least two such requests by the privy council that they do so in 1566 and 1586.³¹ Cosin was thus actively involved in censorship from at least the mid-80s, and in 1589 he was recruited by Edmond Tilney, master of the revels, to help in the process of censoring the theatre.³² The privy council also was wont to call on Cosin for special tasks from time to time, employing him to examine witnesses present at a libellous sermon (1586), imprisoned recusants (1587), a debtor in need of temporary relief from the pressure of creditors (1590), suspects of fraudulent practices (1591), and to help resolve a dispute between the inhabitants of Blackfriars of London regarding the reparation of their church (1597).³³ More importantly, Cosin was involved in several major cases brought before the high commission and Star Chamber, notably Robert Cawdrey's final degradation from the ministry by the high commission at Lambeth in 1590³⁴ and Cartwright's famous high commission and Star Chamber cases in 1591-2. After Whitgift shifted Cartwright's torpid high commission case to Star Chamber in hopes of better results, Cosin, probably aided by Bancroft, compiled a brief of the high commission case to present to Star Chamber and administered the articles of interrogation to Cartwright and his associates while Sergeant John Puckering (lord keeper by 1592) acted as the queen's counsel.³⁵ Apart from Richard Bancroft, Cosin seems to be the only person to whom Whitgift ascribed a certain amount of autonomy with regard to jurisdictional responsibilities. Records left to us of ecclesiastical disciplinary actions from the

use, 'being therevnto induced by the opinions of other [note the singular!] who bare him in hand that such proceedinge by oth was lawfull'. PRO, SP12/238, fo. 107r.

³⁰ John Strype, *The life and acts of John Whitgift* (3 vols.; Oxford, 1822) I, 322.

³¹ Usher, *Rise and fall*, ed. Tyler, 54.

³² Donna Hamilton, *Shakespeare and the politics of protestant England* (Lexington, Kentucky; 1992), 12.

³³ APC, xiv, 60-1; xv, 122; xx, 10; xxii, 116; xxvi, 447-8.

³⁴ BL, Lansdowne MS 68, doc. 47. Cawdrey's case is reviewed in full at 219-23.

³⁵ Collinson, *Elizabethan puritan movement*, 417, 419. Cosin's role in Cartwright's case is studied in more detail below at 164-5.

1590s show Cosin's signature regularly appearing at the end of letters, sometimes amongst several signatures but often as only one of three: the other two being Whitgift's and Bancroft's.³⁶

With Cosin's education in canon and civil law and his broad experience in the highest courts of the realm, it is not difficult to see why he was employed by Whitgift as a legal polemicist. Though it cannot be proven that Cosin was selected by Whitgift to write *An answer to a certain factious libell* after the 1584 parliament, in light of Whitgift's strenuous opposition to the puritan bills calling for innovations in church government as well as his future deployment of Cosin on strategic publishing missions, it seems likely that he was handpicked for the task. One sometimes senses a certain reluctance in Cosin's writings — especially in the prefaces to the two *Apologies* — to embark on the project, yet as he himself noted he could hardly refuse: 'for owing very much unto you, and therefore not daring to deny you so small a matter, I haue...hazarded rather to haue want of iudgement in me, then by lack of good will to be censured by you.'³⁷

But why Cosin? Certainly the answer lies not only in his legal expertise but also in his skills of argumentative persuasion, plainly in evidence in the *Conspiracie* and the second edition of the *Apologie*. While Cosin's subject matter and premise in the *Conspiracie* were weak, he nevertheless utilised an important rhetorical device which formed the bedrock of the *Apologie* — that those who spoke or wrote against the established church and its jurisdiction, even in the name of reformation, were simply 'innovators' seeking to uproot long-established and rightfully instituted authority. Unlike in modern usage, the word 'innovation' in the Elizabethan age invariably carried a wholly negative association in politics; it was often coupled with the idea of sedition or faction.³⁸ Cosin repeatedly made use of this tactic, on some occasions collapsing his opponents' differing (and sometimes truly moderate) views into an amalgam of 'innovations', on others exposing the disparity of their views as a sign of disunity and confusion, the inevitable by-product of 'innovation'.

³⁶ Some good examples can be found in Cambridge MS Mm.I.35 (Baker 24) #12, parts h and k.

³⁷ Cosin, *Apologie* (1591 edition), sig. A3r-v.

³⁸ In 1607 Shakespeare used the word in *Coriolanus*, III/i/175 thus: 'My Selfe Attach thee as a Traitorous Innouator: a foe to th' publike weale.' *OED*, VII, 998.

The threat of innovation in the church was a theme to which Cosin returned many times in his written works. He considered presbyterianism seditious in its basic aspirations but he also found intellectual laziness in the arguments of its adherents. They were single-minded about church government, said Cosin, insisting that any evils or corruptions which existed in the English church were proof of the corruption of the system itself.

Out of this head springs also that errour of some, who doe attribute all disorder and personall faultes of men about execution of lawes vnto the lawes themselues, and vnto the verie pollicie of the Church: thereupon gathering with themselues, that the plot of *Discipline* (if it might come in place) will surely serue as a Mithridate and a soueraigne salue, to heale (with short applying) all diseases and sores, both of Church & Common wealth. Certaine be so bewitched (in like sort) by a kind of admiration of that, which is (in it selfe) most necessarie, as that in the meane time they ouer slippe matters of no lesse importance in the life of a Christian, because they thinke it sufficient to be occupied onely about the other.³⁹

As a result of this tunnel vision with regard to church government and a hysterical effort to avoid the very shadow of popishness, continued Cosin, they no longer revered the sacrament, had no respect for feast or fasting days, and were so entranced with learning and hearing sermons that they forgot to act on what they heard.

But this was the extent of Cosin's religious criticism of presbyterianism. Detailed confutation of nonconformist theology and liturgy was left to doctrinal experts such as Thomas Bilson, Matthew Sutcliffe, Thomas Cooper, John Bridges, and Richard Bancroft. Cosin's main goal was to defend the established church on grounds of law, not theology. What he offered in his main work, the *Apologie*, was a step-by-step explanation of the elements of the ecclesiastical court system and the laws by which it operated, followed by a justification of the same based on scripture, reason, the laws of the realm, precedent, and the royal prerogative. The ecclesiastical law was the established law of the realm and the rightful guardians and interpreters of that law were the ecclesiastical judges. 'Conscience', a popular argument of the puritans which enabled them to refuse the *ex officio* oath, was a Pandora's box which would only lead to anarchy and confusion if allowed to supplant the court's

³⁹ Cosin, *Conspiracie*, sig. B1r.

established criminal procedure. Cosin believed that ecclesiastical judges who understood the law were to be entrusted with its execution rather than allowing every man to judge the law. Such an alteration would ‘put a sure buckler into the hands of Iesuites, other traitors, murderers, felons, and euey lewde companion, to holde foorth against the lawfull examination of Magistrates’.⁴⁰

Cosin’s main rhetorical strategy was two-fold: 1) to convince his reader of the inherent threat to law and order presented by puritan demands, and 2) to reinforce the legitimacy of the establishment. To achieve the latter Cosin adopted a tactic similar to the one Sir Thomas More used in the 1530s in his literary battle with Christopher St. German over *ex officio* procedure in heresy trials: that the civil and canon law, upon which English ecclesiastical law was largely based, was ‘the common lawe of all the Ciuill nations of the world saue one’ (England).⁴¹ Trusting this nearly universal authority of the civil law, Cosin expounded its guiding principle in criminal prosecution — that kingdoms had a demonstrable interest in punishing crimes and therefore ‘all good means’ ought to be employed in the detection of them.⁴²

It was precisely the *means* of detecting crimes that was in controversy between Cosin and his puritan adversaries. Men such as James Morice and Sir Robert Beale argued that ecclesiastical judges were too powerful; in particular that their ability to exact the *ex officio* oath from defendants was not only a tyrannical advantage that could be used to force defendants to commit perjury or else accuse themselves, but that this advantage could, in the hands of an unscrupulous judge, be vulnerable to unbridled abuse. But Cosin swept aside puritan fears of dishonesty and corruption among ecclesiastical judges, defending the clergy as a persecuted minority, beset by anticlericalism and jealous, opportunistic common lawyers. In league with the presbyterians, puritan common lawyers would undo the jurisdiction of the church, resulting in a collapse of authority in both church and state.

Central to Cosin’s thesis was the interconnectedness of secular and spiritual authority and the common danger posed to them by ‘innovation’. As a restorative Cosin proposed an

⁴⁰ Cosin, *Apologie*, III, 183.

⁴¹ Cosin, *Apologie*, ‘Epistle to the Reader’, sig. B4v-C1v.

⁴² Cosin’s discussion of the necessity of punishing crime can be found in the *Apologie*, II, 4-6.

unswervingly authoritarian agenda: submission by both clergy and laity to the laws of the realm — including the ecclesiastical laws, which were no popish, superstitious, foreign, or ungodly laws but laws justly ordained by the queen and parliament. Without the conscious empowerment of ecclesiastical judges to administer the law as they had in times past, he argued, the seditious innovations of the age would seduce and undermine the prince's scepter, dragging the nation into irretrievable chaos.

Cosin was skillful at turning the terms of the debate around: whereas the puritans, with some justification, complained that it was the church that had changed in recent years, suddenly embarking on a campaign for conformity that introduced *ex officio* procedure as its main weapon, Cosin retold the recent history of ecclesiastical jurisdiction in language that pressed out its inconsistencies and discontinuities, like smoothing wrinkles out of a blanket. Puritan opinion by contrast was treated as a novelty, and Cosin's narrative was ordered so as to introduce and consider puritan claims only at the end of long and lulling citations from scripture and canon law, precedents and statutes, each of which served as bricks and mortar in the ancient, unchanging edifice of English ecclesiastical jurisdiction. In contrast he exposed the 'innovations' of the puritans as trees without roots and arches without keystones. Though the puritans had an army of classical and early medieval precedents on their side,⁴³ demonstrating the antiquity of their position clearly proved beyond the capabilities of men like James Morice and Sir Robert Beale. Cosin's rhetorical advantage lay in the fact that he was defending rather than attacking the established custom of the day, regardless of its legitimacy. He did not need to prove his case compellingly as long as he could mobilise the *language* of preservation and order for his cause. The physical force of the high commission, backed by the queen, was sufficient to do the rest. The puritans, unsupported by any auxiliary machine of coercion (parliament was insufficient) were desperate to win the battle on both fronts, defeating the power itself and the mouthpiece which validated it.

⁴³ The puritans who opposed *ex officio* procedure and particularly the oath were easily in line with the juridical assumptions of medieval canon law before the death of Gratian in 1181, and there was plenty of evidence from classical texts to buttress the principle that a judge acting as the sole initiator and prosecutor of a suit was no better than an accuser. For a fuller discussion of this issue, see below, 45 footnote 8.

We have looked at Cosin's rhetorical strategy, but his legal strategy was no less important. It revolved completely around his conception of the royal supremacy and the assumptions behind the Henrician break with Rome. Like all English lawyers Cosin accepted the prince as head of the English church by the laws of God, reason, and statute. He also accepted the Submission of the Clergy as a submission of the canon law to the laws of the realm — in principle. But the failure of Henry VIII and his successors ever to reform the canon law provided Cosin with his thesis: by the very absence of reform, canon law in England had been vindicated. Surely if there were any repugnant canons they would be abolished straightaway by the queen? Thus to speak against any of the canons or ecclesiastical laws now in effect — *ex officio* procedure, for example — was not only to speak in derogation of established law but also to offer injury to the dignity of the imperial crown which had suffered it to continue. To oppose the practices of the church and its courts was to oppose the queen herself. Morice strove hard to point up the obvious flaws in this argument, but his best efforts were in his second work, 'A just and necessarie defence' which was never published.⁴⁴ By removing the gap between the queen and her lawfully appointed ecclesiastical judges, Cosin symbolically grafted the latter onto the former as a sort of infallible extension of the royal supremacy. With this scheme he was able to smash Morice's argument that ecclesiastical judges who infringed on the common law incurred a praemunire. There was some justification for the idea of 'grafting' of authority, but again this was as vague as the original definitions of the royal supremacy itself and open to easy attack.. But Cosin's position on the royal supremacy, consistent throughout the *Apologie*, was similar to the strategies being employed in the writings of other conformists in the 1590s.⁴⁵

What influence Cosin's ideas and writings had in his own field may readily be seen from contemporary sources, though it seems clear he was not universally known outside Whitgift's circle of influence. (In extant documents that mention Cosin his surname is often badly misspelled and his Christian name is sometimes either given wrongly or else substituted with a

⁴⁴ LPL, MS 234.

⁴⁵ See also Matthew Sutcliffe, *Treatise of ecclesiastical discipline*, 1590 (STC² 23471); Thomas Bilson, *Perpetual government of Christ's church*, 1593 (STC² 3065); and Richard Bancroft, *Survey of the pretended holy discipline*, 1593 (STC² 1352).

blank line, indicating that the writer was unsure of it.⁴⁶) His influence on ecclesiastical law, however, both during and after his lifetime was considerable.

The single most tangible effect Cosin had on the events of the 1590s was the influence the *Apologie* played in the judges' decision in Cawdrey's Queen's Bench case. The case opened in 1591 and was not concluded until early 1595, during which time Cosin's *Apologie* appeared in both its first and second editions. The final verdict of the judges went against Cawdrey, declaring in favour of the high commission's authority to deprive him of his benefice based on the authority of ecclesiastical law — and that temporal courts ought to accept without dispute the judgements given in ecclesiastical courts. In the only section of the judge's verdict in which a judicial philosophy was enunciated, there was clear evidence that Cosin's *Apologie*, with its emphasis on the independent authority of ecclesiastical courts, had influenced the judges. The importance of Cawdrey's case was that it validated once and for all the legitimacy of the high commission even in its most controversial aspects of jurisdiction and procedure. It established that the commission was not bound by the terms of the Act of Uniformity, the Act of Supremacy, or any other parliamentary statute, but only by the letters patent of the queen, whose ancient royal prerogative it was to regulate and govern her church through commissions as she saw fit. Thus Cosin's contribution to the high commission's vindication was both tangible and significant.⁴⁷

When the high commission was again under intense assault from the common law judges in the early seventeenth century, several debates (for want of a better term) were staged by King James between the commissioners and the judges. The arguments of the commissioners fell along the very same lines as Cosin had used, invariably insisting that the commission was bound only by its letters patent, not by the Act of Supremacy. They further denied, as Cosin first did, that secular judges were privileged to interpret ecclesiastical laws — even if those laws happened to be passed by Parliament.⁴⁸ Cosin's *Apologie* and *Polity* were unique in that no one after him ever attempted to undertake such thorough, systematic works on ecclesiastical law or the hierarchy of authority in the English church, and thus it was natural

⁴⁶ For examples see *APC* volumes from 1580s and 90s, *passim*; Hasler, *Commons*, I, 661.

⁴⁷ See also below, 219-23.

⁴⁸ Usher covers these debates in detail in *Rise and fall*, ed. Tyler, chapters 8-10.

for commissioners and ecclesiastical lawyers in the Stuart age to look back to Cosin as an authoritative source rather than try to improve on his work. A good example of this is the *Polity*, written in 1589 but first printed seven years after Cosin's death in 1604. The preface, addressed to James and written by Cosin's successor as vicar-general Thomas Crompton (who was shortly to be knighted), contained nothing original but was merely a piece of sycophantic rhetoric claiming (using Cosin's *Apologie* for its ideas) that ecclesiastical jurisdiction plainly belonged to the crown and dignity of the king and was derived from him down to archbishops and bishops and finally to ecclesiastical judges. There was most likely a political reason for the printing of the *Polity*: the Hampton Court Conference had reopened the public debate over the ecclesiastical polity of England, and the puritans had been allowed to present their petitions to the new king formally. Cosin's *Polity*, the basis for much of the *Apologie*, set out in a visual format a systematic foundation for ecclesiastical authority that the conformists wished James to reaffirm. Thirty years later the *Polity* received a reissue in 1634 by the press in Oxford, this time at the instance of the university's new chancellor, Archbishop Laud, who was waging a campaign to drive puritanism and 'backwardness in religion' from the colleges.⁴⁹

Elsewhere in surviving documents, Cosin's influence in civil and canon law appears pervasive. He was cited in an early seventeenth century treatise on judicial practice in the court of the chancellor of Oxford.⁵⁰ A copy of the *Polity* was found along with a number of canon and civil law texts amongst the papers of Dr. Richard Holdsworth, master of Emmanuel College, Cambridge until 1649.⁵¹ James Whitelocke, a judge in King's Bench during the reigns of James and Charles and father of the more famous lawyer Bulstrode Whitelocke, noted that while he was at Oxford he endeavoured to combine his study of common law with that of civil law, 'being encouraged mutche thearunto by a book set out by dr. Cosins, the dean of the arches, intituled, "An apologye of the ecclesiastical proceedings", in whiche I saw how great use he made of his knoledge of the common law to upholde the authority of his owne

⁴⁹ Soon after becoming chancellor of Oxford in a fiercely contested election in 1630, Laud turned his attention to beefing up the university's press output. By 1633 the university was employing three new printers, each with two presses and two apprentices. C.E. Mallet, *A history of the University of Oxford* (London, 1924) II, 303-6, 311.

⁵⁰ LPL, MS 2085, 80.

⁵¹ Owen, *Medieval canon law*, 53.

profession, and to direct others of his place.⁵² Whitelocke later wrote a book called *The sovereign's prerogative*, which was published posthumously in 1657. Francis Clerke, a London proctor in the last decade of the sixteenth century, compiled a book on ecclesiastical procedure in 1596 called *Praxis in curiis ecclesiasticis* (published in Dublin, 1666), and in one of the extant copies of the book there is a marginal gloss referring to Cosin's *Apologie*, attempting to argue that the *ex officio* oath was legal.⁵³ Two civil lawyers in the early seventeenth century, Thomas Ridley and Calibute Downing, praised Cosin as a pioneering civilian who had done much to reinvigorate the study of civil law.⁵⁴ Finally, there was interest in Cosin's *Polity* as late as the eighteenth century, as a manuscript copy dated 1740 shows.⁵⁵

Cosin's main adversary in the debate over the authority of ecclesiastical law was an Essex common lawyer nine years his senior. James Morice is chiefly known to historians as an early champion of the cause of constitutional liberty, but his actual impact on English history has been overrated. While it cannot be denied that in many ways Morice was a seventeenth century man living in the sixteenth century,⁵⁶ it must be remembered that he thoroughly lost the public debate with Cosin and ended his career with a dampened reputation.

Morice was born in 1539, the son of William Morice of Roydon, Hertfordshire and Anne Isaac of Kent. Four years later Morice's father purchased land in Chipping Ongar, Essex, and Morice lived there for the rest of his life, inheriting the estate upon his father's death.⁵⁷ He was admitted in August 1557 at the age of eighteen to the Middle Temple, where he would enjoy a lengthy career and a notable reputation.⁵⁸ It seems that he was elected to Parliament for Wareham in 1563 with the patronage of the second earl of Bedford, who was possibly a relative,⁵⁹ though he would not be returned again until the important Parliament of 1584 in which he took a conspicuous role. In May 1578 he was chosen by the Middle Temple

⁵² Sir James Whitelocke, *Liber famelicus of Sir James Whitelocke*, ed. John Bruce, (Camden Society; London, 1858) 13-4.

⁵³ Helmholz, *Roman canon law*, 131.

⁵⁴ Thomas Ridley, *A view of the civile and ecclesiastical law* (London, 1607) 108-9; Calibute Downing, *A discourse of the state ecclesiasticall of this kingdom* (Oxford, 1632) 30-1; see also below, 256.

⁵⁵ BL, Additional MS 28119.

⁵⁶ It is my opinion that Morice's views on constitutional rights of individuals were so advanced for their day as to be considered radical; yet his ideas would have been welcomed as self-evident in the decades following the English Civil War.

⁵⁷ Hasler, *Commons*, III, 98.

⁵⁸ *Middle Temple records*, ed. C.H. Hopwood, I (ed. C.T. Martin), (London, 1904) 117.

⁵⁹ The suggestion is made by Hasler, *Commons*, III, 98.

to be reader for the following autumn and was chosen again for Lent 1579. During this time he composed a subsequently famous lecture on the royal prerogative, the existing copies of which provide a valuable resource for comparing his early intellectual views with those he expressed in his two major works, *A briefe treatise of othes* (1592/3) and 'A just and necessarie defence' (1594).⁶⁰ Morice became master of the bench some time before February 1586, when his son was admitted to the Middle Temple without fine (usually 20s.).⁶¹ And in June 1596 Morice was chosen treasurer and given a voice in the parliament 'as his two last predecessors have had.'⁶²

Besides his long affiliation with the Middle Temple, Morice was a justice of the peace for Essex from 1573 until July 1596, a few months before his death.⁶³ As a JP he presided regularly at assizes, was appointed as a commissioners on various occasions to inquisitions *post mortem* in Essex,⁶⁴ and in December 1577 was appointed to a commission to enquire into piracy.⁶⁵ In October 1589 he reached the pinnacle of his law career with his appointment to the Court of Wards and Liveries.⁶⁶ Beginning with the 1584 Parliament Morice was a regular representative for Colchester, sitting in 1586, 1589, and 1593. That his legal expertise was recognised by each Parliament can be seen in how he was often asked to draft or edit bills as well as serve on numerous committees.⁶⁷

Morice's first step into wider public debate began during the summer of 1590 between assize circuits when he 'scribed' a treatise about oaths on 'a quire of paper'.⁶⁸ This essay later became *A briefe treatise of othes*, a book that disturbed Whitgift and urgently prompted the need for a revised edition of Cosin's *Apologie for sundrie proceedings ecclesiasticall*. Morice's *Treatise* was brief but effective, encapsulating many arguments against ecclesiastical court procedures into a fifty-eight page tract that was printed anonymously in 1592 or 1593 in

⁶⁰ STC² 18106; LPL, MS 234.

⁶¹ *Middle Temple records*, ed. Hopwood, I, 283-4.

⁶² *Middle Temple records*, ed. Hopwood, I, 367.

⁶³ *Calendar of assize records: Essex indictments, Elizabeth I*, ed. J.S. Cockburn (London, 1978).

⁶⁴ CPR, VI, 352; VII, 449; VIII, 41.

⁶⁵ BL, Lansdowne MS 146, fo. 18.

⁶⁶ H.E. Bell, *An introduction to the history and records of the Court of Wards and Liveries*, (Cambridge, 1953) 22; PRO, SP12/132, doc. 44 wrongly gives the year as '1579'.

⁶⁷ Hasler, *Commons*, III, 98.

⁶⁸ PRO, SP12/238, fo. 107r-v.

Middelburg by Richard Schilders. In the Parliament of 1593 Morice tried to mould the principles he expressed in the *Treatise* into two bills designed to curb the powers of ecclesiastical courts. Despite what seemed to be overwhelming support for the bills in the Commons, the queen confiscated the bill from the speaker and forbade its discussion and, very likely, its passage. Morice was put under house arrest (though at the comfortable London residence of privy councillor Sir John Fortescue) and released after two months.⁶⁹

Thereafter his career suffered unreversed decline. Unsurprisingly, he failed to procure the office of mastership of the Wards as well as attorney-general (though he was among those nominated for the latter by the earl of Essex). The year after the Parliament he wrote a response to Cosin's *Apologie* but dared not disseminate it or allow it to be printed. It was called 'A just and necessarie defence of a briefe treatise of othes' and was an able if sometimes repetitive repartée to the *Apologie*. But no one ever saw it. No one that is except Whitgift who personally requested a copy for himself.⁷⁰ Reflecting on his failure to advance himself, Morice lamented in a letter to Burghley in June 1596, 'I haue not to this daie added one foote of land to the little patrymonie left me by my father.'⁷¹ He died 2 February 1597, passing his estate on to his eldest son, John. The preamble to his will exhibited a distinctly puritan sentiment.⁷²

But perhaps Morice's career was more successful than he himself realised. All indications are that he enjoyed great popularity as a common lawyer, and Lord Burghley was interested in his work as early as 1579 when he requested a copy of his Middle Temple lecture on the royal prerogative.⁷³ His friendship with Burghley seems to have begun around this time, and it

⁶⁹ Cambridge MS Mm.I.35 (Baker 40) fos. 63r-69r.

⁷⁰ BL, Lansdowne MS 82, doc. 69.

⁷¹ BL, Lansdowne MS 82, doc. 68.

⁷² Hasler, *Commons*, III, 100. There are two mistaken theories concerning Morice's later years that need to be eradicated. A Cambridge manuscript with some biographical details about Morice (supposedly by 'Dr. Heylyn' though there is no conclusive evidence that this was Peter Helyen the Restoration historian) stated that Morice was disabled from his common law practice as a result of introducing his two bills in 1593 and imprisoned in Tutbury Castle where he died. Second, several historians relying on J.R. Tanner's *Tudor constitutional documents* (Cambridge, 1940) have swallowed his claim that Morice, like Peter Wentworth, was imprisoned in the Tower of London after introducing his bills. The Tutbury Castle idea is not only without substantiating evidence, but Morice's presence at Essex assize cases until a few months before his death as well as his letters to Lord Burghley in 1596 sufficiently disprove the claim. Tanner's assertion is likewise disproved by the fact that Morice wrote to Burghley several times from Sir John Fortescue's house during his house arrest, which could not well have happened if he were languishing in the Tower. Cambridge MS Mm.I.35 (Baker 40) fo. 69r; Tanner, *Documents*, 557; Cockburn, *Essex indictments*, passim; BL, Lansdowne MS 82, docs. 68, 69. J.A.I. Champion, *The pillars of priestcraft shaken: the church of England and its enemies, 1660-1730* (Cambridge, 1992).

⁷³ Preceding the manuscript copy of Morice's 1578-9 lecture there is an undated letter to Burghley in which he says, 'Nevertheesse for that your honour required a sight of my travaile concerning the kinges prerogatives I humbly offer vnto your Lordship some part of that my reading'. BL, Egerton MS 3376, fo. 1r.

lasted for many years. Burghley protected Morice on a number of occasions, usually when Morice had drawn the ire of Whitgift, as he did in 1590, 1593, and 1596.⁷⁴ He did seem to have a penchant for entangling himself in political causes. As early as 1584 when he was town clerk of Colchester, Morice petitioned the privy council along with several others to oppose the deprivation of a preacher of Colchester, George Northey, for nonconformity.⁷⁵ On other occasions it was the privy council who solicited Morice, such as in 1586, when he was asked to consider the suit of a widow, or in 1588, when he and three others were personally requested by the queen to consider what statutes should be established or reformed at the next Parliament (1589) and to keep the judges informed of their work until then.⁷⁶ By the late 1580s Morice's political views were clear and settled, and he was beginning to make bold with his convictions. As early as 1590 (or perhaps earlier) he became acquainted with Cawdrey's high commission case and, with the help of George Croke and Nicholas Fuller, became counsellor to Cawdrey in an effort to help restore him to his ministry. Cawdrey finally challenged the high commission's ruling in Queen's Bench in 1591, Morice acting as his counsel, but lost the decision. This was the most controversial case Morice was involved in, unless we are to believe he was consulted in the Star Chamber trial of Thomas Cartwright in the same year, which seems entirely possible.⁷⁷ Cosin accused Morice in the *Apologie* of seeking to assist Cartwright and his associates, but Morice indignantly denied it.⁷⁸

It is evident that Archbishop Whitgift feared Morice's ability and influence. They met at least twice, both times at Whitgift's request, and the atmosphere was tense but respectful. Morice was not afraid to debate with anyone, and at their first recorded meeting in London in spring 1591 to discuss his verdict in an Essex case in which he had found an archdeacon guilty of infringing the common law, Morice wasted no time in defending his action and challenged

⁷⁴ The three occasions mentioned are Morice's controversial verdict in an Essex case in which an archdeacon was punished, his two bills in the 1593 Parliament, and the writing of his 'Defence'.

⁷⁵ Collinson, *Elizabethan puritan movement*, 257.

⁷⁶ *APC*, XIV, 198; XVI, 415-7.

⁷⁷ Some of Cartwright's criticisms of the *ex officio* oath sound similar to Morice's arguments, although others do not. See especially a letter of April, 1592 written to the queen from prison; John Strype, *Annals of the Reformation and establishment of religion, and other various occurrences in the Church of England during Queen Elizabeth's happy reign* (Oxford, 1824) IV, 121.

⁷⁸ Cosin, *Apologie*, III, 213; LPL MS 234, fo. 52r.

Whitgift to justify the validity of proceeding *ex officio*.⁷⁹ Again in 1596 when he met the archbishop to hear his review of the 'Defence', Morice disagreed with Whitgift on the issue of whether the *ex officio* oath bore any resemblance to oaths administered in Star Chamber. But both Whitgift and the high commissioners were strangely interested in Morice's writings, contrary though they were, and accorded him a surprising amount of respect. When it became known in 1591 that Morice had written *A briefe treatise of oathes*, copies of it were requested by some of the commissioners who had signed the ecclesiastical memorandum defending *ex officio* procedure.⁸⁰ Whitgift himself requested a copy of the 'Defence' in 1595, and in the following year he suggested a conference between Morice and Cosin for the resolution of their dispute, even though he disagreed with most of the 'Defence'.⁸¹ But this is not to say that Whitgift was simply trying to find answers. While he may have wished a private end to the dispute between these two men of credit, he was not content to let the row fester in public. Morice was dangerous and potentially subversive, and it was with urgency that Whitgift had written to the queen in 1593 to have Morice's bills stopped.⁸²

What beliefs did Morice hold which threatened the ecclesiastical establishment? In short, he was part of an emerging movement in England to elevate the principles of common law over all other systems of law. The movement was by no means new in the 1590s; its roots lay in the late fifteenth century and had its origins at the Inns of Court.⁸³ The movement's first notable spokesman was Christopher St. German (d. 1541), a Middle Temple lawyer who wrote several treatises in the 1520s and 1530s complaining of the confusion created by the conflict between ecclesiastical and common law. 'It is a ryght troublous thyng to the people', he wrote, 'to haue two powers within the realme whereby they may be sued for one thyng in seuerall courtes and by seuerall auctorities...'⁸⁴ This conflict of laws was thought to be caused by an encroachment of ecclesiastical law on the rightful jurisdiction of the common law and

⁷⁹ PRO, SP12/238, fo. 107r.

⁸⁰ Ibid.

⁸¹ BL, Lansdowne MS 82, doc. 69.

⁸² BL, Additional MS 28571, fo. 172r.

⁸³ Guy, 'The Henrician Age'; *Varieties*, ed. Pocock, 24-5; Helmholz, *Roman canon law*, 23.

⁸⁴ Christopher St. German, *A Treatise concernynge diuers of the constitucyons prouynciall and legantines* (London, 1535?) STC² 24236, chapter five. There is no page numbering system in the *Constitutions*, and since most of the chapters are only one page I have cited the chapter numbers instead.

could be remedied by making common law the supreme law of the land, by which all disputed judicial principles should be resolved.

Dispute and disagreement in England between the two law systems dated back to the twelfth century. The most spectacular clash between the jurisdictions of church and state in the Middle Ages sprang from the Becket dispute and the attack on ecclesiastical courts in Henry II's Constitutions of Clarendon (1164), the sixth provision of which required laymen to be properly presented by an accuser or witness in the bishop's presence, rather than merely by suggestion or denunciation.⁸⁵ After the introduction of the *ex officio* oath into England in 1236, there was a growing number of complaints against papal provisions and appeals to Rome, and over time the principle of *praemunire* developed in English law.⁸⁶ An act of Richard II in 1392 (15 Richard II c. 5) declared that if the pope were obeyed in all things, the statutes of the realm would be void and of no effect. It therefore decreed that if any man purchase or pursue lawsuits in the court of Rome or elsewhere which violated the prerogative and dignity of the crown, that he should be attainted with *praemunire facias* and stripped of his lands and goods.⁸⁷ A firm line began to be drawn between two spheres of jurisdiction, spiritual and temporal. But the tension between the laws continued because there was no mechanism for resolving precisely which system had cognisance over certain facets of law.

Common lawyers such as St. German pointed to the sophistication and the Englishness of common law as proof of its superiority over canon and civil law, which were, in his opinion, both foreign and less sophisticated.⁸⁸ It was true that there was much confusion and contradiction in late medieval canon law texts. This was due to the numerous scribal and manuscript errors that had accumulated over many centuries. A good example of this can be seen in the debate between Henry VIII and the papacy on the question of Henry's divorce. Canonical marriage law was so contradictory and confusing that both sides could present legitimate arguments from canon law which were practically opposite. The diverse opinions of

⁸⁵ Levy, *Fifth Amendment*, 45.

⁸⁶ See Helmholz, *Roman canon law*, 25-6, for some relevant comments on *praemunire* in late medieval England; also *Select cases from the ecclesiastical courts of the diocese of the province of Canterbury, c. 1200-1301*, ed. Norma Adams and Charles Donahue Jr. (Selden Society; London, 1981).

⁸⁷ SR, II, 85-6.

⁸⁸ Fox and Guy, *Reassessing*, 102-4, 165-8.

the continental universities on the divorce question are further evidence of this.⁸⁹ English common law, constantly evolving and modernising through moots and case study at the inns of court, did not have these problems, and St. German was able to exploit this situation to his advantage. Drawing attention to the reluctance of canon law to be precise about details, he complained that the concept of ‘censures of the church’ was so vague and ill-defined that it was sometimes impossible for men to know how to avoid them.⁹⁰ St. German considered many recent ecclesiastical constitutions to be violations of the laws of the realm and of the king’s prerogative, and in his *Doctor and student* and *New additions* he proposed that the extent of ecclesiastical law should not reach beyond matters merely liturgical and sacramental.⁹¹

Another contribution St. German made to the movement for common law supremacy was his amplification of Sir John Fortescue’s opinion that the goal of justice should not merely be to punish crime but to protect innocence as well.⁹² This was an emphasis that had been rejected by canon law ever since the early thirteenth century when the proliferation of heresy on the continent caused an alteration in canonical criminal procedure, shifting the burden of proof to the defendant and away from the plaintiff.⁹³ During his lengthy literary debate with Sir Thomas More on the subject of heresy trials, St. German alleged that there was an imbalance of justice in English canon law. In the practice of secret denunciation he saw a legal principle that unapologetically placed defendants at a disadvantage, leaving the door open for innocent men to be falsely accused in secret by malicious adversaries. This overriding concern for the legal safeguard of innocence became a preoccupation among common lawyers throughout the Tudor period.

⁸⁹ Brundage, *Medieval canon law*, 182. The *Corpus juris canonici* was published in Paris between 1504 and 1506, and this brought at least some order to the dishevelled state of canon law. Spalding, *Reformation*, 19.

⁹⁰ St. German, *Constitutions*, chapter 15.

⁹¹ An example was church property which, not being in any way liturgical or sacramental, ought to be adjudicated by Parliament instead of the church. St. German, *Doctor and student*, ed. T.F.T. Plucknett and J.L. Barton, (Selden Society; London, 1974) xi, 323-4.

⁹² Christopher St. German, *Salem and Bizance* (London, 1533), reprinted in More, *Works*, ed. Guy, Keen, Miller, and McGugan, X, 360; Sir John Fortescue, *De laudibus legum anglie*, ed. S.B. Chrimes (Westport, Connecticut; 1979).

⁹³ Previous to the outbreak of heresies in the twelfth and thirteenth centuries, it had been the other way around — the defendant was at a greater advantage since the burden of proof was on the accuser. Brundage, *Medieval canon law*, 95.

In addition to their concern for the protection of innocence, sixteenth century common lawyers were keen to reduce the power of ecclesiastical courts — or at least to check it. Alarmed at the power of the high commission to imprison offenders at its discretion, Chief Justice James Dyer (c.1510-1582) began to collect precedents of *habeas corpus* around 1562.⁹⁴ By the 1590s common law judges were issuing prohibitions against the high commission in an effort to disrupt the commission's expanding jurisdiction and to frustrate its habit of imprisoning offenders contrary to common law. Many of these prohibitions were 'frivolous and inconsistent'.⁹⁵ Though convinced of the supremacy of common law and intent on reducing ecclesiastical law to a subordinate system, common law judges were plainly unsure of how to do it. Typical of this uncertainty were Sir Edward Coke's conflicting remarks about the case of Thomas Leigh. In 1568 Leigh, suspected of attending mass, had refused the *ex officio* oath, was imprisoned in the Fleet by the high commission, and was subsequently delivered by the whole Court of Common Pleas by a writ of *habeas corpus*. The reason? That depends on which occasion Coke was writing. In 1607 he said it was because in such a case the high commission should not have examined Leigh on oath. In 1615 he said it was because the Common Pleas deemed that the principle *nemo tenetur seipsum prodere* (no man may be compelled to accuse himself) was in effect. In the same year Coke said that Leigh was delivered by a writ of privilege because he was a lawyer of the court, and in his *Fourth institute* (published 1630) he declared that the high commission in that case had no power to imprison him.⁹⁶

Morice's career, ranging from the 1570s to 1596, occurred at a time when the jurisdiction of the common law was being visibly challenged by ordinaries' courts and particularly by the high commission. Morice shared the distrust and disdain of canon law that was common at the Inns of Court, believing in the inherent superiority of England's own laws to any foreign laws.

⁹⁴ J.H. Baker notes that the existence of these collections remained unknown even to John Selden in 1627 though he himself was keen to gather precedents on the same subject. Sir James Dyer, *Reports from the lost notebooks of Sir James Dyer*, ed. J.H. Baker (2 vols.; Selden Society; London, 1994) I, lxxviii.

⁹⁵ Levy, *Fifth Amendment*, 223.

⁹⁶ Dyer, *Reports*, ed. Baker, I, 143-4.

The comon lawes of this land are the good and necessarie customes and vsages of the realme agreable with the lawe of god and reason, whereby the partes and members of the bodye politicke of this kingdome are firmly knitte and vnited together, as the naturall body of man by the sinewes thereof: These customes are tearmed the comon lawe not onelie for that they serve to the comon profite of the land, speaking with one and the selfe same voice vnto all, but for that they are also the most publick, vniuersall and generall lawe of the realme, without the which this our pollicye and comon wealthe cannot stand or be contynued.⁹⁷

He concurred with St. German that any ecclesiastical laws that ran contrary to the common law of the realm should be abolished.⁹⁸ One could not serve two masters, and the only true law in England was the common law. There has been speculation that behind Tudor common lawyers' anxiety over ecclesiastical jurisdiction was a professional fear of losing income to ecclesiastical courts. Professor Tyler has even suggested that common lawyers' rabid opposition to the high commission was a reflection of their own failure to infiltrate it.⁹⁹ These considerations are certainly valid, but the simple element of intellectual disagreement should not be underrated.

We now turn to Morice's views on the royal supremacy. He accepted the Italian renaissance ideal that monarchy was the best form of government (as opposed to republicanism) and adopted the anthropomorphic metaphor that the king was head of the body politic, without whom the limbs could not function, yet he rejected *quod principi placet legis vigorem habet* in favour of Theodosius' maxim, *nihil tam proprium est imperii quam legibus vivere et manis imperio est legibus submittere* and he congratulated Elizabeth for ruling after this enlightened fashion.¹⁰⁰ In a draft of his lecture on the royal prerogative at the Middle Temple in 1578-9, Morice wrote that the laws of the realm had '~~ordained~~ and enriched the Royall Throne' with great prerogatives and preeminences, but the word

⁹⁷ LPL, MS 234, fo. 124r.

⁹⁸ Answering Sir Thomas More, St. German stated, 'And in like wise it were good to repel all such laws spiritual, as be made contrary to the king's laws and the custom of the realm.' St. German, *Salem and Bizance*, reprinted in More, *Works*, ed. Guy, Keen, Miller, McGugan, X, 369.

⁹⁹ It is important to bear in mind that the commission was composed not only of clergy but common law judges and privy councillors as well. The percentage of secular judges on the high commission, however, dropped considerably during the latter part of Elizabeth's reign, and anyway most of the secular judges who were commissioners only sat by the invitation of Whitgift, who made certain that the commission was firmly controlled by his trusted servants, Cosin, Bancroft, Stanhope, and Aylmer. Usher, *Rise and fall*, ed. Tyler, xxxi-xxxiii.

¹⁰⁰ BL, Additional MS, 36081 fos. 231v-232r.

‘ordayned’ was struck out and replaced with ‘adorned’, which substantially altered the implication of the sentence.¹⁰¹ If the laws of the realm ‘ordained’ the royal throne, then the common law was antecedent to the king’s *imperium*, but if the laws merely ‘adorned’ the throne they were no more than an accoutrement to the king’s supremacy. The change of language was probably reflexive upon second thought, but the evidence of Morice’s career shows he truly believed the original.

The true locus of the king’s prerogative, Morice continued, was ‘the High and Stately Courte of Parlyament’ as well as the ‘Lawes, Lybertie, Goodes, or Landes’ of his subjects.¹⁰² The influence of St. German is clear in the theory of parliamentary omnicompetence, but the other locus of the royal prerogative — the laws, liberty, goods, and lands of all Englishmen, was more subtle. It was almost a reduction of the royal prerogative from a real, personal power to a concept of limited monarchy where true authority was delegated to the bureaucracy of government and exercised on behalf of the monarch. Morice’s definition was certainly at odds with Elizabeth’s own idea of her authority, though in 1579 it was not yet politically unsafe to express such an opinion.

The common law and the custom of the realm were the ‘rightful Inheritaunce of the Subiect’ which the king could not take away,¹⁰³ and Morice openly repudiated any absolutist reading of the common law:

But to say that the kynge is [an]...emperor over his Lawes and Actes of Parliament (bycawse he hath power to make them) as that he is not bounde to governe by the same but at his will and pleasure, is an Opinyon altogether repugnant to the wise and Politicke State of gouernment established within this Realme...¹⁰⁴

Strangely though, he admitted that the king might make law by letters patent (as well as through Parliament and by royal commandment), and this was a position he held throughout

¹⁰¹ BL, Additional MS, 36081 fo. 232v.

¹⁰² Ibid.

¹⁰³ Cambridge MS Mm.I.35 (Baker 40) fo. 58r; BL, Additional MS 36081, fo. 252r.

¹⁰⁴ BL, Additional MS 36081, fo. 243v.

his career.¹⁰⁵ When there was a conflict between letters patent and statute law, however, as was the case in the trial of Robert Cawdrey, Morice tended to side with the supreme authority of parliamentary statute, although that may have been his position by default in respect of his opposition to the powers of the high commission.

It will also be useful briefly to examine Morice's view towards the English clergy. There is no question that an anticlerical temperament runs through his career from his earliest to his latest writings. His Middle Temple lecture, his speeches in Parliament in 1586 and 1593, and his controversy with Richard Cosin all bear witness to a deep-seated lack of faith in the clergy.¹⁰⁶ Continually irritated by Cosin's pretensions to clerical privilege, Morice echoed a sentiment originally expressed by French civil lawyers that clerical privileges were a gratuity offered by princes out of liberality, not fundamental rights belonging to the clergy themselves,¹⁰⁷ a principle also employed by Henry VIII's divorce team in the *Collectanea satis copiosa* in the early 1530s.¹⁰⁸

What makes Morice historically significant, however, is his opposition to *ex officio* procedure and the *ex officio* oath. Throughout English history, methods of determining guilt or innocence at the common law had always been accusatorial. The two parties were known, one accused the other, everything was done in public. There had never been anything inquisitorial about criminal proceedings at common law, and judges did not initiate cases. Morice thus considered *ex officio* procedure not only foreign to English custom but clearly contrary as well. He was distrustful of the discretionary powers given to ecclesiastical judges, fearful that *ex officio* procedure provided no safeguards against praetorian judges initiating cases against men out of malice, thereby becoming accusers as well as judges. He incredulously rejected Cosin's demand that the law presume integrity in its judges, 'Common and daylie experience (a most true Instructor) hauinge shewed and manifested to the worlde the intollerable corruptions and insincere practises of this their noble office.'¹⁰⁹ It is sometimes

¹⁰⁵ In both 1578-9 and 1594 Morice stated that the king might make law by way of letters patent and royal commandment. LPL, MS 234, fo. 312v; BL, Additional MS 36081, fo. 232v.

¹⁰⁶ For examples see BL, Additional 36081, fos. 229r-274v, BL, Harley MS 7188, and LPL, MS 234, fos. 210r-213v where there is a remarkably bitter tirade against the *ex officio* oath and the English clergy who practised it.

¹⁰⁷ Morice, *Treatise*, 46; Guy, 'The Henrician Age', *Varieties*, ed. Pocock, 34.

¹⁰⁸ Fox and Guy, *Reassessing*, 158-9.

¹⁰⁹ LPL, MS 234, fo. 212r.

difficult to sort out Morice's anticlericalism from his legal objections to the unchecked license of ordinaries, but one is led to conclude that they were mutually supportive.

The most heinous element of *ex officio* procedure was, of course, the oath. In his most honest and forthright work, the 'Defence', Morice admitted that he detested the oath, calling it 'this vnlawfull and baseborne offspring of Rome'.¹¹⁰ It was the means by which a judge might sift a man's personal thoughts and pronounce judgement on them. His strenuous objection to this invasion of a man's mind was widely shared not only among common lawyers but among all men, including ecclesiastical judges. What set Cosin and his fellow commissioners apart was that they believed there could be an exception to the rule that a man's secret thoughts ought not to be judged — when it was in the interest of the state to do so. This reasoning was what vexed Morice so much, and it is easy to see how this debate has been of immense interest to constitutional historians.

While in his *Treatise* Morice did not suggest civil disobedience with regard to the oath, by the time of the writing of the 'Defence' three and a half years later, he boldly claimed it was the right of every man convented before ecclesiastical judges to 'take excepcion and challenge to the Iurisdiccion of the courte and authoritie of the Iudge without offence.'¹¹¹ In fact many puritans were refusing the *ex officio* oath by 1594 on grounds of conscience and from a resolute refusal to incriminate themselves. This refusal usually brought high commission cases to a screeching halt as canon law forbade the conviction of defendants without their confession (which was ordinarily extracted through testimony on oath). It was a successful ploy from a psychological standpoint, but the defendant was usually no better off in the long run since the high commission could still imprison him indefinitely for contempt.¹¹²

Finally, what is known of Morice's views on presbyterianism? There is almost nothing of Morice's life and character about which we know *less* than his private religious beliefs, particularly regarding presbyterianism. He once referred to a client who was suspended from

¹¹⁰ Ibid.

¹¹¹ LPL, MS 234, fo. 194v.

¹¹² The commission could not solve this problem until the second decade of the seventeenth century when, during Bancroft's tenure as archbishop, the court adopted the principle that refusal to take the oath could be considered a tacit admission of guilt, allowing defendants to be proceeded against *pro confesso* if they stood silent. This was the standard practice by 1611. Usher, *Rise and fall*, ed. Tyler, 247 footnote 2.

his ministry, noting that he was a quiet man, ‘not intermedlinge with the troublesom questions of discipline and church government’,¹¹³ but other than this there is no mention of the subject of presbyterianism in any of his works, nor do we have any helpful evidence on the subject from his life. John Strype called him one of the ‘counsellors of the Puritans in these times’ and a ‘professed favourer of the Puritan faction’.¹¹⁴ It is plausible that he may have used legal arguments to obscure religious sentiments, but there is no real reason to suggest he was a presbyterian.

Morice’s historical importance, like Cosin’s, began during his own lifetime and continued well after his death. He was more widely known than Cosin, it seems, and there is no doubt that he enjoyed popularity both among puritans and his fellow lawyers. Evidence shows that his lectures at the Middle Temple must have been widely studied during his life time: Sir Edward Coke, who was a vigorous anti-monopolist in the early seventeenth century, was deeply influenced by Morice’s argument that the king could not erect monopolies of trade.¹¹⁵ Furthermore, a bill that intended to reform monopolies was introduced in the 1601 parliament by a member of the Middle Temple named Laurence Hyde, and the bill enjoyed the support of two fellow Middle Templers, John Davies and Henry Montague.¹¹⁶ James Dalton, a prominent lawyer of Lincoln’s Inn, criticised Morice’s bills against ecclesiastical jurisdiction in the 1593 Parliament by mocking the introduction of his Middle Temple lecture on the royal prerogative.¹¹⁷ And in the famous trial of Nicholas Fuller in 1609, considered by Professor Usher to be the greatest test of the validity of the high commission’s discretionary

¹¹³ This reference, however, is probably not to Robert Cawdrey, for reasons based on Morice’s description of the case. LPL, MS 234, fo. 222r.

¹¹⁴ Strype, *Whitgift*, II, 30.

¹¹⁵ Dyer, *Reports*, ed. Baker, I, liii and *ibid.*, footnote 60. Morice was in fact right about this: there was a precedent from 1573 which determined that monopolies could not be applied to new inventions.

¹¹⁶ David Harris Sacks, ‘Private profit and public good: the problem of the state in Elizabethan theory and practice’, *Law, literature, and the settlement of regimes*, ed. Gordon J. Schochet (Washington, 1990) 126, 128, 133.

¹¹⁷ In the opening paragraph of the lecture Morice had begged the forgiveness of his listeners, hoping that the subject of his talk would not make “ex musca elephantem”. A Mountayne of a Molehill.’ In the 1593 Parliament, Dalton was the first to stand up and oppose Morice’s bill, complaining that he was making a mountain out of a molehill, creating a problem where none existed. Dalton argued the temporal and spiritual jurisdictions were distinct and different, and that the commons should not meddle with the questions raised by Morice’s bills. Dalton’s sarcastic jab showed a familiarity with the text of Morice’s lecture, and the reference must have been easily recognised by the other lawyers in the house. BL, Additional MS 36081, fo. 229r; BL, Cotton MS, Titus F.II, fo. 31r.

powers to fine, imprison, and exact the *ex officio* oath, Morice's arguments were very much in evidence, if not his fighting spirit.¹¹⁸

In these first two sections we have investigated the background to the politico-religious situation of the 1590s and sketched out short biographies of Richard Cosin and James Morice. Over the next six we will examine in detail the literary debate between Cosin and Morice and comment on the wider significance of the controversy which proved two things: first, that by the 1590s there were two irreconcilable interpretations of the Henrician royal supremacy; and second, that a new definition or constitution was needed to preserve the inheritance of the reformed English church. In the final two sections we will see how the prescription for order and authority envisioned in the *Apologie* was ultimately triumphant, helped along at the rhetorical level by government propagandists such as Cosin and at the practical level by the high commission, as well as how the complexion of 'conformism' mutated in the final decade of Elizabeth's reign from what has been broadly termed a 'Calvinist consensus' or a 'Calvinist conformity' into a proto-Laudian outlook marked by a rehabilitation of the prestige of the clergy and the authority of its jurisdiction.¹¹⁹

¹¹⁸ This imitation of Morice was true of many other puritans as well, who generally parroted arguments first employed by him, such as that no man might be imprisoned but by the law of the land, or that the commissioners only had cognisance of the matters listed in the Elizabethan Act of Supremacy. Usher, *Rise and fall*, ed. Tyler, 204.

In recent years Morice has become something of a hero among historians seeking the humble but glorious beginnings of constitutional law. Professor Levy, for example, places Morice on an honour roll that includes Henry II for his creation of the jury system, William Thorpe for refusing the oath administered to him by Archbishop Arundel, and Sir Robert Beale for his contribution to the right against self-incrimination. Levy, *Fifth Amendment*. Levy's whiggism, however, does not detract from the value of his thorough research and his coherent vision of the development of the right against self-incrimination.

¹¹⁹ Lake, Peter, *Anglicans and puritans? (presbyterianism and English conformist thought from Whitgift to Hooker)* (London, 1988); Peter White, *Predestination, policy, and polemic* (Cambridge, 1992); Anthony Milton, *Catholic and reformed: the roman and protestant churches in English protestant thought 1600-1640* (Cambridge, 1995).

Chapter 2

Ex officio procedure and
James Morice's *A briefe treatise of oathes*

In medieval Europe criminal procedure was mostly an extension of the old accusatorial system of ancient Rome with some recent additions from canon law. To initiate a criminal suit a public accuser was necessary, and the cost of prosecuting the case was born entirely by that accuser. To prove his case he needed concurring testimony from two witnesses, but if he failed in his proofs the accuser himself was liable to pay the defendant damages and was also vulnerable to a counter-suit of false accusation. The inadequacies of this system are obvious: a vast number of crimes were likely to go unpunished unless an accuser had both the courage and the money to prosecute them. In the case of heresy the situation was more complex. Finding two witnesses who could substantiate heretical speech or behaviour was immensely difficult to achieve since most of the potential witnesses to heresy were likely to be heretics themselves.¹ This was generally true of all crimes of a secret nature, such as concubinage, sexual offences, and simony.² Between the time of Gratian of Bologna³ and Thomas Aquinas (c. 1225-74), various heresies began to spread throughout Europe. Heretics, who under the conventional criminal system were protected from malicious accusation by the restrictions which bound accusers, were extremely difficult to prosecute, and in the view of the bishops this helped to underpin the spread of the Cathar and Waldensian heresies across much of southern Europe.

Until the end of the twelfth century, obstinate heretics were merely excommunicated and deprived of property and rights, but Innocent III (1198-1216) perceived an urgent need to roll back the tide of heresy, and he personally empowered judges to use any means possible, including imprisonment and torture, to persuade defendants to confess their guilt if the judge was convinced they were guilty of heresy.⁴ Innocent built upon Gregory VII's (1073-85) 'vicar of Christ' theory of the papacy, asserting both spiritual and temporal authority over princes

¹ See More, *Works*, ed. Guy, Keen, Miller, McGugan, X, 72-4, 218.

² Brundage, *Medieval canon law*, 93-4, 142-3. Brundage suggests that Gratian's abrupt transition in the *Decretum* from simony to proof in criminal cases might have been born out of a direct frustration with existing procedure. See footnote 3 for information on Gratian.

³ Gratian was a camaldolese monk of whom very little is known other than his enormous compilation of canon law precedents, entitled *Concordia discordantium canonum*, commonly known as the *Decretum*, which he completed some time around 1140. *Medieval political thought*, ed. Burns, 670.

⁴ Henry Charles Lea, *The inquisition of the Middle Ages, its organization and operation* (London, 1963) 71, 198, 264.

and pioneering the term *plenitudo potestatis*.⁵ This kind of papal legislative innovation was new. Beginning with the papacy of Alexander III (1159-81) in the generation following the death of Gratian, popes began to use decretals (technically called ‘rescripts’) to create new canon law — and they did a lot of creating.⁶

Around the 1180s the papacy began to condone the use of *per notorium* procedure in an effort to make it easier to prosecute certain crimes that historically lacked witnesses. This procedure relaxed the rules of proof in cases of ‘notorious’ crimes when a whole community believed someone had committed a crime yet none would prosecute him. The original purpose of this new procedure seems to have been to control clerical immorality, concubinage, and prostitution, but the procedure turned out to be equally efficient in prosecuting heresy. In this manner of proceeding the judge could initiate and prosecute the case himself *ex officio* — by virtue of his office, citing suspects on the basis of ill fame.⁷ The judge was required to produce two witnesses who had to substantiate the rumour. Once the witnesses had verified the fame he could proceed to condemn the defendant of the crime. There was some opposition to this summary way of proceeding from conservative canonists.⁸ Self-accusation had been condemned by the early church fathers as well as by Augustine and Chrysostom. Gratian himself opposed torture, instead advocating fining and exile for heresy.⁹

Those who supported *per notorium* procedure did so on the basis that *rei publicae interest, ne crimina remaneant impunita* (it is in the public interest that crimes do not remain unpunished).¹⁰ Professor Brundage suggests that one of the reactions against this new form of

⁵ Walter Ullman, *Principles of government and politics in the Middle Ages* (London, 1961) 76, 78, and *passim*; Guy, ‘The Henrician Age’, *Varieties*, ed. Pocock, 30.

⁶ Brundage, *Medieval canon law*, 160.

⁷ The word ‘fame’ is a derivation of the Latin word *fama*, which means a public report or widespread rumour. In canon law the term was used to describe a well-known rumour concerning the wrongdoing of a certain individual and was considered sufficient to authorise a judge to cite the suspect before the court to be examined regarding the supposed crime. See also below, 122-3.

⁸ Tancred (c. 1185-c. 1236) believed that the defendant should at least be interrogated about the supposed crimes rather than simply sentenced. Hostiensis (c. 1195-1271) warned that this form of procedure should only be resorted to cautiously and seldomly because it was a dangerous way of proceeding. William Durand (1231-96) only approved of the procedure in extremely qualified circumstances, such as the commission of a crime in the physical presence of a judge while he was acting in his professional capacity. Even then, he believed that if the defendant denied guilt, ordinary procedure would have to be used to convict him. Brundage, *Medieval canon law*, 144-7.

⁹ Levy, *Fifth Amendment*, 21.

¹⁰ ‘On its darker side this procedure stripped defendants of nearly all the protections the conventional *ordo iudiciarius* afforded them. This opened the way for abuse of the church’s criminal justice system, because proceedings *per notorium* could easily be manipulated or contrived in order to brand as criminals persons whose real crime was to be disagreeable to their superiors or unpopular among their neighbours.’ Brundage, *Medieval canon law*, 145-6.

procedure was the rise of defence by compurgation, which allowed men to declare their innocence finally, in the form of an oath. This oath of purgation was accompanied by the oaths of twelve witnesses who vowed they believed the defendant's oath to be true.¹¹

In 1184 Lucius III (1181-85) issued the bull *Ad abolendam*, which forced witnesses to take an oath to divulge the existence of heretics if they knew of any. In 1199 Innocent III confirmed this bull and made it part of the Roman law as well as issuing a new decretal which expanded the authority of judges to deal with notorious crimes *per inquisitionem*, and to confiscate all worldly possessions from those found guilty.¹² Innocent's new laws were fully in practice by 1215 when the Fourth Lateran Council confirmed their validity. There is no evidence that this principle came from anywhere other than Innocent himself.¹³ *Per inquisitionem* procedure was similar to *per notorium* in that it permitted ecclesiastical judges to initiate cases against suspects *ex officio* without any accuser or denouncer. But by the principles of *per inquisitionem*, public ill-fame was good enough cause to initiate an enquiry by the judge and thus practically served the function of an accusation.¹⁴

Per inquisitionem procedure, which began to solidify around 1200 and became commonplace under Gregory IX (1227-41), was so called because it sought to deal with flagrant and notorious criminal acts through a process of inquisition. Under inquisitorial procedure the old standards of evidence and proof were weakened. Whereas full proof had been necessary before, only partial proof was necessary for conviction using *per inquisitionem*, assuming that enough *indicia* or evidences were presented to burden the defendant with probable proof of his crime.¹⁵ Furthermore, the Fourth Lateran Council did not require that judges prove fames before proceeding against the suspect.¹⁶ With the development of

¹¹ Brundage, *Medieval canon law*, 147.

¹² The practical effect of *Ad abolendam*, which evolved through case study, was that those who abjured were still deprived of their legal rights and excluded from public office. Descendants of heretics or their abettors to the second generation suffered the same exclusion. Heretics were also denied a proper, Christian burial. Anyone accused of heresy was prevented from having any legal representation at all; and since the bishop was the sole adjudicator in the dispute, no appeals were allowed. More, *Works*, ed. Guy, Keen, Miller, McGugan; X, xlvii-xlix.

¹³ More, *Works*, ed. Guy, Keen, Miller, McGugan; X, xlvii-xlviii; see also Levy, *Fifth Amendment*, 20; Brundage, *Medieval canon law*, 147-8. Brundage calls these legislative creations of Innocent's 'radical' in their novelty.

¹⁴ 'This concentration of functions in the hands of a single investigator/prosecutor/judge obviously placed the defendant at an enormous disadvantage and left more than ample room for judicial bias to prejudice the outcome of the case.' The defendant in these cases was not allowed counsel. Brundage, *Medieval canon law*, 148-9.

¹⁵ Brundage, *Medieval canon law*, 93-5.

¹⁶ Levy, *Fifth Amendment*, 23.

inquisitorial procedure, canon law allowed judges to enquire not only into actions but also into men's personal thoughts and opinions.¹⁷ The proliferation of *per inquisitionem* was further encouraged by the Fourth Lateran Council's decree forbidding ecclesiastical officials from taking part in trials by ordeal. Since there was little support for trial by ordeal outside the church anyway, the practice simply ended and was replaced by inquisition.¹⁸ By the mid-thirteenth century *per inquisitionem* was well established. Aquinas accepted the principle of self-incrimination and approved of death as a punishment for heresy; Innocent IV (1243-54) used torture against heretics in order to expedite confessions.¹⁹

Growing mainly out of the necessity to check the spread of heresy, the centralisation of inquisitorial procedures developed more on the continent than in England, since England did not produce any significant heresies before Lollardy.²⁰ According to the Roman-canon law of proof used on the continent, confession of guilt was requisite for conviction, but in England a jury system of proof had developed. Juries determined guilt in criminal cases based on factual or circumstantial evidence which did not require confession on the part of the defendant. This is why judicial torture was so often used on the continent but only occasionally in England.²¹ In early medieval England trial by ordeal was usually reserved for grave crimes, whereas trial by oath or compurgation was for lesser crimes. But Henry II disliked the old forms of proof (sinking or floating, battling, grasping a red-hot iron out of boiling water and then waiting three days to see if the wound had healed 'cleanly' without infection). He expanded the use of inquests, which were basically early jury trials, involving the decisions of representatives of a whole community on a given case. He also encouraged the development of a jury system through two important proclamations, the Assize of Clarendon (1166) and the Assize of Northampton (1176). Jury trials existed at first only for civil cases, not becoming a regular feature of criminal cases until the thirteenth century.²²

¹⁷ Brundage, *Medieval canon law*, 178.

¹⁸ Brundage, *Medieval canon law*, 94-5, 140.

¹⁹ Walter Ullman, *A short history of the papacy in the Middle Ages* (London, 1972) 254; Lea, *Inquisition*, 87-9, 175.

²⁰ More, *Works*, ed. Guy, Keen, Miller, McGugan; X, xlix-l.

²¹ John H. Langbein, *Torture and the law of proof* (Chicago, 1976, 1977) 3-12, 61-9; John H. Langbein, *Prosecuting crime in the Renaissance* (Cambridge, Massachusetts; 1974).

²² Doris M. Stenton, *English justice between the Norman Conquest and the Great Charter, 1066-1215* (Philadelphia, 1964) 16-7; Sir Frederick Pollock and F.W. Maitland, *The history of English law before the time of Edward I* (second edition; 2 vols.; Cambridge, 1898) I, 136-42; Levy, *Fifth Amendment*, 5-6, 9, 11-2.

Per inquisitionem procedure came to England in 1236 via the papal legate Otho. He convened a synod of bishops and introduced them to the reforms that Innocent III and the Fourth Lateran Council had made earlier in the century. One of the constitutions drawn up by Otho for the English church provided for an oath *de veritate dicenda* (to tell the truth) which came to be known in England as the *ex officio* oath because it was administered by virtue of the judge's office. The article in Otho's synod establishing the oath was very brief. In its early Tudor translation it read, '*Evenit et infra*. we establysshe that when the prelates and ecclesiasticall iudges enquire the fautes and excesses of theyr subiectes that deserue ponyshment the lay be compelled if nede require [sic] by sentences of excommunication to gyue an othe to saye the trouth. and if any withstond or let this othe to be gyuen, he shall be brydeled with the sentence of excommunication and interdiction.'

²³ The first recorded use of the oath was in 1246 by Robert Grosseteste, bishop of Lincoln. There were numerous complaints and petitions to Henry III against the oath, and the king finally intervened and asked that the oath be abandoned. Grosseteste refused Henry's request, but he died a few years later, and the oath seems to have died out with him. It resurfaced, however, in 1272 when Boniface, archbishop of Canterbury, not only reinstated it but threatened excommunication as a punishment for those who refused.²⁴ In 1401 the statute *de heretico comburendo* (2 Henry IV c. 15) was enacted for the purpose of containing the spread of Lollardy. Though this law did not mention oaths, the vague wording related to the powers of the church to root out false doctrine was taken by ecclesiastical judges implicitly to condone the use of an oath *de veritate dicenda*.²⁵

The *ex officio* oath never attained full acceptance in England. By the sixteenth century, it was no less controversial than it had been before. William Tyndale spoke out against the forced ransacking of men's hearts by judges in *The Obedience of a Christian man* (1528).²⁶ Christopher St. German asserted that the oath 'standeth nat with conscience', because it did

²³ William Lyndwood and John of Ayton, *Constitutions provinciales and of Otho and Othobone; translated in to englyshe* (London, 1534) (STC² 17113) fo. 28r.

²⁴ Pollock and Maitland, *History of English law*, I, 446-7; Levy, *Fifth Amendment*, 46-9.

²⁵ Offenders were to be detained in prison, 'till he or they of the Articles laid to him or them in this Behalf, do canonically purge him or themselves, or else such wicked Sect, Preachings, Doctrines, and heretical and erroneous Opinions do abjure, according as the lawes of the Church do require.' SR, II, 127.

²⁶ STC² 24446; Levy, *Fifth Amendment*, 63.

not take into account that there were things which a man may not in good conscience reveal under any circumstances. He also doubted the validity of an oath that had been ‘brought vp by the clergie without assente of the kynge or of the people and where vnto they could nat compelle any man before’.²⁷ Parliament began discussing the issue of the *ex officio* oath in the early 1530s. The common lawyers in the House of Commons were aggrieved over this seemingly unfair process against suspected heretics. ‘For the Ordinaries woulde sende for men and ley Accusacions to them of heresy, and say they were accused, and ley Articles to them but no Accuser should be brought furth...[and] the partie so Assited must either Abjure or be burned, for Purgacion he myght make none.’²⁸ A bill was drafted in 1529 which aimed to end the abuses of *ex officio* procedure and which would have outlawed several heresy trial practices: bishops and commissaries would have been prevented from arresting suspects against whom they had personal grudges, at least two credible witnesses would be required for a conviction, the accused would have the right to know the exact charge laid against him and the names of those who accused him, the accused would in some cases be allowed legal counsel, the trial would be required to begin no later than three months after the arrest, the accused would have been allowed bail, and his execution would be stayed until he was formally convicted in a common law court. This bill was never passed. The Supplication against the Ordinaries, which was in part derived from this draft bill of 1529, was approved by the Commons in 1532 but not enacted as law until 1534 when it was refashioned into two different statutes, the Act for the Submission of the Clergy (25 Henry VIII c. 19) and the Heresy Reform Act (25 Henry VIII c. 14).²⁹

²⁷ St. German hastened to add that by opposing the oath he did not seek to give encouragement to wrongdoers; he did favour ‘charytable corrections’ where it was likely the offender might learn from his mistakes, but he claimed the *ex officio* oath did nothing to reform a man. Christopher St. German, *Constitutions*, chapter 4.

²⁸ More, *Works*, ed. Guy, Keen, Miller, McGugan, lvii; see also Edward Hall, *Chronicle*, ed. Henry Ellis (London, 1809) 784.

²⁹ The Heresy Reform Act repealed the heresy act of 1401 (*de heretico comburendo*) while two other heresy acts of 1382 and 1414 were upheld except where they contradicted the new act. The new rules included: accusations in heresy cases were to be made in common law courts by presentment of grand juries or by two lawful witnesses to the bishops; after the accusation the suspect was to be arrested and brought to trial in an ecclesiastical court openly; convicts were to recant and do reasonable penance, but if they refused they were to be turned over to the common law courts; the lay courts were to burn repeat offenders but a writ *de heretico comburendo* must be obtained first from the king; suspects were to be allowed bail upon four sufficient sureties by two justices of the peace, unless the bishop could come up with a reason why bail ought to be denied, and then he should appeal to the king’s council. More, *Works*, ed. Guy, Keen, Miller, McGugan; X, lxxv-lxxvii.

But despite early Tudor parliamentary attempts to outlaw the oath, it continued to be used in non-heresy cases during the reigns of Edward VI and Mary. The recently discovered records from the York high commission show that the *ex officio* oath had been used at least since the beginning of those records (1561), and it seems reasonable to suggest that the southern commission operated the same way, considering that both commissions had almost identical letters patent.³⁰ Although Elizabeth's early letters patent, like Mary's, did not explicitly permit the high commission to proceed *ex officio* or to administer the oath, they empowered the high commission to use its discretion, which in practice often meant the *ex officio* oath was used (although Bishop Edmund Grindal of London was known to have used juries of twelve men).³¹

The wording of the oath as it was administered in Elizabethan England was as follows: 'You shall sweare to aunswere to all such Interrogatories as shall be offred vnto you and declare your whole knowledge therein so god you help.'³² The practical effect of the oath was that defendants, once they had taken it, were obliged to answer all questions truthfully, even if it meant revealing private matters that concerned family members, friends, or neighbours. It is not difficult to see how this inquisitorial procedure was a boon for medieval ecclesiastical judges on the continent. The old Roman accusatorial system made prosecution of heretics almost impossible to achieve, whereas *per inquisitionem*, coupled with the *ex officio* oath, empowered the judge to initiate cases personally and to prosecute them to his own satisfaction. The value of the oath was that the judge was not only in a powerful position to work a suspected heretic into a corner where he must either confess his heresy or be perjured, but he could compel the defendant to reveal the identities of other heretics, beginning with his

³⁰ Usher, *Rise and fall*, ed. Tyler, xxvii.

³¹ The commission was not explicitly authorised to use the *ex officio* oath until the letters patent of 1583; Thompson, *Magna Carta*, 208. Sir Robert Beale believed that the commission's use of the jury system was the way the queen had always expected the commission to operate. He deplored the specific allowance of the *ex officio* oath in later Elizabethan commissions and insisted that the queen had never intended to create such an innovation; BL, Lansdowne MS 73, doc. 2, fo. 9v.

³² This rendering of the oath is reported to us by an anonymous author who wrote a short tract against the oath which is now kept at LPL, MS 445, 438-51. The tract shows ample evidence that the author himself was administered the oath, and the preponderancy of scriptural (rather than legal) criticisms of the oath, as well as the author's habit of referring in the first person to 'we' makes it likely that the piece was written by Cartwright and his associates in the 1590s. Professor Usher suggests that these papers belonged to Morice, but the absence of legal arguments is uncharacteristic of Morice, and the generally polite tone is uncharacteristic of Beale.

own friends. This would in turn lead to further inquisitions and to further convictions of heretics.

In the case of sixteenth century England, the *ex officio* oath provided ordinaries with the same inquisitorial powers but for a slightly different use. After Parliament forbade prosecutions except by grand jury, presentments, and the evidence of two credible witnesses in 1534 in cases of heresy,³³ the oath continued to be used at visitations of ecclesiastical commissions for the purpose of discipline and punishment of ecclesiastical offences. By the late sixteenth century, however, the oath once again found its most powerful expression in suppressing nonconformity, which had begun to increase considerably in the 1570s and '80s. The Heresy Reform Act had been repealed in 1547 by 1 Edward VI c. 12, but even had it not been, the Elizabethan Act of Supremacy had made dissenting religious opinions a secular offence (treason) rather a religious one (heresy). Hence use of the oath by the high commission seemed technically correct since no reform of canon law had been accomplished. By the 1590s, however, the legality of the oath was very much in question. Puritans disliked it for a variety of reasons, mainly because it was aimed against them. They formulated several legal and reasonable arguments against it. Two of the most popular criticisms of the oath were that scripture forbade swearing a general oath in which the particulars were not known, and that the oath was contrary to common law.

A third argument was drawn from canon law itself. The maxim *nemo tenetur seipsum prodere* (no one may be forced to accuse himself) derived from the *glossa ordinaria* of the Gregorian decretals and was a commonly known legal principle among canonists.³⁴ This prohibition against forced self-incrimination was also known to many in Tudor England as records of two trials from the reigns of Henry VIII and Elizabeth I show.³⁵

These criticisms and others were made by James Morice in a fifty-eight-page tract entitled *A briefe treatise of Oathes exacted by Ordinaries and Ecclesiasticall Iudges, to answere generallie to all such Articles or Interrogatories, as pleaseth them to propound. And of*

³³ See also 64-5, 129-30, 133, 146, 205-10, and 217 for further discussion of the Heresy Reform Act of 1534.

³⁴ Helmholz, *Roman canon law*, 56; Julius Clarus, *Practica criminalis* (Lyons, 1661) book V, question 45, addition 3.

³⁵ John Lambert, suspected of denying the real presence of the Eucharist in 1532, and Sir Thomas Tresham, on trial in Star Chamber in 1581 for harbouring the jesuit Edmund Campion. Both refused to incriminate themselves and specifically cited *nemo tenetur seipsum prodere* as their justification. Guy, *Tudor England*, 183-4; Levy, *Fifth Amendment*, 62, 64.

their forced and constrained oathes ex officio, wherein is proued that the same are unlawfull. Most of what we know about the writing of Morice's *Treatise* comes from a letter written by Vincent Skinner to Lord Burghley in early 1591.³⁶ Skinner reported 'that in the last sommer vacacion [Morice] had made a treatise of a quire of paper touching this proceeding ex officio and Inquisicion by waie of othe without accuser or witsnesse.'³⁷ Skinner acquired this information after having been with Morice 'vppon his return to London' where Morice had been 'dealt withall' by Archbishop Whitgift for handing down a verdict against an archdeacon in Essex for violating the common law.³⁸

Hoping to see the treatise, Skinner was told it 'was in the countrie at his howse there' (presumably his estate in Chipping Ongar) and was still in 'scribled' form, 'so as there could not be vse of it vntill a transcript were made thereof'. The next day Morice sent for the rough draft and it soon arrived at his house in Westminster, where he 'put it to be copied which cannot well be but in his own presence for direct[ion?] & reference of dyvers thinges written dispersedly, and in dispersed papers.'³⁹ Skinner added that in his new draft Morice 'will also insert somewhat that shall tend to the direct answering of the book sent from my L. Archebishop whereof he had sene a copie'. Thus, Morice not only would redraft a fair copy of his treatise, but he intended to incorporate an answer to a certain book sent by Whitgift. Apparently there were others interested in a copy of Morice's treatise besides Skinner, who reported that Morice 'had had request made by some of the subscribers for a copie of his booke. whereof by some meanes they had had some inclining, but [he] put them of by reason it was not digested in that order but scribled as a first copie which he wold revise and make a newe copie of at his convenient leisure.'⁴⁰ The word 'subscribers' seems it could only refer to 'the book sent from my L. Archebishop', which would mean there were several authors. This makes it seems probable that Whitgift's 'book' mentioned by Skinner was the memorandum

³⁶ Skinner, a puritan who had been acquainted with Cartwright at Cambridge and corresponded with him at least until 1590, was one of Burghley's messengers and often reported to him on legal issues. Hasler, *Commons*, III, 390-1. The letter, dated 14 March, 1591 is found in PRO, SP12/238, doc. 75, fo. 107r-v.

³⁷ PRO, SP12/238, doc. 75, fo. 107r-v.

³⁸ PRO, SP12/238, doc. 75, fo. 107r.

³⁹ PRO, SP12/238, doc. 75, fo. 107v. So as of 14 March, 1591 it seems the *Treatise* was still private and unrevised, which casts serious doubt on the suggestion by the editors of the *Short title catalogue* (II, 162) that it was printed in Middelburg in 1590.

⁴⁰ Ibid.

defending oaths in ecclesiastical courts signed by nine high commissioners a month before.⁴¹ Morice specifically answered this memo in his *Treatise*, which makes it seem unlikely that Skinner could be referring to anything else.⁴²

Continuing, Skinner reported that Morice ‘so told me that if I wold delyver it into your L. handes he wold take some peynes and reviewe it, and add such further answeres as this other book whereof I delyvered him the copie shold require.’ Skinner thus had a copy of the book to give to Morice, so it seems likely that it was passed to him by Burghley.⁴³ Finally, Skinner noted that Morice promised that the new draft, ‘being finished wold wholly referre to your L. censure, and then to be vsed further according to your good will and pleasure.’ Morice had agreed to submit his treatise to Burghley and leave it up to him to decide whether it should be published or not. Obviously, Burghley then passed it to Whitgift who not only decided it could not be published, but set Cosin to work drafting a reply.⁴⁴

Beginning around June 1591⁴⁵ the *Treatise* was disseminated in manuscript form, though Morice claimed he distributed only two copies, one to a privy councillor and another to a high commissioner.⁴⁶ Ascertaining the date of printing of the *Treatise* is difficult, but late 1592 seems a logical guess. Cosin was informed while he was reviewing part III of the *Apologie* for publication that Morice’s book had appeared in print, and since the third part of the *Apologie* did not appear until spring 1593 after both Parliament and Convocation had ended,⁴⁷ the *Treatise* must have been published in late 1592 or early 1593.⁴⁸ Although the

⁴¹ The memorandum, a copy of which is held at Lambeth and bears original signatures of nine commissioners, is only two pages long and could hardly be called a book, but it is possible there were other documents affixed to the commissioners’ statement or that it was bound into a miniscule volume. LPL, MS 2004, fo. 65r-v. Morice drafted a copy of the memorandum and placed it in his ‘A just and necessarie defence of a briefe treatise of oathes’ in 1594; LPL, MS 234, fo. 100r-v. There are two other copies of the memorandum, one in BL, Cotton MS, Cleopatra F.1 fos. 76-7; and the other at PRO, SP12/238, doc. 47. Neither of these last two have original signatures, but the latter document is dated 16 February, 1591, which fits in well with Skinner’s account.

According to Morice the privy council, in the wake of a recent quarter sessions case in Norfolk involving an alleged misuse of the oath by a resident commissary, ordered an opinion defining the proper use and legitimacy of the *ex officio* oath to be issued by the Queen’s ecclesiastical commissioners. The February 1591 memorandum held at Lambeth was the result. Cosin concurred on these details. LPL, MS 234, fo. 99r-v; Cosin, *Apologie*, ‘Epistle to the Reader’, sig. B1r-v.

⁴² Morice, *Treatise*, 20-1.

⁴³ PRO, SP12/238, doc. 75, fo. 107v.

⁴⁴ PRO, SP12/238, doc. 75, fo. 107v. Presumably, Morice would have liked to see the *Treatise* published *cum privilegio* in England. We do not know whether its eventual publication in the Netherlands was with Morice’s consent or not.

⁴⁵ Cosin reported that the *Treatise* first appeared in manuscript about four months after the ecclesiastical memorandum was written. Cosin, *Apologie*, III, sig. B1r-v.

⁴⁶ Cambridge, Baker MS 40, fo. 55r.

⁴⁷ Cambridge, Baker MS 40, fo. 69r.

⁴⁸ This sufficiently disproves Professors Levy’s and Thompson’s unsupported claims that the *Treatise* was published abroad in 1598. Levy, *Fifth Amendment*, 94; Thompson, *Magna Carta*, 218 footnote 61. The date 1590, proposed by the editors of

place of publication is not expressed anywhere in the printed edition, Cosin believed it was printed in Middelburg or Scotland, and most historians believe it was one of Richard Schilder's publications.⁴⁹ The printed edition of the *Treatise*, which varied slightly from the manuscript copy from which Cosin worked,⁵⁰ did not list an author, and it seems that authorship was for a time mistakenly attributed by some to Nicholas Fuller.⁵¹ There are numerous copies of the *Treatise* still in existence, both printed and in manuscript form.⁵²

The strategy employed by Morice in the *Treatise* comprised three stages. He attempted to show that general oaths⁵³ were contrary to reason and scripture, without precedent in common law, and unwarranted by statute. Morice clarified that he was not concerned with *matters* of ecclesiastical jurisdiction but with the *manner* of ecclesiastical procedure. 'The state of the question which at this present we have in hand is not in what cases those Courts may give or impose an oath, but the matter whereof we now entreat is concerning forced and constrained oaths *ex officio*, and especially in that general manner'.⁵⁴

In the Parliament of 1584 the Commons complained of Whitgift's use of the oath in testing ministers' conformity to the articles of subscription. Archbishop Whitgift personally appeared on the floor of the House of Lords and responded to the puritans' petitions in the lower house, charging that they had inherited their antipathy towards the oath from catholics.⁵⁵ Morice, who was present at that parliament, rebutted the claim in the *Treatise*, arguing that 'this kinde of generall oath and examinations *ex officio mero*, were not first misliked by Iesuites and seminarie Priestes, and from them deriued to others that mislike

the *Short title catalogue*, we have already shown to be impossible; and the date 1600, listed on the microfilm copy of the *Treatise* published by the University of Michigan, is also unsustainable.

⁴⁹ *Short title catalogue*, ed. Pollard, Redgrave, and Panzer; II, 162. Schilders was well-known for publishing puritan tracts in the late sixteenth century.

⁵⁰ Cosin, *Apologie*, III, 'An Advertisement vnto the Reader'.

⁵¹ The copy of the *Treatise* at Cambridge bears the words 'Fuller on oaths' on the binding and on the inside.

⁵² I have found four complete copies of the *Treatise* in manuscript. There is a fair copy at LPL, MS 445, 452-505 (probably the one from which Cosin worked); Morice incorporated a copy of the *Treatise* into his 'A just and necessarie defence of a briefe treatise of oathes', LPL, MS 234; there is a copy written in several different hands found in the book of an Oxford student named Alexander Cooke in 1597, BL, Harley MS 5247; and there is a nearly fair copy (with a few cross-outs) in BL, Cotton MS, Cleopatra F.I, fos. 50-69. Professor Usher mistakenly thought that fos. 1-50 were the *Treatise*; Usher, *Rise and fall*, ed. Tyler, 148 footnote. There is also a fragment from the *Treatise* written in the hand of the high commission's clerk at LPL, MS 2004, fos. 72-5.

⁵³ That the *ex officio* oath was in fact *general* was constantly asserted by Morice, though Cosin vehemently rejected the notion several times, stating that it was specific. Thus, Morice's denigration of general oaths and of the *ex officio* oath were one and the same. See below, 166-7, 180-185.

⁵⁴ Morice, *Treatise*, 45-6.

⁵⁵ Neale, *Parliaments, 1584-1601*, 65-6.

gouvernement and would bring the church to an Anarchie' but by true, godly protestants.⁵⁶ But there had been pre-protestant opposition to the oath in England, as we have showed.⁵⁷ Catholic opposition, on the other hand, seems not to have been particularly strong.⁵⁸ Both Morice and Whitgift were partially correct. There had been resistance to the *ex officio* oath in England since the Middle Ages, but it was also true that Elizabethan protestants did not conscientiously object to the oath until it was turned against themselves.

Particularly distressing to Morice was the unbridled power of ecclesiastical commissioners and their local counterparts, ordinaries. He maintained that their authority to issue general citations in the absence of a public accuser, to initiate cases on the basis of unsubstantiated rumour, to admit secret denunciation, to cause men to take a general oath promising to answer truthfully any question which might be asked, and the authority to imprison without bail those who refused the oath constituted a potentially unlimited source of abuse which deprived Englishmen of their common law rights.

Morice defined a public oath as:

a calling or takinge to recorde or witnesse of the sacred name of God, or of God him selfe by the vse of his holie Name, for the confirmation of the trueth of such thinges which we speake, or for the true performance of our promise. Or more brieflie: An oath is a confirmation of the will of man by the testimonie of God.⁵⁹

There were two kinds of oaths, private and public: private oaths were taken between men to procure faith and credit in business transactions, agreements, promises, or duties. Public oaths were of many different kinds; between monarchs for alliances, between a king and his subjects for just rule and faithful obedience, between men and God for the observation of God's laws,

⁵⁶ Morice, *Treatise*, 18. Morice excerpted a passage from *The prayer and complaint of the ploughman* to show there had been protestant opposition to the oath apart and aside from catholic opposition. Morice was correct, as is clear from the historical evidence presented in this chapter, but Cosin was not convinced. He called Morice's ploy 'an olde dogge tricke'; Cosin, *Apologie*, III, 204. Cosin may have had in mind the famous Star Chamber case of 1581 in which Lord Vaux, Sir Thomas Tresham, and other recusants were accused of harbouring the jesuit, Edmund Campion. Tresham refused to incriminate himself, citing the canon law maxim *nemo tenetur seipsum prodere* in defence of his silence. see Dyer, ed. Baker I, lxvi-lxvii; and II, 397; also Levy, *Fifth Amendment*, 100-5, 182.

⁵⁷ See above in this chapter, 48-9.

⁵⁸ In the York high commission's 1580 inquisition into recusancy, only one out of 170 Catholics refused the oath. Levy, *Fifth Amendment*, 98-9.

⁵⁹ Morice, *Treatise*, 3.

those taken by magistrates to uphold the law, those of soldiers to be obedient to their generals, and finally, those taken by defendants in a court to depose the truth in their testimony. Morice intended to concern himself only with this last type of oath, which he asserted should only be taken for the following purposes: for the glory of God, the confirmation of truth, the maintenance of justice, the protection of innocence, or to put an end to strife.⁶⁰

Three conditions were prescribed under which oaths might be justly or properly taken. First, oaths ought to be taken truthfully and without falsehood. An oath ought never to be taken if it could not be kept, as a broken oath was perhaps the greatest indignity and dishonour that could be shown towards God, perjury being a detestable sin. The second condition for taking an oath was that a man 'ought to sweare in judgement, that is to saye, with good discretion, soberlie, well aduised and assured of that he wil affirme or denie vpon his oath, Not ignorauntlie, rashlie, vainlie'. The third condition of taking an oath required that no man swear to do anything unjust or unlawful, thereby dishonoring the name of God.⁶¹ The second of these preconditions formed the basis of Morice's opposition to the *ex officio* oath which constrained the accused convented to answer any interrogatory whatsoever that might be required by the judge. This constituted a rash, ill-advised oath, said Morice, since the defendant could not thereby be assured that he would not be led into sin by his answers, such as being forced to reveal the doings of his own neighbours and family.⁶²

Yet not all public oaths, noted Morice, were voluntarily taken; some were initiated by judges, and thus it was pertinent to establish conditions for the imposing as well as the taking of oaths. Magistrates ought to exercise great caution and prudence in requiring oaths, and refrain from imposing them for simple or trifling reasons, said Morice. Oaths should not be used unless they could be performed to the glory of God and for the good of the realm.⁶³

⁶⁰ Morice, *Treatise*, 4, 8, 9. These reasons reflected a synthesis of medieval canon and sixteenth century common law judicial philosophies. The glory of God and confirmation of truth were conditions with which Cosin concurred. Likewise, 'to put an end to strife' was a biblical injunction (Hebrews 6) which provided the judicial basis for the oath of purgation (discussed below at 62, 63). The maintenance of justice, however, and the protection of innocence reflected the influence of St. German and English common lawyers. St. German, *A treatise concernynge the diuision betwene the spirytualtie and temporalitie* (London, 1532?) (STC² 21586), chapter seven; St. German, *Salem and Bizance*, 359-60; Cosin, *Apologie*, III, 8-9, 227.

⁶¹ Morice, *Treatise*, 5-6.

⁶² Morice, *Treatise*, 6.

⁶³ 'For if it be a Principle *De minimis non curat lex*, by good reason the Magistrates and ministers of lawe should spare to vse that whiche is most holie and precious in causes of less price or moment'. Morice, *Treatise*, 6.

Moreover, oaths should not be administered using intricate, captious, or subtle questions. Neither should they be exacted from men of suspect reputation or credit since doing so ‘argueth a lightnes and want of good discretion in the Magistrate, who thereby wittinglie doeth minister an occasion of perjurie, whiche if it followe, howe great is the fault?’⁶⁴

Morice contended that a realistic assessment of human frailty revealed the imprudence of administering such oaths. When a man defamed in life and conversation was forced to swear an oath to answer matters concerning his own corrupt life, there could only be two results: either he was forced to accuse himself, which Morice believed was abhorrent, or else he committed wilful perjury by testifying dishonestly. In these circumstances, perjury would overflow the land, since ‘the frailtie of man, for the safetie of life, the preseruacion of libertie, credite, and estimation would not spare to prophane even that which is most holie, and by committing sinfull perjurie, cast both soule and bodie into eternall perdition.’⁶⁵ If judges compelled defendants thus to incriminate themselves, Morice argued, they shared the blame for the perjury that followed.

Another circumstance under which Morice warned oaths should not be compelled was when they were general in nature, without the full particulars of the interrogatories being revealed before the oath was taken. When such an oath was exacted by the judge, it forced the defendant to violate Morice’s first condition for taking an oath, that a man be ‘well-advised and assured of that he will affirm or deny upon his oath’. Taking such a general oath to answer any and all questions thus robbed the defendant of the ability to ensure that his oath would be upheld truthfully, since most men would rather lie than accuse themselves or loved ones of misdemeanours when pressed to do so in a court of law. Vague, general oaths further took from the defendant the power to act justly or lawfully, as he could not know what he would be forced to affirm once the interrogatories began.⁶⁶ General oaths, therefore, violated all three of Morice’s conditions for taking an oath justly.

⁶⁴ Morice, *Treatise*, 7. The culpability of the judge in such cases of ‘baited’ perjury was a point Morice was keen to illustrate.

⁶⁵ Morice, *Treatise*, 30.

⁶⁶ Morice, *Treatise*, 11. The sincerity and integrity of judges could not be presumed, Morice argued, owing to the historic lapses of the English clergy in those virtues. He singled out the examples of Archbishop Arundel and Bishops Longland and Bonner to prove his point. ‘If any man will say as this Archbishop [Arundel] that a subject ought not to suppose that his Prelat will commaund him any vnlawfull thing, but should repose him self in the good discretion & vpriht dealing of his ordinarie, without further aunswere: Let the subtile practise of this one Prelate, and the cruell and the accursed

The practical effect of the *ex officio* oath, suggested Morice, was to seek for controversy rather than put an end to it. He recited the timeless legal maxim that demanded three persons in every suit: a judge, a prosecutor, and a defendant, without any of whom justice could not be ensured.⁶⁷ The *ex officio* oath, however, necessitated that the judge act as an accuser in addition to his capacity as judge since he framed the interrogatories and assumed the office of the prosecution.⁶⁸ The judge in this manner might probe into the mind of the defendant, commanding truthful answers upon any subject (even his most secret thoughts) by virtue of the oath, consequently forcing the party to accuse himself, his family, friends, or neighbours of crimes wholly unrelated to the defendant's own suspected misdemeanour and the cause of his citation to appear in court.⁶⁹ The defendant's role, too, was thus mixed and blurred as he might be compelled by his oath to accuse himself while simultaneously defending himself, thus violating the separation of the three persons required in any suit.⁷⁰ To this point Morice had outlined two main grievances against *ex officio* oaths on the basis of reason and the laws of nature: they divided the convened party against himself, resulting either in forced self-incrimination or perjury; and the judge, by virtue of the general oath administered, became the prosecuting party in addition to the judge.

Morice's third grievance was that the party was forced to take a rash and unadvised oath, contrary to discretion and scripture. That general oaths were impugned by scripture, much less supported, Morice attempted to demonstrate through examples. He could find no sanction

dealings of that barbarous Bishop Longlande stande at this present for a sufficient caueat to euerie man that shall depose, to take heede how he giue ouer-much credite to such glosinge and decyuable speeches, least too late he finde it true, that *faire wordes make fooles faire*.' Morice, *Treatise*, 16.

⁶⁷ Morice, *Treatise*, 9. Though the maxim dated back to Roman times, most English common lawyers would have learned the precept from Bracton: '*Iudicium est in qualibet actione trinus actus trium personarum: Iudicis, actoris, & rei, secundum quod large accipi possunt huiusmodi personae, quod duae sint ad minus inter quas vertatur contentio, & tertia persona ad minus qui iudicet, alioquin non erit iudicium, cum istae personae sint partes principales in iudicio, sine quibus iudicium consistere non potest.*'. *Select passages of Bracton and Azo*, ed. F.W. Maitland (London, 1895) 195. Sir Thomas Smith also confirmed that there must be three people for any court judgement to be just. Smith, *De republica anglorum*, ed. Dewar, 89.

⁶⁸ Cosin responded that this was untrue. 'For that which openeth way to the Iudges Enquirie is holden (by Lawe) as the Accusour, and not the Iudge.' Cosin, *Apologie*, II, 110-1. What Cosin meant by 'that which openeth way' was a fame or public report concerning the accused. He asserted that the testimony of a man's evil reputation was equivalent to the public accusation of a prosecutor. See below, 122.

⁶⁹ Morice accused ecclesiastical judges of using the answers of the party convened to gain intelligence into the crimes of others, thus perpetuating a chain of inquisitions. Cosin denied that any such thing happened. See below, 154, 195-6.

⁷⁰ Morice admitted it might be alleged that it was necessary for a judge to enquire into suspected faults, to 'trie the euill mindes and corrupt consciences of daungerous dissemblers, and so necessarie for the gouernement both of the Church and common wealth', but he maintained there must still be sufficient proof in the form of deposed witnesses rather than bare surmise to proceed against such a man. Morice, *Treatise*, 8.

anywhere in scripture for the imposing or taking of such general oaths, and indeed he found in the story of Herod's oath a perfect illustration of its injuriousness.⁷¹ The daughter of Herodias danced for Herod and pleased him so much that Herod took an oath to give her anything she wished up to half his kingdom. The daughter asked Herodias what she should demand and her mother replied, 'the head of John the Baptist'. When Herod heard the daughter's demand he was exceedingly sorry he had taken the oath but nevertheless commanded that it be done. The oath was to be condemned first, said Morice, for that it was taken rashly, 'proceeding of vaine pleasure and delight', and secondly because it was taken generally to give the damsel anything she wished no matter how just or unjust.⁷² By issuing such an open-ended promise, Herod had taken an oath which left him powerless to ensure that what would be demanded of him was lawful. He was thus left in the wretched position of either contravening his oath (perjury) in order to escape the unlawful beheading of John the Baptist, or carrying through with his pledge by committing wilful murder. Morice claimed, therefore, that Herod's rash promise was a standing rebuke to the *ex officio* oath.⁷³

At the start of chapter two⁷⁴ Morice admitted three possible examples from scripture which might be cited to prove the legitimacy of the oath: the law of jealousy, the inquisition and expiation of manslaughter, and the oath of Achan.⁷⁵ The first of these, the law of jealousy (Numbers 5:11-31), was a legal custom of the Israelites in which a man, if he suspected his wife of adultery, might bring her before a priest for examination. The priest would first charge the woman with an oath to declare whether she had defiled herself. Then he warned her that she would be cursed if she had committed perjury (and thus adultery), but she would be free from iniquity if she had confessed the truth. There were three important elements in this

⁷¹ Matthew 14.6-9 and Mark 6.22-26.

⁷² Morice, *Treatise*, 11. Cosin agreed that the oath of Herod 'rested on a carnal delight' and was to be condemned for that, but he would not go further to say that the oath was wrong due to its generality since Jeremiah had taken a similar oath to king Zedekiah. Morice effectively showed, however, that Jeremiah's oath was not analogous to Herod's. See below, 157-8; 181.

⁷³ 'And what difference is there I pray you betweene the oath of Herode and that which nowe we haue in question, the one being to performe or graunt whatsoeuer should be required: and the other, to aunswere to all questions that shalbe demanded, since there may be as vnlawfull and as vn honest questions ministred, as vngodlie requestes made or desired.' Morice, *Treatise*, 11.

⁷⁴ The printed copies of *A briefe treatise of oathes* at the Bodleian and Cambridge libraries are not marked off into chapters. Chapter divisions do appear, however, in the manuscript version of the *Treatise* which appears interspersed among the pages of the 'Defence' in LPL, MS 234.

⁷⁵ This passage leads us to believe that Morice may have had some particular knowledge of the arguments employed by defenders of the oath since he attempted to answer their objections here. Morice, *Treatise*, 12.

example which Morice believed proved a dissimilarity with *ex officio* oaths. First, there was an accuser — the woman's husband, being the informer or preferrer of the indictment, brought her personally to the priest. Second, the woman knew the identity of her accuser, who was not a secret denouncer but a public presenter. Third, the crime objected against her was made plain and clear from the outset; she was not asked to confess crimes other than the one for which she had been convented.⁷⁶

The example of inquisition and expiation for manslaughter was found in Deuteronomy 21:1-9. If a man were found slain in the open country, the elders of the city nearest the place of the man's death were to sacrifice a heifer and wash their hands over it, taking an oath that they did not shed innocent blood nor knew the identity of the murderer. Presumably, this passage in scripture would have been utilised by the oath's defenders to advocate administration of the oath to answer to the crime itself (that is, to answer directly whether they committed the crime in question), yet Morice found no similarity between expiation for manslaughter and the *ex officio* oath. In fact, the circumstances of the crime described in Deuteronomy were reversed from the crimes often prosecuted in ecclesiastical courts.

we see euidentlie, the fact and felonie...to bee publique and apparaunt, th'offendor only lyeth hidden and vnknowne. On the contrarie, those Inquisitors *ex officio*, haue the man before them whom they will examine, but the matter for the most part is secreat and concealed which they enquire after, and many tymes there is no matter at all but bare & naked suspition or fame of a cryme neuer committed. ⁷⁷

In the final example, Achan's oath (Joshua 7:10-22), God informed Joshua that one of the number of Israelites had stolen forbidden goods from the city of Ai. Lots were cast to determine the offender, and Achan was chosen by lot. Joshua adjured Achan to give glory to God and confess the truth of what he had done, and Achan confessed to having stolen treasure from the city and placed it in his tent. Morice argued that this example could not be used to justify *ex officio* oaths since, as in the previous two examples, there was little or no comparison

⁷⁶ Morice, *Treatise*, 12.

⁷⁷ Morice, *Treatise*, 13.

with those oaths. God informed Joshua of a particular offence — stealing from the city against His express commandment. Thus when the lot fell to Achan, Joshua was already apprised of both offender and offence. When he adjured Achan to confess the truth, therefore, he did so in a particular, not seeking to sift Achan's mind with spontaneous and uncertain interrogatories but to adjure him with reference to a particular crime.⁷⁸

The ecclesiastical memorandum signed by nine members of the high commission, which we have already mentioned, came next to be considered.⁷⁹ The commissioners held that no man might be urged to incriminate himself in hidden or secret crimes, and that the defendant was not bound to answer upon oath to any articles touching the crime itself unless the case was prosecuted by the ordinary *ex officio*. When secret crimes became publicly suspected, dangerous to be suffered, or offensive, 'then are they meete by enquirie and all good meanes to bee discouered, to the ende they may bee reformed, & the partie delinquent brought to penitencie'.⁸⁰ Regarding the process by which intelligence of crimes became known to ecclesiastical judges, this occurred either through the reports of credible men, called *clamosa insinuatio*, or by means of presentments by inferior officials such as churchwardens or sidesmen.⁸¹ The ordinary might then proceed to interview witnesses regarding the fame. Once the fame was either proven or considered sufficient by the judge,⁸² because of the public trust reposed in him he was required to proceed by special enquiry *ex officio* to prosecute the suit, since no wickedness should go unpunished, and the province should be purged of evil men.⁸³ When the ordinary proceeded in this fashion, if the party denied the crime alleged against

⁷⁸ Morice commented that the words *adjuro te* could not necessarily be intended as the imposition of an oath anyway. The same words were used in the New Testament by the apostles when driving out demons as well as by Jesus in commanding the devil not to torment him. Morice, *Treatise*, 14.

⁷⁹ The full text of this memo appears in Appendix 2.

⁸⁰ LPL, MS 2004, fo. 65r; Morice, *Treatise*, 20.

⁸¹ Churchwardens and sidesmen were essentially public prosecutors employed by ecclesiastical courts; their role corresponded to that of the attorney general in Star Chamber. See John Guy, *The Court of Star Chamber and its records to the reign of Elizabeth I* (London, 1985), 37; Thomas G. Barnes, 'Due process and slow process in the late Elizabethan-Stuart Star Chamber' *American Journal of Legal History*, 6 (1962) 230; Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 134-7. Morice objected to *clamosa insinuatio* since, by Cosin's own admission, these reports of credible persons were given without depositions (Cosin, *Apologie*, II, 60). In practice, argued Morice, this amounted to bishops sharing rumours and gossip for the purpose of citing men *ex officio* who were otherwise incapable of being cited without due accusation or presentment. See discussion of Haselwood's case below, 173-4.

⁸² Cosin avouched that judges were not required judicially to prove that a fame existed in order to proceed to examine and judge a suspect. For the means of determining proof of fame and exceptions against the necessity of proof, see below, 118 footnote 46, 122.

⁸³ *Ne maleficia remaneant impunita, utque provincia purgetur malis hominibus*; LPL, MS 2004, fo. 65r.

him, he was by law enjoined to his purgation, at which point he was advised either to clear or convict himself of the charges. The witnesses were also to swear ('weighing his fear of God and conversation of former times') that his oath was true and honest. If they unanimously affirmed the defendant's oath to be good, he was considered cleared of the charges, but if not, he was presumed guilty and spiritually reformable. Finally, the commissioners noted that penances were not to be taken as *poenae* but *medicinae*, or 'tending to the reformation of the delinquent.'⁸⁴

In assessing the memo, Morice was perplexed by the exception to the rule that no man could be compelled to discover his own crime (*nemo tenetur seipsum prodere...*) unless discovered by fame (...*tamen proditus per famam*). This exception, said Morice, 'so weakened this maxime, that scarcely will it stande for a minome'.⁸⁵ He was equally perplexed that two different standards for interrogation existed depending on the nature of the suit. In private suits between two parties the maxim held without exception; in *ex officio* cases the maxim was overthrown by the exception. Thus in cases moved by an accuser or presenter, a defendant could not be questioned touching the crime itself, but when the suit was initiated and prosecuted solely by the judge, he was liable (if a fame concerning him existed) to answer to the crime itself even if it meant self-accusation. Why were there two different standards? Cosin, working from the premise of the judge's inherent sincerity, actually considered *ex officio* proceedings more favourable to the defendant than suits of accusation. The defendant had nothing to fear from the sincere judge enquiring of him touching the crime itself for the confession of truth and for his soul's health. Such sincerity could not be presumed in a private accuser, said Cosin, and at any rate the defendant was not bound simply to affirm his adversary's accusation. Morice and his puritan contemporaries, distrustful of ecclesiastical judges, saw the situation exactly in the reverse. They generally felt that they had nothing to fear (especially in their own dioceses) from accusation or presentment — it was the ordinaries, appointed by Whitgift, who were the threat, and their power to impose the oath to answer all interrogatories gave them an inquisitorial authority not reserved to the common accuser.

⁸⁴ LPL, MS 2004, fo. 65r-v; Morice, *Treatise*, 21.

⁸⁵ Morice, *Treatise*, 22.

While the memorandum claimed that penances enjoined by ordinaries ought to be taken as spiritual medicines rather than punishments, Morice observed little or no difference between the two.⁸⁶ He also took exception to the oath of purgation on the same ground that he opposed the *ex officio* oath requiring the defendant to answer any and all interrogatories. The oath of purgation, he contended, did nothing more than beg for perjury as the defendant, who had nearly been proved guilty, was essentially offered to deny the crime! Such a custom that imperilled men's souls, said Morice, should be dispensed with in favour of something more similar to the justice offered in temporal courts:

Why rather doe not these Ordinaries...free the people from these pernicious oathes and deadlie purgations, and proceede to their sentence of condemnation, not by feyned offices and fictions of lawe; but by good prooffe and lawfull witnesses? And againe, absolue the partie defamed, where such sufficient prooffe doeth faile them. Why should they thinke much to offer to the laitie in their Ecclesiasticall Courts, the like good measure, and vpriight & sincere justice, that they themselues finde & obtaine in the courts temporall of this Realme?⁸⁷

This advice was not heeded, he suggested, because of ecclesiastical courts' desire for monetary gain, a fee being required for the clearing of a defendant from his purgation.⁸⁸ In contrast to the 'unjust' oaths used in spiritual courts, oaths urged in common law courts did not cause the accused to discover his own crime. Morice noted that suits in temporal courts were enjoined between the prince and subject or between the subjects themselves, witnesses were called, the two parties were administered oaths, the parties and witnesses testified to the truth of circumstances surrounding the offence, and the truth was made known through the discourse. There were several different kinds of oaths imposed in suits at the common law, oaths concerning suits for goods, chattels, debts, personal duties, contracts, lands and inheritances, the voluntary 'wager of law' oath, actions of accounts, detinue, and others. But in none of

⁸⁶ Morice, *Treatise*, 23. Sir Robert Beale agreed with Morice's assessment, noting that the commissioners wanted to convince men that their proceeding was milder than accusation and was for the benefit of the offender. But he asked how this could be true if men were deprived of their living or imprisoned simply for refusing to take the oath or accept Whitgit's articles of subscription? BL, Lansdowne MS 73, doc. 2, fos. 9v-10r.

⁸⁷ Morice, *Treatise*, 24.

⁸⁸ Morice, *Treatise*, 25-6. Cosin claimed, though, that ecclesiastical commissioners 'haue no fees at all; no not so much as iiij. s. towards their charges, that Iustices of Peace be allowed by Statute' but served 'freely at their owne charges, with losse of time and intermitting their owne business, only of dutie and conscience to her Maiestie and to the Common weale.' Cosin, *Apologie*, II, 94.

these cases, noted Morice, were any perilous or unnecessary oaths imposed on witnesses or defendants like the general oaths administered in ecclesiastical courts.⁸⁹ Moreover, in criminal cases where loss of life, limb, good name, or liberty might ensue, no oath was imposed on the defendant touching the crime itself.⁹⁰ Therefore, in criminal and especially capital cases, the common law used neither oaths nor torture, the latter being ‘a thing most cruel and barbarous’, proscribed by the laws of the realm.⁹¹

While *ex officio* oaths, in Morice’s estimation, could not be justified by common law custom, neither could any acts of Parliament be cited which established them. He offered four particular statutes for scrutiny that concerned the taking and imposing of oaths: the medieval heresy act *de heretico comburendo* (2 Henry IV c. 15), the Henrician Heresy Reform Act which abolished it (25 Henry VIII c. 14), the Act of Six Articles (31 Henry VIII c. 14), and the Act for the Submission of the Clergy (25 Henry VIII c. 19). The first of those four, *de heretico comburendo*, gave authority to diocesans to arrest those suspected of Lollardy and place them in prison until they canonically purged themselves or else abjured their heresy according to the canon law. Notwithstanding this ‘bloodie and broyling lawe’ which enabled the clergy to punish heresy, it did not explicitly empower ordinaries to administer general oaths or to compel defendants to become their own accuser.⁹² If it were to be alleged that such privileges were implicit in the statute by the deference to ‘canonical decrees’, Morice held that any decree defending such general and indiscreet oaths would be repugnant to the word of God and thus of no force.⁹³

De heretico comburendo was repealed by the Heresy Reform Act of 1534 which accomplished several things at once. We are (accurately) informed by Morice that this came

⁸⁹ Oaths taken by jurors or oaths of homage and fealty could not rightly be accounted similar to *ex officio* oaths, argued Morice, since these were merely imposed and taken ‘for the better administration of lustice, and assuraunce of dueties’. Morice, *Treatise*, 32.

⁹⁰ For a discussion of oaths in Star Chamber and Chancery, see below, 66-7, 148-51, 172, 194.

⁹¹ Morice, *Treatise*, 31. Here Morice cited the famous judge Sir John Fortescue, who, in assessing French law, took the occasion vigorously to denounce the use of judicial torture (see Sir John Fortescue, *De laudibus legum Anglie*, ed. Chrimes, 47-53).

⁹² Morice, *Treatise*, 32.

⁹³ SR, II, 125-8. ‘Yet the same decree being against the laws and decrees of God, as before is proved, that statute was therein no binding law, neither gave sufficient warrant to put in execution any such corrupt course of proceeding, since all laws and ordinances of man whatsoever, being repugnant to the laws of God, are merely void and of none effect, as the learned Saint German in his book of *Doctor and Student* hath well observed...’. Morice, *Treatise*, 33. In other words, if Morice disliked a law, he would find a way to discredit it!

about as a result of the commons complaining to the king about the injustice of the medieval heresy law. In particular, the words ‘canonicall sanctions’ were found to be so vague that it was thought even righteous, obedient subjects could be caught within their grasp and tried for heresy. Thus *de heretico comburendo* was repealed, since ‘it standeth not with the right order of justice nor good equitie,’ that anyone, having been found guilty of a crime, should lose his life, good name, or goods and chattels, ‘vnlesse it were by due accusation and witnesse, or by presentment, verdict, confession, or processe of outlawrie.’⁹⁴ Since even cases of treason against the prince required accusation or presentment, verdict, or process of outlawry, it was not equitable that an ecclesiastical judge should be able to deprive a man of his life, good name, or goods unless one of the above-mentioned processes were used to open the case. Otherwise, the judge might proceed on ‘any suspition conceyued of his owne fantasie’.⁹⁵ This act went even further. The canons of the church were challenged as being merely human laws, assembled by popes and foreign authorities, some of them contrary to the royal prerogative. Thus, a citizen obeying the laws of the realm and upholding the royal supremacy (and, necessarily, denying the authority of the pope) might be in violation of the canonical decrees and hence liable to prosecution under *de heretico comburendo*. To rectify these miscarriages of justice, the Heresy Reform Act instituted a rule requiring due accusation or presentment by at least two lawful witnesses.⁹⁶

While the Act of Six Articles was eventually repealed because its practical effect was to encourage secret and malicious denunciations, Morice held that there was nothing in that act which established or allowed *ex officio* oaths. It merely provided for a commission, under the authority of the bishop of the diocese, to receive information or accusation regarding crimes punishable by ecclesiastical jurisdiction. These commissions were not to urge defendants to an oath, said Morice, but to require oaths only of witnesses and juries of twelve. The Act of Six Articles was amended by a later act, 35 Henry VIII c. 5, which provided for a jury of twelve to be appointed to try such cases which concerned offences mentioned in the Act of Six

⁹⁴ SR, III, 454.

⁹⁵ Morice, *Treatise*, 34.

⁹⁶ For a closer look at the reforms achieved by this statute, see More, *Works*, ed. Guy, Keen, Miller, McGugan, X, lxxv-lxxvii.

Articles.⁹⁷ Neither of these acts, contended Morice, instituted or even mentioned ecclesiastical oaths resembling the *ex officio* oath.⁹⁸ Missing entirely from Morice's examination of statutes was the most important statute in the controversy: the Elizabethan Act of Supremacy (1 Elizabeth c. 1). It is difficult to imagine why Morice chose not to discuss this act since it dealt directly with the establishment and practical authority of the high commission. In his 'Defence' four years later, however, Morice spent much ink interpreting this statute, confuting the broad conclusions drawn by Cosin.⁹⁹

A very brief sixth chapter was devoted to a comparison of the procedures of ecclesiastical courts with those of Star Chamber and Chancery. Morice anticipated that the defenders of *ex officio* procedure would attempt to liken the same to the oaths used in these two courts, but he strove to demonstrate that, in fact, a wide disparity existed. Star Chamber and Chancery proceeded to their verdicts not by jury (as did the courts of King's Bench and Common Pleas) but by the judge himself giving 'definitive sentence vpon the aunswere and examination of the defendent, affirmed by his corporall oathe, and vpon the depositions of witnesses.'¹⁰⁰ But what might appear to be an *ex officio*-like procedure was actually quite different. In these courts, Morice stated, defendants were first made aware both of their accuser's identity and the charge laid against them — and they were permitted to receive counsel in framing their answers to interrogatories to boot.

Who hath euer seene in these Courtes any subject of this lande, in a cause concerning him selfe, brought forth and compelled to depose or make aunswere vpon his oath, no bill of complainte or information formerlie exhibited against him? Nay on the contrarie, these Courtes obseruing the due forme of Iustice, enforce no man to answere, but where hee hath a knowne accuser, and perfect vnderstandinge of the cause or cryme objected, and therewithall is permitted to haue a coppie of the bill of complainte or information (beeing not *ore tenus*.) And allowed moreouer

⁹⁷ *SR*, vol. III, 961.

⁹⁸ Morice mused further that defenders of the oath might suggest that the king, by express words, gave to the commissions established by the Act of Six Articles power and authority to use the oath. It was doubtful, he asserted, that the king could thus empower a commission, since the oath was contrary to the laws of the realm as well as the laws of God. Morice, *Treatise*, 35-7. This question was the very heart of the controversy between Morice and Cosin.

⁹⁹ See below, 190-2, 197.

¹⁰⁰ Morice, *Treatise*, 38.

both tyme conuenient, and counsell learned well to consider and aduise of his oathe and aunswere.¹⁰¹

Morice claimed that Star Chamber and Chancery did not compel defendants to answer interrogatories that addressed matter not found in the bill of information¹⁰² and defendants might refuse to answer such questions without offence to the court. If the accuser's complaint was not provable or if the court dismissed the case on account of incompetence, the defendant was awarded costs.¹⁰³ Thus, oaths in Star Chamber and Chancery differed from oaths in ecclesiastical courts in four material ways: in ecclesiastical courts 1) the accuser and matter for prosecution were unknown, 2) the oath was general rather than specific, 3) the interrogatories to be answered on oath were not fixed or finite but wandered, apparently in search of matter upon which to ground some further inquisition, and 4) the defendant was often forced to condemn himself by revealing his (and other's) thoughts, words, and deeds.¹⁰⁴

Having completed his arguments against the oath on the basis of reason, scripture, common law, and statutes, Morice submitted that the oath was foreign and alien to the policy of the realm.¹⁰⁵ And because it was foreign, it impugned the royal supremacy and insulted the majesty of the prince. Once England had been poisoned by *ex officio* procedure, he suggested, other related abuses surfaced such as the bishops' habit of citing men *pro salute anime* to appear in their consistories without expressing any special cause or charge against

¹⁰¹ Morice, *Treatise*, 38-9. Cosin later seized on Morice's exception of informations submitted *ore tenus*, that is, orally, arguing that the exception proved that it was not simply unjust to deny the defendant a copy of the articles laid against him. The Jacobean Star Chamber judge William Hudson described *ore tenus* as a 'more short and more expeditious' way of proceeding than the normal way of putting in a written bill of complaint and that *ore tenus* was often used in a case 'which is like to prove dangerous if it be not nipped in the bud'. But the court could only proceed *ore tenus* if the defendant gave his consent or if he freely acknowledged having committed the offence. It appears that in *ore tenus* cases the defendant was denied counsel. Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 126-7. A manuscript copy of Hudson's treatise may be found in BL, Harley MS 1226. Professor Baker notes that Star Chamber public prosecutions were often conducted *ore tenus* with absolutely nothing written down. Even important cases might be brought to the court orally. Dyer, *Reports*, ed. Baker, lxxxvii-lxxxix. See also below, 148-51, 172, 194.

¹⁰² The bill of information was the formal charge presented to the court by the plaintiff in writing. See also Guy, *Star Chamber*, 37-9; BL, Lansdowne MS 639, fos. 1v-2r; Henry Hudson, 'Star Chamber', *Collectanea juridica*, ed. Francis Hargrave (London, 1980), II, 150-7.

¹⁰³ For awarding of costs in Star Chamber, see Isaac Cotton's treatise in BL, Lansdowne MS 639, fos. 10r-v, 14r. For awarding of costs in Chancery, see W.J. Jones, *The Elizabethan court of Chancery* (Oxford, 1967) 212-4, 215 footnote 3, 217-8.

¹⁰⁴ Morice, *Treatise*, 39.

¹⁰⁵ Drawing heavily from John Foxe's *Acts and monuments*, Morice hastily summarised the history of abuse perpetrated by the English clergy, marking Anselm, Becket, Langton, Arundel, and Wolsey for special condemnation and suggesting that their aim was to 'maintaine the Romishe hierarchie'. Morice, *Treatise*, 40-4.

them,¹⁰⁶ as well as the practice of imprisoning those who refused to take the oath.¹⁰⁷ According to Morice, these abuses frequently violated the principles of Magna Carta and its consequent statutes.¹⁰⁸ Chapter 39 of Magna Carta affirmed that no freeman was to be imprisoned or deprived of his freehold without due process of law. One of the questions which came to dominate the controversy between Morice and Cosin was, did *ex officio* procedure impugn the law of the land, or was it part of it? Was the evolution of the oath ancillary to the queen's prerogative to appoint commissions for the governance of the church, or was it a clear violation of one of the most basic rights granted to all Englishmen by Magna Carta? Morice believed it to be the latter. He saw Magna Carta as the guarantor of the rights and liberties of each subject and the Submission of the Clergy as a reaffirmation of the church's subordination to parliamentary statute, common law, and the royal prerogative.¹⁰⁹

If *ex officio* procedure was foreign and contrary to the justice of the realm, continued Morice, then its promulgation by ecclesiastical judges was nothing short of *praemunire*.¹¹⁰ The main statute establishing the definition of *praemunire* was 16 Richard II c. 5 (1392-3) which declared that if anyone pursued legal suits or processes in the court of Rome or elsewhere that violated the king's prerogative, they 'shalbe put out of the Kings protection, and their landes and tenementes, goods and chatelles forfait to the King...'¹¹¹ The key phrase in this statute which came to be in controversy between Morice and Cosin was *in curia romana vel alibi* (in

¹⁰⁶ Morice stated that the statute of Marlborough (52 Henry III c. 23) declared that the king's permission was required to compel any freeholder to take an oath against his will. Morice, *Treatise*, 45.

¹⁰⁷ Morice described the high commission's practice of imprisoning for refusal to swear as *peine forte et dure*. This law French term (meaning 'pain strong and hard') described a procedure which came into practice in England in the thirteenth century. Defendants who refused to plead either guilty or not guilty were chained spread-eagle on the prison floor, fed stale bread the first day, only water the second day, and then they laid weights on them, one at a time until they either died or entered a plea. The legal system believed that the defendant's plea one way or the other was necessary for a trial to continue. But, technically speaking, prisoners of the high commission could not be subjected to *peine forte et dure*, but they could be fined and imprisoned. Furthermore, even if prisoners of ecclesiastical courts were subjected to *peine forte et dure*, that was not quite the same thing as judicial torture as it was used on the continent. The difference was that *peine forte et dure* was not an aid to fact-finding or a device to extract evidence against the suspect to convict him. A fine line by modern standards, but the legal distinction is significant. Thus, Morice's claim was merely emotional hyperbole. Morice, *Treatise*, 55; Langbein, *Torture*, 74-7; Levy, *Fifth Amendment*, 17-8; Usher, *Rise and fall*, ed. Tyler, 112.

¹⁰⁸ A statute of 1329 (5 Edward III c. 9) stated that no man should be arrested contrary to the provisions of Magna Carta. Another law of 1368 (42 Edward III c. 3) similarly declared 'that no man be put to aunswere, without presentment before iustices, or matter of recorde, or by due processe, or by writt originall, after the auncient lawe of this Lande.' *SR*, I, 388. Morice added that Fitzherbert had deemed general citations *pro salute anime* contrary to law. (Fitzherbert further declared that if a man was cited by a bishop to appear, the cause must be stated in the citation.) Morice, *Treatise*, 47; Sir Anthony Fitzherbert, *De natura brevium* (London, 1677) 91.

¹⁰⁹ This view of English history was technically inaccurate, particularly Morice's interpretation of the Submission of the Clergy. See below, 92-3, 100, and 145 for Cosin's rebuttal.

¹¹⁰ Although it is not clear from the text, Morice later remarked that this assertion was in fact the central premise of the *Treatise*. LPL, MS 234, fo. 315r.

¹¹¹ *SR*, II, 85-6; Morice, *Treatise*, 48.

the court of Rome or elsewhere), specifically the signification of the word *alibi*. Though Cosin maintained that it referred to any foreign place (such as Avignon) where the pope's residence might be taken up, Morice believed the word could be used to describe bishops' courts in England.¹¹² Morice's position on *praemunire* had hardened since his Middle Temple lecture in the late 1570s,¹¹³ and by the time he wrote the *Treatise* his opinion regarding *praemunire* was more in line with that of St. German.¹¹⁴ By the 1590s other puritans, notably Thomas Cartwright and Nicholas Fuller, were advancing identical arguments.¹¹⁵

Morice envisioned the public reaction that would ensue if temporal courts began to impose the *ex officio* oath. He asked what would be thought of a justice of the peace who summoned a man to appear before him for no reason in particular, requiring the man to take an oath to answer any questions he might be asked, the justice framing questions as both judge and accuser, and imprisoning the party without bail or mainprise should he refuse to answer or refuse to swear.¹¹⁶ The injustice was plain and apparent, said Morice, and *praemunire* was the lawful and appropriate punishment for such an affront to the king's laws.

The example of Wolsey also served well for Morice's purposes. He viewed the fall of Wolsey and his legatine court in 1529, and the Submission of the Clergy three years later, as part and parcel of each other, two events with one cause. For their flouting of the royal prerogative through *praemunire*, the English clergy were forced to mollify the king in 1531, paying him £118,840 and renouncing all authority repugnant to the king's majesty.¹¹⁷ Morice naturally discovered similarities between the clergy of Henry VIII's day and those of his own: the Elizabethan clergy incurred the risk of *praemunire* in a different way — by means of *ex*

¹¹² The word *alibi* did extend to bishops' courts — or it had at one time. Most Elizabethan civil lawyers argued that *praemunire* was no longer possible in the way that it had been before 1534. Smith, *De republica anglorum*, ed. Dewar, 133-4; Cowell, *The interpreter*, sig. Ddd2r-v; Spelman, *Reports*, ed. Baker, 66-70. See also below, 102, 103 footnote 132.

¹¹³ 'If any Judge hold plee of any cause or matter belonging to the courtes of the common lawe, the king by his writt of prohibicion may commaund him to surcease, which commaundement if he continue to disobey he shalbe attached to answere this contempt vnto the king.' BL, Egerton MS 3376, fo. 59r.

¹¹⁴ 'If any suche sute be taken in the spirytuall courte for any temporall thyng that as well the iuge as the partie rène [sic] therby into the premunire.' St. German, *Constitutions*, chapter six.

¹¹⁵ LPL, MS 2004, fos. 49-59. Morice's fullest exposition on *praemunire* occurred in the 'Defence'. See below, 196-8.

¹¹⁶ Morice, *Treatise*, 55.

¹¹⁷ J.J. Scarisbrick, *Henry VIII* (London, 1968) 274-5; Guy, *Tudor England*, 127-9.

officio procedure with its forced general oaths which compelled defendants to accuse themselves.¹¹⁸

Even if the oath had been used in the realm for a long time, contended Morice, there was still authority to expel it. The words of the Act of Dispensations (25 Henry VIII c. 21) enumerated three conditions which must be met for foreign laws to become legitimate in England: toleration by the king, voluntary acceptance of the people (through Parliament), and a long custom of usage. None of these, he claimed, legitimised *ex officio* oaths.¹¹⁹ Moreover, the Act for the Submission of the Clergy of 1534 asserted that no canons, constitutions, or ordinances could be made by Convocation which were repugnant to the crown or to the laws of the realm. Any jurisdiction, therefore, which affronted the royal prerogative and the laws of the realm was a violation of the oath of supremacy.¹²⁰ It can be readily seen by these arguments that Morice rolled the royal supremacy and common and statute law into one unit. Ecclesiastical prerogative was a non-entity — or else it was only legitimate as long as it operated according to common law procedures.

Using the Submission of the Clergy as a keystone, Morice's attack was complete. If the oath could not be proven to be just or legal by reason, scripture, or common law, then any attempt by the clergy to put it into practice would violate the prince's prerogative and incur the penalties of *praemunire*. Morice doubted that the Act of Six Articles could be construed to have empowered commissions appointed by the king to examine offenders using the *ex officio* oath, and in any case he supposed it unlikely such an interpretation could be proved. Even if it were asserted that the oath were established by the king's special grant, it would still be void and illegal if there was no common law precedent in its favour, since the king could not alter common or statute law via grants or commissions without the consent of Parliament.¹²¹

¹¹⁸ Morice, *Treatise*, 51.

¹¹⁹ Morice, *Treatise*, 53. Cosin dismissed Morice's interpretation of the Act of Dispensations, arguing that under Morice's conditions the court of Chancery was not legitimate: its origin was in the civil (a foreign) law and yet no parliament had ever voluntarily accepted its jurisdiction, neither had any king. See below, 93, 149.

¹²⁰ Morice, *Treatise*, 54.

¹²¹ Morice, *Treatise*, 37. That the king was not above the law was a widely shared opinion amongst Tudor humanists and lawyers and was essentially the view expressed in St. German's *Treatise concerning the power of the clergy and the laws of the realm* (London, 1535?) (STC² 21588). While Morice believed that the king could not abrogate or alter the authority of common law without Parliament, he seems to have accepted the political ramifications of the Henrician reformation as legal and consistent with English history. What Henry VIII did in affirming himself supreme head of the English church was nothing other than to state the way things had always been, or ought to have been. Yet even as supreme head, Henry could not give to the church authority that was not warranted by the common law.

In conclusion, Morice listed five general grievances against *ex officio* procedure: 1) that both the imposing and the taking of general oaths to answer any and all questions propounded by a judge was an abuse offered to God; 2) that the oath was an indignity to the crown and the liberty of all subjects; 3) that the oath was neither necessary nor profitable to the church and commonwealth but hurtful to both; 4) that pre-Henrician, popish clergy had instituted the oath; and 5) that the oath was never affirmed by the laws or customs of the realm but rather ‘crept in among manie other abuses’ over time and had been impugned by lawful and just authority on many occasions.¹²²

Periodically in the *Treatise* Morice descended into anti-clerical diatribes.¹²³ He saw greed for power and money as the controlling impulse of the English clergy, manifested in his own day by the many ecclesiastical courts which seemed always to be in session yet lacked sufficient matter for the prosecution of suits. But despite his often disparaging tone throughout the *Treatise*, Morice did propose seven specific reforms which would restore justice to *ex officio* procedure. They were: 1) that proceedings be orderly, with witnesses; 2) that judges be grave, honest, not malevolent or partial; 3) that cases be tried in the area the suspect resided to ensure that the ordinary would be acquainted with the person’s life and manner; 4) that witnesses ought to be received judicially (as opposed to secretly); 5) that all witnesses be deposed, that is, examined on oath;¹²⁴ 6) that witnesses were to ‘render a wise and sufficient cause of their knowledge of the infamy’; and 7) that the grounds of the inquisition should not be wrested or extorted from the party but established by sufficient witnesses.¹²⁵

Once Morice had finished the *Treatise*, he determined that he would fashion out of its arguments a bill to present to Parliament which would validate his claims by outlawing the

¹²² Morice, *Treatise*, 57-8.

¹²³ The tirade on 54-6 is a good example. Cosin took offence at Morice’s ‘reproching and wounding of all Ecclesiasticall Iudges through the sides of Papists’. Morice meant to make his readers believe ‘the same to be now in all bishops present, which was blame woorthie in any of their predecessours.’ (Cosin, *Apologie*, ‘Epistle to the Reader’, sig. B4r-B4v, C1v-C2v.)

¹²⁴ This would have ended the practice of secret denunciations and *clamosa insinuatio* in which ‘credible’ persons were allowed to inform the ordinary of a fame without having to depose. See below, 123-4, for a discussion of *clamosa insinuatio*.

¹²⁵ Morice, *Treatise*, 19-20. Although Morice denied it, Cosin accused him of wanting to subject ecclesiastical law to common law by forcing spiritual courts to follow the practices of temporal courts. Indeed, the seven principles laid out by Morice showed where his sympathies lay.

oath and punishing judges who attempted to impose it thereafter with the penalties of *praemunire*.¹²⁶ Ironically, by presenting the bill for consideration, Morice was in effect admitting that his argument did not yet have the force of law. This contradicted the entire premise of the *Treatise*, which asserted over and over that the oath was not legal and never had been. But if that was true, why was there any need to introduce a bill confirming what was already law?

¹²⁶ The bill was presented on the first day of the 1593 session. See below, 246-8.

Chapter 3

Richard Cosin's

Apologie for sundrie proceedings ecclesiasticall

Part I: Matters belonging to ecclesiastical jurisdiction

Sometime in 1590 or '91 Archbishop Whitgift commissioned Cosin to draft an exposition defending the authority of ecclesiastical courts against the detractions of the puritans.¹ Since Cosin was Whitgift's foremost canon and civil law expert, he hoped Cosin's defence would restore respect for ecclesiastical jurisdiction among the laity and a renewed sense of confidence among the clergy. The first edition of the *Apologie* was not published for general sale — only about forty copies were printed.² Whitgift would have intended these copies for the other high commissioners, privy councillors, and possibly the universities. The rift between the archbishop and puritans had been widening ever since 1585, and recently there had been a spate of harsh attacks on Whitgift's conformity campaign which had only been refuted haphazardly.³ Thomas Cooper and other anonymous writers responded to Martin Marprelate and the puritans piecemeal, but Whitgift wanted a full, systematic justification of his governance of the English church, and Cosin's *Apologie* was the result.

The first edition of the *Apologie* consisted of two parts, the first setting out which matters belonged to ecclesiastical jurisdiction, the second addressing criminal procedure in ecclesiastical courts, whether by accusation or *ex officio*. But the release of Cosin's *Apologie* was ill-timed. Morice's *Treatise* began to circulate in manuscript in the summer of 1591 as did a tract by Sir Robert Beale called 'Notes to prooue the proceeding ex Officio, and the oath and subscription which are now required, to be against the word of God, the ancient Fathers, and Canons of the Church, and the lawes, liberties, and customes of the realme of England'.⁴

¹ Cosin's *Apologie* was not originally directed against Morice's *Treatise* since the *Treatise* did not appear in manuscript until the middle of 1591, about the same time as the *Apologie* appeared in print.

² '...it was then (in priuate sort) committed to the presse, and fourtie copies, or thereabouts were printed, without any purpose of further publishing.' Cosin, *Apologie*, I, sig. B1r-v. The book was published anonymously in London by the deputies of Christopher Barker. There is no entry for Cosin's book in the stationer's register and therefore it is not possible to give the exact date of publication. From external and internal references, however, we may justifiably presume that it was near the middle of 1591, probably in summer. *A transcript of registers of the Company of Stationers of London*, ed. Edward Arber, (London, 1875).

³ *Oh read ouer D. John Bridges* (1588) (STC² 17453) and *Hay any worke for Cooper* (1589) by the anonymous Martin Marprelate (STC² 17456) were two such works, the latter of which attacked Whitgift as well as Cosin; Marprelate, *Hay any worke*, 13. Sir Robert Beale also wrote at least three or four tracts during the 1580s impugning the high commission, the articles of subscription, liturgy, and virtually everything else about the church. Levy, *Fifth Amendment*, 140-72.

⁴ According to Beale, he wrote the 'Notes' around 1588 or 1589. He sent them to Lord Burghley and (like Morice) did not undertand how they fell into the hands of Cosin: 'About the same time I also sent vnto your Lordship a summarie Colleeccion of certeine notes, against the maner of proceedinge *ex officio* by oathe: which by a booke verie latelie published in printe against a treatise of Mr. Morris, I perceauie is also come to their handes, without my priuitie or consent ffor then I would haue digested it otherwyse.' This letter also proves that the second edition of the *Apologie* was in print by the date of the letter, 17 March, 1593. BL, Lansdowne MS 73, doc. 2, fo. 7v. Beale's 'Notes' are unfortunately not extant, although there are snippets of printed books on ecclesiastical oaths in LPL, MS 2004, fos. 77r-78v which may or may not be taken from them (there is no evidence that the 'Notes' were ever printed). John Strype claimed that the essay written against ecclesiastical jurisdiction that appears in BL, Cotton MS, Cleopatra F.I, fos. 1-49 was Beale's 'Notes', but this cannot be right for two reasons: first, the essay is not divided into the sections that Cosin describes as comprising the

It was apparent that the *Apologie* would need to be revised to incorporate a reply to these treatises and then printed again — this time with many more copies than before. The issue of the *ex officio* oath was so crucial that Cosin added a voluminous new section to the second edition of the *Apologie* to address the question of the oath's legitimacy. Most of his effort here was focused against Morice's pithy, intelligently written *Treatise* though he also answered the criticisms of Beale, Cartwright, and other puritans at various points. The title of the second edition of the *Apologie* declared the work to be 'much enlarged above the first priuate project'.⁵ In the 'Epistle to the Reader' which appeared at the beginning of the second edition, Cosin stated that he had been directed to publish the 'rawe discourse' of the original edition and to adjoin to it his own answer to the *Treatise* (Beale's 'Notes', it seems, he was intended to answer only by the way). He chose to do this by revising his first edition, 'not omitting withall to answere the whole matter of the aforesaid *Treatise*' which seemed pertinent, yet not in the same order as it appeared, but working it into the text 'after the method, into which I had first plotted it.'⁶ Despite Cosin's patchwork additions to parts I and II for the March 1593 reprint, they remain well-ordered and systematic, in stark contrast to the sprawling, diffuse part III, discussed below in chapter five. The second edition of the *Apologie* appeared in 1593 but without part III, which was not finished until after Parliament had ended (thus after 10 April).⁷

The earliest copies of the second edition contained the original two parts from the first edition with answers to certain points from the *Treatise* and 'Notes' interspersed with the original material, plus a short section called 'An Epistle to the Reader', which was essentially a brief criticism of the whole of the *Treatise* and 'Notes' in lieu of the fuller, more comprehensive effort which would be forthcoming. How many copies of this edition were

'Notes' (see below, note ⑥); and second, the essay does not venture into canon law, the church fathers, or scripture, though the 'Notes' did. Strype, *Whitgift*, II, 30-1.

⁵ Cosin, *Apologie*, cover page.

⁶ Cosin, *Apologie*, I, 'An Epistle to the Reader', sig. B2r.

⁷ Parts I and II, to which was attached 'An Epistle to the Reader' that summarised the contents of the forthcoming part III, appeared in print some time between 1 March and 17 March, 1593. Part III 'came not to publick viewe, tyll the Parliament was ended, & the Clergye men dispersed.' Morice noted that many copies of this first instalment of the second edition were carried around by clergymen attending Convocation. BL, Lansdowne MS 73, doc. 2, fo. 7v; Cambridge, Baker MS 40, 132-3; Neale, *Parliaments, 1584-1601*, 319.

printed is not known, but it seems that it was intended for a wide, scholarly audience.⁸ This chapter will consider part I of the *Apologie*, in particular the fuller, 1593 edition, which contains the original 1591 material plus answers to various arguments drawn from Morice's *Treatise* and Beale's 'Notes'.⁹ Cosin's explanation for revising the *Apologie* was that the publication of Morice's *Treatise* moved 'those who may commaunde me, to take some time to answere it.'¹⁰ On three different occasions in the *Apologie*, Cosin addressed a superior or patron, each time using the second person. These references, plus everything that is known about Cosin's life and career, would seem to place no one except Archbishop Whitgift in such a role.¹¹

The *Apologie* was not a defence of episcopal government. It was a defence of the jurisdiction and procedure of ecclesiastical courts. Many of the puritan derogators of ecclesiastical proceedings, however, were presbyterians who routinely filled out their arguments against ecclesiastical jurisdiction with calls for the new discipline. For this reason Cosin opened the preface to his *Apologie* by reproving those who impugned the present ecclesiastical government. He resisted classifying Morice, one of the 'queen's counsellors' in the court of Wards, and Beale, clerk of the privy council, as presbyterian extremists, yet he believed the extremists had led honest men astray. The enemies of the present ecclesiastical government,

By whose frequent clamours, some very graue, wise and learned (no way affected to their other fansies) either not being well informed of proceedings Ecclesiasticall, or not weying (for want of leisure) certain points seeming to bee doubtfully reported in the bookes of Common lawe, so thoroughly as their great learning therein doeth afford: in a kind of commiseration (for so I interpret it) towards some of those who seeme distressed, and to be otherwise well meaning men; haue lately called into question diuers proceedings Ecclesiasticall, both for *matter*, and for circumstance or *maner*; that they are contrary to the lawes of this Realme.¹²

⁸ The cover page states: 'Respectiulie submitted to the graue iudgements of the reuerend Iudges and other Sages of the Common lawe: of Iudicious Professors of the Ciuill lawe: and of the right reuerend Prelates and other grounded Diuines in this Realme.' Cosin, *Apologie*, cover page.

⁹ For a comparison of the texts of the two editions of the *Apologie*, see Appendix 4.

¹⁰ Cosin, *Apologie*, I, sig. A4r-v.

¹¹ Cosin, *Apologie*, I, sig. A4r-v; II, 124; III, 241.

¹² Cosin, *Apologie*, I, sig. A2v. This charitable tone was the zenith of Cosin's courtesy towards Morice and Beale, and he did not return to it.

Cosin categorised his adversaries' objections into two main groups: they challenged either the *matter* of jurisdiction or the *manner* of proceeding. The puritans' objections to *matter* were: 1) 'no Ordinarie may cite any whomesoeuer, but in causes Testamentarie and Matrimoniall'; 2) 'no Layman ought to be cited or summoned to appeare before any Iudge Ecclesiasticall to take an oath in any other cause then Testamentarie or Matrimoniall'; 3) 'the iudgement of heresie now lieth rather in the Common law, then in the law Ecclesiasticall'; 4) 'nothing now can be adiudged heresie, but according to the statute, 1. Eliz. cap. 1'.¹³

Their objections concerning *manner* were as follows: 1) 'The Queene's Maiestie cannot giue, nor any man receiue authoritie, to vse any other processe in matters Ecclesiasticall, then by citation'; 2) 'an Ecclesiasticall Court may not proceed without accusation or presentment'; 3) 'Lay men may not be cited ex officio in any cause but Testamentarie or Matrimoniall'; 4) (Regarding the handling of the suit itself) 'if a matter be duely presented against a man, he may not be examined vpon his oath' (meaning he cannot be made to answer directly whether he committed the crime); 5) 'no man is bound to declare any matter against another, except some be an accuser'; 6) (Regarding verdicts of the court) 'by none Ecclesiasticall authoritie, a man may be depriued of his benefice being his freeholde, being not endited, and no suite of partie offered against him'; 7) and the 'Q. Maiestie cannot giue, nor any man may take authority of her, to vse any coercion for any matter Ecclesiasticall but excommunications & such like: and that therefore a man may not be punished by imprisonment or fine, for or in any matter Ecclesiasticall'; 8) 'that a man that standeth aboue fortie dayes excommunicate, may no way be punished, but vpon the writ de excommunicato capiendo: and that the said writ may not be awarded, but vpon originall cause arising vpon some of the ten crimes touched in the stat. 5. El. c. 23'.¹⁴

Cosin often referred to his opponents as the 'innovators', or, on occasion, 'innovating Disciplinarians' when addressing a particularly presbyterian argument. The number or identity of these puritans is not fully ascertainable, although there are some clues given by Cosin. It is

¹³ Cosin, *Apologie*, I, sig. A3r.

¹⁴ The sources for these opinions were varied, and Cosin never identified the authors of them unless they were the 'Treatisor' (Morice) or the 'Note-gatherer' (Beale). Cosin, *Apologie*, I, sig. A3v.

certain that some of them were the nine ministers who stood trial with Cartwright in a Star Chamber case of 1591.¹⁵ The other figures to whom Cosin addressed his arguments may have been the anonymous puritans whose tracts are collected at Lambeth Palace Library.¹⁶ Clearly, though, Cosin showed more respect for the framer of the *Treatise*, offering that he was ‘holden wise, & not vnlearned’.¹⁷ It is suspected that Cosin was aware of Morice’s identity, although, speaking of the *Treatise*, he protested, ‘Truely I neither doe knowe, nor haue heard, who were any of the Authors, or who was the Enditer of it.’ It would be remarkable if Cosin were genuinely ignorant of Morice’s authorship. Although their paths are only known to have crossed once — in the Parliament of 1586-7 where they sat on the same committee for the consideration of a bill for a learned ministry — there were other means by which Morice would have been known to Whitgift by 1591, if not to Cosin as well. Morice had been a justice of the peace for nearly twenty years and had become acquainted with Lord Burghley. Burghley interceded on Morice’s behalf after Robert Cawdrey’s Queen’s Bench appeal in 1591, for which Morice had acted as counsel — Cosin, in the capacity of ecclesiastical commissioner, had been involved in the original proceedings which led to Cawdrey’s deprivation in 1587. Furthermore, Morice delivered a copy of the *Treatise* to Burghley around 1591, and some time later Cosin obtained a copy of the *Treatise* from ‘a right noble Counsellour, who had also much adoe, to procure a copie thereof for himselfe’. Finally, Archbishop Whitgift’s letter to the queen protesting against Morice’s bill in the 1593 Parliament gives the clear impression that Whitgift had long been aware of Morice’s views, and thus it was likely that Cosin would have known as well.¹⁸

In ‘An Epistle to the Reader’, Cosin declared that he had been eager to read the *Treatise*, hoping either to be corrected of his opinions or to be confirmed in them. Upon reading it he was disappointed to discover that the *Treatise* left him unpersuaded in the least, remaining confident in his former opinions. He was also unmoved by the arguments of the ‘Note-

¹⁵ This is evident from Cosin’s description of the case at III, 212.

¹⁶ LPL, MS 2004.

¹⁷ Cosin, *Apologie*, I, sig. B1v. Throughout the whole of the *Apologie* and especially in part III, Cosin spent more time confuting Morice’s assertions than he spent on his other adversaries’ arguments combined.

¹⁸ Hasler, *Commons*, I, 661; and III, 98; BL, Lansdowne MS 53, 55, 57, 58, 61, 64, 68; BL, Additional MS 28571, fo. 172; Cosin, *Apologie*, sig. B1v; BL, Lansdowne MS 82, doc. 69.

gatherer', whose quotations from the church fathers Cosin discovered to be erroneous.¹⁹ The declared intention of part I of the *Apologie*²⁰ was to establish the extent of ecclesiastical jurisdiction, specifically what misdemeanours were determinable in ecclesiastical courts and which were not. In this part Cosin set out to answer his opponent's claims and objections concerning *matter*. He began by defining different types of ecclesiastical jurisdiction. Bishops, who 'onely be immediate Ordinaries vnder her Maiestie' were authorised to carry out the queen's decrees. Their jurisdiction was of two types: *voluntary*, when they dealt in a matter at the request of a party or in the absence of objection from the party, and *contentious*, when the bishop dealt with a party against his will.²¹ Contentious jurisdiction itself was of two sorts, dealing either with *rights demandable* or *crimes punishable*. The first of these (also called litigious jurisdiction demandable and determinable) comprised matters related to testaments and matrimony.²² Matters that concerned rights demandable might arise by contentious jurisdiction from the start or else 'vpon exercise of voluntarie Iurisdiction, and yet by deniall made litigious.'²³ The second type of contentious or litigious jurisdiction, crimes punishable, might be divided into three classes: crimes against piety toward God (*impietas*), crimes against justice towards one's neighbours (*facinus*), and crimes against sobriety towards one's self (*flagellitum*), 'albeit the two last be often confounded'.²⁴

¹⁹ Cosin, *Apologie*, D2v-D3r. For some reason Cosin listed here the eleven sections into which the 'Notes' were divided: 1) testimonies from the ancient fathers against *ex officio* procedure, 2) similar testimonies from the English martyrs, 3) the proceeding against English heretics without using the oath, 4) the canon law teaching on inquisition and proceeding *ex officio* by oath, 5) 'another order of proceeding, but yet in *causa fidei*, and not otherwise', 6) 'the bishops proceedings contrarie', 7) the laws of England, 8) the revocation of *ex officio* procedure during Henry VIII, 9) the way this issue was debated in those days, 10) Sir Thomas More's defence of the *ex officio* proceeding, 11) ways in which *ex officio* procedure violates the common law. Cosin, *Apologie*, I, sig. D2r. This is the best guide we have to the structure of the 'Notes'.

²⁰ Part I is 130 pages in length, preceded by a preface, 'An Epistle to the Reader', and a table of contents listing the titles of eighteen chapters.

²¹ As examples of voluntary jurisdiction Cosin listed institutions, probate of wills, committing of administrations, visitations, certificates of bishops into the queen's courts, and ordaining of real compositions in ecclesiastical matters. Cosin, *Apologie*, I, 6, 17.

²² Cosin added last wills, which, although not technically testamentary, were closely related, as well as codicils, legacies, administrations, and sequestrations of the dead's goods (commonly called letters *ad colligendum*). To matrimonial matters he joined divorces, jactitation of matrimony, questions of legitimation and bastardy, restitution of a man's wife, and suits for goods or chattels made part of a marriage contract. All of these things came under the general name of *reliqua jura ecclesiastica*. Cosin, *Apologie*, I, 18.

²³ As examples of originally litigious cases Cosin listed 1) actions initiated by the judge himself, as in fees of citations or fees of sentences; 2) actions initiated by other attendants in a court, such as fees of advocates, proctors, registers, apparitors, etc.; or 3) actions initiated on behalf of a minister's rights, such as wages for a curate or clerk, or in helping him attain or defend a title and interest in a benefice. Examples of such cases becoming litigious after refusal of voluntary jurisdiction were listed by Cosin as real compositions 'sought by some partie to be disannulled', procurations, pensions, synodals, pentecostals, indemnities, fees for probates, etc. Cosin, *Apologie*, I, 18-9.

²⁴ Lengthy examples of these types of sins are supplied by Cosin at I, 19-20.

Regarding matters commonly thought to be related to testaments and matrimony, Cosin believed some clarification was necessary. Last wills were not to be classified under testaments because there was no executor who handled the legacy. Administrations and letters *ad colligendum* should not be counted as testamentary matters, 'because they are committed when a man dieth intestate'. Divorce, while often classified with matrimony because it dissolves marriage, was not really a matrimonial matter.²⁵ Likewise, goods and chattels promised to a woman as part of a marriage contract were not related to matrimony itself. Despite these exceptions, Cosin doubted anyone would deny that all of these matters properly belonged to ecclesiastical jurisdiction.²⁶

As for matters that were truly testamentary and matrimonial, Cosin asserted that these too were under ecclesiastical jurisdiction, although the jurisdiction of some these matters was mitigated by the temporal law. For example, canon law forbade ecclesiastical persons from willing away property they had secured through church promotions. Such property was required to remain with the church when they died. The temporal law, however, professed that clerks 'may make their willes as liberally and freely as any Lay man may'. In the face of this contradiction, 'such canons are here of no force, nor in practice.'²⁷ In some cases common law defined what came under ecclesiastical jurisdiction, such as cases of legacies and devices which might only be brought in a spiritual court. Likewise, many common law books affirmed divorce to be of spiritual jurisdiction. The second statute of Westminster (13 Edward I c. 34) declared that if a man was living apart from his wife, he might be compelled by ecclesiastical jurisdiction to receive her again and cohabit with her.²⁸ If wardships or chattels real (such as a lease, but not 'lands deuised') were bequeathed by a will, these could also be recovered in a spiritual court. Should a man die intestate, the ordinary would determine who, being nearest

²⁵ Cosin noted that the Act of Appeals (24 Henry VIII c. 12) considered divorce a separate type of suit. Cosin, *Apologie*, I, 21.

²⁶ Cosin, *Apologie*, I, 22. Christopher St. German, who addressed the issue of ecclesiastical jurisdiction in *Doctor and student* and the *New additions*, believed that the church should only have jurisdiction over matters which were demonstrably related to matters of faith or the sacraments. See below, 84.

²⁷ In support of this Cosin cited St. German's *Constitutions*, chapter 13. Similar exceptions where the common law mitigated ecclesiastical cognisance existed in cases of women assigning their husbands to be executors of their wills, executors suing for the goods of their testators, or trespasses on property sequestered by an ordinary from an intestate with the intention to give the property to another man. Cosin, *Apologie*, I, 22-4.

²⁸ Cosin, *Apologie*, I, 25-6.

of kin, should administer the goods of the deceased man.²⁹ And if a man instructed the executor of his last will that a grammar school be built and the executor did not perform this, the suit would be actionable in a spiritual court.³⁰ Concerning money promised in marriage: if in return for marrying a man's daughter, the man agreed to pay the husband ten pounds (an informal agreement without a deed), that money would be recoverable in the king's court, but if the money was promised along with the daughter in marriage (with deed), it would be demandable in an ecclesiastical court.³¹ If the father- or mother-in-law who promised the money to the husband as part of the marriage contract died, the husband could sue the executors for the money in an ecclesiastical court.³²

Cosin's rehearsal of proofs that testamentary and matrimonial matters belonged to ecclesiastical cognisance were unnecessary as no one denied the fact,³³ yet it was symptomatic of his methodical, orderly approach to ecclesiastical jurisdiction. What was in debate, on the other hand, was the rightful jurisdiction of certain matters not related to testaments or matrimony. In chapters four through ten Cosin attempted to prove, by the laws and statutes of the realm, 'that sundrie other causes besides Testamentarie or Matrimonial are of Ecclesiastical conusance.'³⁴

Reviewing a statute from the time of Edward I (24 Edward I c. 1, *De consultatione*) Cosin noted that in cases when an ecclesiastical court's jurisdiction was erroneously challenged by a temporal judge, the lord chancellor or chief justice to the king was to instruct the ecclesiastical judge under whom the case was originated to proceed, notwithstanding any prohibition,³⁵ unless the case could be redressed by a writ out of the Chancery.³⁶ Therefore 'if

²⁹ Cosin noted that this law was brought in by statute, 31 Edward III, c. 11. Cosin, *Apologie*, I, 24.

³⁰ Cosin, *Apologie*, I, 23-4.

³¹ Cosin, *Apologie*, I, 26-7.

³² Cosin, *Apologie*, I, 27-8.

³³ Ecclesiastical jurisdiction over wills and testaments was completely uncontested by common law courts in England, though this was not necessarily the case in the rest of Europe where they were often mixed in jurisdiction. In England only matters of debt arising from wills or testaments were claimed by the secular courts. Brundage, *Medieval canon law*, 89; see also 70-97 for a good discussion of testamentary and matrimonial legal issues in canon law.

³⁴ Cosin, *Apologie*, I, 28.

³⁵ Prohibitions were orders sent from Chancery (usually on behalf of common law courts) to ecclesiastical or other courts ordering them to cease their examination of a case that rightfully belonged to the temporal jurisdiction. For a full discussion of prohibitions, see below, 100-2.

³⁶ For examples of writs issued by Chancery, see Jones, *Chancery*, 378, 383, 392, 397, 398. Chancery also issued what was called a 'common injunction'. This was similar to a prohibition in that it contained a command to surcease but the common injunction, rather than being directed at a court was directed to litigants or their attorney. Jones, *Chancery*, 462-3, 471.

no Writ lie thereupon in Chancerie, they [the ecclesiastical judges] may still holde plea, and take conusance.³⁷ Moreover, another statute adduced by Cosin, 15 Edward III c. 6, stated that ministers of the church might not be impeached, arrested, or forced to make answer before the king's JPs for money taken for redemption of corporal penance, for proof or account of testaments, for the solemnity of marriage, or for any other things regarding the jurisdiction of the church, and that they might have writs from the Chancery if they so demand.³⁸ In addition, 18 Edward III c. 6 (*Pro clero*) declared that ministers of the church should not be investigated by commissions concerning the justness of their processes in matters that notoriously belonged to ecclesiastical jurisdiction. The statute 1 Richard II c. 3 decreed that the pursuit of tithes was a matter for spiritual cognisance. In 1533 the Act of Appeals had reaffirmed the medieval injunction that the two jurisdictions, temporal and spiritual, were expected to aid each other.³⁹ Cosin contended that the central purpose of the temporal law was to protect property, lands, and goods and to preserve the people in unity and peace. The church's duty was to have jurisdiction in matters of divorces, right of tithes, oblations, and obventions (besides testamentary and matrimonial matters), because: '*the knowledge of these causes by the goodnesse of the Princes of this Realme, and by the Lawes and customes of the same, appertaineth to the spiritual iurisdiction of this Realme*.'⁴⁰ In 1534 the act confirming the Submission of the Clergy (25 Henry VIII c. 19) proved this, by restraining all appeals outside of England in any appealable cases belonging to ecclesiastical jurisdiction.⁴¹ The statute 1 Edward VI c. 2 established that collations, presentations, institutions, inductions, letters of order, dismissories, as well as matters of testament, administration, or account upon them were determinable in ecclesiastical courts. And finally, in the reign of Elizabeth the statute *De excommunicato capiendo* (5 Elizabeth c. 23) declared the crimes of heresy, refusal to have a child baptised, receive communion, absence from divine

³⁷ Cosin, *Apologie*, I, 28-9.

³⁸ Cosin, *Apologie*, I, 29.

³⁹ The heresy acts of 1382 (5 Richard II st. 2 c. 5), 1401 (2 Henry IV c. 15), and 1414 (2 Henry V st. 1 c. 7) established this cooperation. More, *Works*, ed. Guy, Keen, Miller, McGugan, X, li-liii; see also *SR*, II, 25-6, 125-8, 182-4.

⁴⁰ 24 Henry VIII c. 12. Cosin's quotation is from the act itself. Cosin, *Apologie*, I, 29-30.

⁴¹ Cosin, *Apologie*, I, 30.

services, error in religion, incontinence, usury, simony, perjury in an ecclesiastical court, and idolatry to belong to spiritual jurisdiction.⁴²

Ecclesiastical courts also had jurisdiction over spoliations of benefices, pursuit of tithes, oblations, obventions, mortuaries, pensions, portions, corrodies, procurations, indemnities, and voidance of benefices (in some cases).⁴³ The right of patronage of a benefice, however, belonged to temporal jurisdiction. Though the rights of tithes were held by Cosin to belong to ecclesiastical cognisance both by statutes and precedents, he conceded there were a few cases pertaining to tithes where the king's prohibition was upheld.⁴⁴ The issue of parish boundaries was somewhat in dispute by judges, but Cosin maintained that the matter belonged to ecclesiastical courts.⁴⁵ Pensions, both by statute and common law were determinable by ecclesiastical courts, likewise for mortuaries, oblations, and maintenance of places of burial and churchyards, since the land belonged to the church. Trespass on a parson's property, though, was considered actionable at the common law, because his property was accounted a 'francke tenement' rather than consecrated to God.⁴⁶ The right to have curates was defensible by ecclesiastical courts, and if a church were denied its right to have a curate read divine service, the matter would be actionable in a spiritual court. Reparations of a church (or contributions towards the same) by parisoners was another matter cited by Cosin for ecclesiastical jurisdiction. Similarly, if a man withheld goods belonging to a church and he instructed his executor to dispense the goods accordingly, the church-wardens might sue the executor for the goods in an ecclesiastical court. Finally, if a church had defects in it, 'money it selfe may lawfully be sued for, in a court ecclesiastical' in order to fix the defect.⁴⁷

Up to this point many of the matters claimed by Cosin to belong to ecclesiastical jurisdiction strike a definite contrast with the jurisdictional claims of St. German in *Doctor*

⁴² Cosin, *Apologie*, I, 30-1.

⁴³ Cosin explained that the common law (specifically St. German's *Constitutions*, chapter 9) mentioned five causes of voidance: death, resignation, deprivation, creation, or cession. The common law had jurisdiction only if the voidance occurred in the case of death, the other four all being determinable by the ecclesiastical law. Cosin, *Apologie*, I, 31-3.

⁴⁴ There is a very long discussion (36-9) of tithes and a distinction made between tithable and non-tithable items such as coal-pits, hay in pastures, corn lying fallow for a year, etc. One case mentioned by Cosin in which the king's prohibition would be upheld would be for tithes of great trees over twenty years old.

⁴⁵ An example of such a matter was when two parsons were in dispute over which parish owned some sheaves of corn. Because the root of the matter was tithes, Cosin asserted that the spiritual courts should have jurisdiction. Cosin, *Apologie*, I, 39-40; see also Helmholz, *Roman canon law*, 91-100 for the issue of tithes; and 155-6, 177-9 for disputes over jurisdiction.

⁴⁶ Cosin, *Apologie*, I, 43-4.

⁴⁷ Cosin, *Apologie*, I, 44-5.

and student and the *New additions*. St. German asserted that all issues involving property belonged to the jurisdiction of temporal courts; spiritual courts could only claim authority over matters relating directly to faith. Thus St. German would have challenged Cosin's asseverations regarding disputed parish boundaries, goods or chattels promised to a woman as part of a marriage contract, reparations or maintenance of church property, wardships and chattels real that were bequeathed by will, and other property-related issues, even if the matters themselves were generally contained with context of testaments, matrimony, or some other heading that was handled by ecclesiastical courts.⁴⁸

Thus far Cosin had dealt mainly with matters of a non-criminal nature, but in chapter eight he turned to issues of offence in order to examine which of these matters were determinable by ecclesiastical jurisdiction. Ordinaries, he asserted, were empowered not only to enquire 'of the foundation, erection, and gouernance' of all hospitals except those founded by the king, but also to 'make thereof correction and reformation after the lawes of holy Church, as to them belongeth.'⁴⁹ In fact, 'causes of correction' were reckoned to be ecclesiastical by statute.⁵⁰ Furthermore, ecclesiastical courts enjoyed the prerogative of jurisdiction in causes *ad correctionem animae* where the sin in question was not punishable in a temporal court.⁵¹

In more serious cases, however, when the sins were offences against God, one's neighbour, or one's self, and where punishment (either corporal or pecuniary) was due, there were many matters over which ecclesiastical courts had jurisdiction. Regarding sins of *impietas*; heresy, idolatry, and error in religion were enquirable and punishable by ecclesiastical authority as was laid out in *De excommunicato capiendo*.⁵² Despite the claims of some of the

⁴⁸ St. German, *Doctor and student*, ed. Plucknett and Barton, 19, 33, 35.

⁴⁹ Cosin, *Apologie*, I, 46.

⁵⁰ This statute was admittedly repealed, but only (according to Cosin) because certain names were not to be used anymore on the ordinaries' seals in citations and processes. Cosin, *Apologie*, I, 46.

⁵¹ Cosin, *Apologie*, I, 46-7.

⁵² This act of 1563 complained that the writ *de excommunicato capiendo*, which was issued was not being duly executed, which only encouraged criminous persons to continue in their ways 'to the greate Contempte of the Ecclesiasticall Lawes of this Realme'. The statute warned that sheriffs would be fined if the writ was not returned to the King's Bench in the term following its issue from Chancery. The ten offences for which the writ might be issued were listed in article VII as 1) heresy, 2) refusal to have a child baptised, 3) refusal to receive holy communion, 4) refusal to attend divine service, 5) error in matters of religion, 6) incontinence, 7) usury, 8) simony, 9) perjury in an ecclesiastical court, 10) idolatry. *SR*, IV, part 1, 451.

puritans to the contrary, Cosin maintained this had always been the case.⁵³ Furthermore, perjury (in spiritual matters) and breach of oath had always belonged to ecclesiastical jurisdiction, even though temporal courts had occasionally taken cognisance in such cases.⁵⁴ Blasphemy, while being *mixti fori* (enquirable and punishable at both the temporal and spiritual law) on the continent, was not punishable by the temporal law in England, but only by ecclesiastical law. The same was true of apostasy, which was the highest form of heresy.⁵⁵ Furthermore, violating or profaning the sabbath, both by custom and by the statute *Circumspecte agatis* were punishable by the spiritual power.⁵⁶ Disturbance of divine service was also punishable by ecclesiastical jurisdiction as Cosin showed from statutes.⁵⁷

Cosin contended that ecclesiastical courts had jurisdiction as well over crimes and offences in the category of *facinus*, or sins against one's neighbour. Simony, usury,⁵⁸ defamation,⁵⁹ and slander were all of ecclesiastical cognisance, as were beating of clerks,⁶⁰ sacrilege, brawling or fighting on church property,⁶¹ dilapidations or waste of ecclesiastical

⁵³ *De excommunicato capiendo* was not the first statute to declare heresy, etc. to be of ecclesiastical cognisance, said Cosin. The medieval heresy statutes of 1382 and 1401 as well as the Heresy Reform Act of 1534, laid the foundation upon which the Elizabethan statute had been built. Cosin, *Apologie*, I, 47.

⁵⁴ Cosin, *Apologie*, I, 47-9. See also Michael D. Gordon, 'The invention of a common law crime: perjury and the Elizabethan courts', *American Journal of Legal History*, 24 (1980) 149-51.

⁵⁵ See also St. German, *Doctor and student*, ed. Plucknett and Barton, 242-3.

⁵⁶ 13 Edward III; Cosin, *Apologie*, I, 64. Among the puritans and others there was some doubt that *Circumspecte agatis* was truly a statute. St. German argued against its validity in chapter 8 of the *Constitutions*, but according to *Statutes of the realm* it does seem to be valid, although there is disagreement as to whether it is one statute or two separate ones. In *Statutes of the realm* it is printed as one, united text (this view is supported by BL, Harley MS 667, but other sources BL, Harley MS 395, for example, list the first 23 lines of the Law French original as one statute and the last part as a separate statute of an uncertain date. Tottel's 1556 publication of Magna Carta (STC² 9277.5) suggests that the second part of this statute belongs with the statute 9 Edward II c. 12 (*Articuli cleri*). Thus the statute seems to be plagued by historical confusion regarding both its validity and contents. *SR*, I, 101 and notes.

⁵⁷ 1 Philip & Mary c. 3 and 1 Elizabeth c. 2 (Act of Uniformity). Cosin, *Apologie*, I, 52.

⁵⁸ Simony was addressed by *De excommunicato capiendo* and usury by 'diuers Parliaments' but especially 15 Edward c. 5, 11 Henry VII c. 8, and *De excommunicato capiendo*. There was an exception with regard to contracts, however. An ecclesiastical court was authorised to determine whether a contract was usurious, but only a temporal court could declare such a contract void. Cosin, *Apologie*, I, 53-4.

⁵⁹ Defamation was of ecclesiastical jurisdiction, both in the determining and punishing of it, by 13 Edward III (*Circumspecte agatis*), 9 Edward II c. 4 (*Articuli cleri*), and the preamble to 12 Henry VIII c. 9 (Statute of Citations). Cosin noted one general exception to the rule of ecclesiastical cognisance for defamation. If the defamation 'ariseth vpon a Temporall matter, [it] is not of ecclesiasticall conisance.' For example, if a man sued another at the common law for trespass and spoke ill of him in public, and then the defendant sued the first man in a spiritual court for defamation, a prohibition should be served, since the original matter (trespass) was of temporal jurisdiction. Cosin, *Apologie*, I, 55.

⁶⁰ For laying violent hands on a clerk, a man was always punishable by ecclesiastical jurisdiction according to *Circumspecte agatis*. Cosin, *Apologie*, I, 58. The matter of beating clerks was not professed by Cosin in all cases to be of ecclesiastical jurisdiction. If a clerk was arrested at the common law, he could not sue for laying on of violent hands at the ecclesiastical law. Also, if the offender was excommunicated by an ecclesiastical court for beating the clerk, the clerk must recover damages for the battery in a common law court. On the other hand, if the clerk was suing only for punishment of the offender and not for damages, the suit was of ecclesiastical cognisance. Cosin, *Apologie*, I, 59.

⁶¹ These offences were punishable by ecclesiastical courts whether the brawlers were lay or clerical. The punishments might differ, though, as a layman would be suspended *ab ingressu ecclesiae* while a clerk would be suspended from ministering his office. It was also possible, said Cosin, that either type could be excommunicated. Cosin, *Apologie*, I, 60.

livings.⁶² Moreover, offences of *flagellitum*, or sins against one's own self belonged to the jurisdiction of the spiritual courts. The disputed statute *Circumspecte agatis* proclaimed that the clergy had jurisdiction in matters of '*penance enioyned for deadlie sinne, as fornication, adulterie, and such like*' which Cosin suggested might be incest, stuprum, or polygamy. To this list he added the suggestions of Lyndwood: star-gazers, fantastical persons, wizards, fortune-tellers, drunkards, and idolaters. Cosin considered all of these to fall under the general title of 'incontinencie'.⁶³ Not every mortal sin, however, was of ecclesiastical cognisance, Lyndwood had noted, yet the sins listed in *Circumspecte agatis* and other such statutes were understood not to belong to the temporal courts but to the ecclesiastical.⁶⁴

So far Cosin's *Apologie* had been distinctly pedestrian. His long inventory of matters falling within ecclesiastical jurisdiction was tedious to the reader and, as Morice and Beale conceived the issue, irrelevant to the controversy. Both Morice and Beale vented their frustration at parts I and II of the *Apologie* in manuscript comments. In reporting that many of the clergy attending Convocation in 1593 were seen carrying the first two parts of Cosin's *Apologie* with them, Morice remarked, 'But lokinge thereunto, they founde a wearisome labor by a confused sort of cases drawne out of the Register & Mr Fitzherbertes Booke of Natura Brevium, not answeringe the matters they expected'. Beale likewise complained, 'manye Leaues are friuoloslye spent, to proue thinges that apperteyne nothinge to the matter'.⁶⁵

Morice and Beale may not have been interested in the *Apologie* up to this point, but neither did they contest Cosin's asseverations regarding the extent of ecclesiastical jurisdiction. At this stage in part I Cosin turned towards more controversial aspects of that jurisdiction. In chapters eleven, twelve, fourteen, and sixteen, he digressed from the stated intention of part I and addressed the *manner* of proceeding in ecclesiastical courts with special attention to the issues of citation, the punishment of excommunicates, and whether the queen could empower

⁶² Both 13 Elizabeth c. 10 and St. German's *Treatise concerning the power of the clergie* (STC² 21588) showed this. Cosin, *Apologie*, I, 60-1.

⁶³ The statute *De excommunicato capiendo* used this generalisation. Cosin also mentioned that St. German, in his *Answer to a letter* (STC² 21588.5), had affirmed that the clergy had jurisdiction over these things (fornication, 'auoutrie', simony, usury, matrimony, tithes, oblations, perjury, etc.), but only because of the 'custome and sufference of princes.' Cosin, *Apologie*, I, 61-2.

⁶⁴ Cosin, *Apologie*, I, 64. There were other church-related matters belonging to ecclesiastical jurisdiction that did not fall under any of the categories mentioned above, such as fees for curates and clerks and citing men out of their diocese, affirmed by 23 Henry VIII c. 9. Cosin, *Apologie*, I, 66-7.

⁶⁵ Cambridge, Baker MS 40, 133; Lansdowne MS 73, doc. 2, fo. 8r.

ecclesiastical courts to use processes other than citation or punishments other than excommunication.

Whether men might be cited to appear in ecclesiastical courts formed the basis of chapters eleven and twelve.⁶⁶ One of the grievances of the puritans mentioned by Cosin in his preface to part I was that ecclesiastical courts were not empowered to cite anyone *ex officio* and put them to an oath except in testamentary or matrimonial matters. Following this line of reasoning, Cosin submitted that if no one might be cited but in those two cases, no witnesses could be had but in those cases either. And ‘if witnesses might not be vrged to testifie vpon othe, in any causes but Testamentarie or Matrimoniall; then could no Plea be holden in any other cause, when the chieftest and most vsuall meanes of prooffe in recent facts, be taken away.’⁶⁷ In the previous chapters Cosin had shown how ecclesiastical courts had power to hold plea in many cases besides those two. Could it be possible that spiritual courts should have power to enquire of and punish those things and yet not have the means to hold plea concerning them? What use then was there in having jurisdiction over certain misdemeanours or crimes?⁶⁸ If men could not be ordered by ordinaries to appear and testify upon oath, the only witnesses who could be procured would be those who volunteered! No man would offer himself to be a witness unless he were either an enemy to both parties or else a friend to one and an enemy or stranger to the other, and neither of these two would make indifferent or impartial witnesses.⁶⁹

Cosin’s opponents maintained that witnesses might be cited and deposed on oath in comparatively insignificant causes such as legacies and wills of goods or marriage contracts while prohibiting citation in the weightier matters of heresy or idolatry, but Cosin challenged them to produce any such legal maxim from statutes or case books.⁷⁰ With few exceptions,

⁶⁶ Although the title of chapter ten included the words ‘proofes that any subiect laie or other, may be cited in any cause ecclesiasticall’, Cosin did not in fact begin his discussion of citation until the start of chapter eleven. Cosin, *Apologie*, I, 62.

⁶⁷ Cosin, *Apologie*, I, 70.

⁶⁸ Ibid.

⁶⁹ Cosin, *Apologie*, I, 71.

⁷⁰ ‘If the law had bin so, could no man hit of it from the Conquest vntill our fathers time, when Fitzherbert writ his *noua natura breuium*? was none of skil in Edw. the 1. time, to put it into the statute of *Circumspecte agatis*: or in Ed. the 2. times, to mention it in the statute of *Articuli Cleri*? Cosin wished that the ecclesiastical law were allowed the same means as the temporal law, as the puritans always claimed to favour. If at the common law *subpoenas* were served to force witnesses to testify, why could not ecclesiastical courts use the same system? Cosin, *Apologie*, I, 72-4.

stated Cosin, both the canon and civil law had affirmed it legal to urge witnesses to give testimony in any and all cases whether they were civilly or criminally moved.⁷¹ Cosin pointed to 9 Edward II c. 12 (*Articuli cleri*) which asserted that the king's tenants might be cited by their ordinary, yet it did not specify whether they were to be cited as a party or as a witness, so it could be either. That statute also declared that tenants were liable to be excommunicated for manifest contumacy, such as refusing to be sworn or examined. Other statutes showed that ordinaries were empowered to cite men for failure to pay tithes, to commit them for contumacy, and to call witnesses for the purpose of deposition.⁷² Lastly, oaths had been administered both to parties and witnesses by ordinaries according to the Statute of Uniformity (1 Elizabeth c. 2).⁷³

The source of the disagreement over whether ecclesiastical courts were empowered to cite men in cases other than those related to testaments and matrimony was a controversial writ of prohibition and attachment mentioned in William Rastell's *Abridgement*.⁷⁴ A certain writ of dubious originality appearing in the *Abridgement* seemed to indicate that laymen were not allowed to be cited and forced to take oaths or depose under oath as witnesses except in testamentary and matrimonial matters. The phrase *contra consuetudinem regni nostri* was found in the writ and supposed by the puritans to refer to ecclesiastical courts' procedure of compelling men to take oaths and testify. Cosin vigorously denied the validity of the writ with three main arguments. First, the writ could not be law since it did not appear in any parliamentary rolls or printed books of statutes, nor were there any ancient copies of the writ. Second, a comment in the margin of Cosin's copy of the writ seemed to indicate that the writ was 'newly deuised to meete with a new mischief.' Third, if the writ were a valid law, it ran against the grain of long-accepted customs of English ecclesiastical jurisdiction.⁷⁵ Therefore,

⁷¹ Privileged people, such as old men over seventy, were exempt from this rule according to the civil law, though the canon law waived this restriction 'in want and defect of other proofes; that the trueth may be found out.' A later canon declared that clerks could not be compelled to testify in 'causes of blood'. Cosin, *Apologie*, I, 74-5.

⁷² Those statutes were 27 Henry VIII c. 8, 32 Henry VIII c. 7, and 2&3 Edward VI c. 13. Cosin, *Apologie*, I, 76. Again, since none of these issues related to articles of faith or things necessary for salvation, Cosin's expansive view of ecclesiastical would have been entirely at odds with St. German's. St. German, *Doctor and student*, ed. Plucknett and Barton, 243, 253, 309; Guy, *St. German*, 20-1.

⁷³ Cosin, *Apologie*, I, 77.

⁷⁴ STC² 20730 (1566) or STC² 20731 (1574).

⁷⁵ Cosin confessed that Fitzherbert was in agreement with the puritans in believing the writ to be valid, yet Cosin nevertheless maintained that the writ had been misunderstood by both Fitzherbert and those against whom Cosin wrote. Cosin, *Apologie*, I, 80-1.

the writ ought to have been understood either as a private suggestion or as having been misconstrued entirely out its original context.⁷⁶

Cosin's thorough attempt to establish the church's authority to cite men into ecclesiastical courts and to compel them to take oaths in matters others than testaments and matrimony was fundamental to his overall strategy. It was not simply enough to assert the high commission's prerogative to regulate and order the church according to its discretion, or for the queen to delegate the day-to-day governance of the church to her clergy. These were issues already deeply controversial with the puritans, and Cosin was best served by preceding his most debatable arguments with a building-block approach to ecclesiastical jurisdiction, laying foundations that would buttress later claims that were bound to require strong justification.

Another point of controversy between Cosin and his adversaries was the issue of punishment of excommunicates. Cosin's aim in chapter sixteen was to disprove the puritans' claim that a writ *de excommunicato capiendo* was necessary for the punishment of men remaining excommunicate over forty days and that the same writ could only be issued for crimes corresponding to the ten offences listed in the statute *De excommunicato capiendo*.⁷⁷ Cosin noted the first opinion was easily refuted, since a man might be fined £20 per month for absence from church, despite his excommunicate status.⁷⁸ Besides, being excommunicate was considered a 'great contempt' and therefore fell under the jurisdiction of the high commission 'vpon the expresse wordes vsed in that Act which doeth establish that Commission.'⁷⁹ This was entirely justified, said Cosin, since many bailifs and under-sheriffs were slack in their duties and needed reinforcement, and in many dioceses their yearly budgets were not enough to bring all offenders to justice by means of the writ *de excommunicato capiendo*. Again the hands of ecclesiastical authority were tied by the

⁷⁶ Cosin, *Apologie*, I, 88-94.

⁷⁷ For a list of these ten crimes, see above, note 52 of this chapter.

⁷⁸ Cosin, *Apologie*, I, 116. Morice laughed at this reasoning, saying that the £20 penalty for missing church was not levied because the person was excommunicate, but because he was absent from church. LPL, MS 234, fo. 168v.

⁷⁹ Cosin, *Apologie*, I, 116-7. This statement by Cosin was an example of the Elizabethan misunderstanding of the foundations of the high commission. See also Usher, *Rise and fall*, ed. Tyler, xxi-xxiii, 34-7.

puritans: 'A decree or iudgement is of no effect, where execution of such sentence can not be had.'⁸⁰

Regarding the punishment of crimes not listed in that statute, Cosin asked how the high commissioners could be expected to function if they could not sustain a writ because certain 'great contempts' that needed to be punished were not listed in the statute *De excommunicato capiendo*? Although that statute was general in its beginning, argued Cosin, it nevertheless stated that if someone was originally punished and excommunicated for one of those ten crimes, then their writ *de excommunicato capiendo* might only be issued to punish those ten crimes. If, however, a man had been excommunicated because of an offence not listed in that statute, this could not be understood to take away execution of the writ in all cases except in those ten crimes.⁸¹

The establishment of Cosin's views concerning the writ *de excommunicato capiendo* and the jurisdiction of the high commission over the terms of that writ begs the question of the authority of the queen's letters patent empowering the commission. Cosin's opponents had insisted that the queen was not empowered to authorise by her letters patent the use of any ecclesiastical process other than by citation,⁸² or to authorise punishments other than excommunication, such as fines or imprisonment. This opinion, based on the Elizabethan Act of Supremacy, was supposed by the puritans to be a restraining force on the prerogative of the queen, 'else might she also giue them authoritie to hang men.' Cosin angrily retorted, 'What? is there no more difference with these men, betwixt attaching, fining or imprisoning, and plaine hanging? What will they then say of the Starre Chamber, which may impose all those three, and yet cannot put any man to lose of limme or of life?'⁸³ But Cosin had dodged the issue, perhaps deliberately. Star Chamber had never been authorised to impose capital punishment on defendants, nor could any defence of such a prerogative be constructed. The

⁸⁰ Cosin, *Apologie*, I, 117.

⁸¹ Cosin added that the clause '*Sauing and reseruing to all persons hauing authoritie to certifie excommunicate persons*' put the matter beyond all doubt that the writ might still be issued even for crimes not appearing in the statute. Cosin, *Apologie*, I, 119.

⁸² Citations were ordinarily accomplished by one of two methods: by *letters missive*, which were a judicial command, summoning a suspect to trial; or by *attachment* if the suspect was fleeing. See also below, 126.

⁸³ Cosin, *Apologie*, I, 106-7. Cosin did not cite the puritan author of the quotation 'else might she also giue them authority to hang men'.

queen's prerogative over the church, on the other hand, was so loosely defined in the Act of Supremacy that the puritans feared the imperial words of the statute might be taken to an extreme if political necessity dictated it. This worry still occupied the minds of puritans in the reign of Charles I, as the testimony of an anonymous tract on the power of the high commission written around 1628 reveals. The essayist first posed the argument of the bishops, that the Elizabethan Act of Supremacy authorised the commissioners to execute all the premises according to the tenor and effect of the letters patent, any matter or cause to the contrary notwithstanding, and therefore the commission was within its rights to fine and imprison by virtue of the letters patent which were grounded on that statute. In the following paragraph the writer opposed this interpretation of the act, 'for then the kinge by vertue of this Statute might make all ecclesiasticall offences by his letters patentes capitall'.⁸⁴ The question was as valid and as disturbing in 1628 as it was in 1593.

While the question of whether the queen could designate certain offences as capital in her letters patent was never discussed by Elizabethan judges, Sir James Dyer, chief justice of the Common Pleas from 1557-82, concurred with the other judges of the Common Pleas that ecclesiastical judges were well within their rights to impose fines, since not only did the Act of Supremacy annex all ecclesiastical authority to the queen to delegate as she wished, but the fining of recusants was previously well established under ecclesiastical law.⁸⁵ The issue of the commission's power to imprison, on the other hand, was apparently not a settled issue. Professor Baker describes imprisonment by extrajudicial authority as 'the main controversy relating to the liberty of the subject' in Elizabethan England, despite the fact that it was a common occurrence.⁸⁶ There were many instances of common law courts challenging the high commission's prerogative to imprison, the first of these occurring in 1565. It involved a prisoner of the commission who was delivered from prison by the Queen's Bench by a writ of *habeas corpus* but who was rearrested shortly thereafter, the commission declaring that it had the right of discretionary imprisonment without bail. The result of this test was, ironically,

⁸⁴ Inner Temple, Petyt MS 518, fo. 70r. The entire sentence is underlined in the original.

⁸⁵ Dyer, *Reports*, ed. Baker, lxxiv.

⁸⁶ Dyer, *Reports*, ed. Baker, lxxvi and footnote 36.

inconclusive. Dyer noted that the issue was debated but no solution was declared.⁸⁷ The whole question of the high commission's discretionary powers of discipline was technically moot, since the words of the letters patent of 1559 and those in later times were undeniably broad, and even the narrowest interpretation of them still gave the commission extensive power. There was no qualifying language that restrained the commission's authority to correct 'misbehaviours', and more importantly, the letters patent contained powerful *non obstante* clauses sweeping away all other laws, statutes, proclamations, privileges, etc. to give the commissioners wide discretion in matters of ecclesiastical cognisance.⁸⁸

Cosin held that the puritans' arguments which abridged the queen's authority were not well grounded in law and concerned 'her Maiesties prerogatiue roiall, and supreme gouernment (that was yeelded vnto her highnesse by statute) very deeplie; whosoever be Author of them.'⁸⁹ The authors (or at least the maintainers) of that opinion were Beale and Morice, who had grounded their opinions not only on the Act of Supremacy but on the words of chapter 39 of Magna Carta: 'No free man shall be apprehended, imprisoned, distrained or impeached but by the law of the land...' Cosin held that this reading of Magna Carta was mistaken.

...the end why this law was made, and the time when it was made, are needfull to be considered. The ende was this, that the Kings of this realme should not chalenge an infinite and an absolute power to themselues, (as some kings elsewhere did, & yet do) without iudgement & lawful proceeding, to take away any mans libertie, life, countrey, goods or lands.⁹⁰

And it was at such time when the kings themselues thought, that Iurisdiction ecclesiasticall, was not (in right) no more then it was in fact at that time belonging to the crowne: therefore in that it is here sayd, *Wee will not passe upon him, nor condemne him, but by lawfull iudgement of his peeres, or by the lawe of the land*; it is manifest, that the wordes haue no relation to Iurisdiction ecclesiasticall: for that which was done by that iurisdiction

⁸⁷ In 1568 the Common Pleas also freed a man imprisoned by the high commission for refusing the *ex officio* oath. The man was an attorney, however, and was thus technically delivered by privilege, so the question of whether the commission could imprison anyone without bail was still not resolved. Dyer, *Reports*, ed. Baker, lxxix.

⁸⁸ Usher, *Rise and fall*, ed. Tyler, 93-5. The issue of the queen's prerogative to empower the high commission is discussed and resolved below, 216-27.

⁸⁹ Cosin, *Apologie*, I, 102.

⁹⁰ Ironically, this statement by Cosin begs the question of why he would disapprove of kings who 'chalenge an infinite and an absolute power to themselues' in secular matters and yet approve of the same prerogatives for the governance of the church.

[ecclesiastical], was not (at that time) taken to be done by the King or by his authoritie: and the lawes that ecclesiasticall Iudges practised; were not then holden to be the lawes of the land, or the Kings lawes...⁹¹

Cosin did not believe chapter 39 of Magna Carta addressed spiritual jurisdiction at all since at that time (1215) ecclesiastical law was handled completely separately from the king's power, as it was (thought to be) under Roman jurisdiction. Instead, he insisted Magna Carta had been written to curb only the lay powers of the king. To Morice and Beale, the resort to processes other than citation or to punishments other than excommunication were direct violations of Magna Carta.⁹² By contrast Cosin did not see Elizabeth's use of the high commission as an instrument of lay power but one of ecclesiastical power, which was left untouched by Magna Carta. The relative merits of Cosin's and Morice's interpretations of Magna Carta will be further debated in chapter seven.

As for the ecclesiastical laws which the puritans, especially Morice, so vehemently spoke against as being 'foreign', Cosin recited the main part of the preamble to the Act of Dispensations (25 Henry VIII c. 21) to show that Parliament might dispense with the 'humane' laws of the realm. Cosin explained that the humane laws spoken of in the preamble were 'those Canon lawes; which by *such sufferance, vse, and custome* are (now) *as the accustomed and ancient lawes of this Realme, originally established as lawes of the same:* howbeit by the meanes aforesaid, but *induced into the Realme*, and not here at first *made nor ordeined*.'⁹³ This was Cosin's first major historical distortion. Although canon law in England had never been reformed,⁹⁴ the act confirming the Submission of the Clergy made it clear that a large portion of the canon law was repugnant to the laws of the realm, incorrigibly papal in nature, or otherwise incompatible with the royal supremacy.⁹⁵ But Cosin argued further

⁹¹ Cosin, *Apologie*, I, 102-3.

⁹² Morice's high regard for Magna Carta as an important document in the history of individual liberty seems not to have been formed as a result of the political exigencies of the 1590s. He expressed almost identical sentiments in 1579: Magna Carta contained 'very excellent Lawes towching the Liberties of the subiectes and the righteous Government of the Kynge.' BL, Additional MS 36081, fo. 245r.

⁹³ Cosin, *Apologie*, I, 103. The italics are Cosin's quotation from the preamble to the Act of Dispensations.

⁹⁴ See the above discussion on the failure of the *Reformatio legum ecclesiasticarum*, 7-8.

⁹⁵ See Logan, 'The Henrician canons', *Bulletin of the Institute of Historical Research*, 47 (1974) 99-103; Guy, 'The Henrician Age', *Varieties*, ed. Pocock, 29; Guy, *Tudor England*, 135; Fox and Guy, *Reassessing*, 128-9; Elton, *Constitution*, 218.

that the preamble to the statute *De excommunicato capiendo* referred to these laws as the 'ecclesiastical laws of the realm', and thus they could not be the strange and foreign laws to which Morice referred, but were thoroughly legitimate and not contrary to the queen's prerogative or to the laws, statutes, or customs of the land.⁹⁶

Turning his attention to the authority invested in the high commission (which he remarked his adversaries seemed intent on whittling down to nothing), Cosin examined the Elizabethan Act of Supremacy. By this act, he noted, the queen empowered the high commission by her letters patent, be they general or specific directives for attachment, fines, or imprisonment.⁹⁷ By contrast, the puritans held that the high commission ought to be circumscribed by the same procedures and prerogatives as the ordinary ecclesiastical courts. Cosin's point was that high commission was not ordinary; it was extraordinary, and thus was invested with a greater degree of power than ordinary church courts.⁹⁸ This distinction implied that the commission was not empowered by the queen's 'ordinary' prerogative but by her 'absolute' prerogative. English law differentiated between these two types of royal prerogative to delineate the sovereign's regular authority to pardon individuals, mitigate the terms of statutes, or exercise other preeminences that were mainly feudal in origin (ordinary) from emergency powers such as billeting troops on homeowners, taxing subjects without the approval of Parliament, and temporarily suspending the ordinary course of law which could be exercised in dire circumstances (extraordinary).⁹⁹ Cosin's assertion that the high commission possessed extraordinary jurisdiction from the queen suggested that Elizabeth had exercised something resembling emergency powers in authorising it.

⁹⁶ Cosin, *Apologie*, I, 103.

⁹⁷ Cosin, *Apologie*, I, 107-8.

⁹⁸ Cosin, *Apologie*, I, 108-9. Though true in the 1590s, times had changed by the second decade of the seventeenth century, and the high commission slowly evolved into a court of equity, handling an ever-increasing number of cases between parties. By 1611 Chief Justice Coke was arguing with Archbishop Abbot that the commission, being an extraordinary court, could only claim jurisdiction over 'enormious' crimes; otherwise it would intrude on the regular business that rightly belonged to ordinaries' courts. What small evidence is left to us of the high commission's work load in the later Jacobean and Caroline years shows that it was a popular court with suitors — only about 5% of its cases were initiated *ex officio*, the rest being promoted by a private party. The vast number of petitions it received to handle cases for the relief of hardship and the records showing a hundred cases decided in a single day make the claims of the Long Parliament in 1640 that the court had never been legal seem unconvincing. Usher, *Rise and fall*, ed. Tyler, 215-6, 323-4; Cambridge, Ely MS F.5.45.

⁹⁹ Glenn Burgess, *The politics of the ancient constitution* (London, 1992) 139-43; John Guy, 'The "imperial crown" and the liberty of the subject', *Court, country, and culture: essays on early modern British History in honor of Perez Zagorin* (Rochester, N.Y.; 1992) 65-7.

Morice had reasoned in the *Treatise* that the Act of Supremacy had only united ecclesiastical jurisdiction to the crown, that is, brought ecclesiastical jurisdiction under the queen's final authority, and that no jurisdiction would or could have been annexed to the crown by that act which was 'repugnant or offensiue to the Common or Ciuill Policie of this Kingdome.'¹⁰⁰ Cosin's answer was typically exacting but elusive: although it was only ecclesiastical jurisdiction that was united to the crown, 'yet the maner of conuenting or punishing [exercised by ecclesiastical courts] is not in that Acte so restrained, but that such other courses may be vsed, as to her Maiesties wisdom shall seeme most fitte.'¹⁰¹ In essence, Cosin was saying that even though the Act of Supremacy only restored ordinary ecclesiastical jurisdiction to the crown and that by ordinary ecclesiastical jurisdiction courts could not imprison,¹⁰² the queen was empowered by that act to supersede ordinary ecclesiastical jurisdiction (via letters patent) and authorise whatever processes or punishments she desired. Cosin pressed his interpretation of the Act of Supremacy on the basis of its vagueness. Because it did not list precise powers for the commission but only 'visiting, reforming, redressing, ordering' etc., the queen was quite within her rights to direct the commission more specifically through letters patent.¹⁰³

While Beale seemed wholly to dismiss the high commission as illegal from the start, Morice accepted its legality but disputed its precise authority, dissenting wholeheartedly from Cosin's liberal interpretation of the words of the Act of Supremacy. But he also disapproved of the commission's practice of compelling lay authorities to assist the commission in its disciplinary forays, an issue which hit closer to home. Morice himself was a JP¹⁰⁴ which naturally placed him within the context of the statutory provisions of *De excommunicato capiendo*, which required lay assistance to be offered to the queen's commissioners in arresting persons for violations against that act. His objection to what he perceived as the high

¹⁰⁰ Quoted by Cosin at *Apologie*, I, 109 but not appearing in the printed version of the *Treatise*.

¹⁰¹ Cosin, *Apologie*, I, 109.

¹⁰² 'It is true', Cosin had stated on 108, 'that by Ordinary authoritie ecclesiasticall, no man may be imprisoned.'

¹⁰³ Cosin compared this makeshift practice to how Elizabeth from time to time authorised the president and Council of Wales to use torture (among other procedures) in an attempt to fill in the gaps left by the statute 38 Henry VIII c. 28 which originally assigned vague powers to that council. Cosin, *Apologie*, 110-1. This interesting comparison will be taken up again in chapter seven.

¹⁰⁴ In the 'Defence', Morice stated he had been a JP for nearly twenty years. LPL, MS 234, fo. 168r.

commission's heavy-handed procedures naturally led him to oppose the warrant *quorum nomina*, which was a command from the high commissioners to secular magistrates 'to assist in Attaching, or to attache any' who were sought by the commission to be brought to justice — similar in effect to the writ *de excommunicato capiendo*. Cosin registered Morice's three grievances against the procedure. First, Morice considered it absurd that JPs should be commanded to attach and imprison offenders until they had given bond for appearance. Second, the cause of the attaching or imprisoning was often not declared in the warrant. And third, he had claimed that '*the names of such persons to be Attached be not set downe by the Commissioners, but are referred ouer vnto others to set them downe*.'¹⁰⁵

Concerning Morice's first complaint, Cosin asked if JPs and sheriffs might not also be commanded by judges of the Common Pleas or King's Bench, the Exchequer, justices of Assize, the lord treasurer, lord chancellor, lord keeper, or the whole privy council? If JPs could be commanded by these, then why not by ecclesiastical commissioners whose power was immediately from the queen? As for Morice's second reason, Cosin denied that warrants of *quorum nomina* were routinely issued with no cause or matter declared in them. But what if they were? Other types of warrants often lacked this information as well. Moreover, what law of the realm was against such a practice? If Morice were to receive a message from the privy council to attach someone but omitted the cause, would he protest that it was against the law? Why then resist a *quorum nomina* from the commissioners, who bore their authority 'by express warrant of her Maiesties letter Patents'?¹⁰⁶ Morice's third reason for disliking these warrants, because the names of the offenders were not expressly written by the commissioners but by their underlings, was not denied by Cosin. The 'Warrant of *quorum nomina*, is very rarely vsed by the Commission, and the rarer, the better', he replied, adding that the names of those to be attached were agreed upon ahead of time by the commissioners, then given to subordinates to fill in. In any case, Cosin was anxious to see how Morice could show this to be

¹⁰⁵ Cosin, *Apologie*, I, 112-3. This passage does not appear in the printed version of the *Treatise*, though Morice repeated these points in the 'Defence'. LPL, MS 234, fos. 172r-174r.

¹⁰⁶ Cosin, *Apologie*, 113. Morice replied that he had never known the privy council, which he held grave and wise, to hand down such a ludicrous order — in effect, implying that he would not obey such a request. LPL, MS 234, fos. 172r-173v.

contrary to law. Perplexed at Morice's interest in the warrant and possibly unaware that he was a JP, Cosin mused, 'Belike himselfe is some Iustice of peace'.¹⁰⁷

Morice was clearly uncomfortable with the way the commission was using *De excommunicato capiendo* and warrants of *quorum nomina* to involve puritan lay authorities in Essex to assist in rooting out puritanism. As a JP, Morice was essentially being called upon to become a local accessory of the conformist clergy in arresting men who had drawn the ire of ecclesiastical authorities. Essex as well as Norfolk had been a religious battleground ever since the mid-1570s, and factions commonly sprang up between the bishops and the puritan gentry. John Aylmer, in particular, had numerous run-ins with the Essex clergy during his tenure as bishop of London. There were also bitter feelings towards the inferior ecclesiastical officers in Essex: the chancellor, commissary, and archdeacons.¹⁰⁸ In fact, one of Morice's main complaints against the commission's use of *quorum nomina* warrants was that these warrants were directed to JPs for the arrest of certain men, 'noe cause or matter of arreste expressed, yea and that which is worse no names of the persons so to be arrested sett downe in the warrant but that referred to an Archdeacon or other Inferior Iudge, whoe againe may tymes putteth it over to those hunting spanyells their apparators.'¹⁰⁹ On one particular occasion Morice recalled receiving one of these warrants and not only was there no reason for the arrest described on the warrant, there were no names of anyone to arrest! Morice mused that for all he knew, he was supposed to arrest the three commissioners whose signatures were on the warrant. He finally found the names of those to be arrested on the back of the paper, scribbled by the apparator or someone of his rank. 'Is not this a sound and legall ecclesiasticall proceedinge trowe ye? Is not the greate truste and confidence reposed in them by her maiestie well discharged?' Morice refused to believe — despite Cosin's assurances that only the commissioners themselves decided who was to be arrested — that in many cases wide latitude was not given to inferior ecclesiastical officers to arrest whomever they chose.¹¹⁰

¹⁰⁷ Cosin, *Apologie*, I, 112.

¹⁰⁸ Collinson, *Elizabethan puritan movement*, 203, 212, 271.

¹⁰⁹ LPL, MS 234, fo. 172r.

¹¹⁰ LPL, MS 234, fos. 173v-174r.

In this chapter thus far we have examined Cosin's explication of the matters belonging to ecclesiastical jurisdiction, both matters pertaining to testaments and matrimony and others, as well as the manner of ecclesiastical procedure, including the issue of citation, the punishment of excommunicates, and the authority of the queen to authorise ecclesiastical processes other than citation, or punishments other than excommunication. What remains to be explored in part I of the *Apologie* are four relatively less controversial issues in debate between Cosin and his opponents: 1) whether a direct royal assent was necessary for the enacting of each canon, 2) whether clerks might be deprived without indictment or presentment by a party, 3) whether after the Act of Supremacy the judgement of heresy belonged to the common law, and 4) whether ecclesiastical judges were guilty of *praemunire* by overreaching their jurisdiction.

The opening chapter of part I was dedicated to refuting the puritan argument 'That a seuerall royall assent is...required to the executing or euery particular Canon.'¹¹¹ Cosin began by stating that if no canon or ecclesiastical constitution could be put into practice without the queen's direct approval, nothing could ever get done. The business of government would grind to a halt, and furthermore all present canons would have been void, since in practice royal assent to each and every canon had never been thought necessary.¹¹² According to Cosin numerous statutes supported the idea of explicit enactment of canons without the queen's consent,¹¹³ and he correctly considered opposing views on this subject to be radical and diversionary. He believed that the Act for the Submission of the Clergy had brought this controversy about in the first place, and yet that law had only established that,

¹¹¹ Cosin, *Apologie*, I, 2.

¹¹² If testamentary and matrimonial matters (which everyone agreed were ecclesiastical issues) and right of tithes, etc. could not be handled by ecclesiastical jurisdiction immediately without the queen's consent but yet could not be handled by any other authority in the realm, there was 'a maine imperfection in the policie of this Common weale.' Cosin, *Apologie*, I, 2.

¹¹³ The Act for the Submission of the Clergy (25 Henry VIII c. 19) 'doth argue that ordinaries might (without further leaue obtained, as in former times they did) execute their jurisdiction ecclesiasticall.' Two other laws also gave power to 'iurisdiction ordinary' for the speedy recovery of tithes in ecclesiastical courts (27 Henry VIII c. 20 and 32 Henry VIII c. 7) and another for recovery of pensions, procurations, etc. (34 & 35 Henry VIII c. 19). In addition, the Act of Uniformity empowered ordinaries, as did the statute *De excommunicato capiendo*, 'which were hindered much from punishment that appertained, for want of due execution of that writte...and therefore prouideth remedie therein.' In the same year a law was passed against perjury wherein, 'it is provided that [jurisdiction] should not extend to Courts Ecclesiasticall: but that offenders in periurie, or subornation in a Court Ecclesiasticall, shall and maybe punished by such usual and ordinarie lawes, as heretofore haue bene, and yet are used and frequented, in the saide Ecclesiasticall Courts' which proueth the vsuall practise of iurisdiction Ecclesiasticall hitherto vsed (without any speciall assent) to be lawfull.' Cosin also mentioned special laws against usury (13 Elizabeth c. 4) and dilapidations (13 Elizabeth c. 10). None of these laws, according to Cosin, mentioned that royal assent was needed to carry out the terms of the statute. Cosin, *Apologie*, I, 2-3.

all Canons which be not contrariant nor repugnant to the Lawes, Statutes or customes of this Realme nor to the dammage or hurt of the Kings prerogatiue Royall, that they shall now still be vsed and executed as they were afore the making of that acte...¹¹⁴

That act only prevented new and unauthorised canons from being introduced without the royal assent, notwithstanding the puritans' claims. Cosin wondered what these canons needed to be made legitimate in the eyes of his adversaries, 'a Commission vnder the great Seale (to warrant the execution of it) vnto him, that is to exercise it'? If that were the case, every steward of a leet court, every constable, and other lay officials ought to be required to procure warrants to ensure that the authority they exercised on behalf of lay jurisdiction was united to the crown!¹¹⁵ Cosin's frustration with this argument seems entirely justified. He had set himself the task of defending the jurisdiction of ecclesiastical courts from its puritan detractors and sometimes this required attending to the time-wasting pedantry of puritan common lawyers. This particular argument was not advanced by Morice, though it may have been put forth by Beale, but at any rate it did not go unrefuted by Cosin, no matter how feeble it seemed. Simply by publishing an answer to such puritan claims, Cosin was showing that the established church had found its voice and could use it.

Chapter thirteen addressed another precisionist argument, that the judgment of heresy now belonged to the common law rather than the ecclesiastical law. Part and parcel of this argument was an adjoining claim that nothing could be deemed heresy but by the terms of the statute *De excommunicato capiendo*. Cosin quoted extensively from the statute *De heretico comburendo* and the Elizabethan Act of Supremacy to argue that both of those laws empowered the clergy to take cognisance of heresy. 'What other may conceiue, I know not;' he said, but 'for my part, I must take it (till I be better informed) to be so simple a conceit, as is worthie rather to be dismissed with laughter then to be confuted with further reason.'¹¹⁶ The puritans' tack in this argument was more subversive. They used the legal distinction between the punishment of heresy, which did belong to the common law, to obscure the well-

¹¹⁴ Cosin, *Apologie*, I, 4.

¹¹⁵ Cosin, *Apologie*, I, 4-5.

¹¹⁶ Cosin, *Apologie*, I, 99-101.

established rule that heresy was determined by ecclesiastical judges, who then turned heretics over to the temporal authorities to be punished.¹¹⁷

Another issue dealt with briefly by Cosin in chapter fifteen was the puritan claim that ministers might not be deprived of their benefices without indictment or prosecution of a party.¹¹⁸ Of the possible grounds for this opinion Cosin admitted to have no idea. He proposed the ever-popular chapter 39 of Magna Carta, cited constantly by the puritans, but if this was the case, as he had already explained, it was a fruitless endeavour since, in his opinion, Magna Carta had nothing to do with ecclesiastical jurisdiction. 'And moreouer, that chapter in Magna Charta requireth no suite of partie to preferre the enditement; so that it may be done by the Iudges of Office well enough.'¹¹⁹ But suppose, offered Cosin, that a minister defended atheism or apostasy? Suppose that he protested to his bishop that he never believed he had been called to the ministry and had forged his testimonials of orders (documents certifying his ecclesiastical status) or else committed simony, incest, adultery, or bigamy? Was a bishop expected to delay while waiting for an accuser to appear or should he cite the minister *ex officio*? Cosin stated that the Act of Uniformity openly licensed bishops to enquire (which could only be done *ex officio*) and to deprive according to the queen's ecclesiastical laws.¹²⁰

The final issue to be discussed in this chapter is the question of *praemunire*. Cosin devoted chapters seventeen and eighteen to the subject, defining and describing the uses of prohibitions, consultations, and the writ of *indicavit* in the former chapter, exhibiting doubts against the puritans' claims in the latter. Cosin defined the terms thus:

When any Court goeth beyond his bounds, and dealeth in other matter or sort then the lawes of the land will warrant; there lieth in some cases writs at the common lawe, which are

¹¹⁷ This cooperation between ecclesiastical and lay authorities was established in the medieval heresy acts of 1382, 1401, and 1414 and continued in the Heresy Reform Act of 1534, but determination of heresy had always been the province of the church. The fact that the Act of Uniformity laid out punishments for offenders against the established religion did not mean that Parliament was suddenly competent to make doctrinal judgements on suspected heretics.

¹¹⁸ Cosin presumed that the holder of this opinion meant to specify that such an indictment must be at the common law and not done by the judge *ex officio*.

¹¹⁹ He suggested that the writer of this opinion might have meant that a bishop could deprive a minister but not *ex officio*, since it was well known the bishops had always had power to institute and deprive ministers within their jurisdictions. If this was the case, it was no favour done to the minister being deprived, said Cosin, as deprivation by a prosecuting party would submit him to the malice of an accuser and perhaps subornation of proofs rather than to the sincerity and duty of the judge. Cosin, *Apologie*, I, 115.

¹²⁰ Cosin, *Apologie*, I, 116. In fact, the Act of Uniformity did not actually use the word 'enquire', though it did give authority to bishops 'to reform, correct, and punish by censures of the church.' Elton, *Constitution*, 407.

of *Prohibition* or *Indicavit*: and in other cases, a writ brought in by statute, called *Prouision* and *Premunire*: and the Prohibition and *Praemunire* doe lie as well against temporall, as against ecclesiasticall Courts.

The Prohibition is a charge by the kings writ, to forbear to hold Plea, either in some matter or maner, which it is supposed a man dealeth in, beyond his iurisdiction, or otherwise then lawe will warrant. Euery Prohibition is either *Prohibitio iuris* by the very lawe it selfe; or *Prohibitio hominis*, where the ministerie of the competent iudges (in that behalfe) is vsed.¹²¹

The statute 18 Edward III c. 5 (*Pro clero*) had stated that no prohibition should be issued from Chancery unless the temporal courts had rightful cognisance, in which case the ecclesiastical court should grant a consultation. (A consultation was a writ directed to ecclesiastical judges empowering them to continue the examination of a case which had been previously halted by a prohibition.)¹²² If the matter truly belonged to spiritual jurisdiction, however, the prohibition was not valid and the case could continue. Prohibitions might be granted either to a party in the suit or to a judge who recognised that the suit exceeded his jurisdiction. A prohibition would also be in order if the matter were temporal and there were a possibility of redress for it in Chancery,¹²³ or if a case evolved enough so that it became clear that while the original issue was right of tithes (which belonged to ecclesiastical courts), the actual issue was right of patronage (which belonged to temporal courts). The reverse of this could also happen, so that a temporal court holding plea might be forced to surcease if the issue became one of ecclesiastical jurisdiction.¹²⁴ Finally, a prohibition would lie if by custom ecclesiastical courts never had cognisance of a certain matter, despite the fact that the matter was not actionable in a temporal court either.¹²⁵

¹²¹ Cosin, *Apologie*, I, 120.

¹²² Jones, *Chancery*, 500; Cosin, *Apologie*, I, 121.

¹²³ There were two exceptions to this as well, since the prohibition would not be upheld if the spiritual court were holding plea for a different end from the temporal, such as if a case concerning the beating of a clerk was being prosecuted both in a temporal and spiritual court, but while the temporal court was determining damages, the spiritual was determining excommunication. Moreover, a prohibition would not lie if one clerk sued another for the goods of his house. Cosin, *Apologie*, I, 121-2.

¹²⁴ The issue of prohibitions became a serious quarrel in the seventeenth century between the temporal and ecclesiastical judges, as the temporal courts sought to restrict the expansion of the church courts' jurisdiction. See Louis A. Knafla, *Law and politics in Jacobean England: the tracts of Lord Chancellor Ellesmere* (Cambridge, 1977) 115-6, 119-21; Usher, *Rise and fall*, ed. Tyler, 167-79, 182-3, 188-93, 198-201, 202, 215-21, 317 and footnote 1, 318, 322.

¹²⁵ Cosin, *Apologie*, I, 122.

A prohibition ceased when a consultation was granted. If the consultation yielded that the issue in question in fact belonged to ecclesiastical jurisdiction, the judge was permitted to proceed despite any prohibitions from the king.¹²⁶ Writs of *indicavit* were essentially prohibitions of a sort, except they dealt specifically with suits of tithes which amounted to at least one quarter of the value of a benefice. Like prohibitions, writs of *indicavit* could only be issued after the libel had been delivered to Chancery and only before the sentence was handed down by the judge. Writs issued after sentence was given were void, thus denying them the status of an appeal.¹²⁷

Having summarised the nature of prohibitions, consultations, and writs of *indicavit*, Cosin next addressed his opponents' protestations that ecclesiastical judges were guilty of *praemunire* by over-reaching their rightful jurisdiction. There were two statutes of *praemunire*, said Cosin, the first one being 27 Edward III c. 1 (*De provisor*), which declared that no cases which belonged to the king and his courts should be prosecuted out of the realm.¹²⁸ The second and more important *praemunire* statute was 16 Richard II c. 5 which stated that no one shall pursue or purchase translations, processes, sentences of excommunication, bulls, instruments, or other matters contrary to the king's prerogative and authority outside the realm or bring them into the realm, or, being brought in by someone else, receive them.¹²⁹ By the same statute it was deemed *praemunire* to sue in another court for the purpose of defeating judgements rendered in the king's courts. While Fitzherbert believed that '*the opinion of the court was...that [the word] Alibi*¹³⁰ *in the said statute was vnderstood of bishops courts: so that if a man sue there, for a thing that belongeth to the Common law, he shall be in the Praemunire*', sometimes a prohibition lay where a *praemunire* did not, for example in cases when the jurisdiction of a certain matter (such as tithes of great trees) belonged generally to ecclesiastical courts and yet the jurisdiction for a particular facet of that

¹²⁶ Cosin, *Apologie*, I, 123.

¹²⁷ Cosin, *Apologie*, I, 123-4.

¹²⁸ Cosin, *Apologie*, I, 124-5.

¹²⁹ Cosin added that the phrase 'a Plea in the kings court' had often been recognised to extend to ecclesiastical jurisdiction as well as temporal. Cosin, *Apologie*, I, 125-6.

¹³⁰ Meaning 'elsewhere'. For Morice's interpretation of the meaning of *alibi*, see also 69, 196-7.

matter belonged to temporal courts.¹³¹ But the Elizabethan Act of Supremacy, argued Cosin, having grafted all ecclesiastical jurisdiction to the crown, altered the equation.

But these notwithstanding, sundry doubts are made in this behalf, because at this day all iurisdiction Ecclesiastical is now truly acknowledged, and is indeed (as it was alwayes in law) in the Souereigne prince, and from her prerogatiue royall deriued downe to others, no lesse then the Admirall court is, or the court of the Constable of England in times past was, when it was vsed.¹³²

Thus *praemunire* by an ecclesiastical court in Elizabethan England was not possible since every exercise of authority was itself an extension of the queen's prerogative. For the puritans to maintain that certain decisions of ecclesiastical courts established by the queen herself were repugnant to her royal supremacy suggested 'an incompatibilitie betwixt the Crowne and Ecclesiasticall iurisdiction', the implication of which was that the puritans 'denie her iust royall prerogatiue ouer all persons, and in all causes aswell Ecclesiasticall as Temporall; as if these could not both flow from the Crowne, nor stand together and meet in one person; which is most erroneous to thinke, and traiterous to affirme.'¹³³ If, however, an ecclesiastical judge dealt in a matter actually belonging to a temporal court,

...yet for some neerenesse and coherence, by him probably supposed to be an ecclesiasticall cause; [such] could not at this day be a *Praemunire*, but subiect onely to a Prohibition, and punishable as a contempt, as it was at the Common law, vpon an attachment after Prohibition.'¹³⁴

Cosin assessed Morice's view that '*to deale in any cause not belonging to their iurisdiction, is Praemunire*' as being 'very hard and rigorous' that every mistaking of jurisdiction by a judge

¹³¹ Cosin, *Apologie*, I, 127.

¹³² Cosin, *Apologie*, 127. Cosin, like John Cowell after him, was undoubtedly informed on this issue by his civilian predecessor, Sir Thomas Smith, who argued that in times past the *curia christianitatis*, or ecclesiastical courts were taken to be a foreign court, but 'at this present this court as well as others hath her force, power, authoritie, rule and jurisdiction, from the royall majestie and crowne of England and from no other forren potentate or power under God, which being granted (as it is true) it may appeare by some reason that the first statute of *praemunire* wherof I have spoken, hath nowe no place in England, for there is no pleading *alibi quam in curia regis ac reginae*.' Smith, *De republica anglorum*, ed. Dewar, 143-4; see also Daniel R. Coquillette, *The civilian writers of Doctors' Commons, London* (Berlin, 1988) 87.

¹³³ Cosin, *Apologie*, I, 128-9. (Pages misprinted '126' and '127'.)

¹³⁴ Cosin, *Apologie*, I, 128. (Page misprinted '126'.)

should result in a *praemunire*.¹³⁵ This would imply that a *praemunire* should be served in every case that a prohibition might, which Cosin believed was certainly erroneous.

Cosin accordingly issued ten doubts that every overextension by an ecclesiastical court was a *praemunire*. He doubted: 1) that there was no difference between simply mistaking a temporal matter for an ecclesiastical one and willfully attempting to usurp temporal jurisdiction, 2) that a judge could be in danger of *praemunire* before he was even aware of the matter, (since Cosin believed that ‘in no Court temporall or ecclesiasticall, the Iudges peruse the writs, declarations &c. when they are first put in’), 3) that it was as great an offence simply to hold plea in such a matter of mistaken jurisdiction as it was to give sentence, 4) that it was as great an offence for an ecclesiastical court to execute a temporal matter by censures of the church as it was to execute the same by ordinary temporal punishment such as fine or imprisonment, 5) that it was a great offence to persist in prosecuting in a spiritual court a case which had revealed itself to be essentially a temporal matter, 6) that it was *praemunire* to hold plea in a matter that had never been handled in either a temporal or ecclesiastical court ‘nor whereof any remedie lieth at the Common law’, 7) that it was an offence to make temporal or ecclesiastical laws without the consent of the prince,¹³⁶ 8) ‘what it was to deale in temporall causes or courts, without commission? and what in ecclesiasticall?’,¹³⁷ 9) what kind of offence it was if a temporal court held plea in a case that belonged to ecclesiastical jurisdiction, and 10) what kind of offence it was for one temporal court to determine a matter in which it was not competent, ‘as for example, if the court of Common Pleas or the Eschequer should deale in pleas of the Crowne that be capitall? with such like a great number’.¹³⁸

The listing of these doubts, which seem to be something of an academic digression for the personal satisfaction of Whitgift rather than a direct response to Morice’s claims regarding *praemunire*, was how Cosin chose to end part I of the *Apologie*, providing for a somewhat

¹³⁵ See also Cosin, *Apologie*, III, 89-90. This exact quote does not appear in the printed version of the *Treatise*, and it is not quite an accurate paraphrase either since Morice’s main contention was that it was the imposition of the *ex officio* oath, not simply the occasional overextension of authority, that was the sole cause of *praemunire*. See Morice, *Treatise*, 47-58. Nevertheless, this opinion was held by other puritans.

¹³⁶ The Parliament of 1604 tried to pass a bill prohibiting Convocation from passing new canons without Parliament’s consent, but they were stopped by James. Levy, *Fifth Amendment*, 214.

¹³⁷ The meaning of this doubt is obscure.

¹³⁸ Cosin, *Apologie*, I, 130.

anti-climactic ending. Indeed, the vast majority of part I was not openly polemical or controversial, consisting of lengthy lists of matters belonging to ecclesiastical jurisdiction, bolstered by citations of statutes, canon and civil law maxims, scripture, and common law precedents. But although on the surface part I seemed unpolemical, Cosin was laying the basis for parts II and III in which he would defend the high commission's manner of conducting criminal prosecutions and its use of the *ex officio* oath, respectively. To establish the extent of spiritual jurisdiction was a necessary first task, only after which could he articulate the latter two arguments effectively. As the *Apologie* progressed, therefore, it became more narrowly focused, finally culminating in a full validation of the high commission's prerogative to exact the oath, deprive nonconformist ministers, and to fine or imprison those who refused the oath. With the extent of church courts' authority thus established in part I, Cosin turned his attention in part II to procedure.

Chapter 4

Richard Cosin's

Apologie for sundrie proceedings ecclesiasticall

Part II: The two ways of prosecuting suits in
ecclesiastical courts: by accusation or *ex officio*

While the first part of the *Apologie* was dedicated to examining the extent of ecclesiastical jurisdiction, the second part was devoted to an examination of the *manner* of prosecuting criminal suits, whether by accusation or *ex officio*.¹ The most controversial aspects of the high commission involved its criminal procedures. Opponents of the commission found fault with the court's *ex officio* style of prosecution, where the judge or judges ordered suspects to appear in court and be interrogated on various articles. The absence of an accuser to initiate and prosecute the case particularly rankled puritan common lawyers who believed that this procedure placed the ordinary in the role of prosecutor as well as judge. The high commission's style of interrogating defendants, based on the continental inquisitorial method, placed the accused at both a psychological and a real disadvantage compared with common law criminal procedure. They were often not told what charges were being laid against them until well after the interrogatories had begun, they were not shown a copy of the questions they would be compelled to answer, they were usually denied counsel, they were made to take a general oath to answer all questions truthfully (even if they caused the defendant to incriminate himself), and they were sometimes asked directly on oath whether they had committed the crime.

With a few circumstantial exceptions, none of these procedures originated in or were used by common law. Criminal defendants in temporal courts enjoyed certain liberties that protected them from false accusation. Standards of proof required for conviction in temporal courts were stronger than in ecclesiastical courts, rules of evidence were more stringent, and the use of juries contrasted sharply with the judgement of the bishop or ordinary.² The main reason why the high commission's criminal procedures were attacked so vociferously by the puritans was because they were effective. Ecclesiastical judges were not reliant on local accusers to bring nonconformists to trial nor on local juries to produce a desirable verdict. In the popular religious turmoil of the late sixteenth century the centralised, authoritarian style of the high commission's *ex officio* procedure allowed Archbishop Whitgift to control the spread of nonconformity to a greater extent than would have been possible using common law criminal

¹ Part II consisted of 140 pages divided into sixteen chapters.

² W.S. Holdsworth, *A history of English law* (12 vols.; London, 1906-1972) vol. IV; Helmholz, *Roman canon law*.

procedures. Because of the high commission's efficiency, the puritans took exception to many of its procedural details as being contrary to the laws of the realm, and they trumpeted their views in print and in Parliament between 1584 and 1593.³

Part II of Cosin's *Apologie* addressed these puritan outcries, smartly following on part I's establishment of what matters rightly belonged to ecclesiastical jurisdiction. In the preface to part II Cosin observed four particular opinions of his adversaries that regarded the 'maner of entrance into some suites.' The first opinion, that an ecclesiastical court could not proceed without accusation or presentment, was rejected by Cosin as being so narrow as to exclude even matrimonial and testamentary matters, since 'accusation or presentment hath none vse, but in matters of crime or offence incident vnto that iurisdiction to punish.'⁴ The second opinion, that no lay person could be cited *ex officio* in any cases but testamentary or matrimonial, Cosin perceived as an attempt to eradicate completely the practice of *ex officio* procedure; for if it were true, then a man being duly presented for any crime could not be cited for lack of an accuser to prosecute him. The primary use of *ex officio* procedure, maintained Cosin, was to prosecute criminals, not wills and marriages. In effect, these first two opinions crippled ecclesiastical judicial authority by preventing judges from proceeding with criminal cases in the absence of an accuser, or from initiating cases in testamentary or matrimonial matters without a presentment.⁵

The 'innovators' third opinion concerned oaths: they asserted that even if a man were properly accused or presented, he could not be examined on oath touching the actual crime, 'whereby (I thinke) is meant, that hee may not be so examined of any criminall and penall matter.'⁶ The fourth opinion contended that no man was bound to declare any matter against another unless there were an accuser. In other words, no witness might be forced to testify in *ex officio* cases, inferring that only voluntary witnesses were eligible for testimony in such

³ Collinson, *Elizabethan essays* (London, 1994) 59-86; Collinson, *Elizabethan puritan movement*; Hamilton, *Shakespeare*, 4-11; Guy, 'The establishment and the ecclesiastical polity', *Reign of Elizabeth I*, ed. Guy, 129-32, 141; Neale, *Parliaments, 1584-1601*, 22, 232, 242, 267-78. See also PRO, SP12/176 doc. 72, fos. 223r-224v; and PRO, SP12/176 doc. 75, fo. 228r-v for good examples of puritan opposition to *ex officio* procedure in 1584.

⁴ Cosin, *Apologie*, II, sig. A2v.

⁵ Cosin, *Apologie*, II, sig. A3r.

⁶ Cosin, *Apologie*, II, sig. A3r. The phrase 'examined on oath touching the crime itself' meant the defendant was asked directly by the judge whether he committed the crime in question. Cosin chose not to confute this opinion until part III of the *Apologie*. See below, 140.

cases. According to Cosin the effect of this last opinion was to empower accusers acting out of malice to coerce witnesses to testify, whereas a judge proceeding 'for satisfaction of his dutie only' might not.⁷ As Cosin argued in part I, witnesses testifying voluntarily 'vpon some pique or humor of enmitie' were not to be trusted.⁸ Thus these four opinions of the puritans restricted either the manner of entering into an ecclesiastical suit or of proceeding in the suit once it was begun.⁹

Cosin began his confutation of the four opinions by defining the categories of actionable faults, ways of denying charges, and the merits of both accusation and *ex officio* as procedures in criminal cases. There were two kinds of faults or sins, said Cosin, those of commission (*peccatum*) and those of omission (*delictum a delinquendo*). Of these offences *crimina ordinaria* (also called *crimina legitima*) were ordinary, familiar crimes, well defined in law through legal precedent. *Crimina extraordinaria* were either uncertainly committed crimes or else crimes not well defined by law, occasionally even lacking a precise name. Admonitions and chastisements for these faults were either given by word or deed, that is, by rebuke or punishment.¹⁰ Punishments themselves fell into three categories: 1) those tempered with mercy, where a man might be subjected to some form of chastisement, 'yet the rigour of the penaltie is spared', 2) those that were exacted for the satisfaction of a party grieved, and 3) those that were imposed for the instruction of others or as a reaction against an abhorrent crime.¹¹

Cosin affirmed it was a judge's duty and interest to punish crime. In fact, a judge himself became an offender by his own refusal to punish offences, thereby encouraging wickedness to proliferate in default of authoritative correction.

⁷ Cosin, *Apologie*, II, sig. A3v.

⁸ Cosin, *Apologie*, II, sig. A3r; *Apologie*, I, 71.

⁹ There were other convictions held by Cosin's opponents concerning smaller matters, which he mentioned briefly at the close of the preface. They were: opposition to the tendering of an oath to answer to all questions when the defendant was not apprised of the particular questions he was to be asked ahead of time, and rejection of the process of further enquiry after answer had been given on oath. These objections were taken up by Cosin in part III. Cosin, *Apologie*, II, sig. A4r-v.

¹⁰ Those admonitions, which were verbal only, tended 'to the reformation & amendment of him, vpon whom they are vsed, by making him sorowfull for it, & more circumspect & carefull how he carieth himselfe in the like afterward, and thereby is a man said to be won by another.' Cosin, *Apologie*, II, 1-3.

¹¹ Cosin, *Apologie*, II, 3-4.

Quicke punishment of sinne giues a remedie against sinne. For all crimes and offences be (in truth) but as so many maladies and distemperatures in the body of the Church and Common weale; which if they be tolerated to grow (without restraint & coercion of lawes) will quickly spread like a cancker, either to the destruction, or to the great and apparant danger of both.¹²

How should offences be brought to the attention of the judge? There were two ways, suggested Cosin: at the instance of a party or *ex officio*, by the judge himself. The way these suits were initiated in temporal courts in England depended on the type of jurisdiction granted to that court. Again there were two types: some temporal courts acted upon the *immediate* or direct authority of the queen, such as those at Westminster, while others operated by her *mediate* or indirect authority, 'yet by her Graunt made (in some sort) their owne, as deriued downe thereby vnto them'. For although all authority ultimately flowed from the queen, the processes in courts bearing indirect authority did not run in the queen's name and her seal was not used. Examples of courts which exercised their authority indirectly were the constables' courts, the earl marshal's court, the courts of counties palatine, the courts of incorporated cities and towns, sheriff's tourns, courts-leet, views of frank-pledge, and courts for maritime causes such as the Court of Admiralty.¹³ The common law was followed at most of these courts, according to Cosin, with only a few exceptions. London and some other incorporated cities and towns, for example, adhered to local customs which sometimes differed from (and were deferred to by) the common law. In the courts of Admiralty, civil law procedure was usually followed because, said Cosin, it was the common law of most nations.¹⁴ Those courts which exercised their authority directly from the queen were of differing sorts. Some did not operate by letters patent — Parliament for example — which met only by the queen's express writ. Chancery operated similarly, the chancellor and lord keeper bearing no commission of letters patent, but who nevertheless 'receiue their authority by deliury vnto them of the great Seale.' Star Chamber, which consisted of the privy council and the chief justices of common law courts, was established 'partly by praescription and

¹² Cosin, *Apologie*, II, 4.

¹³ Cosin, *Apologie*, II, 7.

¹⁴ Cosin, *Apologie*, II, 7-8.

partly by Statute'. The Council of Wales was authorised by act of Parliament (38 Henry VIII c. 28) with periodic refinements in its authority by means of special writs from the queen. Included in those courts which exercised their authority directly from the queen by commission and letters patent were the courts of Queen's Bench, Common Pleas, the Exchequer, and the Court of Wards and Liveries. These leading courts were based at Westminster, but there were other courts established by commission or letters patent in the realm: assizes, nisi prius, gaol delivery, sessions of the peace, the Council of the North, the courts of Stannery in Devonshire and Cornwall, and the Court for Trial of Life and Death at Halifax. Cosin noted that these courts, not merely the ancient courts at Westminster, were referred to as 'courts of common law', though this was not to imply that other courts were contrary to the common law.¹⁵

Cosin argued that when an action was moved in one of the queen's courts, whether by indictment, by the judge himself, by the queen's attorney-general, or by a private person, the suit was essentially *ex officio iudicum* since all suits in these courts were on behalf of the queen, whose courts they were.¹⁶ As evidence that suits moved in these courts belonged to the queen, Cosin observed that those preferring indictments in these courts were not required to pay costs if the defendant were acquitted. Likewise, defendants convicted and punished by fine paid their fines strictly to the queen. However, if in Star Chamber the judges were persuaded that a prosecutor was acting calumniously or maliciously, he was condemned in costs and damages for molesting the defendant.¹⁷ Cosin's claim that all actions in the queen's courts were technically *ex officio iudicum* was tendentious. He was endeavouring to draw a link with the high commission's practice of prosecuting suits *ex officio*, but as we will see,

¹⁵ Cosin, *Apologie*, II, 8. Morice resented this exercise of categorization, suggesting that Cosin 'maketh no difference betwene the common lawe, actes of parleament, and other her maiesties temporall lawes, confounde[s] by like error the diuersitie of her highnes courtes and giue[s] them new names at his owne pleasure.' He disliked Cosin's terming of Parliament a 'court' (being one of the courts which exercised direct authority from the queen). Cosin noted that Parliament sat only by the queen's writ and that it might hear appeals from the King's Bench, but Morice thought it was too much to say that Parliament acted as a 'delegate power to heare and determine cawses either ciuill or criminall'. LPL, MS 234, fos. 200v-201r.

¹⁶ Cosin, *Apologie*, II, 9. In chapter eleven of part II Cosin cited several statutes to show that proceedings by the temporal judges were technically on behalf of the sovereign. Those statutes were 18 Edward III c. 2 (*Pro clero*), 42 Edward III c. 4, 8 Henry VI c. 16, 11 Henry VII c. 25, and 1 Henry VIII c. 12. Cosin, *Apologie*, II, 96.

¹⁷ Cosin, *Apologie*, II, 11-2.

there were substantive differences between temporal and ecclesiastical prosecutions that weakened his assertion.¹⁸

Criminal procedures that did not make use of juries came next to be considered by Cosin. Parliament did not usually try offences unless such offences were committed by members of the house itself,¹⁹ and in those cases Parliament could proceed without an accuser. In Cosin's view this constituted proceeding *of office*. Star Chamber only enquired of extraordinary crimes, demanding special judicial consideration in the deficiency of legal precedent. Suits in that court were initiated either by bill of information (by the queen's attorney-general or an aggrieved private accuser) or *ore tenus*.²⁰ Despite the presence of a prosecuting party, however, this did not constitute an accusation, Cosin argued, since the attorney-general's duty was 'partly to stirre vp and partly to ease the office of that Court by furnishing it with proofes.'²¹ Star Chamber was not permitted to punish by loss of life or limb but only by 'open shame and infamie', fines, imprisonment, 'nayling or cutting of eares, or deforming the face', banishment, or condemnation to the gallies.²² Chancery and the Court of Requests were courts of equity. Suits in these courts, moved wholly privately and never *ex officio*, arose where, although there might be criminal matter contained in the bill, the party prosecuting sought only amends and redress of damages, not punishment of the defendant. The defendant was required to answer the bill (even its criminal components) upon his oath, but he was not to answer the plaintiff's interrogatories on oath unless 'the plaintife will be concluded by the defendants answere vnto them, and seeke to make no further proofes.'²³ In each of these temporal courts mentioned so far, noted Cosin, both those which proceeded by juries and those which proceeded by judges enquired of the party upon their corporal oaths 'when any lewde practice, abuse, or contempt (not capitall, nor tending to mutilation) is supposed to be done against the Court.'²⁴

¹⁸ See below, 133.

¹⁹ The Lords acted as a court of appeal if they agreed to accept a writ of error sent from a litigant in King's Bench or Common Pleas who felt his case had been misjudged. Spelman, *Reports*, ed. Baker, II, 119-23.

²⁰ For discussion of *ore tenus* procedure see 67, footnote 101; and 195, footnote 111.

²¹ Cosin, *Apologie*, II, 11.

²² Cosin added that the Council of Wales and the Council of the North carried similar disciplinary powers to Star Chamber. Cosin, *Apologie*, II, 12.

²³ Cosin, *Apologie*, II, 12.

²⁴ *Ibid.*

Turning his attention to processes in ecclesiastical courts, Cosin revealed that these same two methods of prosecuting offences (by party or *ex officio*) used in temporal courts were also used in ecclesiastical courts. Concerning proceedings by party there were four types, two of which Cosin labelled as commendable, two as uncommendable. *Exception* might be taken against a witness brought forth to testify on the grounds that he was 'lewde or affectionate' and deserved no credit from the court for his testimony. This objection against a witness, said Cosin, did not have the force of an accusation, unless the defendant then proceeded to set down the time, manner, and place of the witness's crime, in which event the suit formally became a case of *recrimination* or *cross-accusation* by the defendant. Exception was considered a commendable way of proceeding by Cosin. The other commendable sort of prosecution by party was *complaint* (or *per querelam*), which of itself was of two sorts. One was extrajudicial and called *querimonia*. This process was defined as a complaint made by a citizen to someone in authority regarding a wrong done to him, seeking only that reason and justice might be done. The other judicial sort was termed *double querele*, which was in essence an appeal to a higher court or to the prince to delay or review a lower court's decision against the defendant.²⁵

This recital of legal minutiae might seem pointless to the reader, but it should be remembered that Cosin was not simply expounding ecclesiastical court procedure, he was defending it from attack. One of the most virulent attack strategies used by the puritans against ecclesiastical law was that it was illogical, unsophisticated, and clumsy. Following in the tradition of St. German, Elizabethan common lawyers glorified English common law as harmonious with the laws of God and nature.²⁶ Cosin's task was to explain not only the function of canon and civil law — which had never been done before in English — but to demonstrate its competence. Sir Thomas More and Sir Thomas Smith, though at least as qualified for this project as Cosin, never attempted anything of the kind.

Of those methods of prosecution by party named by Cosin as uncommendable, the first was *delatio*, which was of two kinds. The first kind of *delatio* was a secret accusation made

²⁵ There was no appeal from the *double querele*. Cosin, *Apologie*, II, 14.

²⁶ Prest, *Barristers*, 257-60, 319; Guy, *St. German*, 19-20; Ives, *Common lawyers*, 207-8.

known to a judge by someone with no material interest in the matter. The second type of prosecutor was a more public and open accuser and was also divided into two sub-types. The first sub-type of accuser preferred the information publicly but under the name of another. The second sub-type preferred the information 'for gaine or reward' under his own name. This second kind, remarked Cosin, sometimes informed for the purpose of securing what someone else would soon be losing, and therefore these people were odious and hated by other men. These people were called *informers* or *promoters*.²⁷

The fourth way of prosecuting and the second uncommendable way, according to Cosin, was *accusation*. Public accusations were either moved civilly for redress of grievances or criminally for punishment of wrongdoing.²⁸ Accusations might be submitted *ore tenus* ('by bare wordes without writing') or, more often, in writing by bill. The civil law required formal accusers to submit three things before their suit could be processed: 1) the name of the accused, 2) the accuser's name, 3) an agreement by the accuser that he be 'committed vnto the like custodie and ward, that the Accused (in regard of the qualitie of the fault, and dignitie of the Accusour) is to susteine, vntill the suite be finished.' This process bound the accuser to prosecute the suit to its conclusion. The reason for this was so that a man might not accuse lightly, knowing that if he failed in his proofs or was shown to have troubled the court and the defendant needlessly, he would face the same penalties as the defendant would have, had he been convicted. This was called *poena talionis* or retaliation. Cosin confessed that many people in England would have found this law quite stringent, yet this was the requirement for accusers in ancient Rome. Those who prosecuted suits in the name of the sovereign, however, were exempt from this rule, as they did not prosecute out of malice, desire for revenge, or in an attempt to gain honor or wealth.²⁹

The practice of accusation, Cosin remarked, had become either forbidden or obsolete in many countries, often replaced by *ex officio* or by a mixed way of proceeding, partly *ex*

²⁷ Cosin added that in ancient times such men were also sometimes called *duplicatores* or *triplicatores* because a half or a third of the penalty was awarded to them. Cosin, *Apologie*, II, 15.

²⁸ There are several other minor types of private accusation discussed by Cosin at II, 16.

²⁹ Cosin, *Apologie*, II, 19-20, 25.

officio and partly by party.³⁰ The reasons for the decline of accusation as a method of criminal prosecution were ascribed by Cosin to be two: the trouble involved, and ‘because it is and hath bene so odious and abhorred of most men in all ages.’ Men tended not to prosecute for four reasons: cost, trouble, common obloquy (discredit or dishonor), and offence taken by the accused. Because of these things, Cosin asserted, criminals ought to be proceeded with either by appointed promoters and prosecutors, or by the judge himself.³¹ The drift of Cosin’s argument is now clear. To establish *ex officio* procedure as the preferred method of dealing in criminal cases, it was first necessary to desecrate the sacred cow of common lawyers: the accusatory method. Cosin proposed that *ex officio* procedure was desirable because it was the only way to ensure that offences would be punished. Otherwise very few men ‘will be found voluntarily to become an Accuser, and to prosecute at his owne costs and charges’. Men who were simply aware of offences would not be likely to report them, ‘For who are commonly made priuie to such sinnes, but men of like humour and affection? In whom we may not presuppose such sinceritie of conscience, that for reformation of the partie delinquent, they will abandon all friendship, and aduenture any displeasure; euen but to take a triall (with their great charge and trouble) howe they shall be able to make prooffe of such matters against them.’³² Were it not for *ex officio* proceedings, submitted Cosin, criminal offences would have multiplied beyond the control of the law.³³

Cosin’s defence for an activist judiciary was unquestionably derived from the medieval justification of inquisitorial procedure against heresy. The overriding concern for the discovery and punishment of offences and the consequent weakening of defendants’ traditional protection linked the rationale between *per inquisitionem* on the continent and *ex officio* in England. Cosin feared that complete reliance on accusation as the only means to initiate

³⁰ Cosin noted that the use of accusation was prohibited in Flanders, in Naples its use was restricted to civil cases only, in Venice private citizens might not prosecute but only magistrates, in France only the three attorney-generals were permitted to prosecute (and even then they were not technically accusers, since they acted *ex officio promoto*). Cosin, *Apologie*, II, 22-3, 112.

³¹ Cosin, *Apologie*, II, 84.

³² Cosin, *Apologie*, II, 83, 86. For further discussion of the obstacles to justice posed by the medieval accusatorial system, see Brundage, *Medieval canon law*, 142-3.

³³ Cosin proposed several other minor reasons for the inferiority of accusation by a private party. One of them was that if there were only two witnesses to a crime, and one of them were required to become the accusing party, ‘then the full proofes...were thereby cleare taken away’, since two witnesses were needed to convict someone of the charges brought by an accuser. In such a case the criminal would escape unpunished. Cosin, *Apologie*, II, 85-7.

criminal cases would mean that many serious crimes would never be punished for lack of accusers, and the history of the medieval church showed that Cosin's fears were justified.³⁴ Scripture itself, asserted Cosin, neither appointed nor commanded criminal matters to be prosecuted by a party, as was evidenced by the scarcity of such examples in the Bible. Indeed the evidence of scripture seemed to Cosin to vindicate his own predisposition towards proceeding of office.³⁵

Thus Cosin found a paradox inherent in the very concept of accusation, that all accusers were 'reuengefull' by their nature and yet were constrained not to be vengeful when they made their accusations. In closing his discussion of accusation, he cautioned that if accusers might remember to refrain from a malicious and vengeful spirit, seeking to do the other party harm, and not to prosecute for 'gaine and lucre sake', accusation 'might still haue a tollerable and profitable vse in Christian Common weales.'³⁶ But this did not mean that Cosin wished better health to the cause of accusation. The success of his elevation of *ex officio* procedure over accusation rested on the moral repugnancy of achieving justice by way of private revenge or malice.

Having catalogued the undesirability of accusation, Cosin recommended other methods of punishing criminous behaviour and suggested that these had actually grown into favour. He devoted chapters five, six, and seven to defending the superiority of proceeding *ex officio* by enquiry over that of accusation, the nature and practice of denunciation, the grounds of special enquiry, and the procedure and jurisdiction of the high commission.

The 'hatefulness' of accusation, suggested Cosin, had made it necessary for judges to resort to a process of enquiry to discover crimes as well as to redress civil grievances, and this

³⁴ See above, 44, for evaluation of the ineffectiveness of accusation in serious ecclesiastical crimes. See also Brundage, *Medieval canon law*, 147-9; Levy, *Fifth Amendment*, 40.

³⁵ Some of the examples cited by Cosin to prove his point did not really prove his point: Leviticus 19:16 said, 'Thou shalt not stand against the bloud of thy neighbour'; verse 18, 'thou shalt not avenge, nor be mindefull of wrong against the children of thy people, but shalt love thy neighbour as thy selfe' and Matthew 5:38, 39: '...But I say vnto you, resist not euill; but whosoever shall smite thee on thy right cheeke, turne to him the other also.' But none of these verses seem to speak to the issue of judicial prosecution of offences. Only 1 Corinthians 6:7 appears to bolster Cosin's case: 'There is vterly a fault among you, because ye goe to law one with another. Why rather suffer ye not wrong? why rather susteine ye not losse?' Cosin, *Apologie*, II, 28.

³⁶ Cosin, *Apologie*, II, 29.

enquiry was conducted by the judge's office or *officium*, which signified among other things, 'that power, whereby he [the judge] may deale of himselfe, without the petition or instance of a partie'.³⁷ To enquire into offences was 'to search into a matter deeply and carefully, that is kept close, to bring it to triall of iudgement, which it deserueth.'³⁸ Cosin contended that *ex officio* procedure was both freer from the corruption of calumnation and less inconvenient than was accusation initiated by a private prosecutor. In fact, *ex officio* procedure was safer for both prosecutor and defendant, argued Cosin, because the fear of subornation of witnesses was taken away on both sides.³⁹

There were two types of enquiry. The first, *general enquiry*, was 'a preparatorie course proceeding of meere Office, purposed to enquire and finde out criminous persons, within some certain territorie or compasse.' There were three kinds of general enquiry, 1) that which was general in respect of persons yet specific in respect of the fault (such as a coroner enquiring into a murder when the offence was known to have been committed and yet the offender was not known), 2) specific in respect of persons yet general in respect of the fault (when the offender was known but crime was not), and 3) general in respect of both (such as at general visitations of dioceses or enquiries made by a grand jury at the assizes or session of the peace).⁴⁰ Morice believed the second and third types of general enquiries were violations of the laws of the realm. In such enquiries, he suggested, the bishop or ordinary 'wandered' in his interrogatories in search of matter upon which to ground an accusation.⁴¹ The second type of enquiry was called *special enquiry* and this described an investigation which was specific both in respect of persons and in respect of the fault, and the end of this sort of enquiry was to bring the suspect to trial. Such cases might be prosecuted by the judge only or by a prosecutor (although the proceeding was still *ex officio*, said Cosin, since it was initiated by the judge's

³⁷ Cosin, *Apologie*, II, 30. Cosin's asseveration that *ex officio* procedure came about as a result of the hatefulness of accusation is untrue. As we have already established, *ex officio* was a descendant of *per inquisitionem* which was a papal legislative innovation pioneered by Innocent III and the popes of the late twelfth and early thirteenth century in an attempt to discover and punish heresy. See above, 44-7.

³⁸ The old term for enquiry was *quaestio* which on occasions signified both enquiry and examination (sometimes by torture). The word *inquisitio* was also used for this purpose. Cosin, *Apologie*, II, 31.

³⁹ Cosin, *Apologie*, II, 34.

⁴⁰ Cosin, *Apologie*, II, 35.

⁴¹ Morice, *Treatise*, 39.

office).⁴² If no party would prosecute the matter, then the proceeding was simply called *officium* or *officium merum*, and the judge himself processed the suit. That was the canon law term; *officium nobile* was the equivalent phrase in the civil law, ‘as of more woorth and dignitie, then the other course which is by a Partie, and at his petition and instance.’ The civil law described such a proceeding at the instance of a party *officium mercenarium*, ‘that is, when the Office of the Iudge is (as it were) hired and employed, but at another mans becke, to serue his turne.’⁴³ Cosin’s low opinion of the accusatory method, with which Morice found much to disagree, is thus a result of his civilian training. His methodical denigration of the criminal procedure so fundamental to common law was a bold manoeuvre, and he buttressed his case with a host of ancient and medieval authorities, scripture, and reason. The purpose of all this was to elevate the integrity of the judge’s office in an effort to justify the inquisitorial procedure necessary for the efficient functioning of the high commission.

In summarising the nature of *ex officio* procedure, Cosin maintained that it was privileged over suits at the petition of a party in six ways: 1) the judge did not run the risk of being repimanded or punished as an accuser would if he failed in his proofs (*propter praesumptam calumniam*) because the law did not presume calumnation in a judge as it did in a private accuser; 2) the judge was permitted to tender an oath to the defendant which was a privilege not enjoyed by an accuser suing in his own behalf ‘because the defendant ought not to bee driuen to furnish vp his aduersaries intention’;⁴⁴ 3) a judge proceeding *ex officio* was not required to prove the fame surrounding a defendant;⁴⁵ 4) in accusatory proceedings contrary proofs to exonerate the defendant’s good name were admitted, whereas they need not be admitted in *ex officio* cases; 5) in accusatory proceedings a criminal trial comprised a *contestation* between the parties, whereas in *ex officio* cases (even in those prosecuted by an

⁴² Such prosecutors either prosecuted throughout the whole suit (*officium promotum*) or for only part of the suit, such as for the furnishing of proofs (*officium mixtum*). This second type of prosecutor was termed a *relater*. *Officium promotum* occurred under one of two circumstances: when a man prosecuted voluntarily (*promotor voluntarius officii*); or when a man was assigned to prosecute (*necessarius promotor officii*) ‘because hee may not refuse this employment.’ Cosin, *Apologie*, II, 35-6.

⁴³ Cosin, *Apologie*, II, 36.

⁴⁴ Or as Morice put it, ‘The partie is not by oath to supplie his aduersaries want of profe’. LPL, MS 234, fo. 102v.

⁴⁵ The exception to this was that if an appeal were made by the guilty party to a higher court after the verdict, proof of the fame must be made by the judge to his superior. Cases of appeal in the high commission were of course impossible since it was the highest ecclesiastical court in England. Cosin, *Apologie*, II, 37. For a full explanation of whether fames must be proved, see below, 123.

appointed promoter or relater) only a *contradiction* was said to exist between the public rumour or fame that concerned the defendant and his denial of the charges; and 6) in *ex officio* procedure more witnesses might be received after publication of testimony because there was no fear of subornation of witnesses in this case.⁴⁶ This catalogue of ‘privileges’ of *ex officio* procedure over accusation shows the remarkable prerogative ascribed by Cosin to ecclesiastical judges. In the adversarial system of common law, judges were trained to arbitrate between two balanced, equally-corruptible litigants, but Cosin viewed ecclesiastical judges in an entirely different light. He imputed an inherent dignity and prerogative to their office that invested them with extraordinary power in conducting criminal prosecutions. The view of common lawyers such as Morice and Beale, which was in part nurtured by anticlericalism, was that ecclesiastical judges were as free to depart from ethical behaviour as any private accuser who was unshackled from the ordinary restraints and qualifications placed on prosecutors in temporal courts.

Cosin next considered the manner of initiating criminal suits. Since a judge could not be expected to have complete and perfect knowledge of all crimes that fell under his jurisdiction, laws had been evolved to bring knowledge of crimes to him. The initial receiving of information from witnesses or denouncers was termed by the civil law the *process informative*, and all proceeding which occurred after the defendant’s first appearance in or willful absence from court was termed the *process punitive*.⁴⁷ The most common of these means was *denunciation*.⁴⁸ Cosin defined denunciation as information of a crime related to an ecclesiastical judge for the purpose of reformation or punishment of the offender ‘yet without that solemne inscription by the Denouncer, which the law requires in an Accusation.’⁴⁹ There were two types of denouncers, said Cosin, those who denounced of their own free will (not always for commendable reasons), and these were called *delators*; and those who denounced

⁴⁶ Depositions by witnesses were always published to the judge, but in accusation cases no new witnesses might be received after the original witnesses gave testimony, ‘for feare of suborning them in the pointes, where he [the accuser] findes the former depositions came too short of his purpose.’ Cosin, *Apologie*, II, 36-7.

⁴⁷ It was not commonly thought necessary, said Cosin, for the defendant to be present for the process informative. Cosin, *Apologie*, II, 56.

⁴⁸ While some writers claimed denunciation to be a third way of proceeding besides accusation and enquiry, Cosin considered it rather ‘a speciall meanes or instrument...[for] drawing the Iudges power and Office into action by Enquirie.’ Cosin, *Apologie*, II, 38.

⁴⁹ Cosin, *Apologie*, II, 38.

as a course of public duty. This second kind were termed *publica sollicitudinis cura* (the care or regard of public watchfulness). Of this second kind there were two sorts in ancient Rome: those who possessed authority simply to enquire and denounce, and those who also were given authority to examine suspects after denouncing them. Cosin compared these ancient offices to wardmote enquests in contemporary London, and in the ecclesiastical law, churchwardens and sidesmen (or questmen), who discharged duties similar to public denouncers.⁵⁰

In temporal courts there were three kinds of denunciation, said Cosin: *querela*,⁵¹ when the denouncing party harboured a particular interest in the suit; *delatio*, when the party was disinterested; and *denunciatio*, when the denouncer was a professional acting in public service, such as the attorney-general.⁵² In ecclesiastical courts there were four types of denunciation: evangelical, judicial, canonical, and regular. Evangelical denunciation was carried out by a disinterested party simply for the offender's reformation rather than for his punishment. The judge's handling of this type of denunciation was 'summarilie and not Iudiciallie: and as a spirituall Father, rather then a Iudge.'⁵³ Judicial denunciation was the refuge of someone either grieved or hurt by the offence of another, and the judge in this case proceeded by special enquiry to clear the suspect should he be innocent, or punish him if he were guilty. Canonical denunciation (which originated from canon law) was for the purpose of removing an ecclesiastical person from his office for some type of offence or sin. And finally, regular denunciation was a private complaint or warning against some citizen to amend his life and was not intended to make any particular offences punished, redressed, or even public.⁵⁴

In the event of uncertainty on the part of a public denouncer whether a crime had been committed (as in adultery or defamation), or if the commission of the crime was certain but the offender unknown (as in murder or forgery), if a fame existed concerning suspected wrongdoers the denouncer was bound to present such fame or knowledge of the crime to the

⁵⁰ In later Elizabethan England churchwardens were not only expected to present offenders, they were sometimes disciplined for failing to do so. Helmholz, *Roman canon law*, 105-9; Brundage, *Medieval canon law*, 143. See also the ecclesiastical memorandum issued by the high commissioners in 1591; LPL, MS 2004, fo. 65r-v.

⁵¹ This term is not to be confused with *double querelle* or *queremonia*, which correspond to the milder action of *complaint*, discussed above at 113.

⁵² Brundage, *Medieval canon law*, 143; Guy, *Star Chamber*, 37.

⁵³ Cosin, *Apologie*, II 43.

⁵⁴ Cosin, *Apologie*, II, 43-4.

judge.⁵⁵ If a private denouncer (someone who denounced of his own free will) failed in his proofs, it would be assumed that he acted calumniously and would be condemned in charges and punished, though not as harshly as an accuser would have been.⁵⁶ If, however, a public denouncer failed in his proofs, he was not condemned or punished for the obvious reason that he was acting on his public charge. Cosin insisted that because it was in the public interest of the realm to punish offences, there was a tangible need for both private and public denouncers to bring knowledge of crimes to the attention of judges, without whose informations a great many offences would go unpunished.⁵⁷

Public denunciation by officers especially assigned for that purpose was called *presentment*. Cosin believed that this definition was what his adversaries had in mind in framing their opinion '*that an ecclesiasticall Court may not proceede against any crime, without an Accusation or presentment.*'⁵⁸ Cosin intended, however, to show that there were indeed some ways of proceeding in ecclesiastical courts that used neither accusation nor presentment.⁵⁹ He argued that since presentment 'hath none vse in an Accusation, but onely openeth a way to the Iudges Office for speciall enquire against him that is presented⁶⁰...then all presentments, which be preparatories to proceeding of Office, must wholly cease.' This was a tricky argument. Cosin was endeavouring to trap his opponents in a cartesian circle, to persuade them that presentment (of which they approved) in ecclesiastical law was necessarily an instrument and component of *ex officio* procedure (of which they disapproved) and that the former could not be had without the latter. The argument rested on a misunderstanding of the term 'presentment', which was used by the puritans to mean something quite different.

⁵⁵ See also Gordon, 'Perjury and the Elizabethan courts', *American Journal of Legal History*, 24 (1980), 145-70.

⁵⁶ There were numerous exceptions to this penalty for private denouncers, though.: 1) if the private denouncer had initiated the case by way of necessity, such as 'when the heire prosecuteth the death of him to whom he is heire'; 2) if the case resulted from 'extreme grieffe' such as suspected adultery; 3) if the crime was 'enormious' such as coining or treason; 4) if 'a great euil fame did runne thereupon'; 5) if the denouncer could prove that the infamy was substantiated by men of worth and good credit; 6) if his witnesses falsely insisted they could prove the crime; 7) if 'he maketh halfe a good prooffe, as by one witnes without exception'. Cosin, *Apologie*, II, 47.

⁵⁷ Cosin, *Apologie*, II, 46.

⁵⁸ Cosin, *Apologie*, II, 52-3.

⁵⁹ For example, he had mentioned earlier that accusers must agree by way of an inscription to endure *poena talionis* if they failed in their proofs. But in the case of an *exception repulsive* only (when a defendant took exception to the accuser's accusation) or both *exception repulsive* and *exception recriminative* (...and sought legal recrimination against him) accusation might be done without such an inscription, and so might be said to be done without either accusation or presentment. Cosin, *Apologie*, II, 53.

⁶⁰ Cosin also made this claim in chapter 12: 'presentment is a preparatorie course peculiar onely to proceeding by speciall enquire of office.' Cosin, *Apologie*, II, 109.

By applying common law terms to civil law procedures that lacked an obvious English equivalent to the Latin original, Cosin was able to twist the common law meanings of these terms to fit his agenda. Thus ‘accusation’, which at the common law was the ordinary method of pleading for redress of grievances, was transmogrified by Cosin into the civil law concept of the spiteful, calumnious individual universally disparaged by ancient authorities. Likewise, a temporal judge arbitrating a case between two parties became at the civil law a ‘mercenary’ hired to dispense his judicial services.

There were other means to open the way to special enquiry besides presentment, noted Cosin, eleven in particular. The first of these was the existence of a *fame*. Cosin defined fame as simply the testimony of the multitude. Fames were of two degrees, only the stronger of which could become the basis of a proof.⁶¹ But what was the practical difference between fame and an ordinary rumour? A rumour became a fame when it was ‘blowen abroad...when the greater part of the whole neighbourhood or towne doe speake thereof’, or, if it were an issue which only a select circle of people would know, when the majority of that circle was talking about the issue. If the fame was not this well blown abroad, asserted Cosin, then it was not a fame but simply a rumour.⁶² A fame was counted in canon law as equivalent to public detection of an offence committed. Consequently, once a fame existed, the judge was both empowered and required to begin his special enquiry. Should an appeal by the defendant be brought on the grounds that the judge proceeded on a fame without presentment, inferior judges were required to prove that a fame did exist. The queen or such judges over whom there could be no successful appeals were not constrained to prove fames in cases where there was no presentment, however, since ‘the law presumeth more stronglie for their integrities, and freedome from Calumniation, conspiracie, and wilfull vniust vexation; then of euerie inferiour ordinarie Iudge.’⁶³ Thus, high commissioners, who recognised no superior ecclesiastical judge, were not constrained to prove fames at all.

⁶¹ The lesser kind of fame manifested itself ‘vpon suspicion onely, and from an vncerteine authour’. This kind of fame was strong enough only to create a *presumption* against the suspect and could only, at its worst, lead to purgation not conviction. The second kind of fame ‘is when it sprung vp and had his originall from a certein and likely presumption, and from probable matter.’ This kind could be made into a full proof or at least a presumptive proof (as in adultery, which left no trace behind, in which case the ordinary penalty for the crime could not be inflicted). Cosin, *Apologie*, II, 56-8.

⁶² Cosin, *Apologie*, II, 58.

⁶³ Cosin, *Apologie*, II, 59.

This was an extremely important point with respect to the powers of the Elizabethan high commission. If an ecclesiastical judge could proceed against a suspect on the basis of a fame he was not required to prove judicially, *ex officio* proceedings could move at a rapid, efficient pace controlled by the judge himself. This would have been especially useful when enquiring into areas that were thickly nonconformist. Should the judge be required to prove the fame, this would have to be done by the testimony of witnesses who would almost certainly be local citizens — probably neighbours or relatives of the accused. Hence, it was the same problem that was encountered by medieval continental judges seeking to suppress heresy. Neighbours and relatives of the suspect would refuse to substantiate the fame, thereby bringing the judge's enquiry to a standstill. By relieving superior judges of the need to prove fames, canon law empowered *ex officio* prosecution of offenders against the church but at the same time gave free rein to partial or malicious judges.

Cosin qualified the rule concerning proof of fames by citing the canon law principle that actually required proof of the fame, but which listed four important exceptions.⁶⁴ The practical effect of these exceptions was that the commissionenrs were free from the rule. Even if the exemptions mentioned by Cosin were the exception to the rule, there is no guarantee that the rule was followed when it should have been. Many canonists and civilians complained in their writings of the disparity between theory and practice. For example, the sixteenth century Italian canonist Julius Clarus affirmed that a fame must be proved to exist before witnesses for the plaintiff could be examined, but he added that this was completely ignored in practice, and in fact the opposite was done.⁶⁵

Clamosa insinuatio was a second means of opening the way to special enquiry. Similar but not identical to a fame, a *clamosa insinuatio* or 'clamorous insinuation' was a report of crimes or offences delivered to a judge by a 'credible person' but without a deposition.⁶⁶ The

⁶⁴ The four exceptions were: 1) in cases of heresy, regarding which most writers agreed that a 'vehement suspicion (grounded vpon any credible relation)' was sufficient to proceed with a special enquiry; 2) in cases when the sovereign either commanded or had knowledge of the special enquiry and when the commission was obtained *motu proprio* for his or her own service, but not in suits moved by a private party with an interest in the matter; 3) when the purpose of the enquiry was for reformation of soul's health rather than corporal punishment; 4) when the enquiry was for neither personal reformation nor corporal punishment but to determine the fitness of someone for an ecclesiastical function. Cosin, *Apologie*, II, 59.

⁶⁵ Helmholz, *Roman canon law*, 17-8.

⁶⁶ Cosin, *Apologie*, II, 60. Morice rejected *clamosa insinuatio* outright, since it could not be guaranteed that 'credible persons' were entirely free from malice or calumny. LPL, MS 234, fos. 97r-v, 102v.

third means of grounding a special enquiry besides presentment was by *complaint*, which might be done by a private citizen either through judicial or canonical denunciation. This was not counted as actual judicial or canonical denunciation, though, as the complainer did not subsequently prosecute the suit to its conclusion as a denouncer would, but left it with the judge to proceed *ex officio*.⁶⁷ A fourth means besides presentment was *indicia*, that is, evidences, inducements, or presumptions. There were three kinds of *indicia*: *levia indicia* (light suspicions), *indicia probabilia* (moderate presumptions), and *indicia indubitata* (violent presumptions). *Levia indicia* were too weak to convict a suspect circumstantially. *Indicia probabilia*, if there were enough of such evidences, might amount to a proof, though a man convicted in such a case might well be given a pecuniary punishment rather than a corporal one. The strongest type of evidences, *indicia indubitata*, might result from secret treaties, hidden crimes, etc., and for these suspected crimes the punishment was certain to be stronger. It was the prerogative of the judge to resolve into which of the three categories any particular *indicia* fell.⁶⁸

A fifth way of opening the process punitive besides presentment was termed *deprehensio in flagranti crimine*, commonly known as being caught red-handed or in the act of the crime itself. *Deprehensio in flagranti crimine* occurred if the judge or someone in authority actually witnessed a crime.⁶⁹ A sixth way to ground a special enquiry was *notorietas facti vel evidentia sceleris*, or the notoriety of the fact. Before a criminal could be convicted in this case, however, the fact of the notoriety was required to be expressed to the judge judicially, and he must make an interlocutory decree that the act was notorious. A seventh means was *incidens cognitio*, ‘when vpon examination of one offendour, it falleth out another of his complices to be discouered.’ But in this case the defendant’s revelation of another offender was not to be

⁶⁷ Any private person as well as public officers were permitted to employ this kind of denunciation. Cosin remarked that some would object to any special enquiry not preceded by fame since many writers seemed to affirm the necessity of such a course. But their writings ought not to be understood as precluding the use of other means of initiating special enquiry such as *clamosa insinuatio* or complaint when those options were available, whereby Cosin concluded that these two means mitigated the strict need for a fame. Cosin, *Apologie*, II, 61.

⁶⁸ This was not necessarily the case, however, if the sovereign or a chief counsel of state were prosecuting, although even then the punishment would likely be lighter than if the defendant had been convicted by the testimony of witnesses or by his own confession. Cosin, *Apologie*, II, 62-3. See also Lyndwode, *Provinciale* (London, 1534) (STC² 17113).

⁶⁹ Cosin, *Apologie*, II, 64.

treated as the testimony of a witness but merely as the report of a relater.⁷⁰ An eighth means was *enormitas criminis*, ‘the great heinousnesse of some crime.’ In such cases of enormity, a judge need not have fame or *indicia* to proceed.⁷¹ The issue of enormity was pertinent to the Elizabethan Act of Supremacy (1 Elizabeth c. 1), which declared that the queen was authorised to order and govern the English church by means of ecclesiastical commissions. Since the high commission was the only body empowered to determine what constituted an enormity, this was an extremely powerful disciplinary tool at Whitgift’s disposal.⁷² A ninth means of initiating special enquiry was by suspicion on the part of the judge that an accuser and accused were in collusion. A tenth way besides presentment was when a defendant allowed or was unable to prevent enough time from elapsing to erase all *indicia* of the crime. The eleventh and final means to open way to special enquiry was when the judge’s intention in proceeding was merely to dispense ‘fatherly and spirituall correction for the soules health onely: and not vnto any publike, corporall, and exemplarie punishment.’⁷³ Cosin denied the puritans’ charge that ordinaries manufactured and spread abroad their own fames for the purpose of initiating suits. Why should they do this, he asked, when there were so many other means at their disposal for the initiation of such suits?⁷⁴ We cannot measure how accurate the puritans’ claim was, but Cosin’s reply does not stand up well under scrutiny. Though there were technically ten other means available to ecclesiastical judges to initiate a special enquiry besides presentment and fame, many of them (being caught red-handed, notoriety of the fact, heinous crimes, suspicion of collusion between defendant and plaintiff, and erasure of evidence) were extremely rare. Of the remaining five, fatherly correction was not a criminal process at all since the offender was admonished rather than punished, and *clamosa insinuatō* and complaint were both closely related to fame, possibly indistinguishable in some cases. *Incidens cognitio*, or the discovery of a man’s offence through the testimony of another, we have already noted was believed by Morice to be an illegal method upon which to ground further enquiry, which

⁷⁰ In combination with the *ex officio* oath, this means of initiating a special enquiry could lead to a chain of *ex officio* prosecutions since the incriminating answers of one defendant might reveal the wrongdoings of another. Morice actually accused Cosin and the high commission using this technique to perpetuate unlawful prosecutions. Morice, *Treatise*, 20.

⁷¹ Cosin, *Apologie*, II, 65-6.

⁷² SR, IV, part 1, 350; Usher, *Rise and fall*, ed. Tyler, xxii, 27-8, 188-93.

⁷³ Cosin, *Apologie*, II, 66.

⁷⁴ Cosin, *Apologie*, II, 60.

leaves us with only the fourth means mentioned by Cosin, *indicia* or evidences. Cosin's claim, therefore, that judges had ten other means available to them to initiate special enquiry besides fame must be seriously qualified.

Having set out eleven other methods to initiate special enquiry besides presentment, Cosin defended the involvement of the high commission in such enquires. In theory,

The matters handled in the Commission Ecclesiasticall are such Crimes Ecclesiasticall...being aggrauated (aboue the ordinarie course of them) by some circumstance of moment...[and] when (either by reason of the power of the delinquents, or through some materiall circumstance) they be not so readily and easily reformable, by ordinarie jurisdiction.⁷⁵

In practice, the commission was empowered to spring into action to rectify the negligence of local officials, if the delinquents had moved elsewhere, if the queen or privy council specifically requested them to intervene, if a whole parish complained, if several credible persons were grieved, if there was a pressing need to aid and assist local officials, or even in cases of *notorietas facti*. Once the commission had decided to act, articles containing the place, time, and perpetrators of the crime (if known) were drawn up, including the people who would testify and all other evidences known. These articles opened the way to proceed by special enquiry *ex officio*, which might be done by one, two, or three commissioners. Next the party was convented either by *citation* (also called 'letters missive') or by *attachment* if the party was fleeing or fugitive or if the crimes were scandalous.⁷⁶ When the ordinary himself proceeded against the crime from the outset, the proceeding must be grounded either on the presentment of a fame, proof by witnesses' testimony, notoriety of the fact, *clamosa insinuatio*, or any of the other eleven courses allowed by law discussed above. When the party appeared before the judge, he was required to take an oath on behalf of the queen's majesty,

to answer the Articles or Interrogatories truely, (being matters of his owne facte and knowledge, so farre foorth as by lawe he is bound) before euery particular thereof be made

⁷⁵ Cosin, *Apologie*, II, 48-9.

⁷⁶ See also above, 87-8, 90, 93, 98.

knownen vnto him; least after perusall (afore his oath taken) he be drawn by counsell to answere cautelously, indirectly, or wholly to refuse to make answer.⁷⁷

But after he had taken his oath, the accused was permitted as much time to deliberate and plan his answer as he wished. If the defendant did not readily confess to having committed a crime, the judge would appoint a party to prosecute the case by attempting to prove the defendant's guilt through the testimony of witnesses. At this point the proceeding was no longer strictly *ex officio* but mixed, *ex officio mero et promoto*.⁷⁸ The issue of whether the judge was authorised to examine the defendant on oath touching the crime itself, added Cosin, was resolved according to the manner in which the suit was originated. If the case were initiated *ex officio promoto*⁷⁹ by a public prosecutor such as a churchwarden, the defendant, though he was required to answer upon oath was not required to answer directly to the crime itself, even if a fame existed concerning him. When the ordinary himself, however, proceeded against the crime, the proceeding must be grounded either on the presentment of a fame, proof by witnesses' testimony, notoriety of the fact, *clamosa insinuatio*, or one of the other eleven courses allowed by law. If, however, a 'perfect' presentment of the crime or fame was made (a presentment that constituted at least a strong presumption against the defendant if not proof), the judge could proceed *ex officio* against the party and put him to an oath to answer directly whether he committed the crime.⁸⁰ If the case were opened by denunciation, contended Cosin, and the crime was not thought notorious or scandalous, the judge might, with the defendant's permission, proceed to examine the party touching the crime itself.⁸¹ If the defendant was pronounced guilty of the crime, he was punished either by penance for his personal reformation and the satisfaction of the church, or by imprisonment, fine, or censures

⁷⁷ Cosin, *Apologie*, II, 49-50.

⁷⁸ Cosin, *Apologie*, II, 50.

⁷⁹ Cosin described this promoter as one 'that will voluntarily stirre vp and sollicite the Iudge vnto his duetie'. Cosin, *Apologie*, II, 50-1.

⁸⁰ A *clamosa insinuatio* was not sufficient to proceed in this manner. In this event Cosin stated that the judge ought to proceed to the examination of witnesses to verify the fame. Should the fame prove true, he was then entitled to examine the party touching the crime itself. Cosin, *Apologie*, II, 50-1.

⁸¹ Examining the defendant on oath touching the crime itself in this case was 'not warranted by law', said Cosin, though the judge might do it if the party raised no objection. Should the defendant demur, the judge was required 'before the Iudge of the appeale' to prove the fame, notoriety of the fact, scandalous nature of the crime, etc. Of course, none of these restrictions applied to the high commission, over which there was no appeal. Cosin, *Apologie*, II, 51-2.

of the church. If on appeal of the sentence the judge was found to have wronged the party, he was required to pay him charges.⁸²

In the course of this lengthy exposition of ecclesiastical court procedure, Cosin had spelled out (though not always boldly) the prerogatives of the high commission. Being the highest ecclesiastical court in the land it could initiate cases *ex officio* based on unsubstantiated fames, compel defendants to answer an unlimited number of interrogatories on oath, examine defendants touching the crime itself, and withhold the charge laid against the defendant until after he had answered the interrogatories. These powers of prosecution were vastly superior to those of temporal courts as well as those of inferior ecclesiastical courts. The high commission was competent to conduct *ex officio* prosecution and to fine and imprison offenders even if the convictions enjoyed neither recognition nor standing elsewhere. The powers of the commission were in fact anti-popular, with power descending from the commission themselves and ultimately from the queen, since she authorised their jurisdiction via letters patent.

Thus far we have mainly studied the first half of part II, which concerns Cosin's explication of the methods of initiating and prosecuting *ex officio* suits in spiritual courts. The second half was devoted to an examination and criticism of puritan arguments employed against *ex officio* procedure. The question of the legality of the *ex officio* oath, however, was not taken up until part III. The debate in the second half of part II centred mostly on the validity of *ex officio* as a method of judicial procedure as opposed to accusation and presentment. In chapter eight Cosin reiterated his opponents' claim that no ecclesiastical court could proceed without accusation or presentment, implying (albeit implicitly, said Cosin) that such was the established custom of common law. But Cosin rejected even this implication; 'for infinite other offences and crimes not Capitall, the Common Law hath vse of Bills in the Starre-Chamber, and of Informations in the other Courts at Westminster.'⁸³ These instances could not be considered presentment, argued Cosin, because he who initiated the suit was not required to present upon his oath as were grand jurors. Neither could such an instance be

⁸² Cosin, *Apologie*, II, 52.

⁸³ Cosin, *Apologie*, II, 69.

rightly termed 'accusation' since those bills and informations were put up *ex officio promoto*, and also because those who presented those bills were not themselves the accusing party, but merely agents for the promotion of the king's suit.⁸⁴ Furthermore, it was known to Cosin that JPs sometimes, upon their own suspicion or by way of secret relation, sent out warrants for men to be apprehended or took information against suspects after hearing the depositions of witnesses but before the defendant had appeared in court. They had even, asserted Cosin, thrown men in prison according to their own discretion. In fact, on several counts there were remarkable similarities between the common law and ecclesiastical law.⁸⁵ If one JP was allowed to conduct criminal investigations based on his own private suspicion, Cosin asked why three commissioners could not be allowed the same privilege?⁸⁶ If it were argued that ecclesiastical courts should not hold the same rights as temporal courts, Cosin would invoke Magna Carta chapter 1, which guaranteed the freedoms and liberties of the English church even at a time when it was believed the church courts were not under the king's authority. And now that ecclesiastical courts were by law united to the crown, maintained Cosin, it was doubly certain that the church's traditional rights should be maintained, especially as there was no great diversity between them and the common law.⁸⁷

Morice had cited the preamble to the repealed Heresy Reform Act of 1534 (25 Henry VIII c. 14) to prove that *ex officio* procedure had been determined vexatious and unlawful, since a conviction which deprived men of their life, good name, or goods, could be based on the bare suspicion of the judge only.⁸⁸ Cosin responded first by stating that no man could ever be convicted in an ecclesiastical court by presentment without witnesses either before or after the Henrician Heresy Reform Act. Secondly, he contended that what was deemed illegal in that act was the conviction of men without accusation (or presentment) and witnesses. What

⁸⁴ Cosin was referring to the attorney-general, whose duty it was to prosecute in Star Chamber. This position of public prosecutor corresponded to churchwardens or sidesmen in ecclesiastical courts. See also Guy, *Star Chamber*; 37, 40-1, 45; BL, Lansdowne MS 639, fos. 2v-6v; Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 134-7.

⁸⁵ Several of these similarities are listed by Cosin at II, 72-4.

⁸⁶ Most cases heard by the commission during Elizabeth's time were conducted by at least three or four commissioners, often five or six. Examination of witnesses and minor enquiries, however, were sometimes conducted by only one or two commissioners. Usher, *Rise and fall*, ed. Tyler, 55.

⁸⁷ Cosin, *Apologie*, II, 73-4. The issue of whether the English church was bound by the sections of Magna Carta which did not specifically mention it will be taken up again in chapters six and seven. See 192-3, 212-4.

⁸⁸ Cosin, *Apologie*, II, 76-7; Morice, *Treatise*, 34.

was not condemned in that act was the process of entering into suits by way of enquiry *ex officio*. Thirdly, the statute in question spoke only of heresy, which sin was accompanied by specific and grievous punishments. Hence, Cosin favoured a stricter interpretation of the statute, since its provisions did not apply broadly to other types of ecclesiastical jurisdiction.⁸⁹ Cosin's three rebuttals were sharp and effective. The Heresy Reform Act of 1534 had spoken exclusively of heresy proceedings. Furthermore, the statute had itself been repealed.⁹⁰

In the 'Notes', Sir Robert Beale had offered three inconveniences brought about by *ex officio* procedure, the first being that ecclesiastical courts did not allow defendants to take exception against and challenge prosecutors or witnesses. Cosin objected to this alleged untruth, affirming that exceptions were fully allowed in *ex officio* proceedings. But had they not been, how would such a criticism impugn the entire procedure? To Beale's second claim that bishops sometimes acted as informers, witnesses, and judges all in the same case, Cosin replied first that a bishop's own suspicion was not enough to open the proceeding, and secondly that he had never heard nor could possibly conceive of a bishop being a witness in a case in which he was also judge. There was no hint of justification for such a practice anywhere in the law unless the judge himself had been a witness to the crime.⁹¹ A third inconvenience of proceeding *ex officio* mentioned by Beale was that *ex officio* procedure had the effect of siphoning cases from the common law into ecclesiastical courts, and that by not declaring in the citation the nature of the charge, the ordinary could deny the defendant his right to sue a prohibition at the common law. This was nothing less than a 'bold assertion', complained Cosin. The citations or attachments most certainly expressed the nature of the misdemeanour but might not express details and particulars. Cosin was curious to know why the serving of writs of *subpoena* out of Star Chamber should not bother Beale, since they 'containe not so

⁸⁹ Illustrating the supposed illogic of Morice's argument, Cosin stated Morice's position for him. 'Without accusation or presentment of heresie; none shalbe put in perill of losse of life, losse of name, and goods: therefore without the one of these two, an Ordinarie may not proceede to the punishment of any other lesse offence ecclesiasticall. Yea though no one of these three, and much lesse all of them be any way thereby hazarded, or brought into perill.' Cosin, *Apologie*, II, 78. Cosin's rebuttal was more rhetorical than effective, however, since the Heresy Reform Act also required presentments by grand jury, which essentially removed the possibility of a suspect being subjected to *ex officio* procedure.

⁹⁰ See More, *Works*, ed. Guy, Keen, Miller, McGugan; X, lxii-lxvii. The heresy statute of 1534 was repealed in 1547 by 1 Edward VI c. 12. See *SR*, IV, part I, 18. For further discussion of the issue of the 1534 Heresy Reform Act, see 51, 64-5, 133, 146, 205-10, and 217.

⁹¹ Cosin, *Apologie*, II, 87-8. This rule, however, was little more than a loophole and would have been easy for the Elizabethan high commission to circumvent. One bishop or commissioner (a 'credible person') might suspect an offender and report his knowledge to another (*clamosa insinuatio*), thereby justifying a special enquiry.

much particularitie of the matters objected, as those Citations in ecclesiasticall Courtes?’⁹² Despite Beale’s clumsy arguments, Cosin’s rebuttal was not valid. Ecclesiastical judges were known to have cited men with vague charges expressed in the citation as well as ordering them to appear *pro salute anime* with absolutely *no* cause of citation expressed. In this respect there was no comparison with either Star Chamber or Chancery which, though not always expressing particulars in their writs of *subpoena*, at least expressed a general cause for citation.⁹³

One of the puritans’ preferred tactics in vilifying *ex officio* procedure was to compare it to the Spanish Inquisition. Even Lord Burghley had complained of a certain inquisitorial nature in the Whitgift’s twenty-four articles of 1584.⁹⁴ Cosin attempted to defuse this charge by clarifying that the inquisition in Spain went far beyond even its own commission from the pope, and that the commission itself was ‘in many points exorbitant from all Lawe and reason.’⁹⁵ There was no rationale, said Cosin, for likening the high commission to the Spanish Inquisition which dealt mainly on the basis of light suspicions and almost always against wealthy men, since the inquisitors themselves took possession of a convicted man’s goods. By contrast high commissioners in England ‘haue no fees at all’, protested Cosin, ‘no not so much as iiii.s. towards their charges, that Iustices of Peace be allowed by Statute’ but rather served ‘freely at their owne charges, with losse of time and intermitting their owne businesse, only of dutie and conscience to her Maiestie and to the Common weale.’⁹⁶ As for Morice’s claim that ordinaries kept their courts in session too often for the purpose of raising revenue, Cosin remarked that he knew ‘some of the greatest of them in England, that haue not two matters *ex Officio mero* prosecuted in them, in three yeeres space.’⁹⁷

⁹² Cosin, *Apologie*, II, 89-90.

⁹³ Jones, *Chancery*, 190-6; Hudson, ‘Star Chamber’, *Collectanea juridica*, ed. Hargrave, 150-7; LPL, MS 234, fo. 235r.

⁹⁴ There is an often-quoted letter from Lord Burghley to Archbishop Whitgift from 1584 in which he expresses this sentiment. James Morice also made this comparison on several occasions in both the *Treatise* and the ‘Defence’ as well as in a letter to Lord Burghley in 1596. PRO, SP12/172, doc. 1; BL, Lansdowne MS 82, doc. 69, fo. 150r-v. For a good discussion of the articles, see Collinson, *Elizabethan puritan movement*, 244-60, 263-72.

⁹⁵ Cosin, *Apologie*, II, 93.

⁹⁶ Cosin reported that commissioners earned roughly threepence for a citation and sixpence for the examination of a witness, the dividends being no different whether the proceedings were of office or by party. Cosin, *Apologie*, II, 94-5.

⁹⁷ Cosin, *Apologie*, II, 94.

The puritans' purpose of comparing *ex officio* procedure in English ecclesiastical courts with the Spanish Inquisition was primarily rhetorical and emotional, probably based on ignorance. The central features of the inquisition — a liberal use of judicial torture and sequestration of the convicted man's goods and property — had nothing in common with the high commission's *ex officio* procedure.⁹⁸ High commissioners made almost nothing in fees by comparison. Cosin's figures were accurate, and the disparity between them and the fees of common lawyers was a sore point with Whitgift, who complained that common lawyers, 'whose learning is no learning anywhere but at home', made outrageous sums of money.⁹⁹

Puritan attempts to invalidate *ex officio* procedure through inconveniences, complaints of avarice, and imperfections seemed not only indefensible to Cosin but foolish as well. He maintained that the laws of the realm allowed *ex officio* procedure under the name of *office del court*, which was simply a common law version of *ex officio* procedure. The statute 3 Edward I c. 13 showed that the king could allow someone else to be the prosecuting party in any misdemeanour, but if forty days passed without an accuser, the king himself would take up the case, *ex officio*. 'Which suite being in his owne Court and before himselfe, must needs be *of office*.'¹⁰⁰ Besides this, argued Cosin, proceedings by temporal judges were truly on behalf of the sovereign anyway, whether by direct or indirect authority.¹⁰¹ Although one of the Henrician statutes against heresy was now repealed (27 Henry VIII c. 10), its wording showed 'that course *ex officio* to be as warrantable as the other, made at the suite of a partie'. Also, the Elizabethan Act of Uniformity empowered ordinaries to enquire and punish *ex officio* any infringements against the same act 'as heretofore hath bene used in like, by the *Queenes ecclesiasticall lawes*.' There were even cases, he declared, when the common law privileged the proceeding of office.¹⁰²

⁹⁸ For scholarly treatments of the Spanish inquisition, see Henry Charles Lea, *A history of the inquisition of Spain* (4 vols.; New York, 1906-7); Henry Kamen, *Inquisition and society in Spain in the sixteenth and seventeenth centuries* (Bloomington, Minnesota, 1985); William Monter, *Frontiers of heresy: the Spanish inquisition from the Basque lands to Sicily* (Cambridge, 1990).

⁹⁹ There is no existing evidence to show that the commissioners even in William Laud's time made any money from exercising their office, and Laud's accusers did not even attempt to construct such a case at his trial. Prest, *Rise of the barristers*, 225; Usher, *Rise and fall*, ed. Tyler, 249.

¹⁰⁰ Cosin, *Apologie*, II, 95-6.

¹⁰¹ Cosin, *Apologie*, II, 96.

¹⁰² Examples of these were consultations granted to proceed *ex officio* in cases involving the laying of violent hands on a clerk, failure to find a chaplain or curate, or for the withholding of tithes, etc. Cosin, *Apologie*, II, 98-101.

Using a barrage of examples, Cosin hoped to weary his opponents into believing that temporal courts utilised *ex officio* procedure in a similar fashion to ecclesiastical courts. This strategy necessarily relied on subterfuge and obfuscation since temporal courts did not regularly employ procedures that resembled the high commission's inquisitorial methods of criminal prosecution. As we have established in this chapter and the previous two, the high commission's *ex officio* procedure was a derivative of the medieval procedure *per inquisitionem*, developed on the continent in the late twelfth and early thirteenth centuries to combat heresy by relaxing the rules of proof and relieving the need for private accusers. Common law criminal procedure in England utilised private accusers, circumstantial evidence, probable proof, and juries. There were some *ex officio* prerogatives allowed to temporal judges, which Cosin mentioned, but overall, criminal procedure in temporal and spiritual courts were based on differing juridical precepts and traditions.¹⁰³ Though Star Chamber, the Court of Requests, and the provincial councils in Wales and the North employed what Cosin termed *ex officio promoto*, where a public officer such as the attorney-general prosecuted a suit on behalf of the crown, this still constituted a major contrast with *ex officio* procedure in ecclesiastical courts where the offices of public prosecutor and judge could be combined in the same person. The fundamental difference was that canon law imputed a sincerity and integrity to the ecclesiastical judge that secular law did not assign to his temporal counterpart.

According to Beale, the Heresy Reform Act of 1534 repealed *ex officio* procedure. Cosin corrected Beale's liberal interpretation by suggesting that what was repealed was merely the ordinaries' abuse of the medieval heresy statute of 1401 (2 Henry IV c. 15, *De heretico comburendo*) in citing men for heresy without accusation or presentment. He continued, adding that the Act of Six Articles (31 Henry VIII c. 14) did not impugn *ex officio* procedure either but merely added the requirement of information by two witnesses and allowed for enquiry, which was by definition *ex officio*.¹⁰⁴ Cosin further hacked away at Beale's assertions by questioning his use of sources, namely St. German.¹⁰⁵ Beale had also made five particular

¹⁰³ See Brundage, *Medieval canon law*; Helmholz, *Canon law*; Helmholz, *Roman canon law*; More, *Works*, ed. Guy, Keen, Miller, McGugan; X.

¹⁰⁴ Cosin, *Apologie*, II, 107.

¹⁰⁵ In support of his arguments, Beale had cited these sources: St. German's *Division, Salem and Bizance*, and *Concerning the power of the cleargy* (London, 1535?) (STC² 21588); John Goodale's *Of the liberties of the clergy* (London, 1554?)

claims regarding temporal courts which Cosin endeavoured to answer. They were: 1) that temporal courts signified to defendants what they were charged with before they were arraigned or required to answer; 2) that indictments given at the common law always declared certain, particular matters; 3) that those who give such indictments were not to be the judges of him who was indicted; 4) that judges in such cases should 'proceed circumspectlie'; 5) that unless the party willingly confessed, two witnesses ought to be present at the arraignment.¹⁰⁶

Cosin affirmed all of Beale's five points as accurate descriptions of proceedings in ecclesiastical courts as well.¹⁰⁷ Regarding the first point, Cosin admitted to agreeing with Sir Thomas More that a man need not know who gave or preferred the evidence which led to an indictment. Beale had confuted More's statement '*that a man may be at that law arrested and imprisoned, onely upon suspicion*' by declaring that at the common law the suspicion must be based upon demonstrable fact, without which such a man was wronged by false imprisonment. But Cosin contended that some crimes left behind no visible trace, but that it was still lawful to imprison a man in this case if he were connected to other suspicious evidence such as speeches, treaties of conspiracy, or treason.¹⁰⁸ And whereas a JP might in fact imprison a man only on suspicion, added Cosin, an ecclesiastical judge needed stronger grounds. As for Beale's second point, Cosin rejected it outright, stating that defendants convented in ecclesiastical courts 'know by their examination the matter objected' — in essence, that the accused would at least know the particular charges before he defended himself.¹⁰⁹ Beale's third and fourth points, respecting a judge acting simultaneously as an accuser, was echoed by Morice in the *Treatise*: '*heereby the same man is Iudge and Accuser: which is contrary to the policy of this Realme, that suffereth not an Accusor to be a witnesse, nor an Enditour to be a*

(STC² 12006); and Marsilius of Padua's *The defence of peace* (London, 1535) (STC² 17817). Cosin: 'Truely, sauing in the first of them, there is not a word mentioned against proceeding *of Office*.' He was misinformed in this, however. In *Salem and Bizance*, chapter 15, St. German compared *ex officio* procedure for heresy unfavourably with the writ *de gestu et fama* (imprisonment for suspected felony). But Cosin was justified in saying that the fault St. German found with *ex officio* proceedings (see the *Division*, chapter 7) was not the procedure itself, but that secret denunciation was accepted and used in cases of heresy, a capital offence. Yet St. German was not 'challenging the very proceeding thereby for vnlawfull, but as being (with such circumstances) some cause of diuision betweene the two states...the soundesse of which iudgement I minde not here to examine.' Cosin, *Apologie*, II, 108; St. German, *Salem and Bizance*, reprinted in More, *Works*, ed. Guy, Keen, Miller, McGugan; X; St. German, *Division*, chapter 7.

¹⁰⁶ Cosin, *Apologie*, II, 104.

¹⁰⁷ Cosin, *Apologie*, II, 104-5.

¹⁰⁸ Cosin, *Apologie*, II, 105.

¹⁰⁹ Cosin, *Apologie*, II, 106.

*iuror for triall of the fact.*¹¹⁰ Cosin denied the validity of these claims. A correct understanding of *ex officio* procedure, he noted, showed that he who opened the way to special enquiry, that is, the denouncer or indicter, was the legal equivalent of the accuser, not the judge.¹¹¹ Cosin's brief rebuttal suggests he feared that spending a great deal of time confuting Morice and Beale on this point might have actually drawn too much attention to the issue. What made Cosin's assertion that the judge was not also an accuser a hard sell was that in circumstances when special enquiry was opened by means of a fame, *clamosa insinuatio*, or *indicia* (the degree of which was defined at the judge's discretion) the judge himself opened the case. After all, 'credible persons' who reported crimes to the judge were neither deposed on oath for confirmation of the truth of their report, nor required to prosecute the suit to its conclusion.

Cosin devoted the final three chapters of part II to proving the validity of *ex officio* procedure (in both temporal and spiritual courts) from canon and civil law, and from scripture. Drawing three main citations from canon law, Cosin argued that *ex officio* procedure was acceptable 'for the common benefice' without fame if it were only for the purpose of correction rather than punishment in cases of suspected crimes against the majesty of God. The civil law, said Cosin, which referred to the proceeding of office as *per nobile iudicis officium*, was fraught with mentions of the practice.¹¹² In fact, the civil law condoned the use of *ex officio* where 'the common interest is the Accusour', in cases of private offences as well as of public misdemeanours.¹¹³ One difference Cosin noted between *ex officio* procedure in canon and civil law was that the procedure was used as an extraordinary remedy in civil law, while it was an ordinary remedy in canon law.¹¹⁴ The puritans' complaint that 'bad and infamous persons suggestions haue bene accepted' as a result of *ex officio* procedure was turned around by Cosin who admitted it was true, but by the same token such people had also

¹¹⁰ This quotation by Cosin does not appear in the printed version of the *Treatise* but is consistent with its arguments. Cosin, *Apologie*, II, 110-1.

¹¹¹ Cosin, *Apologie*, II, 110-1.

¹¹² For example, Cosin writes, 'This proceeding was so well known to all in those times, that Tertullian an auncient father of the Church doth put the Emperours to whom he writes, in minde of their owne lawes, where he there urgeth execution.' Cosin, *Apologie*, II, 111-3.

¹¹³ Cosin explained that civil law considered 'fame precedent to be a kinde of Accuser. And where fame wanteth, other presumptions, and *Inidicia* or *euidences* are (in this behalfe) equiualent vnto a fame.' Cosin, *Apologie*, II, 113-4.

¹¹⁴ Brundage, *Medieval canon law*, 139-53; Helmholz, *Roman canon law*, 104-20; Levack, *Civilian writers*, 150-1.

been admitted as witnesses in temporal courts.¹¹⁵ Morice had charged in the *Treatise* that *ex officio* procedure was strange and foreign and had ‘corruptlie crept in among manie other abuses’.¹¹⁶ Cosin replied that, on the contrary, *ex officio* procedure and indeed all customary English laws springing from canon and civil law should be accounted ‘our owne homebred English lawes, and her Maiesties lawes ecclesiastical, as they be often termed in actes of Parliament’.¹¹⁷ Here Cosin returned to his interpretation of the Act for the Submission of the Clergy, 1534.¹¹⁸

Cosin finally attempted to prove that both enquiry and *ex officio* procedure were shown, in ‘diuers not obscure’ places of scripture, to be justifiable¹¹⁹ as well as that the use of the word ‘accuser’ in many places of scripture was dissimilar from its present usage and meaning.¹²⁰

In first part of the *Apologie* Cosin had delineated the boundaries of ecclesiastical jurisdiction. Proving that *ex officio* procedure was a valid legal process formed the second major hurdle in Cosin’s endeavour to justify the Elizabethan high commission and its jurisdiction. This second category was highly contentious as *ex officio* procedure was clearly foreign in origin and had never been popular with lawyers and judges of the common law. Cosin’s repeated efforts to draw the judicial procedures of ecclesiastical courts within the mainstream of the royal supremacy was an indispensable strategy and, ultimately, a winning strategy. In the final part of the *Apologie* Cosin narrowed his focus again, singling out the *ex officio* oath for a prodigious justification and defence that spanned the length of parts I and II combined. The oath was the high commission’s most powerful weapon in suppressing diverse opinions in religion, and without the license to impose it the commission’s ability to order and correct the church in the last decade of Elizabeth’s reign would be quickly nullified.

¹¹⁵ Cosin, *Apologie*, II, 114.

¹¹⁶ Morice, *Treatise*, 58.

¹¹⁷ Cosin, *Apologie*, II, 116.

¹¹⁸ See above, 93, 98-9.

¹¹⁹ Cosin listed several exmples at II, 122-6, 128-9.

¹²⁰ For example, when scripture says that Jesus was accused by the chief priests and elders, Cosin maintained that Jesus had in fact already been condemned by the Sanhedrin and these post-judicial accusations were simply an attempt to secure a decree for crucifixion; those accusing Jesus were not, properly speaking, accusers, and there was no third party brought in to accuse. Cosin claimed that his argument that ‘accusers’ were actually witnesses was bolstered by Deuteronomy 19.15-19 and Deuteronomy 21.18 and ff., but this argument is dubious. Cosin, *Apologie*, II, 127, 129.

Chapter 5

Richard Cosin's

Apologie for sundrie proceedings ecclesiasticall

Part III: The lawfulness of *ex officio* oaths

Part III of Richard Cosin's *Apologie*, published in mid-1593, originally appeared separately from parts I and II, but in later printings all three parts were bound together.¹ Part III was almost as long as parts I and II combined, (241 pages in length, divided into sixteen chapters). Roughly a third to half was a direct response to Morice's *Treatise*, the remaining parts being directed against Beale and other, unnamed puritan writers. The declared purpose of part III was to address the lawfulness of imposing oaths in general and of the *ex officio* oath in particular. This oath was the heart of *ex officio* procedure and was the most powerful tool in the Elizabethan high commission's arsenal. By this process defendants were required to take an oath to answer any questions put to them by the judge. Once they had taken the oath, they were obliged to reveal their knowledge on any subject the judge considered pertinent to the case, such as the defendant's past behaviour, conversation, or beliefs, or those of his family and friends. In this way, the high commission was able to expose the religious nonconformity of ministers and laymen. The only way for the accused to frustrate the process was to refuse to take the oath in the first place. This course was being advocated more boldly in the early 1590s than before,² but puritan writers such as Morice and Beale were still determined to prove the oath's illegality and abolish it forever. A strong conformist response was needed to defend the oath, and Cosin proved worthy of the task.

Like Morice, Cosin had his own definitions of oaths. His short definition was that an oath was 'a confirmation of that whereof we sweare.'³ In fact, every time a man declared something to be true, said Cosin, he was in a sense taking an oath.⁴ He explained that a true oath was both a service and worship yielded to God in two regards: it was service in that one fulfilled or performed what he promised, and it was worship in that by swearing, one acknowledged that God sees and knows all and will punish those who swear falsely. Morice's

¹ Morice's journal from 1593 notes that parts I and II of the *Apologie* were published together with 'An Epistle to the Reader' in March or April, 1593, but readers 'were forced with patience to expect the Civilians Third part of his Apologye, w/ch came not to publick viewe, tyll the Parliament was ended'. (Cambridge, Baker MS 40, fo. 69v.) There are only two extant copies of part III published separately, all other copies containing all three parts. There is no complete manuscript copy of the *Apologie* in existence, but there is a short, near-verbatim manuscript of pages 113-7 of part III in LPL, MS 2004, fo. 81r-v.

² This opinion was held by several puritans. See the many treatises written against oaths in LPL, MS 2004, fos. 72-8, 83-7.

³ Giles Jacob's law dictionary defined an oath as 'an Affirmation or Denial of any Thing, before one or more who have authority to administer the same, for the Discovery and Advancement of Truth and Right, calling God to witness that the Testimony is true'. Jacob, *Law dictionary*, sig. Uuu1r.

⁴ Cosin, *Apologie*, III, 8.

definition of an oath, 'a calling or takinge to recorde or witsesse of the sacred name of God...for the confirmation of the trueth of such thinges which we speak'⁵ was quite similar to Cosin's, but the requisite conditions Morice and Cosin prescribed for the giving or taking of oaths differed. Cosin was not persuaded that all of Morice's conditions for the taking of an oath could be met in every case. For example, Morice had affirmed that one of the central purposes of an oath was to protect innocence.⁶ Cosin pointed out that if a guilty defendant took an oath, 'it is most cleare that (by such oathes) none Innocencie is protected, but *nocencie* either more heaped vp vpon the partie himselfe; or else discouered by the witnesses.'⁷ He declared that the same point was valid in a different context: what innocence was protected by swearing allegiance to the queen's supremacy? The alleged defects and omissions in Morice's conditions for the giving and taking of oaths prompted Cosin to enumerate his own conditions.

Cosin affirmed that an oath must always be kept unless 1) what was promised was evil, regardless of whether the evil was known to the party at the time of swearing; 2) the oath would prevent a great good from occurring, such as a man of sound doctrine and good education refusing to become a minister of God; and 3) it were discovered after making the oath that the keeping of it were impossible or wrong. For example, once Herod realised his oath had bound him to order the death of John the Baptist, he should have retracted his oath. Similarly, if person B was expecting payment from person A and B consequently promised to pay person C the same amount, if the money from A never arrived, B should be excused from having to keep his oath to pay C. These were the only conditions for negating an oath, said Cosin.⁸

There were also different kinds of oaths. As Morice had divided oaths into public and private, Cosin divided them into *assertory* and *promissory*. An assertory oath was a promise to

⁵ Morice, *Treatise*, 3. See also above, 56, for Morice's conditions.

⁶ This was hardly more than an invention by Morice. There is no evidence in English history that the need to protect innocence was located in the oath itself. Holdsworth, *English law*, III and IV. In *Salem and Bizance*, St. German complained that it was the duty of judges presiding over heresy cases to protect innocent men from the taint or ignominy of heresy, but he did not draw a link between innocence and the *ex officio* oath. Reprinted in More, *Works*, ed. Guy, Keen, Miller, McGugan; X; 359-60.

⁷ Cosin, *Apologie*, III, 161. To protect innocence was only one of Morice's several reasons for taking an oath. Cosin presumably agreed with the others which were: to glorify God, to confirm the truth, to maintain justice, and to put an end to strife. See above, 56.

⁸ Cosin, *Apologie*, III, 14-5.

affirm the truth regarding some act or event, past or present. These oaths could not be dispensed by human authority. Promissory oaths validated a promise to perform some action in the future. Some promissory oaths might be dispensed with, said Cosin, if they met the three conditions listed above.⁹ It can readily be seen how Cosin used these definitions to break the ground for his own arguments which were to follow. The *ex officio* oath fell into the category of assertory oaths, since it was a promise to confirm the truth of past or present facts. By forbidding assertory oaths to be dispensed by any human authority, Cosin had already negated the puritan claim that a man was not compelled to honour his oath if he were forced to reveal his own or others' offences.¹⁰

One of the central challenges brought by Morice, Beale, and other puritans against the oath was that it was contrary to justice to administer any oath which allowed the judge to examine the defendant touching the crime itself.¹¹ Cosin spent the bulk of part III of the *Apologie* answering this claim.¹² Cosin's defence of the oath embraced five main fronts: oaths administered to defendants in criminal matters were legal on the grounds that 1) they accorded with the laws of the realm; 2) similar oaths were routinely administered in temporal courts (thereby disproving a repugnance); 3) they accorded with canon and civil law; 4) they accorded with scripture and the primitive and modern churches; and 5) they accorded with reason. Cosin maintained that oaths were neither administered in all *ex officio* cases nor might be justified in all circumstances. The most obvious case in which an oath might not be tendered was in capital cases, endangering the life or limb of the defendant. The laws of England forbade such an oath to be tendered as it was supposed a man would value his life and limbs above an honest oath and certain punishment.¹³ Yet forbearing to administer an oath in matters touching liberty or good name was another matter. Cosin believed that if the

⁹ Cosin, *Apologie*, III, 16.

¹⁰ This argument of the puritans is discussed below in this chapter at 159-60.

¹¹ The phrase 'examine the defendant touching the crime itself' referred to the judge's authority to ask defendants directly whether they committed the crime in question.

¹² Of the sixteen chapters in part III, nine deal specifically with a defence of administering oaths that force defendants to answer to the crime itself, while three deal sporadically with the same subject.

¹³ The one exception to this rule was in cases of crimes against the person of the prince, where not only should an oath be imposed at the very least, but torture if necessary. Cosin, *Apologie*, III, 38, 42. For a discussion of perjury as a crime of part-ecclesiastical, part-temporal nature, see Michael D. Gordon's essays, 'The perjury statute of 1563: a case history of confusion', *Proceedings of the American Philosophical Society*, 104 (1980) 434-54; and 'The invention of a common law crime: perjury and the Elizabethan courts', *American Journal of Legal History*, 24 (1980) 145-70.

imposing of oaths were prohibited under these conditions, there might as well be no oaths at all, for even small actions such as debt and detinue carried with them the possibility of perjured testimony from men seeking to secure their goods and property against loss.¹⁴ Likewise, all legal actions questioned a man's good name to a certain degree in that each suit originated in an irreconcilable disagreement between two parties. This view, however, was mitigated by the notion that an oath ought not to be offered to a defendant if the judge was certain he would swear falsely.¹⁵

The puritans' concern that defendants would sooner perjure themselves than accuse themselves was largely dismissed by Cosin regarding cases not capital. Simply to forbear imposing an oath on a defendant touching the crime itself for fear of perjury was tantamount to admitting that a man suspected of a crime ought not to confess it.¹⁶ Similarly, Cosin found nothing amiss in tendering an oath to men of suspected faith and credit, although Morice was strictly opposed to the practice on the grounds that perjury was extremely probable.¹⁷ Again, the difference between canon law and common law traditions was brought into sharp contrast, this time by the issue of perjury. At the heart of many of Cosin's arguments was the goal of involving the defendant in the court's verdict by confessing his own crime. Though his insistence on it in all cases was not as strong as that of his medieval counterparts (for example, he accepted that confession in most capital cases was not to be extorted by oath), confession of the crime was still a higher priority in general than fear of perjury. Morice, on the other hand reflected the assumptions of the common law, which placed no importance on confession since circumstantial proof was sufficient for conviction by a jury. For this reason, Morice tended to reject convoluted schemes designed to force confession of crimes at the risk of perjury.¹⁸

To allay his opponents' fears that the high commission was intent on ransacking men's consciences, Cosin devoted some attention to describing instances when *ex officio* oaths could

¹⁴ Cosin, *Apologie*, III, 77-9. (Pages are misprinted '79', '80', and '81'.)

¹⁵ Cosin, *Apologie*, III, 38-9. Morice argued that the *ex officio* oath was a case in point.

¹⁶ Cosin, *Apologie*, III, 48-9.

¹⁷ Cosin responded that he knew no law or divine who had ever required such a prohibition. Besides, '...a man may be suspected, yea and diffamed also for conuersation of life, and yet without iust cause: yea, and though there bee cause of the fame and suspicion; yet is it not (in charitie) to be presumed that euery one, who (through frailtie) hath offended; will therefore forswear himselfe, when he shall bee put to an oathe.' Cosin, *Apologie*, III, 138.

¹⁸ See also below, 183.

not be imposed by ecclesiastical judges. If a criminal suit was moved by a prosecutor rather than by the judge *ex officio* and the crime was completely hidden, Cosin accepted that the defendant was not bound by oath to answer to the crime itself. The justification for this was the ancient canon law maxim that ‘meere secrete sinnes neede not be published, but are to be left vnto God alone: *De occultis Ecclesia non indicat*.’ For this reason, at visitations and other general enquiries the oaths taken by denouncers and presenters included a declaration that they were only reporting what they actually knew or believed to have taken place.¹⁹ A judge, therefore, might not query a defendant respecting his hidden thoughts or secret deeds. ‘For before they be (at least) so manifested, it is not of any possibilitie, to make enquire or question after particular crimes, when they bee not so much as supposed to be done.’²⁰ It would seem by this statement that Cosin, like the puritans, disapproved of ecclesiastical judges enquiring of the private thoughts or actions of defendants. The operative issue, however, was the distinction between purely secret sins, and sins which, though in a sense secret, had become suspected or in evidence, and a credible report of them brought to the judge.

Another case in which a judge might not administer an oath in criminal matters was in special enquiries when a defendant refused to take a preliminary oath to affirm or deny the existence of a fame concerning his own supposed misbehaviour. If the party refused to swear either to affirm or deny the existence of such a fame, he incurred contumacy for, in effect, accusing the judge of attempting to establish something which, in itself, was not illegal. Should a defendant refuse to take this preliminary oath, the judge was prohibited from proceeding to administer an oath touching the crime itself, until witnesses could be produced who might substantiate the fame.²¹

While utterly hidden faults were beyond the cognisance of ecclesiastical courts, fames of crimes committed might be taken up by a judge, whether by ‘mere office’ or by way of information.

¹⁹ Cosin, *Apologie*, III, 113-4; see also Cambridge, Ely MS F/5/45, 98-9.

²⁰ Cosin, *Apologie*, III, 180-1. In another place Cosin said, ‘There is none equitie to enquire of faultes that are absolutely secrete and hidden.’ (III, 114). Again, ‘The Magistrate...cannot possibly in speciall or particular manner interrogate him of that whereof he neuer heard, nor once dreamed.’ (III, 79-80, pages misprinted ‘81’ and ‘82’). There was no doubt in Morice’s mind, however, that ecclesiastical courts engaged in this very practice. See also the quotation of Morice on 184.

²¹ Cosin, *Apologie*, III, 117.

But if a man be once discouered thereof by Presentment, denunciation, Fame, or such like, according to lawe: then is not the fault simply secret, but reuealed (in some sort) abroad, or to the Magistrate, who for auoyding scandall to Christian religion, and for reformation of the partie, may thus enquire of the offence, to see it redressed, and punished.²²

This passage underscored a major quarrel between Cosin and his adversaries. While his most radical opponents asserted that an ordinary could not cite any man without a formal accuser and judicially received witnesses, Cosin extended the frontier of the ordinary's authority to the realm of public report and the 'common voyce'.²³

Whether a defendant was required on oath to answer simply to the circumstances of the crime or to the crime itself as well depended on whether the suit was moved by accusation or *ex officio*. Cosin affirmed that in accusation cases the defendant was not required to answer to the crime itself but only to the circumstances unless 'greatly to be holden suspected' by the judge, that is, unless probable evidence was deduced against the defendant.²⁴ In cases moved by the judge *ex officio*, however, he was required to answer to both the circumstances and the crime itself. Why was *ex officio* procedure privileged in this respect, asked Cosin? It was essentially a matter of integrity and efficiency:

...when the Iudge proceedeth by enquireie; before hee offer the oath to the partie, the presumptions against the partie are knowen vnto the Iudge: but when by way of accusation, till the accuser haue brought in such proofes as hee can, they are not knowen vnto him. Besides, the Accuser doeth it of malice, or for reuenge, or for other satisfaction of his owne priuate humour, for the most part: But the Iudge (by common entendement) doeth it of sinceritie of minde, and for the good of the common weale.²⁵

²² Cosin, *Apologie*, III, 79-80 (pages misprinted '81' and '82'). Fames were not simply rumours but rampant, notorious rumours. A defendant was permitted to appeal his sentence if he had been driven to his purgation by a fame — in which case inferior judges were required to prove the existence of the fame (but not the high commissioners). See also above, 122-3.

²³ Cosin, *Apologie*, III, 179.

²⁴ Cosin, *Apologie*, III, 45.

²⁵ Cosin, *Apologie*, III, 45-6. Cosin pressed a very similar argument at III, 116, concluding that in accusations a man was not to be put to oath regarding the crime itself, since 'no man is bound (simply) to furnish vp his aduersaries intention, who (at his owne perill) ought to come (otherwise) sufficiently prepared.' If the accuser, however, made 'an halfe proofe', 'then may the Iudge tender to the defendant an oath (which he cannot refuse)...'.

To a common lawyer of the sixteenth century, nothing could have sounded more outrageous! The idea of an institutionalized ‘sincerity’ which precluded the possibility that a judge might be vulnerable to human affections such as malice or partiality must have angered and bewildered the *Apologie*’s readers at the Inns of Court. For his own part Morice was fuming. ‘Shall we imagine’ he protested, ‘that spirituall Iudges are allwaies free from euill and corrupt affections? yf they...had not to apparantlie bewrayed their iniquitie within the memorie of man, I might perhappes be brought to thinck that their proceedinges coulede be none other then vpriight and sincere.’²⁶ According to Cosin, however, the judge was untainted by the ‘priuate humour’ or ‘malice’ of an accuser and was fully apprised of the presumptions against the defendant before the trial (through fame, denunciation, etc.) and therefore was in an ideal position to conduct both fair and speedy criminal prosecutions.

To summarise, Cosin’s conditions under which an oath touching the crime itself in criminal matters could not be imposed were the following: 1) in capital matters (except in crimes against the person of the prince); 2) in matters where the crime was simply hidden or secret; 3) in matters when the judge was certain that perjury would ensue, but not generally in cases involving only loss of liberty or good name; 4) in cases moved by an accuser, unless the accuser greatly burdened the defendant with probable proof; and 5) when the defendant refused a preliminary oath to affirm or deny the existence of a rumour concerning his own suspected misbehaviour. Stated in the positive, an oath could be imposed in non-capital, criminal matters moved *ex officio* by way of fames or denunciation regarding some crime, providing the accused agreed to affirm or deny that the fame existed; and also in cases of treason, heresy, or in accusation cases when the prosecutor burdened the defendant with probable proof.

In the *Treatise* Morice had contended that the laws of the realm stated that defendants should not be forced under any circumstances to answer to the crime itself, and that any such forced oaths by any court were repugnant to the laws of England.²⁷ Cosin confuted this claim in chapters seven and eight of part III. Although Morice had taken up the issue of Magna

²⁶ LPL, MS 234, fo. 43r.

²⁷ Morice, *Treatise*, 30.

Carta at the end of his discussion of statutes, Cosin was keen to begin with it. His interpretation of Magna Carta was radically different from Morice's and equally advantageous to his own cause. Cosin stated that Chapter 39, which declared that no man could be apprehended, imprisoned, or deprived but by the law of the land, neither addressed ecclesiastical jurisdiction nor related to it in any way. For that matter, said Cosin, neither did any part of Magna Carta relate to ecclesiastical courts except where it was plainly expressed. He explained that this was because at the time of Magna Carta's composition the English church and its courts were considered an estate separate from the temporal courts, and therefore the king might not alter the laws governing church courts 'without [the] disanulling and reuoking of that which immediately afore (euen by the same Acte) hee had first of all confirmed vnto them.'²⁸ Cosin applied the same criteria to the statute of Marlborough (52 Henry III), which declared that no free-holder could be compelled to take an oath against his will.²⁹ Morice's claim that by the statute 42 Edward III c. 3 no man might be 'put to aunswere without presentment before Iustices, or matter of recorde, or by due processe, or by writt originall after the auncient lawe of this Lande' was also rejected by Cosin as applying only to temporal courts.³⁰ Cosin was vexed by Morice's implied assertion: that pre-Reformation statutes passed in Parliament ought to apply fully and equally to ecclesiastical courts as well as temporal. 'Woulde hee haue them to proceede in the selfe same maner that common lawe courts doe? hee might aswell exact of them Indictments, and afterward tryals by Iuries of twelue.'³¹

The issue in debate was whether pre-Henrician parliamentary statutes that used absolute language such as 'no freeman' or 'the law of the land' included ecclesiastical as well as temporal courts and their litigants. Cosin's contention was that since ecclesiastical jurisdiction was at that time thought to be under the power of Rome, all pre-Reformation statutes only

²⁸ Cosin, *Apologie*, III, 70. Cosin was referring to chapter one of Magna Carta in which the Church of England was declared free and its rights and privileges inviolable.

²⁹ Cosin, *Apologie*, III, 71-2. Morice argued that this statute was further confirmation of the illegality of forced general oaths in ecclesiastical courts. Morice, *Treatise*, 45.

³⁰ Morice had wrongly cited this statute as 43 Edward III c. 9 and Cosin remarked that the parliament of that year 'hath not so many chapters', but he asserted that if such a law did exist it would not further Morice's case. Cosin, *Apologie*, III 72-3 (pages misprinted '74' and '75').

³¹ Cosin, *Apologie*, III, 73 (page misprinted '75').

addressed temporal jurisdiction, otherwise they would have clearly encroached on the liberties of the church. Morice's argument was that what was or was not believed at the time about the independence of the ecclesiastical courts was immaterial. At the present time, he argued, all ecclesiastical jurisdiction was united to the crown, and since no statutes remaining in force were contrary to the royal supremacy, all pre-Reformation statutes ought to be understood as embracing the whole of the queen's realm, all of her courts.³²

Cosin also disagreed with Morice's handling of the preamble to the Heresy Reform Act of 1534 (25 Henry VIII c. 14) which repealed the act *de heretico comburendo* of 1401 (2 Henry IV c. 15), because Cosin found nothing in that preamble which in any way mentioned the administering of oaths, which, presumably, had been Morice's reason for citing it in the first place.³³ Likewise, the Act of Six Articles (31 Henry VIII c. 14), which Morice had claimed 'rejected and disallowed whollie as vnjust' *ex officio* oaths, did not address oaths either.³⁴ 'Why Sir, it speaketh not of [oaths] at all: and can you therefore gather, that *it doth not allowe, but rather disallowe them*'? At any rate, Cosin noted, since the Act of Six Articles was repealed, what good could this argument do for Morice's cause?³⁵ This final point was the most effective one. Morice had cited the Heresy Act mainly to demonstrate the alleged illegality of *ex officio* procedure, thereby attempting to disallow all processes contained with that procedure, including the oath.³⁶ If his contention that the preamble to the Heresy Act and the Act of Six Articles had forever banished *ex officio* procedure was true, he would have outwitted Cosin on this issue, but both statutes had been repealed in the first year of Edward's reign by 1 Edward VI c. 12 as Cosin incisively pointed out. Furthermore, the context of both of the Henrician acts was heresy trials, not ecclesiastical court trials in general.³⁷

³² See also 192-3.

³³ Cosin, *Apologie*, III, 73-4 (pages misprinted '75' and '76'). The act did not specifically address oaths but it did establish the injustice of sentencing heretics without due accusation or presentment. *SR*, II, 125-8. See also 51, 64-5, 129-30, 133, 205-10, and 217 for further discussion of the Heresy Reform Act of 1534.

³⁴ Morice, *Treatise*, 35.

³⁵ Cosin, *Apologie*, III, 74 (page misprinted '76'). Here, as in other places of the *Apologie*, Cosin's quotations of Morice as taken from Cosin's manuscript version of the *Treatise* differ substantially from the same passage in the printed copy of the *Treatise*.

³⁶ Morice, *Treatise*, 34-5.

³⁷ For the statute which repealed the Heresy Act and the Act of Six Articles, see *SR*, IV, part 1, 18, the preamble to which explains the causes of repeal. See also Diarmaid MacCulloch, 'Henry VIII and the reform of the church', *Henry VIII*, ed. MacCulloch, 174-5, 177-8; Guy, *Tudor England*, 203-5; Elton, *Constitution*, 64-7.

Morice's review of statutes was calculated to show that the laws of the realm proscribed the imposing of *ex officio* oaths on defendants in criminal matters. From this premise he drew the conclusion that ecclesiastical judges had superseded their authority and that such an offence constituted *praemunire*, an affront to the queen's regality and laws. Cosin admitted the conclusion flowed from the premises, but he rejected the premise. Morice had cited the statute which established the prohibition against *praemunire*, 16 Richard II c. 5, but Cosin pointed out that that law was made 'in such corrupt times' when it was believed that the ecclesiastical laws of the realm were not united to the prince's sceptre and throne:

For the Bishops then did not claime their Iurisdictions Ecclesiasticall next and immediately vnder God, from the Crowne as now they doe. But seeing this parte of Regall power is nowe no lesse truely and fully vested in the crowne then is the Temporall; so as the Lawes allowed for the gouernement Ecclesiasticall are termed by sundry Parliaments, *The Queenes Ecclesiastical lawes*, and *Lawes of the Realme*; as well as those which were first and originally made heere. And the Bishops are proued to haue their authoritie and Iurisdiction Ecclesiasticall, deriued downe vnto them from the Queenes Highnes, vnder the great Seale of England, as vpon sundrie incident occasions hath beene shewed afore.³⁸

It was the same argument Cosin had used with Magna Carta. The pre-Henrician statutes must be understood within their context. Like Magna Carta, the statute of *praemunire* operated under the assumption of two separate estates, the temporal and the spiritual, which were not understood at the time to be united under the crown. Therefore, because the two estates were now recognised to be fused together under the crown and ecclesiastical judges received their power directly from the queen's authority, the church's laws were also the queen's ecclesiastical laws and therefore the laws of the realm. *Praemunire* was an obsolete issue.³⁹ This view, together with Cosin's interpretation of the Submission of the Clergy,⁴⁰ constituted a reinvention of the context of the 1530s. Cosin saw the clergy as a separate estate not only before the Reformation but after. The only difference was that in the post-Reformation

³⁸ Cosin, *Apologie*, III, 85-6. This was essentially the same argument (but stated more boldly) that Cosin had advanced in part I. *Praemunire*, according to Cosin, was not possible as it had been before the Reformation. See above, 100-4.

³⁹ Cosin, *Apologie*, III, 89-90.

⁴⁰ See above, 93-4, 98-9.

church the two estates met in the person of the queen, to whom they owed a common allegiance.⁴¹ Cosin's conception of the clergy as a separate *societas* had more in common with the old catholic view than with the views of most late Elizabethan conformists. The significance of this peculiar philosophy will be considered again in chapter eight.⁴²

Later in chapter seven Cosin confuted his adversaries' attempts to demonstrate an intolerable disparity between the criminal procedures in temporal and ecclesiastical courts. They had employed this line of attack for the purpose of showing that ecclesiastical courts were repugnant to the laws of the realm. Cosin agreed that ecclesiastical judges were bound to practise only those laws that were neither 'contrary nor repugnant to the Queenes prerogatiue royall, nor to the Lawes, Statutes and Customes of this Realme', but he denied any such contrariety existed.⁴³ He first assailed Morice's views on oaths touching criminal matters in Star Chamber and Chancery. Morice had stated that even though those courts examined defendants on their oaths, 'it would not followe that the same might be practized in the Courtes and Consistories Ecclesiasticall, vnlesse the like allowance thereto and consent of the whole Realme might be prooued also.'⁴⁴ Cosin noted that Parliament embodied the consent of the realm, yet Parliament had never made any laws establishing oaths in Star Chamber or Chancery. Why should the consent of the realm be necessary for oaths in ecclesiastical courts, he asked, 'which haue reteined the practise of such oath beyond all memorie of man, and beyond most Records nowe extant?'⁴⁵ This was a typical example of Morice's frequent attempts to subjugate ecclesiastical courts either to common law procedures or to popular ratification. Cosin was correct about the foundations of Star Chamber and Chancery. Although both courts had been acknowledged and their procedures sometimes regulated by Parliament in small details, neither had been originally established or 'authorised' by statute,

⁴¹ Cosin's view was plainly dissimilar to opinions of the royal supremacy during Henry VIII's reign. In the 1540s Lord Chancellor Thomas Audley cautioned Bishop Stephen Gardiner of Winchester to 'look at the Act of Supremacy [25 Henry VIII c. 1], and there the king's doings be restrained to spiritual jurisdiction; and in another act [25 Henry VIII c. 19] it is provided, that no spiritual law shall have place contrary to a common law or act of parliament.' The clergy's authority had not been made automatically derivative from the king, Audley argued, otherwise, 'you bishops would enter in with the king, and, by means of his supremacy, order the laity as ye listed.' John Foxe, *Acts and monuments*, ed. G. Townsend (8 vols.; London, 1843-9) VI, 43. See also Guy, *Tudor England*, 371-2; Guy, 'The "imperial crown" and the liberty of the subject', *Court, country, and culture*, ed. Kunze and Brautigam, 72-3.

⁴² See below, chapter 8, especially 254-5.

⁴³ Cosin, *Apologie*, III, 56-7.

⁴⁴ Morice, *Treatise*, 38.

⁴⁵ Cosin, *Apologie*, III, 93.

and neither was a common law court except in the narrowest sense that common law was the benchmark for equitable intervention and relief in Chancery cases.⁴⁶

Morice's rendering of procedure in Star Chamber also came under scrutiny. He had asserted in the *Treatise* that defendants in Star Chamber were shown the bill of information against them and allowed counsel before they were required to answer upon oath, except in *ore tenus* cases.⁴⁷ Cosin believed that the exception of *ore tenus* proved there were occasions when oaths might be administered without the defendant having the benefit of seeing the articles or receiving counsel.⁴⁸ In fact, he claimed that *ore tenus* proceedings in Star Chamber closely resembled criminal proceedings in ecclesiastical courts, where defendants were shown the articles only after they had answered them. Cosin omitted several important details about *ore tenus* proceedings, though. First of all, *ore tenus* was generally used by Star Chamber in extraordinary cases, and often the defendant was trapped into confessing by the use of intricate and captious questioning. Second, *ore tenus* could only be used after confession by the party or else by his consent.⁴⁹ Furthermore, Elizabethan and Jacobean writings on Star Chamber procedure reflected confusion and doubt among jurists regarding the validity of proceeding *ore tenus*. Some believed it was an unjust way of proceeding which violated Magna Carta, while others hinted it was not as sure a method as proceeding by bill.⁵⁰ Overall, Cosin's comparison between *ore tenus* procedure and *ex officio* procedure was not accurate.

Cosin also argued that defendants in ecclesiastical courts held the same privilege as their counterparts in Star Chamber to refuse to answer questions impertinent to the charge against them. But he qualified his claim by adding, 'But who shall then iudge, whether they be impertinent, or not? shall the partie himselfe? no verily, but (as it is in the Starre-chamber) the court it selfe: or else some of them that are skilfull in lawe; being thereunto required by the

⁴⁶ Wilkinson, *The Chancery under Edward III*, 1-10; Guy, *Star Chamber*, 2-7.

⁴⁷ Morice, *Treatise*, 39. *Ore tenus* cases are also discussed at 66-7, footnote 101; and 195, footnote 111.

⁴⁸ Interrogatories in Star Chamber were administered in private, and the defendant was not allowed to see the articles ahead of time or have the help of counsel while he was answering interrogatories. 'The examiner readeth an interrogatory, and requireth an answer to the same, and then readeth another'. The defendant's verbal answers, however, could be amended before he put them down in writing at the end of the examination, at which point his answers were made final. Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 170.

⁴⁹ Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 127; Levy, *Fifth Amendment*, 183-4.

⁵⁰ Lambard, *Archion*, 209-11; Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 127.

rest.’⁵¹ We can imagine that Cosin’s assessment of what constituted ‘pertinent’ questions differed markedly from the assessment of a common law judge. As Cosin demonstrated earlier, ecclesiastical judges were concerned with a very wide range of words, thoughts, and deeds, and their *ex officio* interrogations often touched on matters relating to defendants’ private conversations with friends or the religious opinions of his family. Again, the comparison with interrogatories in Star Chamber was weak.⁵²

Although Morice had claimed that common law courts did not impose oaths in cases where liberty or good name were at stake, Cosin noted that Star Chamber rendered oaths to defendants where infamy might result from a conviction and where liberty was restrained by imprisonment or in rare cases, banishment.⁵³ In general, said Cosin, defendants in ecclesiastical courts were treated more favourably than in Star Chamber, where punishments were more grievous and defendants were often at the mercy of their adversaries.⁵⁴ He compared the treatment of defendants in accusation cases in both courts. In Star Chamber when suits were moved by a private accuser, ‘who (as the law intendeth) doeth it for malice, reuenge, or some other particular respect’, the accused was liable to be examined on oath regarding his alleged crime, yet in equivalent suits in ecclesiastical courts the defendant was never to be examined on oath touching the crime itself. There he might only be questioned on oath touching the crime itself if the suit were *ex officio*, at the instance of the judge, who, ‘euen for his duties sake, and for the publike commoditie of the common weale, doeth make the Inquirie.’⁵⁵

⁵¹ Cosin, *Apologie*, III, 95.

⁵² A perfect example of Star Chamber interrogation is a case in which Cosin himself administered the interrogatories: Cartwright’s trial in 1591, discussed in more detail below at 164-5. By Cosin’s own report, Cartwright refused to answer questions that were impertinent to the charge expressed in the bill, many of which he would have been forced to answer in the high commission on oath. See also Collinson, *Elizabethan puritan movement*, 417-9; Hudson, ‘Star Chamber’, *Collectanea juridica*, ed. Hargrave, 164; Barnes, ‘Due process and slow process’, *American Journal of Legal History*, 6 (1962) 221-49.

⁵³ Cosin, *Apologie*, III, 68. But neither Star Chamber nor Chancery were common law courts, according to Morice. They were special courts which, though they sometimes borrowed common law practices, could not be classified as such. See below, 185.

⁵⁴ Cosin, *Apologie*, III, 55.

⁵⁵ Cosin, *Apologie*, III, 54-5. This was inaccurate in two ways. First, by Cosin’s own previous admission, defendants in ecclesiastical courts could be made to answer to the crime itself in accusation cases if the accuser made a probable proof (see above, 127, 143). Second, Star Chamber judges could only force defendants to answer on oath to the crime itself in non-capital cases. Hudson, ‘Star Chamber’, *Collectanea juridica*, ed. Hargrave, 164; BL, Lansdowne MS 639, fo. 5r. See also the Star Chamber case of Lord Vaux and Sir Thomas Tresham, BL, Harley MS 859, fos. 50r-51r.

Cosin went to great lengths to illustrate the similitude between criminal procedure in ecclesiastical courts and Star Chamber, but he was mistaken on the crucial points. It was true that defendants in Star Chamber were required to answer interrogatories on oath and that those who refused this oath were usually imprisoned for contempt,⁵⁶ but they were not compelled to answer any interrogatories until after declaration of the charges against them had been made.⁵⁷ In contrast, high commission often required answers on oath before the charges had been read to the defendant.

Commenting briefly on Chancery procedure, Cosin explained that although for the most part Chancery was a court of equity involving civil rather than criminal cases, it nevertheless witnessed ‘many bills of complaints...put vp against defendants, wherein sundry their lewd practises and misdemeanors criminall bee deduced and set foorth; and yet must the defendant make perfite and particular answer thereto, vpon his oath.’ This was significant since Chancery, the oldest court in England, originated all writs and commissions ‘wherupon the other courts do ground all their proceedings.’ But again Cosin’s attempt to liken Chancery’s oaths to those of the high commission was not fully convincing.⁵⁸

Of the five separate defences Cosin devised for *ex officio* oaths, we have already looked at two: first, that *ex officio* oaths were permitted by the laws of the realm; and second, that since such oaths were often administered in temporal courts as well, there was no repugnance between the two jurisdictions. We now come to his third line of defence, that *ex officio* oaths accorded with civil and canon law. Cosin mustered for this defence the opinions of civilians and canonists both in England and on the continent, modern and ancient. Here his training as a canon and civil lawyer served him best, as the endless and cluttered notes in the margins

⁵⁶ If the defendant refused to answer interrogatories he was imprisoned for contempt until he complied. He could not be proceeded against *pro confesso* (as if he had confessed guilt), because refusal to answer interrogatories was not equivalent to refusing to answer the charges contained in the bill. Thus, refusal to answer the interrogatories did not imply guilt. In this case, therefore, men could and did remain in prison indefinitely. If, however, the defendant refused even to answer the charge contained in the bill, he was imprisoned and given a second hearing at a later date. If he still refused after this, he was assigned another hearing date and proceeded against *pro confesso*. Hudson, ‘Star Chamber’, *Collectanea juridica*, ed. Hargrave, 167-8, 171-2; Barnes, ‘Due process and slow process’, *American Journal of Legal History*, 6 (1962) 221-49; BL, Lansdowne MS 639, fos. 2v-5r.

⁵⁷ BL, Lansdowne MS 73, doc. 2, fo. 11r.

⁵⁸ Cosin, *Apologie*, III, 50-1. A defendant in Chancery ‘was required not merely to meet the points of the plaintiff’s bill with a negative or affirmative, but to answer as to the general truth of the matter. He did not always have to reveal any precise or specific details, save in so far as the plaintiff had attempted to set up discovery.’ Jones, *Chancery*, 214.

testify.⁵⁹ He first defended the memorandum on oaths in ecclesiastical courts produced by the high commissioners in 1591⁶⁰ from the attacks of Morice, who had thrown doubt on its assertions. He asserted that ‘A Iudge may not interrogate iudicially: but where he is ledde thereunto by good equitie. But there is none equitie to enquire of faultes that are absolutely secrete and hidden.’⁶¹ Yet once a crime was ‘but blowen abroad’ by means of rumours, fame, or notoriety of the fact, the judge was empowered by canon law to enquire of the offence *ex officio* and, if necessary, to administer an oath to the suspect. Thereafter he might examine the defendant indefinitely upon his oath, as he saw fit, even before witnesses were produced.⁶²

‘Yet to prooue further, that by these lawes, an oath is appointed and may be ministred in some cases touching a cause criminall’, Cosin compiled a prodigious list of quotations and references from the Code of Justinian, the ancient Fathers, and the Councils.⁶³ While most of his citations were taken from the customs of Italy, Hungary, France, Germany, and even ancient Sparta and Greece, he intended to show how it had been the custom of both pagan and Christian nations to urge and require oaths in criminal matters. But in the *Treatise* Morice had complained that the high commissioners were unfaithful to their own law. He had cited the canon law maxim *nemo tenetur seipsum prodere*, adding that the commissioners themselves had cited this maxim in their memorandum on oaths, apparently for no reason since they ignored it in practice.⁶⁴ Cosin argued that this maxim only applied in cases when the crime was completely hidden and secret.⁶⁵ He maintained that Morice had deliberately misconstrued the text of the memorandum which clearly stated, ‘*nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere & seipsum purgare.*’ Thus, he concluded that a man might not be forced to discover his own crime unless he was accused by fame (*tamen proditus per famam*). This qualifying phrase was ‘as a gloase confoundinge the text’, objected Morice, which ‘wholie and altogether

⁵⁹ Cosin, *Apologie*, III, chapter 9, passim.

⁶⁰ LPL, MS 2004, fo. 65r-v.

⁶¹ Cosin, *Apologie*, III, 114.

⁶² Cosin, *Apologie*, III, 116, 148; Levack, *Civil lawyers*, 150-1, 154, 156; Brundage, *Medieval canon law*, 144-53.

⁶³ The references begin with the civil laws in the times of the Roman emperors before Christianity, followed by the civil and canon laws of early Christian emperors and finally, the nations of Europe. Cosin, *Apologie*, III, 118-24.

⁶⁴ See above, 62.

⁶⁵ Cosin, *Apologie*, III, 113-4.

destroy[s] that rule or principle'. Cosin rejoined, 'yet is it not any glosse, but aswell warranted by lawe as the rule it selfe. neither doth it confound, but shewe howe that rule is (truely) to bee vnderstoode'.⁶⁶

Part of the problem was that the definition of self-accusation was itself a particularly divisive issue, made more difficult by Cosin's muddying of the waters. Morice had cited the civil law principle that the purpose of enquiry was not to 'make the partie by oath or examination to be his owne accuser; but to receiue information, and witnesses against him.'⁶⁷ Cosin agreed that no man was compelled to become his own accuser, but was rather 'by discouery of the whole trueth, to cleare himselfe of the crime after he be (as it were) accused, and brought into question by some of those lawfull meanes, which open a way vnto speciall Enquirie.'⁶⁸ He disliked his opponents' use of the word 'accuser' because it was too easily confused with one who formally prosecuted a suit for a private grievance, and of course no man was expected to prosecute himself. If, however, a guilty party answered truthfully upon oath, Cosin held that he had faithfully discovered the whole truth of the matter, not accused himself.⁶⁹ Cosin thus redefined acceptable self-incrimination as 'discovery of the whole truth', and it is now evident that his explanation of assertory oaths at the beginning of part III was carefully articulated to fit into this concept. As we will recall, Cosin defined an assertory oath (which could not be dispensed with by any human authority) as a promise to affirm the truth of past or present facts.⁷⁰ Thus, defendants who were compelled by ecclesiastical judges to answer on oath to the crime itself merely 'discovered the whole truth concerning their own or other men's past or present facts, thereby honourably performing the conditions of an assertory oath. Cosin's strategy was a masterful reassembly of the components of the *ex officio* oath into a statement aimed at extolling the cooperative defendant as an honest man and good Christian.'⁷¹

⁶⁶ Morice, *Treatise*, 22; Cosin, *Apologie*, III, 129. Some historians disagree about the spirit of the *nemo tenetur* maxim. Levy argues that the common lawyers misconstrued the meaning of the maxim by citing it out of context, but Helmholz suggests that common lawyers were merely trying to get civilians to abide by their own law. Levy, *Fifth Amendment*, 96-7; Helmholz, *Roman canon law*, 157-9.

⁶⁷ Morice, *Treatise*, 18-9.

⁶⁸ Cosin, *Apologie*, III, 128.

⁶⁹ Cosin, *Apologie*, III, 62.

⁷⁰ See also above, 139-40.

⁷¹ Cosin, *Apologie*, III, 62.

In assessing the high commissioners' memorandum, Morice had also complained of 'the extortinge by oath of the ground and foundation of the inquisition from the partie conuented', which was made manifest 'by the resolution of these learned men'.⁷² Cosin flatly denied any such conclusion could be reached from the memorandum, or that the grounds of inquisition were ever extorted from the party, 'seeing no such practise is either allowed, or (I thinke) in this Realme heard of'.⁷³ But by Cosin's own exposition of *ex officio* procedure he had already given credibility to Morice's suspicion. The question was whether ecclesiastical judges cited troublesome individuals with the intent to examine them indefinitely on oath until they produced incriminating evidence against themselves, thereby enabling the judge to construct a formal charge where none originally existed. We know that the testimony of defendants could provide evidence upon which to base a new enquiry into the crimes of others,⁷⁴ but Morice's claim seems impossible to substantiate one way or the other.⁷⁵

The final issue involving canon and civil law that Cosin endeavoured to address was what he called the 'two statutes' for the Submission of the Clergy.⁷⁶ Cosin reported that Morice had claimed that those two statutes 'doe take away canon lawe'.⁷⁷ He then argued that those statutes only restricted what future canons could be made by ensuring that they were not repugnant to the prerogatives of the crown or to the laws of the realm. The reference to the Submission of the Clergy, however, was thought by Cosin to be yet another diversion, since the oaths in question were, in his opinion, neither contrary to the laws of the realm nor in need

⁷² Morice, *Treatise*, 22.

⁷³ Cosin, *Apologie*, III, 128.

⁷⁴ The *ex officio* oath was used to examine defendants on issues pertinent to the charge against them, and as we have established, this constituted a wide range of private thoughts, words, and deeds. In part II Cosin enumerated eleven ways of initiating special enquiries besides presentment, and one of these methods was called *incidens cognitio*. This particular means of opening way to special enquiry occurred (in Cosin's words) 'when vpon examination of one offendour, it falleth out, another of his accomplices to be discouered.' Such incriminating testimony was not considered, however, to be the testimony of a witness but rather that of a relater. Nevertheless, this relation or report of a crime to the judge was sufficient to begin a new special enquiry into the suspected crime of the accomplice. Cosin, *Apologie*, II, 65; see above, 124-5.

⁷⁵ There is presently no evidence to validate Morice's charge, but neither is there enough data to discredit it. See also Peter Clark, 'The ecclesiastical commission at Canterbury', *Archaeologica Cantiana*, 89 (1974) 183-97; Cambridge, Ely MS F/5/45; Canterbury, Z.3.25; and Usher, *Rise and fall*, ed Tyler.

⁷⁶ Cosin cited these in the margin as 25 Henry VIII c. 19 and 27 Henry VIII, the latter of which was probably 27 Henry VIII c. 15, one of the statutes in which Henry sought aid from Parliament in setting up a commission to review the canon law. Cosin, *Apologie*, III, 129-30; Elton, *Constitution*, 340 footnote 33.

⁷⁷ Cosin, *Apologie*, III, 130. In fact, Morice had said no such a thing, at least in the published version of the *Treatise*. On pages 53 and 54 he did discuss the Submission of the Clergy, commenting only that by that act, any canons contradictory to the royal prerogative were void and of no effect. Possibly Cosin accidentally attributed the claim to Morice when the author was actually Beale or another of the puritans.

of any special dispensation to make them 'English lawes', seeing that they had been used in England time out of mind.⁷⁸

Let him therefore vnderstand; that all those things there required (viz. sufferance, consent, and custome) to make the Canons establishing such oathes to be accounted the customed, and ancient lawes of this Realme, originally established as lawes of the same; doe in these oathes so aptly concur (as hath beene prooued) that none of his confident denials thereof, can or shall bee able any more to impeach them from so being then the burning of canon lawe at Wittenberge by Luther (when the Pope had burnt his bookes at Rome) either did, was meant, or yet could abrogate the continuall vse of a great part thereof in Germanie, euen vntill this day; or then it coulde, or ought to haue any force to disanull it here in England.⁷⁹

The puritan opinion that canon law was 'taken away' by the Henrician break with Rome was unsustainable. As Cosin noted, the words of the act confirming the Submission of the Clergy was proof of that.⁸⁰ But Cosin's own interpretation of that act was not entirely accurate either.⁸¹ He did, however, successfully fend off the claim, especially in part I, that canon law no longer had any place in England. The multiple failures of the *Reformatio legum ecclesiasticarum*, discussed in the introduction, proved that there was ambivalence on the part of Tudor parliaments to do away completely with the ancient law of the church.⁸²

In the years before the appearance of Richard Hooker's *Of the laws of ecclesiastical polity* both puritans and conformists alike relied on the use of biblical exegesis to prove the validity of their own view of church government. The problem was that there was no clear agreement on what the Bible said, even though all English protestants held that the Bible was self-interpreting as well as self-authenticating.⁸³ Though Cosin was one of the first conformists to articulate a defence of the established church based on legal rather than scriptural

⁷⁸ Cosin, *Apologie*, III, 131.

⁷⁹ Ibid.

⁸⁰ The preamble stated only that 'dyverse constitucions ordynance and canons' were 'muche prejudiciall' to the royal supremacy and laws of the realm, which ought to be reformed. There was no suggestion of total abolition. *SR*, III, 460.

⁸¹ For Cosin's interpretation see above, 93-4, 98-9.

⁸² See the introduction for this discussion, 7-9.

⁸³ Lake, *Anglicans and puritans*, 80-139, 154.

arguments, he was also one of the last to engage in the hair-splitting scriptural interpretations that characterised Elizabethan polemic over church government.⁸⁴

Predictably, Cosin enlisted the help of Romans chapter thirteen: 'euery soule must be subiect vnto the higher powers, for there is no power but of God, & the powers that be are ordeined of God'. Those who resisted the authorities, said Cosin, resisted God himself by refusing to obey his chosen rulers. When God's law and man's law conflicted, men must naturally follow the law of God, since God's word established laws and nations rather than abolished them. For this reason, Cosin warned that unless a man could show how scripture specifically and directly condemned oaths administered *ex officio*, they ought not to be resisted since they were the established law of England.⁸⁵ He rejected his opponents' claims that because the Bible did not expressly condone the *ex officio* oath that it was illegal to impose it. It was 'a grosse error in Diuinitie', thought Cosin, 'to affirme that a man may not holde any humane matter with a certaine perswasion...but onely such as we haue a positieue, or affirmatiue warrant for, in the word of God.'⁸⁶ The oath was legitimate, Cosin claimed, because it was not expressly condemned. But Cosin also attempted to show that scripture allowed oaths that were similar to *ex officio* oaths, even in criminal and penal causes. Ezra tendered an oath to the chief priests and the people of Israel 'to sweare; that they would doe according to this worde.'⁸⁷ Likewise, Joshua required of Achan an oath to divulge his sin against the Lord.⁸⁸ Here again, Cosin's account of the story differed considerably from Morice's. Morice had reasoned that Joshua administered a particular interrogatory for a particular crime, and although Achan answered truthfully, he did not take an oath.⁸⁹ Cosin held that Achan did take an oath because the Hebrew text indicated that he was *adjured* by Joshua, yet Cosin also saw in the story an illustration of general and special enquiry: the

⁸⁴ Perhaps Cosin's argumentative strategy in the *Apologie* was in some sense illustrative of the sense among conformists that biblical exegesis was becoming a fruitless exercise in the debate over ecclesiastical discipline, since he only spent two chapters in part III (less than 20%) defending the *ex officio* oath from scripture.

⁸⁵ Cosin, *Apologie*, 132-3. The 'civil authorities' argument was sensible but also forced since Cosin was unable to find any examples in scripture which specifically endorsed the *ex officio* oath.

⁸⁶ 'For if this were a true position; then a man might beleue no historie to be true, which is not in the Bible; nor common principles, left knowne vnto vs by the light of nature (as that two and two make foure) nor that there is any such countrey as America, &c'. Cosin, *Apologie*, III, 134.

⁸⁷ Cosin, *Apologie*, III, 137; Ezra 10.

⁸⁸ Cosin, *Apologie*, III, 142; Joshua 7.

⁸⁹ See above, 60-1.

general enquiry being Joshua's sifting of the tribes and casting of lots in search of the offender, the special enquiry being the oath given to Achan to confess the truth of his crime for the glory of God.⁹⁰

Cosin drew other examples from scripture to prove the legality of administering oaths in criminal cases: the oath imposed upon a whole city in Deuteronomy 21 to discover the identity of a murderer,⁹¹ the Jews compelled in Leviticus to discover each other's crimes for the good of the people of Israel, and Jeremiah's willing oath to answer the king on any matter as long as his life might be spared.⁹² Finally, Cosin disagreed with Morice's reason for condemning the oath taken by Herod, in which Herod promised to give the daughter of Herodias anything she wished up to half his kingdom.⁹³ Morice had argued the oath was wrong because it was undeniably rash and general, and because Herod would not be able to ensure that Herodias' daughter would demand something just or lawful. Yet in Cosin's estimation,

...it was not the generalitie of Herods othe which was condemned. For the prophet Ieremie made vnto the king [Zedekiah] as generall a promise of answering what he would demaunde of him; as Herod made of giuing, vnto the dauncing damsell. But it was the rashe vnadvisednes of it, rising vpon a carnall delight: and when he had made it, a more vnlawfull performance, of a thing simply wicked: which are the things therein to be condemned.⁹⁴

Cosin's logic seemed to be that since Zedekiah did not take advantage of the generality of Jeremiah's oath to demand something unjust or wicked, that there was nothing dangerous about the vagueness of the oath. It was difficult to deny that Herod, by his general oath, was not bound to give the daughter of Herodias something unlawful should she ask for it, and she

⁹⁰ Cosin's quotation of Morice on this topic at the bottom of III, 143, either indicates a substantial discrepancy between Cosin's manuscript copy of the *Treatise* and the printed copy, or else it is an erroneous citation. There is a similar passage in the printed version on page 14, but the main difference is that here Morice did not specifically state that Achan's answer 'is none oath', as Cosin suggested.

⁹¹ Morice had described a complete dissimilarity between this example (known offence, unknown offender) and *ex officio* procedure (unknown offence, known offender), to which Cosin remarked that the difference between the two neither spoke anything to the question of validity nor demonstrated the latter to be wrong. Morice, *Treatise*, 13; Cosin, *Apologie*, III, 146.

⁹² These and other minor examples, mostly from Exodus, Leviticus, and Jeremiah may be found at III, 149-50, 154-6.

⁹³ See above, 59.

⁹⁴ Cosin, *Apologie*, III, 164.

did — the head of John the Baptist on a platter. Cosin might have more convincingly condemned the generality of Herod's oath yet denied its similarity to *ex officio* oaths since canon law presumed a certain sincerity in the judge which could not be presumed of the daughter of Herodias. This strategy would have been consistent with Cosin's past arguments, but instead he chose a transparently poor argument that merely highlighted the moral danger of taking a general oath to someone of dubious integrity.

Cosin concluded that 'by the equitie of Gods owne Iudiciall Lawe', it was manifest that men might be examined on their oaths even in criminal matters. If they refused to swear, they should be held guilty, even in cases moved by an accuser. And 'where a common good to an whole Christian state is sought', a judge was competent by virtue of his office to administer oaths according to the laws of the realm.⁹⁵ Cosin's rhetoric of authority becomes steadily more apparent throughout part III of the *Apologie*. Underpinning this rhetoric were two crucial principles: the need for commonwealths to punish crimes, and the institutional integrity of ecclesiastical judges.

Cosin devoted chapter thirteen to refuting the puritans' allegations that the *ex officio* oath was contrary to reason. The four sorts of 'Innovators' he set out to discredit were the following: 1) those who called for their accuser to be presented, and when told their accuser was the public voice⁹⁶ or a denouncer, would ask for witnesses to step forth; 2) those who agreed at first to take the oath, but then presented as a condition that they not be forced to accuse themselves or their brethren; 3) those who agreed to take the oath and, if need be, to reveal both their own and their brother's crimes for the purposes of removing evil from the land, yet disagreed in the particulars of what constituted 'evil in the land'; 4) those who believed that they should not be examined on oath if witnesses could be produced.⁹⁷

The first of these opinions Cosin held to be the most dangerous and unreasonable, because it undermined the judicial process. Once a crime manifested itself abroad in the form of a fame, said Cosin, it was proper for the ordinary to enquire and correct or clear the party

⁹⁵ Cosin, *Apologie*, III, 151.

⁹⁶ This term was sometimes used by Cosin interchangeably with 'fame'.

⁹⁷ Cosin, *Apologie*, III, 179-83. From this roster it is interesting to see the dilatory methods employed by the puritans around 1593 to resist the oath. They had not yet come to embrace the maxim that private thoughts were property and thus protected by the precepts of Magna Carta, chapter 39. Hamilton, *Shakespeare*, 7-8.

of the crime. The puritans' insistence on the need for witnesses was a denial of the judge's sufficient authority.⁹⁸ This was something of a euphemistic reference on Cosin's part. It was not exactly the judge's authority that was doubted by his opponents but his judicially-declared sincerity and integrity. The puritans wished for witnesses to substantiate fames to verify that they were true, but their motives for desiring this were partly self-serving, since they must have known that local witnesses might consider their allegiance to the defendant stronger than their sense of duty to the judicial process, especially in matters of religion. This was certainly the case in East Anglia where puritanism and anticlerical sentiment were widespread during Elizabeth's reign.⁹⁹

The second group, those who took the oath only with a guarantee against self-accusation, believed that the judge acting *ex officio* was also a prosecutor or accuser. If no men were to discover either their own or other men's offences, said Cosin, crimes would never be punished, unless the offenders themselves 'shal wilfully come in and desire (for Gods sake) to be hanged vp'.¹⁰⁰ Cosin answered the third group, those who agreed to reveal theirs and other's offences yet disagreed on what constituted 'evil in the land', by maintaining that they were not content to be overruled by men who understood the law and were reliable judges of right and wrong. It was a problem of conscience. The puritans in this third group believed that their conscience convicted them of the rightness or wrongness of an action, so that if they felt a certain act to be right, they would forbear to reveal it in court. 'But who shall iudge whether such matters as they be enquired of ought to be accounted for faults and offenses,' asked Cosin?¹⁰¹ He had reached the crux of the matter, not just regarding the controversy over ecclesiastical courts, but for the whole battle between the rigour of the law and the mitigating influence of equity: 'For it commeth to this point, that euery man shalbe his owne Iudge, how farre he neede to

⁹⁸ Cosin, *Apologie*, III, 179, 181.

⁹⁹ Collinson, *Elizabethan essays*, 84-5; Collinson, *Elizabethan puritan movement*; LPL, MS 234, fos. 99r-101r, 103r-104v.

¹⁰⁰ Cosin, *Apologie*, III, 182. Again, Cosin's view in this matter reflected the late medieval principle of *respublica*, which placed the mystical body of the commonwealth within the body of the church. The power to punish sin was therefore believed to be inherent in the commonwealth, which justified the inquisitorial privileges given to spiritual judges. Brundage, *Medieval canon law*, 104, 145-6.

¹⁰¹ Cosin, *Apologie*, III, 183.

obeye lawes and Magistrates that require him to deliuer his knowledge touching his owne or other mens factes; so he himselfe will account them lawfully done.’¹⁰²

Cosin perceived two fatal errors in this opinion. First, if every man were to decide according to his conscience whether to take oaths or how far to answer them, each man would become a law unto himself, and the error of Anabaptism would soon envelop and destroy all authority.¹⁰³ Men who refused the oath because they deemed their brethren’s or their own causes to be just had already, in Cosin’s estimation, judged the law itself to be unjust and assumed to themselves the roles of judges. These men were their own sentencers: ‘their blood is vpon their owne heads’, and no one was guilty of ‘the punishment inflicted vpon them but themselves; for standing obstinately mute without direct answering...as they ought.’¹⁰⁴ Second, the truth ought always to be told. He had returned to assertory oaths. The defendant, said Cosin, was not invited to assess the propriety of his or other men’s actions but simply to reveal them. He found it odd that ‘these Innovators’ did not consider it part of their discipline to tell the truth.¹⁰⁵ Besides, men conuicted would have nothing to fear from revealing their deeds to ecclesiastical judges if their deeds were upright and lawful.

Cosin’s twist of rhetoric was adept. As he did in the *Conspiracie*, here he took advantage of the puritan notion of conscience and cast it in a seditious, anti-authoritarian light. He did, in fact, have a valid point, and he utilised the puritan understanding of ‘conscience’ to show its destabilising effects when applied to criminal procedure. But this was not a substitute for proving that all judges were free from calumnious inclinations, which he never did in the *Apologie*. Nevertheless, his language was clear: those who refused the oath on the basis of conscience were neither law-abiding citizens nor obedient Christians. They were an impediment to justice.

The fourth and last group held that an oath ought not to be exacted if witnesses could be produced, (so that a minister might not be examined by *ex officio* oath for a sermon he

¹⁰² Ibid.

¹⁰³ Cosin, *Apologie*, III, 165.

¹⁰⁴ Cosin, *Apologie*, III, 203.

¹⁰⁵ He continued: why should they not merely tell the truth and ‘stand assured they haue done but well, what punishment soeuer should light vpon them for it...and reioyce with the Apostles that they are found woorthie to suffer punishment for the Disciplinaryan part of the Gospell?’ Cosin, *Apologie*, III, 184.

had preached in public). What was at stake in this last opinion of the puritans was the entire disciplinary apparatus of Whitgift's subscription campaign. One of the most effective methods of suppressing nonconformist preachers was to isolate them and drive them on oath to 'discover the truth' of their own nonconformity. Though it seems at times that Cosin and his opponents were quibbling over legal niceties, the stakes were in reality very high. Cosin granted the validity of this opinion only in cases of accusation, since ecclesiastical law forbade a man to be put on oath touching the crime itself in such cases. He stated, however, that where witnesses might be called, ecclesiastical courts did proceed to condemnation by witnesses (in accusation cases), and if proofs failed they proceeded to absolution.¹⁰⁶

In the final three chapters Cosin addressed the legality of further enquiry after initial answers were made on oath, the validity of forcing defendants to discover the crimes of other men, and the legality of a judge's refusal to reveal the particulars of interrogatories to defendants before they took the oath. He spent the concluding chapter of the *Apologie* answering the first of these arguments. The puritans commonly cited Hebrews 6 which stated that 'an oath for confirmation is amongst men an ende of all strife.'¹⁰⁷ Cosin brought two reasons for disagreeing that this verse was a universal condemnation of trying men by further enquiry on their oaths. He explained that the oath spoken of in that passage was most applicable to a *promissory* oath, not an *assertory* oath.¹⁰⁸ Secondly, all criminal law expressed the need for two witnesses (*dictum unius, dictum nullius*) to render an account judicially acceptable as truth.¹⁰⁹ Since this rule held for witnesses, suggested Cosin, it was also applicable to defendants. If further enquiry was not made against a suspected offender, how could proof of his guilt ever be deduced? 'For when a defendant hath denyed a crime objected, or refused to answere yea or nay...what criminous person could, or were likely to bee euer directly conuicted?'¹¹⁰ Furthermore, continued Cosin, it was the common practice of both Chancery

¹⁰⁶ Cosin, *Apologie*, III, 236. Cosin had asserted earlier that men should not be put to an oath to answer to the crime itself in accusation cases since defendants were not bound simply to furnish up the contention of their adversary. See above, 118.

¹⁰⁷ Cosin, *Apologie*, 227.

¹⁰⁸ A promissory oath was a promise to perform some future action. See also above, 139-40.

¹⁰⁹ Cosin, *Apologie*, III, 227-8.

¹¹⁰ Cosin, *Apologie*, III, 200. This was why Morice suggested that defendants be pronounced guilty on the basis of circumstantial evidence, that is, on the determination of the judge in light of the testimony of informers, witnesses, and the defendant himself. See above, 63.

and Star Chamber to make further trial of defendants through interrogatories,¹¹¹ and recent statutes validated the practice of further enquiry.¹¹² Hence, Cosin concluded that reason, equity, and practice showed that a judge need not be content only with a man's testimony upon oath and might proceed to offer him a second oath, 'partly of Purgation and partly of Enquirie'.¹¹³

In chapter fourteen Cosin argued that to discover the offences of others in court was not a sin but was supported by scripture and church history. His opponents brought the example of Rahab from Joshua 2 who refused to tell the authorities where the spies of Israel were hiding, but Cosin deflected their argument on the grounds that 1) Rahab was not commanded to tell where the spies were but was simply asked to bring them out, and 2) Rahab was no longer technically under the allegiance of the king of Jericho but was discharged of that duty by God, who was about to give the city over to the Israelites.¹¹⁴ The puritans held it to be a sin for a defendant to reveal a man's actions to the judge if he believed those actions to be unimpeachable. Cosin, however, contended that if a man's brother had truly not sinned, the revealing of his actions was no sin either. Deposition and testimony were not synonymous with slander — if they were, the practice could never have become part of the law.¹¹⁵ Proverbs 29 affirmed that a partner to a thief who refused to reveal the thief's crime hated his own soul.¹¹⁶ And the words of 2 Timothy, 'Euill men and seducers will goe forward from worse to worse, both continuing in error themselues, and leading others into it' provided more proof for Cosin that their crimes were 'meete to be discouered' for the prevention of sin and evil. He

¹¹¹ Especially in Chancery, 'if plaintifes should alwayes rest, and might proceede to no further proofes after the defendant hath answered vpon his oathe: they should (for the most parte) haue very colde suites, and small reliefe or remedie could bee giuen by that high Court.' Cosin, *Apologie*, III, 231; Jones, *Chancery*, 246 footnote 1, 246-8; Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 161-72; BL, Lansdowne MS 639, fo. 5r.

¹¹² 34 Henry VIII c. 4 and 13 Elizabeth c. 7, Cosin, *Apologie*, III, 231-2.

¹¹³ Cosin, *Apologie*, III, 232. This hybrid oath was described earlier by Cosin as being 'giuen to the defendant vpon criminall matter objected and vpon the circumstances thereof: yea (oftentimes) with purpose to make further prooffe, in case the defendant shall not confesse it, or not so fully in materiall circumstances as the Iudge hath cause to thinke may by witnesses or otherwise be prooued. yet if he shall confesse so farre as is thought may bee prooued; then (according to the qualitie of such his answer) hee is presently either proceeded with thereupon vnto a iudgement, or else dismissed as cleared thereof, by his oath.' Cosin, *Apologie*, III, 27.

¹¹⁴ Cosin, *Apologie*, III, 208.

¹¹⁵ Cosin, *Apologie*, III, 211.

¹¹⁶ Cosin, *Apologie*, III, 140-1.

remarked that heresy in particular had for centuries been sought out by spiritual authorities in an effort to discover offenders and punish them.¹¹⁷

The punishment of crime was so crucial, Cosin argued, that even judicial torture was defensible in cases of heresy and treason, even to be used on children against their fathers.¹¹⁸ He suspected that this opinion ‘may perhaps be thought of very hard’, but he noted the legality of torture for suspected capital offenders in military camps, Wales, and the Tower of London was ‘well warranted by her Maiesties instructions and by Act of parliament’.¹¹⁹ Cosin’s mention of torture was by no means incidental. There were more cases of judicial torture in the 1590s than in any other decade between 1540 and 1640.¹²⁰ The purpose of torture was to extract a confession from a defendant, confession being a central facet of ecclesiastical criminal prosecution in the Middle Ages when the practice began.¹²¹ Torture was exceptional in England because it was contrary to common law jurisprudence.¹²² Cosin’s reference to the legality of torture in Wales was significant because it proved that the queen could authorise criminal procedures via letters patent that ran counter to common law principles. The authority of the Council of Wales to use torture in cases of suspected treason, murder, or felony was established by the statute 34&35 Henry VIII c. 26, article 4, but the council also applied for a special commission from the queen. It never received a commission, but Elizabeth did issue letters patent periodically to authorise the council to continue exercising these disciplinary powers.¹²³ This lent credence to Cosin’s assertions in part I that the queen’s letters patent were not bound by the restraints of common law or statutes as well as bolstering his arguments in favour of the authority of ecclesiastical courts. The high commission operated by letters patent, and it could thus be argued that the commission was

¹¹⁷ Cosin, *Apologie*, III, 197-9.

¹¹⁸ Cosin, *Apologie*, III, 213-4.

¹¹⁹ Cosin, *Apologie*, III, 68.

¹²⁰ After the 1590s torture was most frequent in the 1550s (19 cases), the 1580s (16 cases), and in the 1570s (11 cases). Cosin does not seem to have been commissioned to oversee any judicial torture, however. His name does not appear on any of the torture warrants. Langbein, *Torture*, 94-123, 128.

¹²¹ The bull *ad extirpanda*, issued by Innocent IV in 1252, marked the beginning of judicial torture. Brundage, *Medieval canon law*, 95-6; Levy, *Fifth Amendment*, 27-34.

¹²² More, *Works*, ed. Guy, Keen, Miller, McGugan; X, xlvi-l.

¹²³ See Penry Williams, *The Council in the Marches of Wales under Elizabeth I*, (Cardiff, 1958), 24-7, 47-53.

not constrained by common law procedures any more than was Elizabeth as supreme governor of the church.¹²⁴

But what were the justifications for enquiring so far into a man's life as to discover his private conversations and intimate discussions?

If such priuate talke or asking of counsell haue bene concerning some platte or practise laid or to be laide, that shall (in discretion) be adiudged by the Magistrate expedient (for the common wealths sake) to bee knowen and discouered; and therefore if they shall enquire directly of it: I can not see, how it may stand with any mans dutie to God, vnto the Prince, vnto Lawes, & to the Common wealth to conceale it, being charged to the contrary.¹²⁵

There was now almost no limit to the range of interrogatories an ecclesiastical judge might consider 'pertinent' with regard to the examination of a defendant. To the puritans' charges of unfettered tyranny Cosin replied, 'Here (we see) that the law of their loue and felowship, and *ius hospitale*, towards such their priuate friends as haue received them; is by them more esteemed & accounted of then either the publike lawes and statutes of the realme, or then their duetie to the Christian Magistrate and to their countrey'.¹²⁶

He recalled Thomas Cartwright's Star Chamber case (though not by name) in which he noted the defendants stubbornly refused to answer any interrogatories which would reveal the names of their associates or the house at which they held their synods.¹²⁷ To persist thus in refusing to answer was a gross sin against the laws and the word of God, said Cosin, and such men 'shall beare their owne iniquity indistinctly; whether the matters to be vttered be commendable in their brethren or not'.¹²⁸ Cartwright was tried in Star Chamber after he refused to take the *ex officio* oath before the high commission in 1591. The move to Star Chamber was engineered by Archbishop Whitgift, who then assigned Cosin to prepare

¹²⁴ See above, 90-2 and 216-27, for discussion of the queen's prerogative to authorise processes contrary to common law and statutes. See below, 224, footnote 105; for a comment on the queen's prerogative to authorise torture in Wales.

¹²⁵ Cosin, *Apologie*, III, 210.

¹²⁶ Cosin, *Apologie*, III, 211.

¹²⁷ Cosin, *Apologie*, III, 212. On trial with Cartwright were eight other ministers, Edmund Snape, Humphrey Fenn, Edward Lord, Daniel Wight, Andrew King, William Proudlove, Melancthon Jewel, and John Payne. Snape and Fen had drafted treatises against ecclesiastical oaths and were undoubtedly two of the 'innovators' against whom Cosin wrote. Fen's treatise is at LPL, MS 2004, fo. 83r-v, Snape's is at fos. 85-7.

¹²⁸ Cosin, *Apologie*, III, 214.

interrogatories against the defendants.¹²⁹ The charge against Cartwright and his associates was conspiracy and sedition for allegedly plotting to establish a presbyterian system of church government. They were also charged with attempting to persuade other men to refuse the *ex officio* oath, but the ministers denied all of these charges.

They defended their refusal to take the oath in the high commission on four grounds: 1) because the oath was infinite; 2) because sufficient time to deliberate and answer were not allowed despite the fact that the matters of which they were asked to answer happened long ago; 3) there were no accusers, and because the defendants were ministers, there should have been at least two or three accusers; 4) because those of the defendants who were imprisoned for refusing the oath sat in prison for almost six months before the articles were shown to them; 5) there was no precedent for using *ex officio* procedure in matters of religion in general but only for heresy, and that precedent had been ended by the Heresy Act of 1534 (25 Henry VIII c. 14).¹³⁰ Attorney-general Popham was unable to prove criminal intent against the defendants, mainly because they refused to answer any of the substantive interrogatories, asserting that they were impertinent to the matter contained in the bill. The ministers were imprisoned for contempt¹³¹ and asked to sign a declaration affirming that the established government of the church was lawful and godly, which they refused. They were kept in prison for only a short time, but after their release none of them ever became politically involved in the presbyterian cause again.

The final issue to be examined in this chapter is the puritans' claim that all defendants should be apprised of the particular interrogatories upon which they would be examined before taking the *ex officio* oath. Cosin remarked that the reason these men wished to know the particulars before swearing was so that they could deny the charges if they thought them too weak to be proved, or else because they were confident they could 'easily wade through

¹²⁹ Strype reports that Attorney-General Popham was assigned two clerics, one a doctor of divinity and the other a civil lawyer, to help him construct the charges against Cartwright. These two men were most likely Bancroft and Cosin, who had already had experience with Cartwright in the high commission trial. Strype, *Whitgift*, II, 84; see also Collinson, *Elizabethan puritan movement*, 417-9.

¹³⁰ Levy, *Fifth Amendment*, 181, 184-8; Strype, *Whitgift*, III, 257; Usher, *Rise and fall*, ed. Tyler, 135-6. The ministers were undoubtedly informed in some of these opinions by their lawyer, the puritan Nicholas Fuller.

¹³¹ The defendants could not be proceeded against *pro confesso* in this case, because they did take the oath to answer all pertinent interrogatories. See above, 151, footnote 56 of this chapter.

with them.¹³² There were two reasons why particulars were not offered to the party, explained Cosin. First, it was not always possible to reveal interrogatories beforehand since ‘one Interrogatorie often riseth of an other’, especially if a defendant answered in the affirmative. In other words, the interrogations often took a course of their own based on the responses of the party. Second, the defendant might use the information of the charge to inform his associates how to disguise the truth or dilly-dally.¹³³ Aside from these reasons, said Cosin, there was no law of which he was aware that required particular articles to be shown to the party before swearing. But he admitted it was likely that if a defendant would but agree to take the oath after perusing the articles, there was no reason why he might not be shown them beforehand.¹³⁴

The second reason brought by the puritan writers for refusing an oath when particulars were not revealed was that a man ought to be certain beforehand that his oath would not cause him to violate God’s laws. Morice himself expressed a similar concern.¹³⁵ Cosin affirmed that every honest man should be bound in conscience to obey the laws of the land which required him to take the oath as long as it was not against God’s commandment. The general heads of the interrogatories could be revealed to the accused beforehand, he should be assured the questions endangered neither life nor limb, and he was advised that he might challenge any question as not being binding on him to answer. These conditions, said Cosin, should be enough to allay the fears of the puritans.¹³⁶ The third reason for refusing the oath, that it was infinite and therefore ‘*a snare to a mans conscience*’, was also confuted by Cosin. He maintained that the oath was neither infinite nor general, as his disputants claimed, since it was grounded on articles that laid out the specifics of an actual misdemeanour such as time, manner, and place.¹³⁷ Cosin also denied the fourth and last objection, that the defendant’s

¹³² Cosin, *Apologie*, III, 215.

¹³³ Cosin, *Apologie*, III, 215-6.

¹³⁴ Cosin, *Apologie*, III, 216; see also the high commission procedural manual at Cambridge, Ely MS F/5/45, 20. Reviewing this passage in the ‘Defence’, Morice grumbled, ‘Wee were troubled but with one othe before, nowe another is required...What good shall the sight of the Interrogatories doe him, yf therevpon he maie not refuse any of them?’ LPL, MS 234, fo. 38r-v.

¹³⁵ See above, 56.

¹³⁶ Cosin, *Apologie*, III, 216-7.

¹³⁷ Cosin, *Apologie*, III, 217. Morice denied that such specifics were always present in the articles, and even when they were, the interrogatories were prone to wander and might seek to establish the defendant’s position on such matters as the authority of bishops. Morice related such an occasion: ‘I my selfe not manie yeares sins became a suitor for a godlie preacher, a man quiet not intermedlinge with the troublesom questions of discipline and churche gouvernement yet

judgement was taken away if he did not know all the particulars. 'A promise doth neither affirme nor deny the trueth of a matter: but is to be made a true vowe and promise, by the due performance of it'.¹³⁸ It was true enough, he declared, that canon law required judges to provide the party with a copy of the *indicia* (evidences) against him, though it did not specify exactly when this should take place.¹³⁹ Cosin asserted that this procedure of administering oaths before the defendant had perused the articles was also used by Star Chamber and Chancery as well as in other criminal examinations before magistrates.¹⁴⁰ If anything, remarked Cosin, his adversaries ought to be thankful to be living in England: the common practice on the continent was to call in the witnesses even before the defendant was made aware of the evidences and presumptions against him.¹⁴¹

In conclusion, Cosin defended in part III the justness and legality of the *ex officio* oath from the temporal, canon, and civil laws as well as from scripture and reason. He also answered the objections of the various detractors of ecclesiastical oaths, attempting to expose their strategies as misguided, logically inconsistent, legally baseless, deceitful, or subversive. Cosin based his defence of the oath on his previous arguments formulated in parts I and II, relying heavily on his interpretation of the royal supremacy and annexation of ecclesiastical jurisdiction to the crown. Part III contained a greater degree of rhetorical language than parts I and II, which read more like academic manuals, while the third part had more strident political tones. In justifying the high commission's use of the oath, Cosin revealed his view of the opinions of his adversaries as tending to the overthrow of sound judicial process and, ultimately, the peace and stability of the realm.

suspended from his function by the ordinarie and the same a commissioner ecclesiasticall, the cawse I vnderstood euen from the Bishshoppes owne mouthe to be, for that this preacher refused to answere what he thought of the place and callinge of a Bishshopp in the Churche of Englande, whether it were lawfull or vnlawfull.' LPL, MS 234, fo. 222r.

¹³⁸ Cosin, *Apologie*, III, 218.

¹³⁹ Cosin accepted that the charges might be given to the party before the interrogatories began, but it was only necessary that they be given before witnesses were called, enabling the accused to defend himself against the charges. Cosin, *Apologie*, III, 223.

¹⁴⁰ Cosin, *Apologie*, III, 224; Jones, *Chancery*, 213-63; Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 170. Having sight of the interrogatories before taking the *ex officio* oath was particularly important to defendants in the high commission because they were not yet aware of the charge laid against them. In Star Chamber and Chancery, on the other hand, defendants were at least apprised of the charge against them before being required to take their oath to answer, which must have taken some of the fear out of not knowing the particular interrogatories ahead of time.

¹⁴¹ Cosin, *Apologie*, III, 221-2.

Morice's counter-attack the following year, 'A just and necessarie defence', was never published, and Cosin's *Apologie* became the last word heard in the public controversy over ecclesiastical jurisdiction in the 1590s. The significance of Morice's 'Defence' is not in its direct impact on events, but in its capacity as both a corrective to the *Apologie's* weaker assertions and a confirmation of its most powerful arguments.

Chapter 6

James Morice's
'A just and necessarie defence'

Morice was surprised and annoyed that a manuscript copy of *A briefe treatise of oathes* found its way into Cosin's hands. In a letter written to Burghley in 1596 he indirectly laid the blame for this at the lord treasurer's door.¹ Cosin's *Apologie* had been completely unexpected by the puritans, and none of them dared publish a response to it, though they complained bitterly in private.² Morice considered many of Cosin's asseverations in the *Apologie* insults which questioned his honour, and he felt compelled to frame a reply that would defend his former work from Cosin's attacks. 'A just and necessarie defence of a briefe treatise'³ was completed in 1594, the year after the second edition of the *Apologie* was published. This time Morice kept the manuscript private, offering it to no one. But word that he had penned a reply to the *Apologie* eventually reached the ears of Archbishop Whitgift, who requested a copy for himself. On the condition that no harm would come to him, Morice drafted a copy of the 'Defence' expressly for the archbishop. Whitgift's is the only known copy of the 'Defence' to exist today, and its value is enhanced by marginal comments inserted by Whitgift himself.⁴ Though framed as a vindication of the *Treatise*, the 'Defence' also contained new and valuable data on the *ex officio* oath controversy from the years 1590 to 1594 as well as answering Cosin's claims in the *Apologie*.⁵

The element of *ex officio* procedure around which Morice's criticisms revolved was the amalgamation of the offices of prosecutor and judge in the same person. In Morice's estimation, a judge should only hear and receive the public complaints and suits of others, never himself to prosecute. Prosecution, he maintained, could not occur until a lawful

¹ Morice had given a copy of the *Treatise* to Burghley and 'Sone after I knowe not howe, Mr doctor Cowsyn obteyneth a copie therof (as he saith by the meanes of a right noble counsellor)'. BL, Lansdowne MS 82, doc. 69, fo. 150r.

² Beale's response may be found in a letter to Burghley at BL, Lansdowne MS 73, doc. 2, fos. 8r-11r. For Morice's reaction see BL, Lansdowne MS 82, doc. 69.

³ Its full title was 'A iust and necessarie defence of a briefe treatise made ageinst generall oathes exacted by Ordinaries and Iudges Ecclesiasticall to aunswer to all such articles as pleaseth them to propounde, and against their forced oathes, *ex officio* mero, and consequently a iustification of the lawes, liberties, and Iustice of England impugned by Richard Cosyn, doctor of the ciuill lawe in his Appologie for sondrie proceedings by Iurisdiction Ecclesiasticall'. Fixed underneath this title was, 'By James Morice, Esquier, Her Maiesties attorney of the Covrt of Wardes & liueries Anno domini 1594 Anno Reg: Regine Eliz: 36'. LPL, MS 234, fo. 1r. This title page was probably constructed especially for Whitgift's benefit, seeing that it was to be his personal copy.

⁴ Cambridge, Baker MS 40, fo. 69v; BL, Lansdowne MS 82, doc. 69, fo. 150r-v. This copy of the 'Defence' is at Lambeth Palace Library, MS 234.

⁵ The 'Defence' was roughly equal to the *Apologie* in length (327 folio pages) and was sorted into eight chapters, each corresponding to the original eight chapters in the *Treatise* and framed as individual defences of them with Cosin's relevant arguments juxtaposed and confuted along the way.

presentment had been received by the judge from a third party.⁶ He balked at Cosin's theory that fame or the 'public voice' was technically the prosecution in *ex officio* criminal cases.⁷ Instead, he focused on the well-established judicial principle that a judge must not also be an accuser,⁸ but there was no controversy over that point. What was in dispute was whether a judge acting *ex officio* was free to conduct criminal proceedings with the intent to prove the defendant guilty. Common law discountenanced the notion that fame or clamorous insinuation could take the place of public accusers or presenters, and Morice took this to indicate that proceeding *ex officio* on this basis was naturally unjust. This argument, therefore, was contained within his larger belief system that common law was the supreme law of the land and that canon and civil law were subordinate to it.

Secret denunciation, another facet of *ex officio* procedure, came under Morice's censure for two reasons. He had previously complained in the *Treatise* that denunciation tended to protect malicious and cowardly men, but in the 'Defence' he added another reservation. Denunciation, he suggested, was also injurious to the defendant by way of a procedural rule: the accused was cheated out of being able to take exception to the oath since the proceeding was done *ex officio*, 'to the intent he maie not be priuiledged to saie that he is not bound to aunswere, as perhappes by lawe he might yf it weare at first preferred and prosecuted by a partie.' Thus, according to Morice, secret denunciation tended to thwart justice on two fronts.⁹ Cosin had allowed that men could not be forced to take the oath in cases initiated by accusation, so as not to force defendants to supply their adversary's lack of proof, but in cases initiated *ex officio* he maintained that defendants were required to take the oath, since the judge prosecuted the case out of duty and sincerity.¹⁰ But Morice pointed out that under these rules a man could still be forced to answer upon oath if his accuser chose to denounce secretly rather than accuse publicly. Denunciation was entirely canonical in origin and English

⁶ LPL, MS 234, fos. 31r-32v.

⁷ See above, 122-3.

⁸ See also Bracton quote above at 58, footnote 67; Smith, *De republica anglorum*, ed. Dewar, 89; Baker, 'Criminal courts', *Crime in England*, ed. Cockburn, 15-22; Jones, *Chancery*, 247.

⁹ One who secretly denounced was, said Morice, 'like an Adder lurking in the grasse, his name suppressed and his practise protected by the Iudges office...who maie goe safe or free from trouble and daunger, calumniators beinge allwaies ready and forward, enflamed by malice'. LPL, MS 234, fos. 33r-34v.

¹⁰ See above, 133, 144, 158-9.

common lawyers had never accepted its validity. As Morice illustrated, denunciation was simply a no-risk method of accusation that protected a denouncer's identity, enabled him to inform the court without being deposed as an accuser would, and authorised the judge to cite the defendant *ex officio* and cause him to take an oath to answer all questions, even though the original information had been submitted by a private individual.¹¹

Morice also took issue with Cosin's claim that the behaviour of ecclesiastical judges was courteous and favourable towards defendants. He noted that defendants cited *ex officio* were told that after they had sworn to answer all interrogatories they might peruse the articles of interrogation (that is, the main headings but not every particular one) at their leisure. 'Is not here a wonderfull great fauor, trowe ye?' commented Morice.¹² If the defendant could not refuse to answer any of the interrogatories, he argued, there was little point in seeing them beforehand. Even though the party was advised that the interrogatories threatened neither life nor limb and that he was only required to answer according to facts of his own knowledge, Morice complained, 'what is the knowledge of all this to the purpose? For since the chefest poinctes and those that most nerelie touche and concerne him are conceled, his oathe can not be but blinde and vndiscreet.'¹³ Morice was, in effect, requesting a privilege for defendants in ecclesiastical courts that was not enjoyed by defendants in other courts. Allowing defendants to peruse the articles of interrogation before taking an oath to answer was not allowed in Star Chamber, Chancery, or the common law courts, but the oath in those courts was also different — defendants were not compelled to incriminate themselves or others by their answers. If Morice could not abolish the *ex officio* oath, he sought to give high commission defendants an escape avenue by way of refusing the oath if they thought the interrogatories would bind them to accuse themselves.

In response to Cosin's defence of the integrity of ecclesiastical judges, Morice remarked, 'Yes marry sayth our Civilian there is mallice in the Accusor, mildenes in the Iudge, the one is an adversarie or enemy: the other a father yea a spirituall father whoe charitablie seeketh the

¹¹ See also Holdsworth, *History of English law*, IV, 620-2; Brundage, *Medieval canon law*, 143, 148; Baker, 'Criminal courts', *Crime in England*, ed. Cockburn, 18-21.

¹² LPL, MS 234, fo. 35r-v.

¹³ LPL, MS 234, fos. 37v-38r.

parties good, his reformation, his amendement of lief, the removinge of scandall, and discharge of his owne dutie.'¹⁴ But Morice held that some accusers accused justly, and some judges proceeded out of malice.

As an example of the vindictiveness that could be exhibited by ecclesiastical judges, Morice recalled an event 'not yet one yeare paste' when he was in Colchester 'about the deliury of the gaole there The daie before the Sessions beeinge Sondag'.¹⁵ The bishop suffragan was in town and, unbeknownst to the magistrates, preached in the morning, despite the fact that the pulpit had previously been appointed to 'a graue and learned man', one Knewstubbs. In the afternoon Knewstubbs rose to preach, thinking it was permissible for him now to do so without offence. While he was preaching the suffragan came in, sat down in his pew, and beckoned to one of the bailiffs. The bailiff, whose name was Haselwood, sent one of his servants of the mace to find out what the suffragan wanted. The servant was told to tell the bailiff to order Knewstubbs to step down since the suffragan had already appointed someone else to preach. The bailiff, however, refused to order Knewstubbs to come down, and so he continued, 'to the good likinge and edificacion of the people there assembled.' After the service was over, Morice was going out of the church along with the suffragan and heard him give 'some fewe wordes of commendacion both of the sermon and of the preacher himself.' But then later the suffragan cited the bailiff, Haselwood, to appear before him to be proceeded against *ex officio* for refusing his episcopal command.¹⁶ Haselwood appeared and he was offered an oath to answer to whatever interrogatories were put to him. Haselwood complained that the suffragan was not dealing charitably with him for his soul's health but out of malice, 'apparentlie shewed to be true for that after this sermon of Mr. Newstubbes his Lordship beeinge in place where this bailiffe was would not soe much as once speake vnto him.' So Haselwood refused the suffragan as an incompetent judge¹⁷ and would not take the oath 'for that it was both vngodlie and againste the lawe.'¹⁸

¹⁴ LPL, MS 234, fo. 102v.

¹⁵ LPL, MS 234, fo. 103r.

¹⁶ LPL, MS 234, fo. 103r-v.

¹⁷ This was apparently done in writing. LPL, MS 234, fo. 103v, line 17.

¹⁸ LPL, MS 234, fo. 103r.

Morice noted that then the suffragan became a secret denouncer and a whisperer in the ears of Bishop Aylmer of London, and Aylmer's chancellor, regarding this matter. These two commissioners and a third summoned Haselwood by letters missive to appear before them at St. Paul's in London. Thus Aylmer, in Morice's estimation, became a suffragan for the suffragan and bailed him out. When Haselwood appeared, he was charged with the same oath as before, to answer any and all questions. Haselwood refused again and was thrown into the Fleet, 'there to remain as a gage for the other which they could not apprehende', presumably meaning his conscience.¹⁹

After some time Haselwood was set free, but no more so than 'the beare that is ledd about by the nose.' The commissioners, exacting bail from him, ordered him to return from London to Colchester. By this measure, they assured that he would return to court as he did again and again, each time refusing the oath and being threatened with penalties or fines. He finally submitted and accepted the oath, not fearing any question they could ask him. He was then told he would quickly know his purgatory and a few days later he was exhibited twenty articles, said Morice, not a dozen or half a dozen, as Cosin had claimed was standard.²⁰ One of the articles called Knewstubbs a man publicly known to oppose the ecclesiastical government. The chancellor's name appeared in seven of the twenty articles, said Morice, which left the strong impression that he was a judge in his own case.²¹

After Aylmer's last triennial visitation was over, Morice continued, the chancellor, 'descendenge from powles to Colchester to gather in not any Peter pence but powle money of such persons as stood vndischarged in his bookes', was sitting in St. Mary's Church. He demanded fee money from a man named Isaac Shelberry. Shelberry would not pay, so the chancellor sent a warrant, signed by some ecclesiastical commissioners, to Haselwood (who was then the bailiff) to have Shelberry committed to ward. Haselwood refused, so the chancellor ordered some high constables to do it; they refused. This angered the chancellor, who left town.²² These illuminating anecdotes give some insight into Morice's personal

¹⁹ LPL, MS 234, fo. 103v.

²⁰ Cosin, *Apologie*, III, 223.

²¹ LPL, MS 234, fo. 104r.

²² LPL, MS 234, fos. 103r-104v.

experience with church officials in Essex and seem to show a widespread resistance amongst the laity to ecclesiastical disciplinary measures, consistent with Professor Collinson's and others' claims that East Anglia was a hotbed of religious discontent in the later Elizabethan years.²³

If the *ex officio* oath was refused, said Morice, it was done so either justly or unjustly. If justly, the defendant was wronged in having it forced on him. If his refusal was unjust, Morice proposed another common law procedure: the defendant could be proceeded against *pro confesso*.²⁴ Of course, in a common law court a defendant would have been notified of the charge laid against him at the beginning of his trial, whereas his counterpart in the high commission might not. Thus, Morice's suggestion of *pro confesso* was rhetorical, since 'no man is to be condemned as confessing the fault that neuer vnderstood perfectlie what he was charged with.'²⁵ This was why ecclesiastical judges insisted so strongly that the party take the oath, explained Morice, since a defendant, having refused to swear to answer any interrogatories, could not possibly be apprised of the charge against him and thus remained ignorant of the cause of his trial. Under such circumstances a man could not be convicted. Morice contended, therefore, that the oath was in part a strategy employed by the commissioners to validate proceeding *pro confesso* as a secondary course of prosecution should the defendant refuse to answer interrogatories after he had promised on oath to do so.²⁶

By this reasoning Morice established that the *ex officio* oath was the linchpin which held together the massive powers of the high commission. If defendants could be made to take the oath, they were either forced to incriminate themselves through their answers or else were proceeded against *pro confesso* if they refused to answer. The best alternative left to recalcitrant defendants was thus to refuse the *ex officio* oath in the first instance, which

²³ Collinson, 'Puritanism and the Modern World', *English puritanism*, ed. Collinson, 22, 26, 28-9; see also Whitgift's conference with Morice in 1591, PRO, SP12/238, doc. 75; Emmison, *Morals & the church courts*.

²⁴ Defendants who were proceeded against *pro confesso* were prosecuted as if they had confessed the crime. This procedure occurred when defendants engaged in some obstruction (such as refusing to answer to the charges laid against them) which implied guilt. See above, 151, footnote 56; and Hudson, 'Star Chamber', *Collectanea juridicia*, ed. Hargrave, 168, 171-2.

²⁵ LPL, MS 234, fo. 36v.

²⁶ As for the defendant's prerogative to challenge any of the questions put to him if the law did not bind him to answer, Morice asked who would judge the challenge. Naturally, the judge himself would decide, and what judge would give sentence against his own interrogation? LPL, MS 234, fo. 36v.

saddled them only with contempt of court rather than implied guilt.²⁷ The high commissioners could not proceed any further against defendants who stood in contempt by refusing the oath, so they generally resorted to imprisonment for an indefinite period of time until the defendant agreed to take the oath.

Encapsulating Cosin's explication of *ex officio* procedure into a single example, Morice sought to illustrate its alleged injustice more dramatically by setting the reader before an imaginary trial. The scene is an ecclesiastical consistory. In the role of a lone commissioner Morice chose to cast Cosin, 'beinge a man in respect of his profession enabled by lawe to exercise ecclesiasticall Iurisdiction'.²⁸ Cosin is placed in his seat and on either side of him are set 'flienge fame; set forthe in hir monstrous and hideous shape' and 'priue information, with his face couered like a masker.'²⁹ Also present is a scribe or register for the court, and an apparator who brings in two suspects, a man and a woman who have been cited to appear. Morice himself assumes the role of chorus or prologue: 'The court thus furnished, let vs imagine the speeche of this Iudge to be accordinge to his owne rules, and the aunswers of the seuerall parties conuented agreable to the exceptions by him remembred.'³⁰

The judge asks the man to swear to answer all questions put to him. The man replies he does not know why he should swear when he has not been informed of the charge against him; he asks his accuser to come forth. The judge clarifies that no individual accuses him but that Fame stands in place of an accuser, 'who by lawe maketh waie vnto inquisition of crimes'.³¹ It is she who has reported the defendant's misdemeanours to the judge. The man protests that Fame is a horrible monster, not lawful or sufficient to take the place of an accuser, but the judge contends she is the 'testimony of the multitude, the voice of the people' and of a certain divine nature,³² as well as lawful. The man complains further that she is false and deceitful, often the work of malicious enemies, but the judge replies that such people might also be

²⁷ This was precisely the strategy used by Thomas Cartwright in Star Chamber. See above, 164-5.

²⁸ LPL, MS 234, fo. 39r.

²⁹ LPL, MS 234, fo. 39v. These two figures were intended to embody the canon law concepts of fame and clamorous insinuation as explained by Cosin in the *Apologie* (see above, 122-3). Morice's description of fame suggested the uncertain nature of rumour while his picture of clamorous insinuation illustrated the clandestine, deceitful nature of gossip.

³⁰ LPL, MS 234, fo. 39v.

³¹ Ibid.

³² This strange comment ('of a certain divine nature') Morice apparently attributes to Cosin, but the meaning is obscure. LPL, MS 234, fo. 39v.

speaking truth, so he sees fit to hear her out. Doubting whether Fame has ever spoken evil of him, the man asks for proof that he has been denounced; is there a presentment or judicially received testimony against him? He suspects the fame might have been caused by the judge himself.³³ The judge responds that even though nothing has been proved, he may affirm by his judicial prerogative that the fame exists and is therefore meet to be investigated.

The man argues that according to ecclesiastical law, if there is no presentment a fame must be proved before the judge proceeds to examine the defendant. This rule has many exceptions, answers the judge, one of which is that if the judge intends merely to 'reform spiritually' as opposed to 'punish corporally' he may proceed without proving the fame.³⁴ Labouring to protect his good name, the man declares that Fame speaks well of him, and he offers to prove it with witnesses. The judge answers that by law he need not grant this request, since the proceeding is *ex officio* and the law does not 'entend and presume ageinst my sinceritie.'³⁵ He charges the man to take the oath.

But the man continues to resist. He claims that canon law states that if anyone is accused or prosecuted by another, the defendant should not be compelled to answer or be examined on oath so as not to play into the hands of his adversary. The judge argues in response that he has a prerogative 'beside the common course of lawe' to compel a defamed man to take an oath when proceeding *ex officio*. That is one of the reasons, the judge notes, the office is called noble and excellent.³⁶ The man asks to know with what he is charged and wishes to see the interrogatories, otherwise he fears his oath will be indiscreet, but the judge knows no law which binds him to grant this request. It is dangerous, he says, to let the defendant see the questions first, in which case he might answer deceptively, indirectly, or not at all. Besides, not all the judge's questions are framed yet. If the man will first take an oath to answer all interrogatories, the judge promises he will then be allowed to read them at his leisure. The

³³ This detail may have been a reference to a certain case before the high commission during Mary's reign, discussed by Morice later in chapter 1. No proof could be brought against one Shetterden to prove him guilty of heresy, but when he pressed the commissioners for evidence of his guilt, one of them who was a bishop said that he himself suspected Shetterden of being a heretic. This caused Shetterden (in Morice's words) to remark that 'it was a thinge vnreasonable for one man to be both his accusor and Iudge.' LPL, MS 234, fo. 43v. Foxe, *Acts and monuments*, ed. Townsend, vii, 308-9.

³⁴ LPL, MS 234, fo. 40r.

³⁵ LPL, MS 234, fo. 40v.

³⁶ Cosin did not draw a connection between the title *ex officio nobile* and the judge's prerogative to administer the oath. The judge's boast here was merely creative scriptwriting by Morice. See above, 118.

man asks to see the principal parts so he knows what crime he is alleged to have committed, but the judge orders him to swear to answer first, for canon law does not distinguish at what time the heads or principal parts of the questions must be opened to the party, stating only that it be done so that he can defend himself, which he does not commonly do until after witnesses have testified and he speaks up to refute them.³⁷

The man then turns to the civil law, protesting that it requires copies of evidences against the defendant to be shown to him and asks why the canon law does not recognise the same principle. The rule requiring evidences has many exceptions, the judges explains, one of which is that it is invalidated when *ex officio* procedure is used, 'soe highe and extraordinarie...is this function of a Iudge ecclesiasticall.'³⁸ The judge agrees to show him the interrogatories, however, if he will first swear that he will take an oath afterwards to answer them. The man responds that he would not dare to entangle himself in an oath when he does not know what that oath will force him to affirm or deny. Of courtesy the judge says he will reveal that a fame is abroad which charges the man with incontinent living. He asks if this will suffice and charges the man to swear to answer directly. The man, however, desires a fuller explanation of this charge, saying that every bill of complaint or information ought to contain particulars of persons, time, and place regarding the crime. The judge concludes that if he is at this point, the censures of the church will proceed against him, adding that if this case had been before the ecclesiastical commissioners, the man would have been imprisoned without bail or mainprise for his contumacy and contempt.³⁹

The judge now turns to the woman and asks her to swear to answer the articles. The woman asks why she should swear to answer when no one accuses her. The judge replies that there need not be an accuser in this court since he is proceeding *ex officio*, which means he may conduct the case without the suit of a party, and his integrity is sure. The woman confesses to know very little about the law, but she believes it is the custom of England that no one should be forced to answer in criminal cases unless there is a private suit, accusation, indictment, or presentment and asks if there is any. The judge marvels that she mentions

³⁷ LPL, MS 234, fo. 41r.

³⁸ Ibid.

³⁹ LPL, MS 234, fo. 41v.

indictment and warns her to leave that to the common law; this proceeding is by canon law. But since she desires to know her accuser, he notes that Privy Information has informed against her and stands here in place of an accuser. The woman asks to see his face or know his name, but she is denied by the judge, who responds that all she is entitled to know is that he is a man of credit. He adds that since a judge proceeding *ex officio* is not likely to have personal knowledge of crimes committed, canon law provides that he may receive secret information in order to reform or punish the offender. Although Privy Information is not on oath, says the judge, his information is lawful in the court, and the judge may therefore compel her to an oath to answer interrogatories.⁴⁰

The woman complains that by this rule people might be defamed unjustly by malicious or deceitful people, but the judge explains that honest men are not likely to become public accusers, since formal accusation is generally odious and perilous. Therefore it is provided in most parts of the world that judges may operate by enquiry to compensate for the lack of accusers. The woman rejoins that it is better to accuse openly than secretly. She adds that she is told it is against canon law to receive information from men who will not identify themselves in court. The judge says that she has another party against her besides Privy Information, and that is the public interest. This is a 'fetched accuser', says the woman, and she refuses the oath again.⁴¹ The judge asks her one final time if she will swear. The woman asks what she is charged with and what is contained in the articles. The judge notes that she is charged with defamation but he will not reveal the contents of the articles. The woman protests that she is the one defamed by this baseless charge. She will not swear until she has seen the questions and agreed whether to answer them. Refusing her request, the judge proceeds to pass sentence of excommunication against her.⁴²

This imagined consistory trial, part Lucianic dialogue, part exposé, was generally accurate in representing Cosin's positions, except where I have noted otherwise. Morice chose two interesting cases for study, probably based on his own experience or knowledge. In these examples he singled out fame and clamorous insinuation as being particularly contrary to

⁴⁰ LPL, MS 234, fos. 41v-42r.

⁴¹ LPL, Ms 234, fo. 42v.

⁴² Ibid.

justice, because they violated common law principles of judicially received testimony. Also, the charges against the two defendants ought not to go unnoticed. Incontinence and defamation were likely to be crimes commonly imputed to troublesome puritan ministers, especially defamation.⁴³

At the conclusion of his mock trial, Morice suggested that the high commission be dissolved as it was 'subiect to no ordinary course of Iustice'.⁴⁴ He listed seven alleged procedural and theoretical illegalities in support of his proposal: 1) the high commission deprived defendants of the right to take exception against the *ex officio* oath; 2) the judge combined his office with that of an accuser; 3) men were dishonoured by the court, often without just cause or recompense for their trouble and costs; 4) defendants were forced to take an oath even when fames were not proved; 5) criminal examinations were conducted without lawful accusation, presentment, or proof; 6) defendants were forced to accuse themselves; 7) men were required to take general oaths to answer unknown articles and this entrapment of men's consciences was done under the pretence of punishing sin.⁴⁵

Morice argued that the glory of the commission could not exist without the extortion of *ex officio* oaths which formed its central machinery of power.⁴⁶ The inquisitors had exceeded their commission, he concluded, and professional corruption was not occasional. There was money to be made from visitations, especially in Essex where Morice had been informed that hundreds of pounds could be raised from the small sums of individual cases. Summoners 'waxe wealthie and purchase Landes, beinge as I said the huntinge spaniells to springe and retrieve plentie of game for the courtes and Consistories of hungry Commissaries and officialls.'⁴⁷ Proceeding *ex officio* was an expedient for accumulating wealth, he claimed, 'fillinge the pollinge purse' in the countryside 'whatsoever it be with the doctor in the Citie'.⁴⁸

⁴³ Helmholz, *Canon law*, 9-11; Collinson, *Elizabethan puritan movement*; see also Cawdrey's case at BL, Lansdowne MS 68, doc. 54.

⁴⁴ LPL, MS 234, fo. 43r.

⁴⁵ Ibid.

⁴⁶ LPL, MS 234, fos. 30v, 39r. There was a loftiness to the commission as well that Morice disliked. For example, he objected to the self-glorifying language used in the statement of Cawdrey's case which described John Aylmer, the bishop of London, as 'not onelie an highe but one of the supreme that is of the higheste or greateste Comissioners of all others...' He was not convinced that titles such as 'high commission' were warranted by law. LPL, MS 234, fo. 195r; see also BL, Lansdowne MS 53, doc. 72.

⁴⁷ Morice used the phrase 'huntinge spaniells' in the *Treatise*, to which Cosin took exception in his Epistle to the Reader, (Cosin, *Apologie*, sig. B4v-C1v). Here Morice defiantly repeated his former affront. LPL, MS 234, fo. 45v.

⁴⁸ LPL, MS 234, fo. 45r-v.

Cosin had endeavoured in the *Apologie* to defend a precept which he termed 'the discovery of the whole truth' against oneself.⁴⁹ He had cited Ecclesiasticus 4, 'Be not ashamed to tell truth for the good of thie soule; for there is a shame that bringeth sinne and there is a shame that turneth a man to honor and grace.'⁵⁰ But Morice failed to comprehend how this verse should incite a man to betray his family and neighbours. Several times Morice confuted Cosin's allegations that every scriptural adjuration to confess sin be interpreted as corresponding to public testimony rather than to private morality. This was particularly the case in chapter 12 of part III of the *Apologie*, 'wheare, confounding othes, he maketh no difference betwene such as are Iudiciall, of which we entreate, and othes which we deale not with but will referr to the wise and learned reader to consider'. Morice suggested that the same reasoning could have been used by Cosin to prove the legality of the catholic practice of auricular confession.⁵¹

Morice offered six responses to Cosin's six 'privileges' enjoyed by ecclesiastical judges.⁵² First, he submitted that judges should not be relieved of the necessity to prove their own integrity and sincerity. Rather than proclaiming their good faith by virtue of their office, they should earn the same by demonstrating the burden of proof against a defendant before declaring him guilty; and it was not necessary, he added to put the accused on oath to demonstrate their guilt. Second, he maintained that God was not glorified by this oath but dishonoured. Third, a lawful accuser or presenter must prosecute the case. Fourth, there would be no end of controversy if denunciations were allowed to be considered by judges. Fifth, Morice claimed the oath was indiscreetly taken. Lastly, the oath was 'as generall as the oathe of kinge herode, and in respect of the generalitie to be condemned.'⁵³

In the second chapter Morice challenged Cosin's supposition that scripture provided justification for *ex officio* oaths. Cosin had pointed to three particular Old Testament passages as examples or justifications of oaths that were general in nature.⁵⁴ The first of these

⁴⁹ See above, 153.

⁵⁰ Cosin, *Apologie*, III, 48.

⁵¹ LPL, MS 234, fo. 34r.

⁵² These were discussed above at 118-9.

⁵³ LPL, MS 234, fo. 34r-v. There seems to be no difference between Morice's fifth and sixth reasons.

⁵⁴ For all three of these examples see Cosin, *Apologie*, III, 154 and III, 226 for further mention of Jeremiah's oath.

concerned the oath administered to Abimelech by Abraham in Genesis 21. Abimelech, king of Gerar, caused Abraham to swear that he would deal loyally with him and his descendants. In Cosin's estimation, this oath was more general than the *ex officio* oath, but Morice countered that Cosin had missed the point. The true question was whether general oaths could be exacted judicially by magistrates in criminal cases. Abraham's oath to Abimelech was an agreement between a prince and a foreigner, said Morice, not one of the king's subjects. Abimelech and Abraham swore as equals, and voluntarily.⁵⁵ Morice contended that Abimelech wanted to be assured of Abraham's friendship since he saw that God's favour was upon him, but he failed to comprehend how this example justified compulsory *ex officio* oaths in criminal cases.

Cosin likewise had pointed to the story of Esau (Genesis 25) as evidence of an oath in scripture that exceeded the generality of any oath administered by the high commission. Again Morice asked how this example proved Cosin's assertion that obligatory, general oaths could be administered by ecclesiastical judges. Though Cosin had stated that Esau's oath was approved and ratified, Morice argued that Hebrews 12 clearly condemned Esau for the profanity of his act.⁵⁶ Cosin's third example that *ex officio* oaths were approved by scripture was the oath sworn by Jeremiah to Zedekiah, king of Judah (Jeremiah 38.14-16) in which the king promised not to put Jeremiah to death if Jeremiah would answer the king's question truly. This was not even an oath, asserted Morice, but simply a man promising to speak truthfully to a king. Morice's examination of the passage showed that Jeremiah bargained with Zedekiah to spare his life and did not simply promise to answer any uncertain interrogatories that might cause him to be convicted.

Behould I beseech you whether nowe at the length this good man hath brought us from iudicyall oathes in causes cryminall. We were before this drawne to oathes made for confirmacion of leagues...and from them to an oath made for ratificacion of a bargaine and

⁵⁵ The text seems to bear out Morice's assertion: after Abimelech offered the terms of the oath, Abraham responds, 'I will swear', agreeing to take the oath but under no compulsion to do so (verse 24). LPL, MS 234, fos. 59r-60r.

⁵⁶ LPL, MS 234, fos. 60v-61r. '...lest there be any fornicator or profane person as Esau, who for one morsel of meat sold his birthright. For ye know how that afterward, when he would have inherited the blessing, he was rejected: for he found no place of repentance, though he sought it carefully with tears.' Hebrews 12.16, 17.

sale. Lastly altogether from oathes to bare speeches, thereby to prove a general oathe by an equity yet very properlie he harpeth somewhat uppon the stringe...⁵⁷

Morice's interpretation of Achan's expiation (Joshua 7.16-21) in the *Treatise* had been confuted by Cosin, who maintained that Achan's expiation was a good example from scripture of both special enquiry and the *ex officio* oath. Joshua had gathered all of Israel together to ascertain which man had committed a grievous sin, the knowledge of which crime had been previously made known to him by God. Lots were taken to discover who had committed the sin and the lot fell to a man named Achan. Joshua ordered Achan to confess what he had done and Achan did so. Morice had argued that this did not constitute an oath, but Cosin asserted that it did and that the falling of the lot to Achan was a presumption upon which to ground a special enquiry. In the 'Defence' Morice maintained that the falling of the lot to Achan was a full and sufficient conviction of Achan by divine providence — it signified guilt itself, not a presumption of guilt into which enquiry should be made. Since God had made clear to Joshua that a crime had been committed and had detailed what the crime was, when the lot subsequently fell to Achan all that remained was to pass the sentence of guilt on him.⁵⁸ This case also reinforced Morice's plea for the speedy conviction of offenders. If a judge had sufficient evidence to convict a criminal, he ought to proceed to the sentence rather than waste time encouraging perjury by enforcing an oath to confess the crime.⁵⁹

Another example brought by Morice in his *Treatise* and confuted by Cosin was the case of murder when the offender was unknown (Deuteronomy 21.1-9). In such a case the elders of the city nearest the site of the murder were to swear that they were not guilty and to offer a heifer as a plea of their innocence. Morice stated that the word 'oath' was not even used in this passage but the relevant words were 'protest' and 'answeare'.⁶⁰ He felt compelled in many circumstances to bring Cosin back to the main point:

⁵⁷ LPL, MS 234, fo. 61r.

⁵⁸ 'This was noe doubt a most graue and wise proceadinge of the Iudge Iosua. But what if Hacan had refused to harken to this good counsell and to manifest the particulers of the thinges stolne [sic], had not Iosua neuerthelesse sufficient matter whereuppon to proceede to iudgment of death against him?' LPL, MS 234, fo. 70v.

⁵⁹ LPL, MS 234, fo. 73r-v.

⁶⁰ LPL, MS 234, fos. 65v, 74v-75r.

The question and pointe in controuersie (which I am forced in respecte of his greate forgetfulnes often to remember) is that these generall and officious othes are vnlawfull amonge other causes, for that the deponent is sworne to make aunswere to Interrogatories to be propounded conteyninge vnknowne, secret, or barelie suspected matter neuer committed, so that the othe becometh in respect of the matters vnknowne, as to the taker indiscreate and without Iudgment in respect of the seacrecie or bare suspicion, wrongfull and iniurious.⁶¹

Morice concluded that all of Cosin's arguments from scripture to prove that the *ex officio* oath was consistent with the word of God had failed. They were either irrelevant to the issue of forced, general oaths in ecclesiastical courts or else they operated on faulty logic. He conceded that no man with sound judgment would deny that magistrates might exact oaths lawfully from subjects under their jurisdiction, but the issue was not whether men might voluntarily take general oaths (as many of the examples Cosin cited from scripture illustrated), but whether they might be compelled by law to take oaths in criminal matters.⁶²

There was one simple reason why the *ex officio* oath was indiscreet and unjust, said Morice: not every truth that a man possessed in his head ought to be told. There were some things that a man ought to be permitted to retain privately in his mind.⁶³ For example, it would not be discreet to reveal that a certain man and woman committed adultery many years ago, though they had long ago mended themselves and lived in the fear of God. To force a man to reveal such an indignity from the distant past, argued Morice, would be to open an old wound afresh (and very likely a lot of trouble) after it had, in time, been healed. To counter Cosin's charge that he had played the part of an anabaptist by justifying a denial of the oath on grounds that it was not safe for a man's conscience, Morice denied any sympathy with the doctrine of conscience as the heretical, 'fantasticall' anabaptists understood it. But he maintained that there were some canons in England that flouted the laws of the realm and the royal prerogative of the prince. He even went so far as to counsel the refusal of the oath: 'I stand in no doubt but am fullie assured (whatsoever he dreame) that those generall

⁶¹ Morice's use of the word 'committed' in the above quotation does not mean that an offence had not been committed but that the unknown, secret, or barely suspected evidence against a defendant had not been judicially received (committed) to the court beforehand. LPL, MS 234, fo. 76v.

⁶² Morice remarked that Cosin had entirely skirted this issue in part III, chapter 11 of the *Apologie*. LPL, MS 234, fos. 64v-65r.

⁶³ Hamilton, *Shakespeare*, 7-8, 37; St. German, *Salem and Bizance*, reprinted in More, *Works*, ed. Guy, Keen, Miller, McGugan, X, 355.

and officious oathes maie iustlie be refused, both by the Lawes of god and of this Kingdome, and if my reasons and proffes made to that end maie instructe men to retaine a good conscience I shalbe right glad thereof.'⁶⁴

Cosin's lengthy enquiry into the legal customs of foreign countries, how their princes and judges handled oaths, what kind of oaths were and had been used,⁶⁵ did not interest Morice nor did he consider it pertinent to the controversy, which concerned (he claimed) England and its laws only. He defined the common law of England as 'the good and necessarie customes and vsages of the realme agreable with the lawe of god and reason' which bound all subjects together into a body politic.⁶⁶ The common law, while being *jus non scriptum*, was validated by tradition and prescription, and upon it the life and continuance of the nation rested. The sovereign was a 'principall parte and porcion' of common law and ruled to protect the same.⁶⁷ Courts which observed the common law were called common law courts, the primary and foremost among these being the King's Bench, Exchequer, and Common Pleas. Chancery was, according to Morice, a common law court only in so far as it was a court of record, but otherwise it was unique.⁶⁸

In answer to Cosin's examples of bailiffs, sheriffs, accountants, and other officers tendering oaths to their inferiors, Morice responded that the issue, once again, was not whether the oath could be voluntarily taken but whether it could be forced.⁶⁹ To Cosin's charge that the oath of the grand jury at sessions and assizes was at least as general if not more so than that in ecclesiastical courts, Morice complained that Cosin was merely dallying with words, pretending not to understand Morice's use of the word 'general'. The oaths of jurors,

⁶⁴ LPL, MS 234, fo. 89r.

⁶⁵ Cosin, *Apologie*, II, 22-9.

⁶⁶ LPL, MS 234, fo. 124r.

⁶⁷ Morice mentioned that Fortescue had affirmed the ancient nature of Britain's monarchy. It had been accepted by the five nations which ruled Britain (the Britons, Romans, Saxons, Danes, and Normans). In fact, the king's coronation oath included a pledge to uphold the laws of the land, 'so that he may not, thoughte hedd of the bodye politicke of this kingdome, But by consent and allowance of his people, alter or abolishe anye parte thereof'. LPL, MS 234, fo. 124r-v; Fortescue, *De laudibus*, ed. Chrimes, 39-41.

⁶⁸ There were other laws in England, too, such as maritime law, martial law, ecclesiastical law, and merchant law, but none of these systems of law nor all of them together, said Morice, could properly be termed the common law or even a part thereof. In this he was at odds with Cosin who viewed all law systems in England as equal under the queen. LPL, MS 234, fos. 124v-125r.

⁶⁹ Cosin had argued that oaths were regularly administered by officers to their underlings. Morice was skeptical, however. 'It is vsually donne saith he, It is abusedlie donne saye I, yf it be so donne. Greate Lordes & lesse then Lordes may require an othe of their accomptant yet is yt at the will of the other to accept or reiecte yt.' LPL, MS 234, fos. 127v-128r.

he maintained, could not be said to be general or indiscreet since the common law, both in custom and usage and in laws expressed in Parliament, was publicly known. What jurors would be given in charge at any session was already printed in books. Any recitation of the particulars of their charge, therefore, would serve merely as a reminder of them. But oaths in ecclesiastical courts, said Morice, were blind since defendants could not possibly imagine what questions they might be forced to answer. If ecclesiastical judges would only reveal to the party beforehand what particular crime the defendant was suspected of having committed, Morice supposed no one would find fault with their proceedings.⁷⁰

Cosin's attempt to show that common law was consonant with civil and canon law with regard to *ex officio* oaths was dismissed as a failure by Morice who concluded that the two laws were in open disagreement.

The comon Lawe forbiddeth the ministring of an othe to any defendant in cawses crymynall & penall whereby losse of libertie or good name may ensue. The Cannon lawe presseth oathes vpon defendantes in such cases, and shall not these lawes be accompted not so much as dyvers? Naye they are altogether repugnant yea, at open warre, striving and contending strongly as vtter enymyes the one against the other, never to be reconciled, how much soever The apologer laboreth to bring them to agreement.⁷¹

As a further demonstration of the repugnance between common law and civil law, Morice turned briefly to the subject of torture. He remarked that Cosin had maintained that common law forbade torture for the revealing of crimes or accomplices in crime.⁷² But Cosin later revealed that torture was acceptable in the Marches of Wales, in the Tower of London for treason, and in military camps.⁷³ Morice did not deny the legality of torture in those areas of jurisdiction, but he reiterated that it was illegal according to common law. That the civil law acknowledged torture in certain cases showed the disparity between the two laws. Cosin believed, like his predecessor Sir Thomas More, that if a man could be tortured in cases of treason, he might also be tortured in heresy cases, since heresy was no less than treason against

⁷⁰ LPL, MS 234, fo. 135r-v.

⁷¹ LPL, MS 234, 141v.

⁷² Cosin, *Apologie*, I, 110-1.

⁷³ See above, 163.

the divine majesty.⁷⁴ But Morice countered that there was no torture in England in cases of heresy, nor were defendants compelled to take oaths to answer to the crime itself in capital cases. Citing the authority of the civilian Sir Thomas Smith, he noted that torture was heinous because it ran the risk of tormenting an innocent man needlessly and was no guarantee of true testimony.⁷⁵

In the *Apologie* Cosin had cited several statutes which he claimed allowed self-incrimination,⁷⁶ but Morice rejected Cosin's examples for various reasons. The first example, concerning oaths administered to coroners,⁷⁷ was no comparison with the *ex officio* oath, said Morice. Although coroners were charged to speak truly, they were not required to do so concerning any hidden matter. He further declared that these articles were in fact set down in print and available to the public view.⁷⁸ The second example was the statute 13 Richard II st. 1 c. 7 in which JPs were required to swear to uphold and put into execution all statutes and ordinances touching their office. Morice maintained that, like the oath taken by coroners, the oath of JPs concerned nothing unknown or concealed.⁷⁹ The last two statutes cited by Cosin related to oaths for the maintenance of the privileges of the church (13 Edward III c. 3) and the oath of great officers to suppress heresy diligently (2 Henry V c. 7). Morice noted that since he was only concerned with statutes and acts of Parliament still in force, these two need not be answered, but even if those acts had not been repealed, the oaths which were made legal by them were wholly dissimilar to *ex officio* oaths.⁸⁰

Morice accused the high commissioners of committing seven particular errors in exercising their jurisdiction. The first error involved the commissioners' presumed authority to command JPs to arrest and attach the queen's excommunicate subjects, to send them up as prisoners to appear before the commission, to cause JPs to take bond from them for

⁷⁴ Cosin, *Apologie*, III, 213-4, quoted by Morice, LPL, MS 234, fo. 50v. More had claimed that heresy was 'treason to god' and used the two terms as if they were nearly equivalent. More, *Works*, ed. Guy, Keen, Miller, McGugan, X, 70, 80-1.

⁷⁵ LPL, MS 234, fos. 144r-v; Smith, *De republica anglorum*, ed. Dewar, 117.

⁷⁶ Cosin, *Apologie*, III, 98-110.

⁷⁷ 4 Edward I c. 1. See *SR*, I, part 2, 40.

⁷⁸ LPL, MS 234, fo. 155r.

⁷⁹ LPL, MS 234, fo. 155r-v; See *SR*, II, 63.

⁸⁰ These 'dead and buried ordinances called and conjured upp agayne, to speake for this civilian' were in fact particular in their intention, though the wording of the oaths was general. At any rate, Morice thought that the deponent, by these statutes, might have some knowledge of the matter before his oath was taken. LPL, MS 234, fos. 155v-156r.

appearance, and to constrain them to obey the commands of inferior ecclesiastical officials such as archdeacons. Morice charged that such orders from the high commission violated the statute *De excommunicato capiendo* (5 Elizabeth c. 23), which stated that excommunicate persons were not to be proceeded against by ecclesiastical jurisdiction before the specified forty days had expired, and even after then only by the queen's special writ *de excommunicato capiendo*.⁸¹ Morice enquired whether it was the office of a justice of the peace to apprehend men deemed arrestable by some authority other than themselves? Did it pertain to their duty to take bonds for appearances before ecclesiastical commissioners, or could they justly commit to prison those who refused or could not enter bond? In short, what law had made JPs gaolers for the high commission? The duties and office of a JP, said Morice, were expressed in his commission and numerous other statutes, and Morice knew of no law that assigned such powers to JPs.⁸²

The second error which Morice accused the judges of committing concerned the legality of the warrant *quorum nomina*, deemed lawful by the commissioners on the basis of the Act of Supremacy. Morice described this writ as a command to JPs to arrest and attach suspects and send them to appear before the commissioners despite the fact that the cause for their arrest was not expressed in the warrant, and on occasion the warrants were handed down with no names on them.⁸³ Besides the issue of legality, Morice thought it was impudent to suggest that any such precept of *quorum nomina* could be found in the queen's letters patent.⁸⁴ The third error attributed by Morice to the commissioners was forcing men on the grounds of the Elizabethan Act of Supremacy (1 Elizabeth c. 1) to answer general oaths without accusation, presentment, or other judicially received information.⁸⁵

⁸¹ See also *SR*, IV, part 1, 451.

⁸² 'The prince indeed may will and command all her offycers and mynisters of iustice to be aydinge and asistinge, but that is to be intended where and in such cases as by the lawe and by the iustice of the land they may be aidinge and asistinge.' LPL, MS 234, fo. 168r. JPs in East Anglia were especially uncooperative in their relations with ecclesiastical courts and were occasionally reprimanded by the privy council for their feisty independence. Collinson, *Elizabethan puritan movement*, 204-5, 408, 409; Elton, *Constitution*, 464-8; Emmison, *Morals & the church courts*.

⁸³ LPL, MS 234, fo. 172r; see also above, 96-7.

⁸⁴ LPL, MS 234, fos. 173v-174r.

⁸⁵ Morice evidently wanted to force ecclesiastical courts to use principles of common law, according to Cosin (*Apologie*, III, 108). Morice replied that he knew the commission as it was now empowered to be of both ecclesiastical and civil jurisdiction, but it should use the proper form of the proceeding for the case which was pending, that is, common law for civil cases, ecclesiastical law for church cases. LPL, MS 234, fo. 174r-v.

The fourth error Morice noted in the commissioners concerned whether a judge was authorised to proceed *ex officio* to examine a defendant. Cosin had claimed it was the opinion of learned men that defendants might lawfully be put to answer upon general oaths without accusation, presentment, indictment, or lawful information if the offence were notorious or if it were known to the judges themselves to be dangerous or scandalous. Morice insisted, however, that a third person was needed besides the defendant and the judge in order for the proceedings to be just and fair, notoriety of the fact notwithstanding.⁸⁶

The fifth error was the acceptance of secret denunciation. Cosin had cited the example of the Babington plot against the queen in his attempt to prove the validity of secret denunciation. Information was brought secretly in that case, and the informer was not, and still had not been, made public. Was it unjust to allow such a 'backbyter' to bring information secretly, Cosin had asked?⁸⁷ It was indeed unjust, Morice countered, in that the traitors were not proceeded against by way of indictment. The fact that the names of the givers of intelligence were suppressed 'was nothinge materyall in that iudicyall accion.'⁸⁸

The sixth error accorded to the commissioners was that of professing themselves publicly to be the accuser as well as the judge. 'The Iustice of this land, detestinge such lawles proceedinge suffereth not any man to be Accusor and witnes, an Inditor and a Iuror for the tryall of the facte, much lesse any magistrate to be both iudge and accusor.'⁸⁹ Morice suggested Cosin would respond to such a charge by maintaining that the judge was not an accuser, but simply the representative for the prosecution, which might variously be fame, clamorous insinuation, or another means to initiate a suit.⁹⁰ But the reality of *ex officio* proceedings was a judge who, in the absence of an accuser, presenter, informer, or indicter, took upon himself the business of the prosecution.⁹¹

⁸⁶ 'I haue learned that a iudge ought not to knowe but as a Iudge, his private knowledge may directe his consyence but can offer him no course to Iudge by.' LPL, MS 234, fo. 179v.

⁸⁷ Cosin, *Apologie*, III, 108-9.

⁸⁸ Morice conceded that at length Cosin had moderated his position, admitting that such secret informations were not usually sufficient ground for special enquiry unless they were frequent or the offence was scandalous, and that secret informations were as rare in ecclesiastical courts as in common law courts. Morice, however, denied that secret information ever took place at the common law. LPL, MS 234, fos. 179v-180v.

⁸⁹ Cosin undoubtedly would have denied that ecclesiastical judges openly proclaimed themselves accusers as well as judges. LPL, MS 234, fo. 180v.

⁹⁰ See above, 122-6 for the eleven ways to initiate criminal suits in ecclesiastical courts other than accusation or presentment.

⁹¹ Cosin's attempt to qualify the term 'accuser' by suggesting that witnesses, too, were in some sort accusers was rejected by Morice: 'in apte speache a witnes ys no accusor, neither may an accusor be a witnesse sins he is rightelie tearmed a witnesse,

The seventh and final error of the commissioners, according to Morice, was their practice of imprisoning without bail or mainprise those who, not knowing their accuser or the matter of accusation, refused to take the oath. He noted that Cosin himself had admitted that by ordinary ecclesiastical jurisdiction, no man could be imprisoned for refusing the oath. The matter was resolved, Cosin had argued, by understanding that the Act of Supremacy gave the commissioners *general* powers of ordering and redressing in ecclesiastical matters. Though legislation did not specify exactly how malefactors were to be convented and punished, the details were to be supplied subsequently by the queen's letters patent. Thus imprisonment for refusal to take the oath was an extraordinary punishment allowed by the queen's grant.⁹²

While Morice allowed that there were many learned men who held that the queen's letters patent fully authorised the commission to administer the oath, he believed such men 'doe greate vyolence vnto that good statute' by perverting its intended use and 'wrestinge the same vnto a wronge sence contrarie to the verie plaine and expresse wordes therof.'⁹³ Believing himself that the act merely restored and united pre-Marian authority, Morice 'looked for a warranty before the Acte' to justify the practice of imprisonment for refusing the oath. The Act of Supremacy, he asserted, only restored ecclesiastical authority that was previously lawful — not just the *matter* of ecclesiastical jurisdiction but also the *manner* and form of citation and punishment. But Cosin had alleged that the specific means of conventing and punishing was left to the queen, 'supplied by those generall woordes viz. according to the tenor & effect of the lettres patentes.'⁹⁴ Morice responded that the means available to the commission for conventing and punishing were shown by that act to be the same as they ever were:

for they are either graunted or restored and annexed as thauncient Lawfull course & manner of proceeding, and that as expressly as any thing els. If then th'auncyent iurisdicion ecclesiasticall to Convent by cytacion & to proceed to ecclesiasticall Censures doe still continew in force and are annexed to the crowne, as Iurisdicions ecclesiasticall from thence to be delegate by commission vnto others, how then may the commission ecclesiasticall appoint or assigne any

that is indifferent and cometh not till he be called. An accusor ys not intended indifferent & voluntarily offreth him selfe to complayne.' LPL, MS 234, fo. 181r; Cosin, *Apologie*, II, 18.

⁹² Cosin, *Apologie*, I, 108-9; LPL, MS 234, fo. 183v.

⁹³ LPL, MS 234, fo. 165v.

⁹⁴ Cosin, *Apologie*, I, 110; LPL, MS 234, 184v.

new forme of Conventing proceeding or punishing? sins by the Cyvillians owne confession a commission may not be graunted to chaunge any lawe in force.⁹⁵

Furthering his point, Morice added, 'here ys an act of restitution and vniting, not a woord of chaunge or alteracion of any manner or forme of ecclesiasticall Iurisdiccion.' Noting the provisions of the act he asked, 'ys there anything to be executed according to the tenor and effect of the lettres patentes but the premises?' If the letters patent introduced innovatory methods of ecclesiastical jurisdiction, he maintained, the Act of Supremacy could not be considered simply as a restoration of ancient jurisdiction.⁹⁶

But Cosin had employed a keen analogy. He had compared the vagueness of the wording of the commission's powers in the Act of Supremacy to the vagueness in wording of the statute authorising the president and Council in Wales to act upon present and future letters patent from the king. Although torture was illegal according to the common law, letters patent directed to the council from time to time empowered it to use torture in cases of suspected felony or murder.⁹⁷ Cosin's point was that the sovereign could, through letters patent, authorise punishments contrary to the ordinary course of law — torture by the council in Wales, imprisonment by the high commission in England. Morice chose to interpret Cosin's example as a boast that the queen could empower the commission to torture men. 'By which his speach and strange interpretacion doth he not fullie and plainlie affirme that if it should please the prince...to committe the rackinge and torturinge of her subiectes to the Commissioners ecclesiasticall that then they might lawfullie vse and execute the same.'⁹⁸ Here Morice attempted to expose Cosin as an advocate of cruelty, but he was unable to refute the logic of Cosin's argument.

If the Act of Supremacy did not empower the queen to specify punishments to be used by the commission, Cosin had contended, the authority given to her by that act was useless. This sent Morice into one of his sharp tirades, declaring, 'I doubte not but he meaneth olde ecclesiasticall Iurisdiccon is to base, to milde, to favorable, we muste haue a more highe and

⁹⁵ LPL, MS 234, fo. 185r-v; Cosin, *Apologie*, I, 110.

⁹⁶ LPL, MS 234, fo. 185r-v.

⁹⁷ See above, 163-4

⁹⁸ LPL, MS 234, fo. 186v.

supreme authoritie, more greivous peynes and punishementes'. In these days there must be 'rough and hard handlinge by messingers and pursevantes: chargeable bondes for apparances: dauncinge attendaunce from day to day till the purse be well purged, greivous fynes: forced oathes: [and] punishinge of the body by longe streighte and close imprisonment'.⁹⁹ Surrounding this complaint were charges of abuse and corruption — a recurring grievance in both the *Treatise* and 'Defence'. As we will see in the next chapter, Morice was outwitted on the issue of the Act of Supremacy and was forced to resort to empty protests such as the ones above. Cosin's analogy of imprisonment by the high commission with torture by the Council of Wales illustrated that Parliament had given authority to the sovereign to act above the common course of law on special occasions, irrespective of the separate issue of royal prerogative.¹⁰⁰

Turning his attention to Magna Carta, Morice declared that Cosin's attempts to reinterpret the text to exonerate the clergy from their duty to obey chapter 39 had been in vain.¹⁰¹ Cosin believed Magna Carta had essentially comprised two separate grants, one to ecclesiastical jurisdiction, the other to the temporal, and he had pointed to the first chapter of Magna Carta as being the place where this severance took place. The confirmation of the church's liberties at the beginning of the charter indicated to Cosin that the rest of the document was impertinent to ecclesiastical jurisdiction except where it was plainly expressed to be relevant.

Morice recited the words of the first chapter of Magna Carta: 'ffirst (saith the king) we haue graunted to god and by this our present Charter haue confirmed for vs and our heires foreuer, that the churche of Ingland shall be free and shall haue all her noble rightes and liberties vnhurte.'¹⁰² He suggested that these words provided for, among other things, freedom from foreign laws:

⁹⁹ LPL, MS 234, fo. 187v.

¹⁰⁰ See below, 224, footnote 105.

¹⁰¹ See above, 92, 93, 100; as well as Cosin, *Apologie*, I, 102 and II, 73-4.

¹⁰² LPL, MS 234, fo. 250v.

yf the courtes Ecclesiasticall notwithstanding shall be suffered to drawe men before them vppon secrete complainte, suspition, and fame supposed, put them to vndiscrete othes to bewraye them selves, then haue not the fremen of this realme that which was prouided for them.¹⁰³

Morice hoped to prove that chapter 39 of Magna Carta applied to ecclesiastical as well as temporal courts, which proof would invalidate any *ex officio* proceedings which did not accord with common law procedures. Professor Holt suggests that the precise nature of the grants made in Magna Carta is confusing. The document, he states, 'admitted the corporate capacity of the Church...but for the rest it conveyed its privileges severally to all free men.'¹⁰⁴ At any rate, there was no solid evidence to prove that chapter 39 obliged ecclesiastical courts to observe common law processes: Morice's argument rested on subjective assumptions.

Cosin had pressed his point further by suggesting that because the statute *De excommunicato capiendo* spoke of the ecclesiastical laws of the realm, affirmed by Parliament, Morice had no grounds for claiming them to be strange and foreign laws. Morice replied that the preamble to that act did indeed mention the ecclesiastical laws of the realm, but it did not state which laws!¹⁰⁵ Could it be, asked Morice, that the Parliament in that act sought to endorse popish, foreign laws as part of the ecclesiastical laws of the realm? The answer being negative, Morice vowed to continue his opposition to *ex officio* 'inquisition' as a foreign custom that never achieved status as a law of realm. Rather than proving anything, however, Morice had simply arrived back at his long-standing disagreement with Cosin that the *ex officio* oath was foreign to the laws of the realm. This was already slightly at variance with his own admission at the end of the *Treatise* that the oath had corruptly crept into England over time.¹⁰⁶ He seemed to be caught throughout much of his writing between claiming the oath was foreign and had never been accepted into the realm and claiming that it had been accepted into the realm, though illegally through the abuses of the clergy and their misapprehension of the Act of Supremacy.

¹⁰³ The argument was that the foreign procedures used by ecclesiastical courts were in direct defiance of the provisions of Magna Carta. Ibid.

¹⁰⁴ Holt, *Magna Carta*, 278-9; see also 272-3, 327-31; Faith Thompson, *Magna Carta: its role in the making of the English constitution, 1300-1629* (Minneapolis, 1948) 121-5, 140, 142; Giles Jacob, *A new law dictionary* (London, 1732) sig. Mmm4v-Nnn1r.

¹⁰⁵ SR, IV, part 1, 451.

¹⁰⁶ Morice, *Treatise*, 58.

The sixth chapter of the 'Defence' was devoted to refuting Cosin's statement that oaths administered in Star Chamber and Chancery were similar to the *ex officio* oath. Morice reviewed Cosin's discussion of *ex officio promoto* (the act of public officers prosecuting in the sovereign's name),¹⁰⁷ contending that suits in the king's courts could not be said to be preferred *ex officio* simply because the courts were the king's. After all, it was expressed in law that the king himself was a party in all cases before his courts, and since he could not be the judge in his own case, as Morice explained, the case could not really be said to be *ex officio*.¹⁰⁸ The question, he noted, was not whether temporal courts administered oaths to defendants for the truth of their answer — that was granted. What was in controversy was whether they compelled defendants to take blind or general oaths concerning criminal matters.¹⁰⁹

Regarding Star Chamber, Morice objected to Cosin's comparison between oaths in that court and the *ex officio* oath. He repeated his assertion in the *Treatise* that in Star Chamber the accuser was always known and the defendant fully apprised of the crime objected against him. Cosin had insisted that there was not always an accuser: a public official might act in the common interest to stir up and excite the attorney- or solicitor-general to his duty. But Morice thought Cosin had not answered the main point which was that the defendant knew his accusers and his charge before his oath was required. Cosin concurred that bills were exhibited in Star Chamber previous to a defendant's answer — as were articles in ecclesiastical courts. 'A close and couerte answeare', remarked Morice.¹¹⁰ The truth, he clarified, was that no one exhibited articles in ecclesiastical courts, but the judge himself framed them, occasionally beforehand but most often after the defendant had taken his oath.

Is it so in the consistorie ecclesiastical? no, he must first sweare to answeare trulie not what he hath hearde or vnderstoode, but what shalbe afterward read and opened vnto him; Is not heare thincke yow a iust and discreete ministring of an oathe? Is this the same that is vsed in the Chauncerie or Starchamber?¹¹¹

¹⁰⁷ See above, 127-8, 133.

¹⁰⁸ LPL, MS 234, fos. 206r-207r.

¹⁰⁹ LPL, MS 234, fo. 216v.

¹¹⁰ LPL, MS 234, fo. 217r.

¹¹¹ LPL, MS 234, fo. 217v. Even Cosin's assertion that the defendant was not allowed counsel in *ore tenus* cases was confuted by Morice. In some cases, noted Morice, the defendant did not desire counsel or the judge deemed it unnecessary, but the defendant was certainly allowed this liberty. When the proceeding was *ore tenus*, however, a defendant's counsel could

Concerning Cosin's statement that the defendant was also not allowed counsel when answering interrogatories, Morice intended to show this statement false as well. Although the defendant might not have his counsel present during the interrogation, 'yet taketh he aduise and direction how, and in what manner, and to what kinde of Interrogatories he shall answeare', which was not strictly the same as being denied counsel. His attorney generally instructed him not to answer any interrogatories 'impertinent to the matter of accusation conteyned in the bill of complainte or Informacion' or to any questions he had previously answered.¹¹² If the other party in the case objected to the silence of the defendant on any question, contended Morice, he might move the court to order the defendant to justify his reasons for remaining silent, and the defendant might do this with counsel. Cosin had admitted that defendants in ecclesiastical courts could refuse to answer impertinent questions just as they might in Star Chamber, but, as in Star Chamber, the judge determined what constituted impertinence.¹¹³ It was right and good, affirmed Morice, that in Star Chamber the judge should decide that question since the bill of complaint or information, which set out the issues of the charge clearly, was put in by the accuser. But the same procedure could not be justly done in ecclesiastical courts, 'sins the Iudge him selfe is theare the profferer of the articles and no indifferent person to Iudge and decide his owne cawse.'¹¹⁴ As a contrast to the specific and pertinent questions asked by judges in Star Chamber, Morice gave two examples of impertinent questions asked of defendants in ecclesiastical courts: 'What thincke yow of suche a man or matter?' or 'what meane or entende yow to doe heareafter in suche a case?'¹¹⁵ Morice's implication was that interrogatories in the high commission had a discursive quality, and as he asserted several times, he believed these questions purposed to discover matter upon which to ground a charge against the defendant.

not speak for his client; the defendant himself must answer. LPL, MS 234, fo. 218r; Hudson, 'Star Chamber', *Collectanea juridica*, ed. Hargrave, 128.

¹¹² LPL, MS 234, fo. 218r-v.

¹¹³ Cosin, *Apologie*, III, 95.

¹¹⁴ LPL, MS 234, fo. 220r.

¹¹⁵ LPL, MS 234, fo. 222r.

The major allegation of Morice's 'Defence' came in the eighth and final chapter. He concluded that any flagrant violation of the king's laws by ecclesiastical judges constituted *praemunire* according to acts of Parliament defining that offence.¹¹⁶ In the *Treatise* Morice had grounded his charge on the statute 16 Richard II c. 5, the primary act of Parliament which defined *praemunire*.¹¹⁷ Cosin had objected to this for two reasons: first, he claimed that statute did not address ecclesiastical jurisdiction at all; and second, that because ecclesiastical courts' powers were derived down from the crown, *praemunire* was not possible in the post-Reformation church. Cosin had adopted a narrow interpretation of the act, holding that *praemunire* could only be the result of specific actions mentioned in the statute, such as translations, processes, sentences of excommunication, bulls, instruments, etc. and for them to be accounted *praemunire*, they must be purchased or pursued in the court of Rome.¹¹⁸ The difference of opinion between Cosin and Morice on the rendering of this statute centred on the meaning of the word *alibi*, or 'elsewhere'. Morice interpreted *alibi* to include not only Rome but anywhere else, such as ecclesiastical courts, where an attempt was made to defeat a decision given in one of the king's courts. The definition of the word *alibi*, he asserted, could not be limited to another country or place such as Rome, but must be taken to mean anywhere the royal prerogative was infringed. Thus the operative sense of *alibi* was not primarily geographical but jurisdictional.¹¹⁹ This was a well-accepted precept in the fifteenth and early sixteenth centuries, but in Elizabethan England the issue arose less frequently among the judges, given the union of temporal and ecclesiastical jurisdictions after the break with Rome.¹²⁰

Cosin had asserted in the *Apologie* that *alibi* could no longer pertain to the ecclesiastical courts since, being the queen's courts, they were annexed (along with their canons) to the crown. Moreover, the Elizabethan Act of Supremacy had empowered the queen through her letters patent to authorise bishops and commissioners to conduct processes in their courts

¹¹⁶ LPL, MS 234, fo. 315r.

¹¹⁷ See above, 68-9, 71; *SR*, II, 85-6.

¹¹⁸ LPL, MS 234, fo. 300r; see also 100-4.

¹¹⁹ LPL, MS 234, fo. 320r.

¹²⁰ Morice still had advocates in Sir John Spelman and Sir Edward Coke, who continued to adhere to the theory that any attempts to defeat judgements in the king's courts constituted *praemunire*. Gray, 'The boundaries of equitable function', *AJLH* 20 (1974) 193-4; Spelman, *Reports*, ed. Baker, 66-9; Helmholz, *Roman canon law*, 25-6.

according to the provisions laid out in that statute. But Morice noted that bishops now held court in their own names and with their own seals, which argued for a certain amount of autonomy from the crown. Though Cosin had insisted that ecclesiastical courts derived their authority from the queen, Morice would not surrender the possibility that they could still be guilty of *praemunire*.¹²¹ This was a complicated and seemingly fruitless argument. Since Morice himself in other places argued that the Act of Supremacy was merely a uniting and restoring act rather than an innovative one, it was disadvantageous to concede here that the commissioners were extraordinarily authorised by the queen's letters patent simply for the sake of demonstrating that they could be guilty of *praemunire* when throughout both works he argued that the high commission could only exercise ordinary jurisdiction. It would have been more consistent with his logic to state that the commissioners could be guilty of *praemunire* by virtue of their abuse of ordinary power *restored and united* by the Act of Supremacy rather than by their use of extraordinary power *created* by the Act of Supremacy.

Morice admitted, however, that not every misjudgement by an ecclesiastical official should be accounted *praemunire*. For instance, if anyone sued in an ecclesiastical court for laying violent hands on a cleric when in fact he had previously been sued in a temporal court for debt of trespass and was merely trying to wriggle out of it, Morice suggested that a prohibition was sufficient. If the ecclesiastical court were ignorant of the first matter, they should be served a writ of prohibition rather than *praemunire*. It was an entirely different matter, however, if an ecclesiastical court knowingly interfered with a suit determinable by a temporal court.

Summarising his principal argument, Morice stated that compelling defendants to take the *ex officio* oath was worthy of *praemunire* because it was an injury to the crown's dignity and prerogative. Cosin had complained that Morice, by seeking to replace prohibitions with writs of *praemunire*, 'had lost all sense of degree. Cosin believed that prohibition and attachment were sufficient to prevent ecclesiastical courts from meddling with temporal jurisdiction, but Morice emphatically disagreed. 'No no. the sword of prohibition and attachement is ouer blunte. It is the sharpe and two edged sworde of premunire whiche

¹²¹ LPL, MS 234, fo. 302r-v.

protecteth and preseruethe hir maiesties rightes and prerogatiues from the Iniurie of ordinaries and their substitutes.'¹²² Here, at the end of his 'Defence', Morice felt obliged to attack his opponent more forcefully: he predicted Cosin would one day be called to account for his deceitful dealing against the laws of the realm when the queen was made aware of how her trust had been misplaced. The *Apologie for sundrie proceedings*, he maintained, had been nothing more than a defence of encroachment upon the royal prerogative for the sake of bringing the queen's subjects into thralldom and servitude at the hands of a corrupt and abusive clergy by way of *ex officio* procedure and lawless imprisonment.¹²³ He hoped for a public book of retractions by Cosin not only for his false opinions concerning sundry proceedings ecclesiastical but also for his misquotations and misrepresentations of Morice's viewpoints.¹²⁴

Even after his failure in the 1593 parliament which ended with a reprimand from the privy council, Morice still seemed unable to believe that Elizabeth fully supported the disciplinary tactics of the high commission. He was so deeply rooted in institutional anticlericalism and a belief in the superiority of common law that he became professionally marginalised at the end of his life, oblivious to the new authoritarian tendency of Elizabethan government. Cosin was never called to account for his opinions, but died honourably in the same year as Morice (1597), and came to be seen in the seventeenth century as a pioneer of the civil law in England.¹²⁵

Morice claimed that the only cause of his grief was the offence offered by unjust general oaths 'to godes holie name; her maiesties crowne and regalitie, and the freedome of the subiectes of this lande'.¹²⁶ Whether *ex officio* procedure was used against evil or just men was immaterial; justice ought to be ministered to all men equally.

¹²² LPL, MS 234, fo. 320v. Morice was probably aware that many of the prohibitions issued by the common law courts in his own day were ultimately ineffectual. This fruitlessness increased during the early years of James' reign, as the number of prohibitions swelled outrageously. Usher, *Rise and fall*, ed. Tyler, 167-8, 170-9, 182-3, 188-93, 198-201; Levy, *Fifth Amendment*, 223.

¹²³ This passage contains some of Morice's strongest language, and his choice phrases did not escape the pen of Whitgift. LPL, MS 234, fos. 324v-325r.

¹²⁴ There is some justification in this particular complaint, as many of Cosin's quotations from the *Treatise* were either incomprehensibly truncated or simply did not appear in the printed text and might have mistakenly been drawn from some other author's work.

¹²⁵ See also 256.

¹²⁶ LPL, MS 234, fo. 52r.

It is the due and sincere administracion of Lawe and Iustice (I would the doctor should knowe) that I seeke and contend for (without any partiall respect to any particuler persons or causes as he slaunderslie imputeth) fearinge that the contagion of this iniustice and wronge will in time spredd and enlarge yt selfe to the subuersion of our pollicie and common wealth which god forbid.¹²⁷

The 'Defence' was a spirited rejoinder. Intellectual, anecdotal, and passionate, it took a proto-constitutional approach to law that would not gain substantial acceptance until 1689. Morice caught Cosin on several errors, though he added a few of his own. Most importantly, the 'Defence' failed to dislodge some crucial assertions of Cosin's *Apologie*, and we will examine why this was the case in the next chapter. We have studied the literary controversy between Cosin and Morice in their own words. The resolution and significance of this controversy now remains to be unravelled.

¹²⁷ LPL, MS 234, fo. 52r-v.

Chapter 7

The resolution of the controversy

Sixteenth century English rhetoricians believed that the revival of preaching that came with the Reformation should be accompanied by a revival in the art of speaking.¹ Tudor authors of books on rhetoric followed the classical authorities Quintilian and Cicero in stressing the 'need for an alliance between reason, wisdom, and eloquence' in public debate. Rhetoric, according to Quintilian, was simply the art of eloquence and could be taught by those who had mastered it.² One of the foremost among the Tudor rhetoricians, Thomas Wilson, believed that the study of rhetoric was indispensable to counsellors and active citizens, and his contemporary Henry Peacham observed that the gift of persuasion was the surest means of elucidating the beauty and power of wisdom.³ In practical terms rhetoric could be used for the profitability of the commonwealth, wrote Richard Beacon, by inducing the people (even deceitfully) to accept virtuous though sometimes unpleasant new laws.⁴

Rhetorical strategies formed a large part of the writings of Cosin and Morice, neither of whom was short-sighted enough to rely on his legal arguments alone. In fact they both resorted to literary devices when they lacked an adequately convincing argument based on logic and reason. One of the main techniques they employed was repetition, and this was characteristic of their legal training. Cosin cited authorities endlessly in the margin, particularly in part III of the *Apologie*, and Morice tended to compile as many examples to prove his point as he could bring to mind. This habit, common to all polemical works of the time, was borne out of the necessity for the writer to appear to be expounding and explaining authoritative law rather than asserting it. As it was clearly noted in chapter one,⁵ to be seen in Elizabethan England as an 'innovator' in religion or politics was a kiss of death for the ambitious statesman. In an age when it was still believed that all of the greatest wisdom lay in

¹ Sir John Cheke, Sir Thomas Elyot, Roger Ascham, and Thomas Wilson were all rhetoricians at Cambridge, either as students or teachers (or both) in the 1530s and '40s. Notable rhetoricians of the later Tudor period included Dudley Fenner and Henry Peacham. Skinner, *Reason and rhetoric*, 67, 73; Stanford E. Lehmberg, *Sir Thomas Elyot, Tudor humanist* (Austin, 1960) 34-5, 76.

² Skinner, *Reason and rhetoric*, 86.

³ Wilson was a student at Kings College, Cambridge in the 1540s and studied under Sir John Cheke. In 1554 he wrote *The arte of rhetorique* (1553) (STC² 25799) which went through at least eight editions during Elizabeth's reign. In fact, it helped start a trend of vernacular treatises on rhetoric in England. Peacham's famous work was *The garden of eloquence* (1577) (STC² 19497). Skinner, *Reason and rhetoric*, 52-3, 67-8, 85-6, 99.

⁴ A book on statesmanship and politics, Beacon's *Solon his follie, or a politique discourse, touching the reformation of commonweales* (1594) (STC² 1653) was his only work. It has generally been seen only in its context to the Irish campaign of the 1590s but Markku Peltonen believes it has a much wider significance regarding late Elizabethan government in general. Peltonen, *Classical humanism*, 75 and footnote 90, 75-88.

⁵ See above, 22-3.

the past rather than in the future, an orator, lawyer, academic, or tract writer was expected to summon up the sagacity of the ages to prove his contention.

The art of ‘redescribing’ a fact or someone’s character for the purpose of enhancing moral value or exaggerating evil qualities was a powerful tool in the hands of a skilled orator or writer, and it was an indispensable strategy in literary controversy where a writer sought to colour the arguments or assertions of his rival. Redescription was thus an effort to reshape the audience’s opinion about a fact that had already occurred or had previously been described by one’s opponent.⁶ This technique was favoured by Morice in his attempts to undermine the moral integrity of the clergy and especially ecclesiastical judges. Spurred on by his anticlericalism, he repeatedly adumbrated his criticisms of *ex officio* procedure and the oath with revelations of greed, vanity, incompetence, bias, and malice on the part of ordinaries and high commissioners.⁷ Morice exploited the anticlerical bias in most chronicle accounts of English history and other contemporary works, producing tales of spiritual corruption and abuse of power from the lives of archbishops Arundel, Becket, Anselm, Langton, and Boniface; Cardinal Wolsey; and the Marian bishops Bonner and Longland.⁸ These biased examples of corruption amongst ecclesiastical officials Morice juxtaposed with Cosin’s protestations of the sincerity and integrity imputed to ecclesiastical judges by the canon law.⁹

Another rhetorical device employed by both writers, but especially by Morice, was the use of nicknames. He variously described Cosin as ‘the patron of officious Inquisitions’, ‘our consistoriall doctor’, the ‘wylie Apologger’, ‘our Canonically Cyuillian’, and ‘our restlesse Inquisitor’ among many others.¹⁰ He was also given to bragging about the irresistible force of his own arguments and the supposed failings of Cosin.¹¹ These mocking names and confident

⁶ Skinner, *Reason and rhetoric*, 138-44.

⁷ Morice’s anticlericalism was probably enflamed by the fact that Cosin was a student of the civil law. The Marprelate tracts showed that puritans, especially radicals, ‘saw the Pope and his minions lurking behind the robes of the civilians.’ But the civilians thought this was ridiculous. They continued to study continental civilian literature not because they were secretly papistical, but because it was good. Helmholz, *Roman canon law*, 147.

⁸ For prime examples see Morice, *Treatise*, 16, 40-1, 51-5; LPL, MS 234, fos. 48v, 244r-245r. Morice relied mostly on Foxe’s *Act and monuments* (1536) (STC² 11222) and John Britton’s *A treatise on the laws of England* (1533) (STC² 5803) for his historical material. He may have also relied on William Tyndale’s popular *The practtise of prelates* (1530) (STC² 24465).

⁹ See above, [def]

¹⁰ LPL, MS 234, fos. 81r, 63r, 65r, 121r, and 121v, respectively.

¹¹ ‘Beholde here I beseech you howe our Civiyan staggereth to and fro, he speaketh indeed but confusedlie, and as a man sodenlie awaked out of a dreame.’ LPL, MS 234, fo. 173r. ‘meere ignorance ys the mother of this our Civillians simple speache, for had he knowne what ys meant by these woords Inditor and Iuror he would no doubt for his credites sake

boasts sometimes concealed weak or inconsistent arguments on Morice's part, probably as a diversionary tactic. This was clearly the case in his response to Cosin's argument that the queen could not empower commissions contrary to common law.¹²

On rarer occasions Morice made use of imagery and invention, particularly in his mock trial in the 'Defence'.¹³ This memorable section proved that he was a skilled writer when he wanted to be, and the *Treatise* would have greatly benefitted from this kind of scenic dialogue. In response to Cosin's dry concepts of canon and civil jurisprudence, Morice allegorically constructed living characters appearing in an Elizabethan consistory and articulated his own views through the two defendants on trial. This was a literary achievement far beyond anything in the *Apologie*. Like a medieval didactic play, the imaginary court described by Morice illustrated judicial principles through a dialogue of arch-types — fictional protagonists representing conflicting ideas and guiding the reader towards moral conclusions.¹⁴

Cosin's rhetorical tactics also included redescription. His main strategy was to portray opponents of the high commission as trouble-makers intent on dissolving rightful spiritual authority and impugning the royal prerogative. His warnings to the puritans at times implied charges of treason. For example, he asserted that it was impossible for ecclesiastical courts to be guilty of *praemunire* since ecclesiastical jurisdiction was united to the crown, and suggested that those who made this claim tried 'to implice an incompatibilitie betwixt the Crowne and Ecclesiasticall iurisdiction...which is most erroneous to thinke, and traitorous to affirme.'¹⁵ Again, he rejected Morice's definition of *alibi* as extending to bishops' courts: '...let such as shall so affirme, beware they incurre not (hereby) the danger of implied, if not direct denyall;

haue bin silent heerein'. LPL, MS 234, fo. 182r. 'Yea this our defendor of those abuses fearinge leaste these his conceiptes would be accompted but for toyes and fantasies of a weake brayne at length...betaketh himself to an other course...' LPL, MS 234, fo. 188v.

¹² LPL, MS 234, fo. 186r-v; see also above, 191-2, for discussion.

¹³ See above, 176-9.

¹⁴ It is even possible that Morice's imaginary trial was based on the trial of Duessa in Spenser's *Faerie queene*, though instead of the judge being the wise and just Mercilla (Elizabeth), it is the 'unjust' Cosin. See M. Pauline Parker, *The allegory of the Faerie queene* (Oxford, 1960) 40-1, 220-2.

¹⁵ Cosin, *Apologie*, I, 128-9 (pages misprinted '126' and '127').

of a part of her Highnesse Royall stile; and the breach also of their oathes taken, for assistance and defence of all Prerogatiues, &c vnited or belonging to this Imperiall crowne.’¹⁶

References in the *Apologie* to puritan arguments were generally coloured by an overexaggeration of their radical nature, and Cosin spent the last five chapters discrediting and marginalising his adversaries while positioning himself as a stay and anchor for lawful, orderly society. Contrarily, when describing inquisitional procedure in ecclesiastical courts, Cosin was given to habitual understatement. This was mainly accomplished using a tone of ‘fatherly correction’ in discussing the need for punishment of crimes.¹⁷ He asserted that punishments for all crimes except heresy, apostasy, and atheism ought to be viewed as *medicinae*, or tending to the defendant’s spiritual healing, rather than *poenae*.¹⁸ Even the most heavy-handed tactic of the high commission, forcing defendants to take the *ex officio* oath, was described in gentle terms. Ecclesiastical judges, said Cosin, ‘for auoyding *scandall to Christian religion*, and for reformation of the partie, may thus *enquire* of the offence, to see it redressed, and punished’, that is, they could compel defendants on oath to accuse themselves of their crimes.¹⁹ These rhetorical tactics on the part of Cosin and Morice helped fill out (or distract attention from) their arguments, but the bulk of their respective writings was devoted to complex, adversarial legal debate that required an impressive amount of learning.

The literary controversy began with the ecclesiastical schedule issued by Cosin and eight other high commissioners in 1590 or 1591 at the request of the privy council.²⁰ Morice used this memorandum to spark a public debate on the legality of certain ecclesiastical procedures, notably the *ex officio* oath. In both the *Treatise* and the ‘Defence’ he attacked the oath as unjust and contrary to the laws and equity of the realm of England. Cosin defended the procedures of the high commission as reasonable, necessary, and demonstrably lawful.

The issue of *ex officio* procedure is not easily or perhaps satisfactorily untangled, but some conclusions can be drawn. The battle between Morice and Cosin over of the legality of

¹⁶ Cosin, *Apologie*, III, 86.

¹⁷ Cosin, *Apologie*, I, 46, 115; II, 59, 66, 94; III, 42-3.

¹⁸ This was also the view expressed by the commissioners in the 1591 memorandum on oaths. LPL, MS 2004, fo. 65r-v. See also Cosin, *Apologie*, III, 42-3.

¹⁹ Cosin, *Apologie*, III, 79-80 (pages misprinted ‘81’ and ‘82’).

²⁰ See above, 52, footnote 41.

the oath was fought on many fronts, one of which was the proper interpretation of medieval heresy law. Three statutes had summarized medieval legal concepts of heresy in England. These laws were enacted in 1382 (5 Richard II st. 2 c. 5, commonly called 'An Act against Lollardy'), 1401 (2 Henry IV c. 15, *De heretico comburendo*), and 1414 (2 Henry V st. 1 c. 7). The first of these acts was not controverted by Morice or Cosin, and the third was only briefly referred to,²¹ but the significance of *De heretico comburendo* was forcefully disputed.²² Briefly, the statute *De heretico comburendo* proscribed Lollardy, sloppily defining its adherents as 'diverse false and perverse people of a certain new sect' who espoused 'divers new Doctrines'. Outlawed by this act were preaching or writing without license, publications that opposed catholic doctrine, and conventicles (unauthorised religious meetings). All books owned by Lollards were to be submitted to the bishop for review. Those who were 'defamed or evidently suspected' of contravening the act were arrested and either fined or imprisoned 'till he or they of the Articles laid to him or them in this Behalf, do canonically purge him or themselves, or else...do abjure, according as the lawes of the Church do require.' Second time offenders were burnt (hence the name of the act).²³ It was commonly believed that by the general words of this statute Parliament had authorized the *ex officio* oath, especially against heretics. *De heretico comburendo* was repealed by the Heresy Reform Act of 1534 (25 Henry VIII c. 14) and the causes for the repeal preoccupied Morice and Cosin. Did the repeal of *De heretico comburendo* indicate that *ex officio* oaths and procedure had been deemed contrary to the law of England?

Morice spoke of this law in vicious terms, adopting the vocabulary of the Henrican parliament that repealed it. It was, said Morice, a 'bloudie and broyling lawe' which defined the terms 'canonicall decrees' and 'lawes of the Church' so vaguely that it enabled the church to widen the scope of *ex officio* procedure and the oath at the expense of the common law procedures of accusation or presentment, witnesses, and juries.²⁴ Cosin likened *De heretico*

²¹ Cosin pointed to 2 Henry V st. 1 c. 7 in an attempt to establish statutory precedent for the *ex officio* oath, but his argument, based on the power of ecclesiastical judges to enquire of hospitals, was weak. Cosin, *Apologie*, III, 98.

²² For a thorough analysis of all three medieval heresy statutes on their own merits, see More, *Works*, ed. Guy, Keen, Miller, McGugan, X, xlvii-lxvii.

²³ *SR*, II, 127.

²⁴ Morice, *Treatise*, 32-3; LPL, MS 234, fos. 214r-215r; see also Lehmberg, *Reformation parliament*, 186-7.

comburendo to the Elizabethan Act of Supremacy (1 Elizabeth c. 1) in that it empowered the clergy to enquire of nonconformity and to punish it.²⁵ The best response Morice could provide to this was a simple disagreement that *De heretico comburendo* legally established the *ex officio* oath — a conclusion which would have been contrary to the word of God and thus void in law.²⁶ Cosin attributed the repeal of *De heretico comburendo*, however, entirely to its generality, noting that heresy was not clearly defined by that act and that many were wrongly convicted of heresy as a result of that generality. A further reason given was that some canonical decrees at that time were clearly popish and foreign and infringed upon the royal prerogative.²⁷ Agreed upon by both writers was that, rightly or wrongly, *ex officio* procedure had been used and justified by ecclesiastical courts on the basis of *De heretico comburendo*.

During its one hundred and thirty-three years of existence, *De heretico comburendo* was never universally regarded as a binding law.²⁸ Its repeal in 1534 laid to rest the question of the legality of the law, but it raised another question: why had it been repealed, and what judicial principles had been affirmed by way of the repeal? The preamble to the Heresy Reform Act of 1534 repudiated *De heretico comburendo*, complaining that it did not specifically define heresy, that the words ‘canonical sanctions’ were unnecessarily imprecise, and that ‘capcious interrogatoryes’ administered by ordinaries often caused innocent men to be convicted of heresy. In a passage often quoted by Morice, the preamble continued by affirming that ‘it stondesth not with the right order of justice nor good equitye that any person shuld be convycte and put to the losse of hys lyfe good name or goodes onles it were by due accusacion and wytnes, or by presentment confession or proces of outlarye...’²⁹ Cosin opted for a narrow interpretation of the preamble, suggesting that it treated only of heresy, not other matters of ecclesiastical jurisdiction.³⁰ He maintained, therefore, that the concluding section of the preamble which read, ‘wherfore it is not resonable that any Ordynarye by any suspeccion conceyved of hys owne fantasie without due accusacion or presentment shuld put

²⁵ Cosin, *Apologie*, I, 100-1.

²⁶ LPL, MS 234, fo. 157r. Morice accepted, however, that it was thought by ordinaries at the time (though unjustly) that *ex officio* procedure was implicitly condoned by *De heretico comburendo*. LPL, MS 234, fos. 158r-159r.

²⁷ Cosin, *Apologie*, III, 74 (page misprinted as ‘76’).

²⁸ More, *Works*, ed. Guy, Keen, Miller, McGugan, X, li-liii.

²⁹ SR, III, 454.

³⁰ Cosin, *Apologie*, II, 78, 107.

any subjecte of this Realme in the infamy and slaunder of heresie to the perell of lyf losse of name and goodes...' could only be applied to cases of heresy.³¹

Morice countered that by taking such a strict view of the preamble Cosin 'shutteth his eyes as an owle in the brighte sunne shine'. He admitted that the act was brought about as a result of grievances concerning heresy trials, but he argued that the historical context of the act was crucial.³² A comparison with the words of the preamble to the Act of Dispensations (25 Henry VIII c. 21), drafted by the same parliament, shows a similar style of language that bolsters Morice's argument. Like the Heresy Reform Act, the Act of Dispensations declared a judicial principle in its preamble: that 'It stondith...with naturall equitye and good reason' that all humane laws 'made within this Realme or induced into this Realme by the seid sufferance consentes and custome', may be dispensed with at any time by the king and Parliament. Although the specific occasion for the making of the Act of Dispensations was the payment of money to Rome and suing for licenses, it was acknowledged that the preamble expressed a general legal maxim that *any* foreign laws introduced into England by consent and custom might be repealed, not simply the ones mentioned in that statute.

By the same reasoning, a case could be made that the preamble to the Heresy Reform Act enunciated a principle of law applicable to other cases besides heresy.³³ The Commons' Supplication against the Ordinaries (1532) had criticised the use of *ex officio* procedure for *various* causes.³⁴ This background to the act, argued Morice, ensured that the words of the preamble to the Heresy Reform Act were intended as general principles of justice, suitable to other crimes or misdemeanours besides heresy. The language of the Act of Six Articles, passed seven years later, seemed to reinforce his assertions. This act reasserted catholic doctrine and empowered ecclesiastical officials severely to punish offenders against the articles. But common to all of the punishments listed in the act was the proviso that offenders be

³¹ SR, III, 454; Cosin, *Apologie*, II, 78, 107; III, 74 (page misprinted '76').

³² LPL, MS 234, fo. 214r.

³³ SR, III, 464.

³⁴ The Supplication complained that many subjects were convented before ordinaries, 'at the pleasures of the said ordinaries...for displeasure without any provable cause...' and that 'they be committed to prison without bail or mainprize' and are 'constrained to answer to many subtle questions and interrogatories...by the which a simple unlearned or else a well-witted layman without learning some time is and commonly may be trapped and induced by an ignorant answer to the peril of open panance to his shame...' Nowhere in the Commons' complaint about *ex officio* procedure and oaths was there any mention of heresy. Elton, *Constitution*, 334; Cooper, 'The Supplication against the Ordinaries reconsidered', *English Historical Review*, 72 (1957), 616-41.

proceeded against only by accusation or presentment and the testimony of witnesses.³⁵ Frustrating Morice's line of reasoning, however, was the fact that the Heresy Reform Act had itself been abrogated by an act of 1547, 1 Edward VI c. 12, which was part of Protector Somerset's general repeal of conservative legislation.³⁶

The causes of the act's repeal were clearly expressed in its terminating statute of 1547. The preamble explained why this act and many others (over ten) were to be abolished. It stated that it was better to show too much clemency and forgiveness than to be overly severe, and that although there were difficult times in any commonwealth which required a need for strict laws, in more peaceful times these laws might be relaxed or simply done away with.³⁷ The tone is one of leniency and forbearance, making it seem unlikely that the Heresy Reform Act was repealed because its preamble — which articulated a need to safeguard defendants against unjust criminal procedures — was considered too cruel. But because the repeal of any act nullified everything in that act, any new legal maxims that may have been expressed in the Heresy Reform Act were swept away and, by default, *De heretico comburendo* would seem to have been restored. In case there was any doubt, Queen Mary consciously resurrected *De heretico comburendo* along with the two other medieval heresy statutes in the first year of her reign.³⁸

Cosin attempted also to use the Act of Six Articles to show that its wording allowed *ex officio* procedure to be as warrantable and legitimate as accusation or presentment.³⁹ He alleged that the act, in 'grounding proceeding ecclesiasticall euen in the crime of

³⁵ The law authorised ordinaries 'to take information and accusacion by the othes and deposicions of two able and lafull persons at the least'. All accusations or informations were required to state the matter of prosecution, the name of the offender, his dwelling place, the time and date of crime, and the place where the crime was committed. Admittedly, these conditions were intended to supplant verdicts by jury, yet the act's attention to procedure was uniform. In later articles of the act whenever punishments are mentioned, it is always in the context of an accusation or presentment having occurred previously, suggesting that proceeding *ex officio* by special enquiry was not intended. Even article XI, which empowered commissioners to commit offenders to prison, speaks of those offenders as having been presented or accused. Likewise, article XII declared that commissioners found guilty of violating the act should be accused and presented themselves. *SR*, III, 739-42.

Professor Elton's remark that the parliament which drafted the Act of Six Articles had forgotten its own opposition to heresy trials only seven years before misses the point that the procedure by which heretics were to be convented was, by both the 1534 and 1539 acts, essentially the same (accusation and presentment). Elton, *Constitution*, 396.

³⁶ See M.L. Bush, *The government policy of Protector Somerset* (London, 1975)

³⁷ '...as in tempest or winter one course and garment is conveyent, in cawllme or warme weather a more liberall rase or lighter garment bothe maye...be followed and used...' *SR*, IV, part 1, 18.

³⁸ *SR*, IV, part I, 244. 1 & 2 Philip and Mary c. 6 revived 5 Richard II st. 2 c. 5 (1382), 2 Henry IV c. 15 (*De heretico comburendo*, 1401), and 2 Henry V st. 1 c. 7 (1414).

³⁹ Cosin, *Apologie*, II, 98.

heresie...prouideth besides Accusation and Presentment, not onely information by two witnesses; but also enquire, and that is alwayes of Office.’⁴⁰ But this was an unprovable pretension in light of the words of the act. Granted, in the context of the controversy, the wording of all of these acts is almost defeatingly vague, but that the word ‘enquiry’ must necessarily be taken to indicate special enquiry *ex officio* is not certain. Article VIII of the act, for example, designates that commissioners may enquire and take informations and accusations during their visitations, but it is not clear from the text whether special enquiry *ex officio* (complained of angrily by the Commons in 1532) is what is thereby signified. Near the end of the same article it is mentioned that commissioners may enquire upon the oaths of twelve men, which suggests that enquiry might refer to the judge acting by virtue of his office, though not necessarily *ex officio* in the sense of the controversy.⁴¹

But ignoring whether the word ‘enquiry’ could be taken implicitly to mean special enquiry *ex officio*, Morice held that the Act of Six Articles merely provided for a commission to receive information or accusation regarding crimes punishable by ecclesiastical jurisdiction.⁴² In answering Cosin’s rejoinder that the act made no mention of oaths at all, either for or against,⁴³ Morice pointed out that it had considered ‘heresies & matters of Relligion, cawses subiecte to the Iurisdiction of courtes ecclessiasticall’, which, according to Cosin’s lengthy argument in parts I and II of the *Apologie*, had historically included administering the *ex officio* oath. ‘yf it weare so,’ continued Morice, ‘how happened yt then that the Realme at this tyme was so iniurious to those courtes and consistories, as to depriue them of their due & legall course of proceedings in cawses concerning their rightfull Iurisdicion’, unless Parliament had decided that they weren’t rightful proceedings?⁴⁴ Again, the arguments of both lawyers were undermined since the Act of Six Articles was repealed by 1 Edward VI c. 12. But Cosin’s argument that the act validated special enquiry was hampered by two things: first, the vagueness of the word ‘enquiry’ as it was used in the statute does not really support his interpretation as explained above; and second, the preamble to the Heresy

⁴⁰ Cosin, *Apologie*, II, 107.

⁴¹ SR, III, 741-2; Lehmborg, *Later parliaments*, 119, 187, 198.

⁴² Morice, *Treatise*, 35-7.

⁴³ Cosin, *Apologie*, III, 74-5, (pages misprinted ‘76’ and ‘77’).

⁴⁴ LPL, MS 234, fo. 162v.

Reform Act makes it seem difficult to suppose that the Commons would have supported the very procedures they condemned in 1532 and 1534.⁴⁵ The individual sections of the Act of Six Articles, in fact, suggest that the principle of accusation or presentment as a necessary prerequisite for depriving criminals of life, good name, or goods was considered requisite in 1539.

It would be tempting to see these four acts, *De heretico comburendo*, the Heresy Reform Act, the Act of Six Articles, and the act abolishing these latter two (1 Edward VI c. 12) as one extended statutory dialogue on the issue of *ex officio* procedure. Whatever else they were, they were the main statements by Parliament on this subject. The first of these acts — seen to establish or at least condone *ex officio* procedure for heresy trials — was extinguished in 1534 by the second act for being contrary to justice and the royal prerogative. The preamble to this act enunciated that men should not be put to loss of life, good name, or goods unless it were by accusation or presentment — but this was in the context of heresy. The third act in 1539 empowered ordinaries again to use commissions for visitation and enquiry — not necessarily regarding heresy, and it specifically retained the safeguards of accusation and presentment mentioned in the second act in 1534. These two statutes were together voided by the fourth act in 1547 on the grounds that they were too severe. But all of these statutes were long and complex, addressing many issues besides ecclesiastical court procedure, and it would be misleading to view them as articulating any definitive constitutional statements on *ex officio* procedure or the *ex officio* oath.

The Elizabethan Act of Supremacy, however, re-repealed *De heretico comburendo* in 1559, and thus the only statute that could be cited to have established the *ex officio* oath in England was invalidated.⁴⁶ But the issue does not end there: the oath had originated canonically, not by means of the common law. What, therefore, was the status of the oath after 1559 according to the laws of the church? If Elizabeth specifically empowered the high commission to exact the *ex officio* oath in cases other than heresy, she was authorising them in

⁴⁵ Based on the Supplication of the Ordinaries and the Heresy Reform Act, it seems probable that the Commons opposed *ex officio* procedure in general as a contrary judicial philosophy, even though they did not technically outlaw it except in heresy cases. At any rate, it would be very difficult to prove that the Act of Six Articles condoned *ex officio* procedure.

⁴⁶ SR, IV, part 1, 351.

contradiction to the Gregorian Decretals which stated that no one was bound to incriminate themselves in a criminal case.⁴⁷ But there was widespread dispute and confusion among canonists regarding the medieval canon law. There were contradicting glosses and contrasting *opinionones doctorum* which naturally resulted in variations in local practice and an acceptance that canon law interpretations varied from place to place.⁴⁸

Professor Helmholz cautions us not to draw parallels between how canon law was adjudicated in Reformation England and how binding statute law is enforced by modern appellate legal systems. Canon law judges in England and on the continent were allowed a wider latitude to interpret and contribute to the development of legal principles than their modern counterparts. '[Canon law] left more room for judges whose "hands were free" from temporal bindings to follow local traditions and needs, sometimes even where decretal law appeared to direct the contrary. That sort of freedom, far from making the English Church "insular", shows that it was fully a part of Continental legal traditions.'⁴⁹ It is therefore important to make clear that although Cosin's arguments in favour of the *ex officio* oath in non-heresy cases was contrary to the decretals, this did not mean Cosin was necessarily condoning a procedure that was illegal according to canon law.

The act confirming the Submission of the Clergy in 1534 (25 Henry VIII c. 19) effectively severed English canon law from papal control by abolishing all present canons that were contrary to the royal prerogative and by requiring new canons to be submitted to the king for approval. Acceptable canons already in force were to be reviewed by a committee of thirty-two (selected from the clergy and parliament by the king) and appropriately reaffirmed or nullified. The result of the committee's work, the *Reformatio legum ecclesiasticarum*, was never ratified, throwing into manifest confusion the future of English canon law.⁵⁰ Without an official revision of canon law, the determination of which canons were repugnant to the imperial crown became a case-by-case affair.

⁴⁷ Guy, 'Elizabethan establishment', *Reign of Elizabeth I*, ed. Guy, 146-7.

⁴⁸ Helmholz, *Roman canon law*, 14-8; Brundage, *Medieval canon law*, 158-9.

⁴⁹ Helmholz, *Roman canon law*, 19.

⁵⁰ For a discussion of the *Reformatio*, see above, 7-8.

Cosin and Morice stumbled onto the issue of the status and viability of canon law as a result of Morice's claim that *ex officio* procedure violated chapter 39 of Magna Carta,⁵¹ the famous chapter which stated that no freeman could be deprived of his freehold or convicted and imprisoned but by the judgement of his peers or by the law of the land. In the 1590s *ex officio* procedure was mainly used against ministers who refused to take an oath to uphold the Articles of Subscription and was a particularly powerful weapon in depriving them from their benefices.⁵² Morice argued that benefices were freeholds, that ministers were freemen and that they could not be deprived by ordinaries 'for not subscribing to articles of their owne Invention' without divesting them of their rights granted by Magna Carta.⁵³ Cosin did not deny that ministers were freemen or that benefices were freeholds, but he insisted that chapter 39 of Magna Carta was irrelevant to ecclesiastical jurisdiction.⁵⁴ This surprising twist from Cosin opened a debate over the nature of ecclesiastical law.

The Henrician royal supremacy had united all ecclesiastical jurisdiction to the crown in name as well as fact: it proclaimed that although the authority of the pope had been tolerated in England in times past, that he was in fact no more than the bishop of Rome and possessed no legitimate authority in England. But was the uniting of ecclesiastical jurisdiction to the crown by Henry VIII retroactive? Cosin said no. In assessing Magna Carta he noted that the words of chapter 39 which ensured the liberty of freemen 'haue no relation to Iurisdiction ecclesiasticall: for that which was done by that iurisdiction, was not (at that time) taken to be done by the King or by his authoritie: and the lawes that ecclesiasticall Iudges practised; were not then holden to be the lawes of the land, or the Kings lawes'. Cosin believed that since ecclesiastical law in the thirteenth century was independent of the king's power (as it was thought to be under Roman control), Magna Carta was simply written to curb the lay powers of the king.⁵⁵ This claim, of course, tended to conflict with Henry VIII's claim that

⁵¹ Morice, *Treatise*, 47.

⁵² This oath was reinforced by the act, 13 Elizabeth c. 12, which required subscription by all ministers to the Articles of Religion on pain of deprivation from or non-admittance to a benefice. LPL, MS 234, fo. 176v; *SR*, IV, part 1, 546-7.

⁵³ LPL, MS 234, fo. 176v.

⁵⁴ Cosin, *Apologie*, I, 115.

⁵⁵ Cosin, *Apologie*, I, 102.

ecclesiastical jurisdiction had always been united to the crown, even in the Middle Ages, and thus by means of this argument Cosin was altering the normal framework of the debate.

Other English clergy had taken a stance similar to Cosin's in the past. For example, during his King's Bench trial Sir Thomas More cited Magna Carta against the pretensions of Henry VIII, arguing that the grant of liberty to the clergy in chapter 1 was being violated in Henry's attempt to remove England from papal authority.⁵⁶ An irate Morice digressed into a long, unhappy ramble, arguing that kings before Henry VIII had been fully conscious of their power to reform the church in an effort to show that chapter 39 of Magna Carta had addressed both temporal and spiritual jurisdiction.⁵⁷ But his labour was beside the point. Even if he could prove that Magna Carta addressed both jurisdictions, Cosin's claim that appointment to and deprivation from benefices had always belonged to ecclesiastical courts was unassailable.⁵⁸

But for the sake of the argument, Cosin's view was closer to being correct. He noted that Magna Carta required trial by jury, yet judgements in Tudor ecclesiastical courts were rarely by jury. Furthermore, heretics were never convicted of heresy by juries.⁵⁹ More controversially, Cosin claimed that chapter 1 of Magna Carta, which declared the church of England free and guaranteed the rights and privileges of all ecclesiastical persons, was a prior grant to the clergy (coming before the guarantees of chapter 39). This opening chapter, said Cosin, clearly showed that all subsequent chapters only addressed temporal jurisdiction unless spiritual jurisdiction was specifically expressed. But Morice believed chapter 1 simply freed the church from foreign laws.⁶⁰ The evidence seems to indicate that chapter 39 did not encompass church courts. Papal annulment of Magna Carta was anticipated, which probably accounted for the

⁵⁶ J. Duncan M. Derrett, 'The trial of Sir Thomas More', *English Historical Review* 79 (July 1964) 449-77. This article is reprinted in *Essential Articles for the Study of Thomas More*, ed. R.S. Sylvester and G.P. Marc'hadour (Hamden, Connecticut; 1977) 55-78.

⁵⁷ He submitted that the many medieval statutes in which the king directed orders to churches and religious houses concerning purveyances, taxation, lands, etc. fully showed that ecclesiastical jurisdiction had always belonged to the king. He added that the statute of praemunire (16 Richard II c. 5) complained of new encroachments and usurpations by the pope, and that the first statute of Westminster (3 Edward I c.1), especially its preamble, proved that the king has always had the power to reform abuses of the clergy appeared in . LPL, MS 234, fo. 245r-v; *SR*, I, 26-39; II, 85-6. For Morice's full argument see above, 192-3.

⁵⁸ The one exception was in cases of right of patronage. Cosin, *Apologie*, I, 31, 103-4; Helmholz, *Roman canon law*, 170; Lyndwode, *Provinciale* (STC² 17113).

⁵⁹ Cosin, *Apologie*, I, 103-4; More, *Works*, ed. Guy, Keen, Miller, McGugan, X, I-iv.

⁶⁰ LPL, MS 234, fo. 250v.

wording and placement of chapter 1, and the history of the English church in the fourteenth and fifteenth centuries appears to confirm that the provisions of chapter 39 did not apply to them. If it had, every deprivation of a minister since 1215 would have been illegal unless it had been accomplished by a jury trial.⁶¹ The claim, therefore, that chapter 39 encompassed ecclesiastical jurisdiction as well as temporal seems to have had its origin in late Elizabethan and puritan thought.

The interesting thing about Cosin's argument was that he spied in Magna Carta an affirmation of the ancient rights and privileges of canon law in England, implicitly including *ex officio* procedure. His interpretation of the act confirming the Submission of the Clergy (25 Henry VIII c. 19) was almost identical — that it ratified the ancient privileges of the clergy — with the exception of popish canons contrary to the royal prerogative (here he parted ways with More).⁶² Morice reminded Cosin of the forgotten plan proposed by the clergy themselves some sixty years before to review and amend the canon law, 'ffor that diuerse of those lawes were thought not onely much preiudicyall to the kinges regall Iurisdicion & repugnant to the lawes statute of this Realme, but also overmuch Onerous to the king and his subiectes.' The committee of thirty-two was supposed to determine which canons violated the king's prerogative and abolish them. This committee, said Morice, 'hath not as yet been accordinglie perfected, althoughe in a generalitie all Canons and constitucions contrarie or repugnant to the lawe of god, or of this Realme are abrogated and abolished.'⁶³ The point which Morice wished to stress was that the act confirming the Submission of the Clergy in 1534 had indicated that a great many canons of the English church were in flagrant violation of the crown's authority and were due to be abolished. But while Morice believed canon law had been *restrained* by the Submission of the Clergy, Cosin asserted it had been *maintained*.

The act, stated Cosin, 'doth argue, that ordinaries might (without further leaue obtained, as in former times they did) execute their jurisdiction ecclesiasticall',⁶⁴ and that it only prevented new and unauthorised canons from being introduced without royal assent.⁶⁵

⁶¹ Holt, *Magna Carta*, 272-3, 278-9, 327-31; Thompson, *Magna Carta*, 121-5, 130-6, 140.

⁶² Cosin, *Apologie*, I, 4.

⁶³ LPL, MS 234, fo. 87r-v. See also fo. 313r.

⁶⁴ Cosin, *Apologie*, I, 2-3.

⁶⁵ Cosin, *Apologie*, I, 4-5.

Furthermore, he observed that the Act of Dispensations, passed in the same session as the act confirming the Submission of the Clergy, had used the term ‘humane laws’ in its preamble to include ‘those Canon lawes; which by *such sufferance, vse, and custome* are (now) *as the accustomed and ancient lawes of this Realme, originally established as lawes of the same*: howbeit by the meanes aforesaid, but *induced into the Realme*, and not here at first *made nor ordeined*.’ In other words, canon law, which originated on the continent, had been made part of English law voluntarily by Parliament.⁶⁶ This statement by Cosin was intended to breathe life back into English canon law by asserting that it had unconditionally been grafted into the common law, but the fact remained that canon law had been roundly condemned by the Submission of the Clergy as being imperfect on many points. What those points were was never decided, but Cosin’s assertion that the Act of Dispensations implicitly admitted the whole of canon law as part of the ‘humane laws’ of the realm was hampered by that same parliament’s decree that canon law was seriously impaired.⁶⁷ Cosin was unique among the conformists of the 1590s in attempting to lift the prestige of canon law from the ashes. This interesting facet of Cosin’s contribution to the conformist cause in the 1590s will be scrutinised in the next chapter.

The quarrel over the status of canon law had been picked as an extension of the debate over the legality of the *ex officio* oath. Morice repeatedly attacked the oath as foreign to English justice, but Cosin affirmed that it had been established by canons long preceding the 1534 parliament and had yet to be deemed contrary to the laws of the realm.⁶⁸ If one wanted to know ‘what the humane lawes Ecclesiasticall of this realme are’, offered Morice, one should look at the acts of Parliament and other ‘home made Canons & ordinaunces’ which were originally established in the realm or came in through the acceptance of the people and king, which were the conditions established by the Act of Dispensations for the validation of foreign-made laws.⁶⁹

⁶⁶ Cosin, *Apologie*, I, 103. Also *SR*, III, 464.

⁶⁷ Cosin also pointed the 1563 statute *De excommunicato capiendo* (5 Elizabeth c. 23), claiming that its reference to ‘the ecclesiasticall lawes of the realme’ proved that canon law was alive and well. Morice pointed out, however, that that statute did not define what the ecclesiastical laws of the realm were. Cosin, *Apologie*, I, 103; LPL, MS 234, fo. 250r-v.

⁶⁸ Cosin, *Apologie*, III, 129-30.

⁶⁹ LPL, MS 234, fo. 249v; Morice, *Treatise*, 53.

Canon law after 1534 became subordinate to the crown in theory but as long as the *Reformatio* remained a mere proposal, individual canons not specifically repealed lived a fugitive existence, surviving alongside common law in a legal grey area. *Ex officio* procedure, including the oath, undeniably a foreign practice in origin, had been induced into the realm from the continent and given canonical approval by the provincial synod of Otho and Octobone in the thirteenth century as well as statutory acceptance by *De heretico comburendo* (2 Henry IV c. 15) in 1401.⁷⁰ With the final repeal of *De heretico comburendo* in 1559, the legality of the *ex officio* oath according to common law seems doubtful. But whether the abolition of that law had the force of annulling the thirteenth century canons which established the oath for the use of the church is also doubtful, since the queen was the supreme governor of the church and therefore the guarantor and protector of its rights, privileges, and liberties. Thus, whether the oath was legal in the 1590s according to the laws of England remains, at this point in our discussion, unresolved.

The extent of the high commission's authority, which remains to be considered, provides us with the key to unlock the unanswerable questions about the legality of the oath. Several important legal developments took place between the parliament of 1534 and the Cosin-Morice debate over *ex officio* procedure in the early 1590s. The Elizabethan Act of Supremacy of 1559, the statute most relevant to the high commission's authority, must be carefully studied in conjunction with the 1595 Queen's Bench verdict in Robert Cawdrey's case, which reflected on the implications of the Act of Supremacy and the controversial powers of the high commission to deprive ministers for nonconformity.

Perhaps the greatest disagreement between Cosin and Morice regarding the Act of Supremacy was whether it allowed new powers to the queen or merely restored old powers.⁷¹ Morice believed that the Act of Supremacy only gave the monarch limited authority over her ecclesiastical commissions, that is, powers specifically delineated by Parliament either in that act or used generally before it. Contrarily, Cosin affirmed that the act gave the queen the same power the pope had previously wielded, that is, all of the ancient ecclesiastical

⁷⁰ See also above, 48. The legality of the oath, as authorised by the synod, was complained of but not denied by St. German. *Constitutions*, chapter 4.

⁷¹ For the text of article VIII of the Act of Supremacy, see appendix 1.

jurisdictions that had been considered foreign before the Submission of the Clergy. According to this view, Elizabeth's letters patent could be interpreted broadly since they were a product of her royal prerogative.⁷²

The high commission had been accused by its puritan adversaries of using processes other than citation and punishments other than excommunication, despite the fact that ordinary ecclesiastical courts had traditionally only used these two.⁷³ The most notorious process used by the commission not specifically delegated by the Act of Supremacy was the *ex officio* oath. Morice accused the commissioners of forcing people on the grounds of the Act of Supremacy to answer 'vppon such generall oathes, no accusacion, suite, lawfull Informacion, presentment, or inditement Iudicially prederinge or dependinge.'⁷⁴ Morice was convinced he was towing the historical parliamentary line, consistent with the Heresy Reform Act of 1534 and the Act of Six Articles of 1539, that it was contrary to justice to put men to loss of life, good name, or goods unless by due accusation and witness or by presentment.

But Cosin's view was bigger. He recognised that by ordinary ecclesiastical jurisdiction men could not be forced to take the oath or be imprisoned for refusing it, but he contended that because the Act of Supremacy had not explicitly enumerated the exact powers of the high commission, the queen might empower her commission as it pleased her.⁷⁵ Morice insisted that no new powers were given to Elizabeth by that act, and thus the high commission was only empowered to exercise ordinary jurisdiction. In his opinion, the commission was restrained by the laws which governed ecclesiastical authority at the common law before the Act of Supremacy.⁷⁶ And besides, he added, the act itself reaffirmed the same principles spoken of in the preamble to the Heresy Reform Act, providing in one of the later articles that no person should be indicted or arraigned for any of the offences adjudged by that act, unless there were at least two witnesses to testify and declare the offences to the court, and that those

⁷² Professor Thompson has suggested that Cosin's interpretation was historically more accurate. Thompson, *Magna Carta*, 205-9.

⁷³ Cosin, *Apologie*, I, 101-2.

⁷⁴ See also above, 188-9.

⁷⁵ The high commission might even, added Cosin, proceed by juries if they wished, as did Archbishop Grindall. Cosin, *Apologie*, I, 106-9.

⁷⁶ This went for heresy as well, LPL, MS 234, fos. 170v-171v, 185v.

witnesses should be brought forth in person face to face before the accused party.⁷⁷ Therefore, was it not unjust for the high commission to proceed to administer *ex officio* oaths without accusation or witnesses? At this point in Morice's manuscript, there is a potent marginal notation by Archbishop Whitgift stating: 'noe. vnless you thinke that her maiestie can not gyve vnto them authoritie to deale otherwise, as yt semethe you doe.'⁷⁸ This bold statement begged the question that we have been broaching for some time: whether the queen's letters patent could contravene acts of Parliament.

Was the high commission limited by the Elizabethan Act of Supremacy or by the queen's letters patent? A careful reading of the act shows that Parliament clearly gave the queen a blank cheque to empower the commission as she chose. Morice vehemently denied this, but there were signs that even common law judges accepted this. Sir James Dyer and his colleagues held that ecclesiastical judges were authorised to fine recusants since the Act of Supremacy united all ecclesiastical authority to the queen to delegate as she wished, even though the Act of Supremacy did not specifically authorise fining.⁷⁹ And Sir Edward Coke, as we will see in a moment, delivered a verdict with similar implications in *Cawdrey's* case. Thus if the queen could empower her commissioners as she wished, fining was only one of the processes she could choose. Henry Hobart, James' attorney-general from 1606 to 1613, was enlisted to defend the high commission on behalf of the king during the debates between the common law judges and the bishops in the 1610s. He declared that the commission's powers were not limited to the Act of Supremacy — if that were true, he stated, all the letters patent since 1559 would have been illegal. He correctly observed that the act itself allowed the commissioners to exercise their power according to the tenor and effect of the letters patent, anything in the statute notwithstanding. He also stated that the act was a restoring act declaratory of the royal supremacy of Henry VIII and Edward VI, not a restraining act.⁸⁰

But even if the commission was empowered primarily by the letters patent, what made the queen's letters patent to the commission authoritative? There were three possibilities: 1) the

⁷⁷ Article XXI. *SR*, IV, I, 354.

⁷⁸ LPL, MS 234, fo. 175v.

⁷⁹ Dyer, *Reports*, ed. Baker, lxxiv.

⁸⁰ Usher, *Rise and fall*, ed. Tyler, 193-7.

letters patent described ancient clerical privileges that had existed before the Reformation and were now united to the crown; 2) the letters patent were an extension of the queen's royal supremacy; or 3) the letters patent reflected the sovereign's ancient prerogative to regulate the church through commissions. Interestingly, none of the letters patent dealing with commissions for visitations before the second half of Elizabeth's reign mentioned the royal supremacy. Professor Tyler has suggested that this showed 'that the origin of Tudor Ecclesiastical Commissions lay not in the legal quibbles of the royal supremacy as interpreted by parliament, but in the traditional duty of the Crown to safeguard the Church and the Christian community.'⁸¹

The mystery is more easily resolved by studying the verdict in Robert Cawdrey's Queen's Bench case. Cawdrey had been deprived by the high commission in 1587 for defaming the prayer book and for refusing to celebrate divine service properly,⁸² but his deprivation was contrary to the terms of the Act of Uniformity (1 Elizabeth c. 2) which asserted that ministers should only be deprived after their second offence; Cawdrey was deprived after his first. The method of attack chosen by Cawdrey was to sue his successor to the benefice, George Atton, for trespass, hoping thereby to convince the judges that his deprivation had been unjust and that the benefice ought to be returned to him. His counsel in the case was Morice with the advice of two other lawyers whose futures would be eventful, Nicholas Fuller⁸³ and George Croke.⁸⁴

Even as the case in Queen's Bench was getting underway in 1591, the main participants were writing to Lord Burghley to defend their positions. Bishop Aylmer, who handed down the deprivation against Cawdrey, called the defendant a stubborn, incorrigible man who deserved no credit.⁸⁵ Morice (to whom Burghley passed copies of Aylmer's letters)

⁸¹ Usher, *Rise and fall*, ed. Tyler, xxiv.

⁸² See Morice's statement of the case at BL, Lansdowne MS 115, doc. 17, fos. 31r-32r.

⁸³ Fuller had won notoriety by defending Thomas Cartwright in Star Chamber the same year and was shortly thereafter to find himself in prison for a short spell. He was present in the 1593 parliament when Morice introduced his famous bill to outlaw the *ex officio* oath but is not known to have spoken during the debate. In the first decade of James I's reign, he defended two puritans who had refused the *ex officio* oath and was again imprisoned, this time by the high commission itself, for nearly a year. Hasler, *Commons*, II, 161-2.

⁸⁴ Croke was one of the two judges in 1637 who, along with Sir Richard Hutton, refused to grant that the king was empowered in emergencies to raise ship money by prerogative. Hasler, *Commons*, I, 675-6.

⁸⁵ BL, Lansdowne MS 68, doc. 54.

complained in July, 1591 of the bishop's unjust dealings and hoped for victory in the appeal.⁸⁶ But William Aubrey, one of the ecclesiastical commissioners who had been involved in Cawdrey's deprivation, wrote to Burghley later that same month. His letter touched the central nerve: he argued that if the commissioners had only been acting on the Act of Uniformity, then Morice's argument was true; Cawdrey's deprivation would have been unjust. But if one was to understand 'the lawe ecclesiasticall beinge in suche force for maner of proceedinge, as it was before the makinge of that statute and the comission warrantinge the Commissioners to proceede accordinge to the lawe ecclesiasticall or accordinge to their sounde discreacons', it was evident that Morice's argument was invalid. He noted further that the chief justice of the Common Pleas, the chief baron of the Exchequer, and the attorney-general had been present at Cawdrey's deprivation and consented.⁸⁷

As Cawdrey's attorney, Morice submitted two main reasons why the judges should declare Cawdrey's sentence of deprivation void. First, he should not have been deprived until his second offence, according to the Act of Uniformity; and second, the same act provided that actions against ministers could only be by verdict of a jury, confession, or notorious evidence of the fact — not for non-attendance before the commission.⁸⁸ The case lasted four years, verdict not being reached until Hilary term, 1595. It was 'solemnly and oftentimes debated at bar by the Counsel of either party, and at the bench by the Judges' and was only decided 'after great and long deliberation and consultation...with the rest of the Judges'.⁸⁹

The court responded to Morice's two points regarding the Act of Uniformity, saying first that that act, 'being in the affirmative, doth not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative had been added, as, "and not otherwise, or in no other manner or form,"'. This was a general rule in statutes concerning matters of the church, they noted. In answer to Morice's second reason, they noted that ecclesiastical authorities were empowered to deprive ministers according to ecclesiastical law as had always been the case.

⁸⁶ BL, Lansdowne MS 68, doc. 55.

⁸⁷ BL, Lansdowne MS 68, doc. 56. Cawdrey himself had supposed that his argument that he should not have been deprived for his first offence against the Act of Uniformity would have perked up the ears of the two common law justices present at his deprivation, but 'The Lord chiefe Justice and the Lord chiefe baron beinge there, yet woulde they not saye one worde herevnto.' BL, Lansdowne MS 68, doc. 57.

⁸⁸ Sir Edward Coke, *The reports of Sir Edward Coke, Knight*, (London, 1826), book V, xix-xxii.

⁸⁹ Coke, *Reports*, V, xix.

Even the Act of Uniformity, they contended, had not designated any punishment for depraving the prayer book, and thus ecclesiastical courts were free to punish offenders by their own law.⁹⁰ The judges continued,

And therefore by the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy consisting of one head, which is the King, and of a body politic, compact and compounded of many, and almost infinite several, and yet well agreeing members: all which the law divideth into two several parts, that is to say, the clergy and the laity, both of them, next and immediately under God, subject and obedient to the head;⁹¹ also the head of this politic body is instituted and furnished with plenary and entire power, prerogative and jurisdiction, to render justice and right to every part and member of this body, of what estate, degree, or calling soever in all causes ecclesiastical or temporal, otherwise he should not be a head of the whole body.⁹²

Thus England was an empire and the queen was furnished with full authority over both the temporal and spiritual estates — the language was drawn from the preamble to Henry VIII's Act in Restraint of Appeals (24 Henry VIII c. 12). The court continued, noting that as cases in temporal courts were determined by temporal judges, 'so in causes ecclesiastical and spiritual...the same are to be determined and decided by ecclesiastical Judges, according to the King's ecclesiastical laws of this realm.' Some ecclesiastical laws were admitted by the judges to be foreign in origin. Just as the Romans borrowed from the Greeks and the Normans from the English, the English had borrowed ecclesiastical laws from elsewhere, but those laws which had been approved and allowed in England 'are aptly and rightly called, the King's Ecclesiastical Laws of England, which whosoever shall deny, he denieth that the King hath full and plenary power to deliver justice in all causes to all his subjects, or to punish all crimes and offences within his kingdom'.⁹³

The echo of Cosin's *Apologie* here is clear. In part I Cosin answered the puritans' claims that the queen could not empower the high commission to use extraordinary procedures by

⁹⁰ Coke, *Reports*, V, xxii-xxiv.

⁹¹ This expression of equality between the temporal and spiritual estates under the prince accorded perfectly with Cosin's view. See also above, 95, 163-4.

⁹² Coke, *Reports*, V, xxviii.

⁹³ Coke, *Reports*, V, xxviii.

saying, 'These opinions if they be not well grounded vpon lawe, seeme to me to touch her *Maiesties* prerogatiue roiall, and supreme gouernment (that was yeelded vnto her highness by statute) very deeplie; whosoever be *Author* of them.'⁹⁴ He discountenanced their attempts to circumscribe the queen's authority to direct the commission, cautioning, 'And if this authoritie that is hereby impugned, be (in trueth) a *preheminance* vnited and annexed to the *Imperiall crowne* of this realme, by *Parliament*: and if he be a man of any qualitie, (so that hee hath taken the oath of *Obedience*) let him vse good aduisement, how it may stand with such his oath and allegiance.'⁹⁵ This warning, directed to public officers of the realm, was intended to clarify that foreign laws which had been accepted into the realm 'be often called, *The Kings or the Queenes ecclesiastical lawes*.'⁹⁶ In later printings of Coke's *Reports*, the reference to 'Dr. Cousins's Apology 102' is duly acknowledged.⁹⁷

The reason why Cawdrey lost his case was not because he could not convince the judges that the high commission acted against the terms of the Act of Uniformity — it is clear that they did — but because the power to deprive ministers was the prerogative of bishops aside and apart from statute law. The implication was that deprivation was not really restricted by the Act of Uniformity, which act, according to the judges, only provided positive commands enabling ecclesiastical authority, not negative ones prohibiting it. Thus, although the act stated that ministers must be deprived after their second offence, they could still be deprived after only their first offence according to ecclesiastical law. In the sense, therefore, the Act of Uniformity's provisions were meaningless.⁹⁸

The basic verdict in Cawdrey's case did nothing to enhance the prestige of the high commission, because what was in question was a punishment that had been ordinarily determinable by the clergy before the Elizabethan Act of Supremacy (deprivation) rather than one that had not (fining or imprisonment). If the judges had merely stated that Cawdrey was lawfully deprived because deprivation from a benefice had always belonged to the clergy, even before 1559, they would not by that verdict have validated the high commission's power to

⁹⁴ Cosin, *Apologie*, I, 102.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Coke, *Reports*, V, xxviii.

⁹⁸ Usher, *Rise and fall*, ed. Tyler, 137-8.

fine or imprison. But, oddly, the judges chose to make two much bigger and broader statements than the case actually required. First, they asserted that common law judges did not have a monopoly on interpreting statutes. Laws that applied to ecclesiastical courts ought to be interpreted by ecclesiastical judges, they concluded, and each court should give credence to the other's decisions since they could be trusted to be experts in their own matters.⁹⁹ Second, the judges concluded that the commission was not only empowered to use the ecclesiastical law as it existed before 1559, it was also authorised to execute anything in the queen's letters patent, since she had *imperium* to create and direct such a commission.¹⁰⁰ This extended statement, though not necessary for the case at hand, had major implications because the judges insisted on making a philosophical statement about the high commission's power. It was judicial activism, and it made Cawdrey's case a landmark.

If the commission was empowered by the queen's *imperium* via letters patent and the letters patent directed the commissioners to fine or imprison, they were lawfully empowered to do so, though these powers were not enjoyed by the English clergy at large as they were contrary to ecclesiastical law.¹⁰¹ Thus, the high commission's powers were far more expansive than those of other courts who were bound to abide by ordinary ecclesiastical or common law. According the Act of Supremacy, only the commissioners could decide what crimes constituted 'enormities', and since the queen's letters patent permitted them to punish any notorious or flagrant enormities, the commissioners had tremendous discretion in determining what constituted a crime.¹⁰²

Hence, there were no set judicial procedures or punishments assigned by the letters patent to the commissioners, which left them free to use any that suited them. Archbishop Grindal was known to favour indictments and verdicts by juries of twelve; Whitgift preferred

⁹⁹ The decision in Cawdrey's case casts doubt on Professor Helmholz's contention that common law courts exclusively interpreted parliamentary statutes. 'Whenever a statute came into play, the civilians were bound to follow the construction put upon it by the temporal courts. Where there was doubt, they had to consult the common law judges.' A little below this he remarked that ecclesiastical courts 'gave a limited kind of assent' to this arrangement. But if this was true throughout most of Elizabeth's reign, the verdict in Cawdrey's case altered judicial practice, because the Queen's Bench judges held that statutes of an ecclesiastical nature should be interpreted by ecclesiastical courts, not temporal courts. Helmholz, *Roman canon law*, 173.

¹⁰⁰ See also Usher, *Rise and fall*, ed. Tyler, 139, 198.

¹⁰¹ In 1611 when the debate over the high commission's authority was again raging between the common law judges and the bishops, Archbishop Abbot reminded Coke that he himself had reported the results of Cawdrey's case, which showed that the commission was lawfully empowered to imprison and fine at its discretion! Usher, *Rise and fall*, ed. Tyler, 217-21.

¹⁰² *SR*, IV, part 1, 352.

ex officio procedure and the oath to answer all interrogatories. The procedure chosen was largely a matter of preference.¹⁰³ Sometimes the commission mixed different procedures together. For example, Thomas Cartwright's attempt to reform the church of England through the introduction of the Book of Discipline was discovered and obstructed by the commission, but the way this was done was simply the old visitatorial method and nothing new. Cartwright's criminal examination, however, was by *ex officio* procedure.¹⁰⁴ In the final assessment, therefore, the use of the *ex officio* oath by the high commission was perfectly legal — not because it accorded with canon law or common law, but because the commission was a delegate body of officers licensed by the queen (on the basis of her royal prerogative) to regulate and govern the English church according to her written instructions.¹⁰⁵

If the commission could exercise judicial authority contrary to the ordinary course of English law, what limits or restrictions were there on the queen's letters patent to the commission, if any? Could she 'giue them authoritie to hang men' as the puritans feared?¹⁰⁶ It is important to look beyond the Elizabethan Act of Supremacy as well as the entire Reformation to find a clear answer. The power of the high commission to fine and imprison offenders was not a prerogative of the medieval English church, so it could not be defended on the basis of the annexation of ecclesiastical authority to the crown that occurred at the break with Rome. The power to fine and imprison was first given to the commission in the letters patent of Edward VI,¹⁰⁷ so this was clearly a post-Henrician development. Likewise, any semblance of legality the *ex officio* oath enjoyed according to common law was eradicated with the second and final repeal in 1559 of *De heretico comburdendo*, the medieval act which was believed to have originally legalised the oath.¹⁰⁸

¹⁰³ Thompson, *Magna Carta*, 213; Usher, *Rise and fall*, ed. Tyler, xi-xii, xxxii.

¹⁰⁴ Usher, *Rise and fall*, ed. Tyler, 50-1.

¹⁰⁵ This was not the only example of imperial authority contravening statute law. The Council of Wales, whose disciplinary powers had originally been granted in the statute 34&35 Henry VIII c. 26, was periodically empowered through Elizabeth's letters patent to torture men suspected of treason, murder, or felony, though this was clearly against common law. The queen authorised the council to use torture on at least five occasions: in 1560, 1570, 1576, 1586, 1601, and 1602. Williams, *Council*, 24-7, 47-53, 56-7 and footnote; Smith, *De republica anglorum*, ed. Dewar, 117-8; Langbein, *Torture*, 73-4, 134-9.

¹⁰⁶ Cosin, *Apologie*, I, 106-7.

¹⁰⁷ Usher, *Rise and fall*, ed. Tyler, 145.

¹⁰⁸ To review briefly the confusing history of this law: it had first been repealed by the Heresy Reform Act of 1534 (25 Henry VIII c. 14). But this act plus the Act of Six Articles of 1539 (31 Henry VIII c. 14) were repealed by an act of 1547, 1 Edward VI c. 12. Thus, with the repeal of the Heresy Reform Act, *De heretico comburendo* was resuscitated and with it, the only statutory basis of the *ex officio* oath. For good measure, *De heretico comburendo* was formally reenacted by

It can be argued that the sovereign could not authorise the commission to fine, imprison, or exact the oath based either on medieval clerical privilege or on the two Acts of Supremacy but only on the right of the crown to safeguard the church via commissions — an old prerogative of the king that pre-dated the Reformation and had never been shared with Parliament.¹⁰⁹ From medieval times English monarchs appointed ecclesiastical commissions to regulate the church, and the primary business of these commissions was the enquiry into and suppression of ecclesiastical crimes, particularly heresy.¹¹⁰ Not much changed in the sixteenth century except that the methods of prosecution had evolved to meet new political pressures. Whitgift, finding himself presiding over a church riven with faction and rebellion, sought the queen's support for stricter procedures in detecting crimes, punishing crimes, and terrifying others from committing crimes.¹¹¹

It is important to clarify that the Act of Supremacy of 1559 did not empower the commission to exact the oath. This is proved by the fact that the Act of Supremacy was not necessary to validate the fining and imprisoning of offenders by the commission, a practice which, though contrary to the act, existed both before and after it in letters patent directed to ecclesiastical commissions. The authority to exact the oath derived ultimately from the queen's prerogative to appoint commissions to order and govern the church. The Act of Supremacy, like the Act of Uniformity, was only a positive act of confirmation, not a negative act of prohibition. Thus the 1559 Parliament merely ratified a power that already existed under the medieval kings, Henry VIII, and even Queen Mary.¹¹²

It is inevitable in human history that the nature and limits of political authority will always need to be more precisely defined in future days. Statutes can only address the political questions of the present and the foreseeable future, not the unforeseeable future, and this has

Mary (1&2 Philip and Mary c. 6) and then abolished again by the Elizabethan Act of Supremacy (1 Elizabeth c. 1, article VI). With this second repeal of *De heretico comburendo* in 1559, therefore, the oath was deemed illegal by common law, though it continued to be legitimately used on the basis of the royal prerogative to regulate the church, which was not dependent on the common law for its approval. *SR*, II, 125-8; III, 454, 739; IV, part 1, 351.

¹⁰⁹ Usher, *Rise and fall*, ed. Tyler, xxiii. It should be noted that fining and imprisonment by the high commission during the Tudor was never defended on the basis of the imperial supremacy but always on the ancient prerogative of the sovereign to safeguard the church.

¹¹⁰ Helmholz, *Canon law*; Helmholz, *Roman canon law*, 46-7; Usher, *Rise and fall*, ed. Tyler, xviii.

¹¹¹ The best discussion of Whitgift's campaign against nonconformity is in Collinson, *Elizabethan puritan movement*, 243-72. See also Guy, 'Elizabethan establishment', *Reign of Elizabeth I*, ed. Guy, 138-40.

¹¹² Usher, *Rise and fall*, ed. Tyler, 223-9.

led to crises in authority when old definitions of prerogative or rights suddenly seemed vague and disputable where they had once seemed perfectly clear. This was the case during the last decade of Elizabeth when important statutes such as the Elizabethan Act of Supremacy and the act confirming the Submission of the Clergy could no longer command a consensus of interpretation even from judges. Professor Usher asked where 'residual judicial authority' lay in Elizabethan England, that is, to whom was judicial authority given when the laws of the land were silent?¹¹³ Was it given to the king, to Parliament, to the king-in-Parliament, to the people?

Common lawyers such as Morice, Sir Edward Coke, and Nicholas Fuller wholeheartedly believed that residual authority lay in Parliament and in the accumulated precedents of the common law. But Cosin, Richard Hooker, and Archbishop Laud believed that the king was the source of residual judicial authority.¹¹⁴ If Morice was right, Elizabeth's royal supremacy could be circumscribed by statutes. If Cosin was right, Elizabeth could create an infinite number of prerogative courts like the high commission without the consent of Parliament. Despite the emergence of proto-constitutional ideas in the writings of Morice, Coke, and Beale, the historical evidence shows that residual judicial authority had always been with the king.¹¹⁵ This is why Morice's attempt to pass a bill in the 1593 Parliament to outlaw the *ex officio* oath and restrict the high commission was a failure.¹¹⁶ The high commission was not a branch of the common law but a subsidiary of the royal prerogative. He was meddling in an area forbidden to the Commons — the governance of the church, which was strictly a matter of the queen's royal supremacy. If Morice's bill had been passed, it would have proved that the queen's prerogative could be pruned and clipped when Parliament found it necessary. The view held by Morice, Coke, and the common lawyers, that residual authority was found in the common law, was a constitutional innovation of the Elizabethan era.¹¹⁷

¹¹³ Usher, *Rise and fall*, ed. Tyler, 223-4.

¹¹⁴ Thompson, *Magna Carta*, 354-74; Levy, *Fifth Amendment*, 225, 229-65; Lake, *Anglicans and puritans*, 201-5, 213; W.J.T. Kirby, 'The royal supremacy in the thought of Richard Hooker', Oxford University thesis, 1987.

¹¹⁵ Burgess, *Ancient constitution*, 162-7; Holdsworth, *A history of English law*, 190-6; Usher, *Rise and fall*, ed. Tyler, 230.

¹¹⁶ For a detailed account of Morice's bill, see below, 246-9.

¹¹⁷ Howell A. Lloyd, 'Constitutionalism', *Political thought*, ed. Burns and Goldie, 254-5; Usher, *Rise and fall*, ed. Tyler, 230-1

With the resolution of the controversy we now turn our attention more broadly to the issues of the 1590s as they relate to the struggle for order and authority in the church of England. Cosin's *Apologie* carefully articulated a new view of the Elizabethan church that emphasized strong central authority, jurisdictional might, the danger of sectarianism, and a fear of the collapse of stability. His defence of the high commission's massive powers of arrest, administering the oath, fining, and imprisonment occurred against a background of religious, social, and economic turmoil in which the conformists themselves were divided on how to govern the church and stave off a growing sense of chaos. As we will see, Cosin's *Apologie* marked a turning point in the evolution of Elizabethan conformism, bringing the movement further to the right than it had even been before.

Chapter 8

Richard Cosin and the 1590s

What binds a *polis* together, even in a far-flung state where men's cultural backgrounds and places of residence might vary, is a unified constitution. So taught Aristotle in book III of the *Politics*,¹ and this need for unity and order was a central concern of the Tudor regime in both its civil and religious dimensions.² The growing religious dissension of the last two decades of the sixteenth century brought into doubt the continuation of what Professor Tyacke has labelled the 'Calvinist consensus'.³ This broad generalisation refers to the relative religious peace amongst English protestants during most of Elizabeth's reign with regard to matters of doctrine, particularly double and absolute predestination and the nature of grace, and *adiaphora* ('things indifferent').⁴ The maturation of puritan political consciousness in the 1580s, culminating in parliamentary defeats in 1584 and 1586 and the arrest of Thomas Cartwright in 1591, proved that a serious gulf was opening between protestants who sought further reformation in the church and those who stressed the importance of defending the church from the twin dangers of catholic insurrection and radical protestant revolution.⁵ Suddenly the meaning and definition of 'conformity' in the English church was uncertain.

Starting in 1583 Whitgift had begun to narrow the definition of conformity. Though puritans initially expected good things from the new archbishop, his inaugural sermon delivered at Paul's Cross on 17 November 1583 demonstrated that there was something distinctly unpuritan about his approach: he emphasized the authority of magistrates and bishops, called for obedience to lawfully instituted authorities, and condemned recusants, anabaptists, and those who clamoured for further reformation.⁶ Shortly thereafter, all ministers were required to assent to three articles of belief: that the queen was supreme

¹ Aristotle, *The politics*, ed. Stephen Everson (Cambridge, 1988) 54-5.

² J.G.A. Pocock dismissed the idea that Elizabethan England was a *polis* in *The machiavellian moment* (Princeton, 1975), arguing instead that every privy councillor took separate oaths and counselled the queen severally, renaissance fashion. But Professor Collinson has convincingly demonstrated that the opposite was the case. There was legitimate resistance theory in Elizabethan England which recognised the difference between monarchy and tyranny; there existed a 'background' authority auxiliary to the prince (the body politic) as evidenced by such devices as the Bond of Association and the Act for the Safety of the Queen's Person (both 1584); and there were clearly two governments in operation: one by the queen and the other by the privy council. Patrick Collinson, 'The monarchical republic of Queen Elizabeth I', *Bulletin of the John Rylands University Library*, 69 (1986-7) 394-424.

³ See Tyacke, *Anticalvinists*; Nicholas Tyacke, 'Anglican attitudes: some recent writings on English religious history, from the Reformation to the Civil War', *Journal of British Studies*, 35 (April, 1996), 139-67.

⁴ For a brief discussion of *adiaphora* see below, 269-70.

⁵ Guy, *Tudor England*, 304-8; Collinson, *Elizabethan puritan movement*, 59-100; Haigh, *English reformations*, 268-84; MacCulloch, *Later Reformation*, 44-64, 82-92, 144-62; *Reign of Elizabeth I*, ed. Guy, 11-5.

⁶ MacCulloch, *Later Reformation*, 48-9; Collinson, *Elizabethan puritan movement*, 243-4.

governor of the church, that the Book of Common Prayer contained nothing contrary to the word of God, and that the Thirty-Nine Articles were consonant with scripture. The only remarkable request here was the subscription to the prayer book, and this was the first narrowing of conformism.⁷

Previous to 1584 there had been moderate criticism of some elements of the prayer book, but this was acceptable within a broad definition of conformity to the established church. Now any minister who refused to subscribe was removed from the ministry. This was a courageous beginning for Whitgift since it threatened to decimate the ranks of preaching clergy if a substantial number refused. And this might have occurred at a time when the fear of catholic uprising, given recent urgency by the assassination of William of Orange by catholics in the Netherlands, was quite strong.⁸ Subscription met not with serious but with well-placed resistance. Most ministers conformed quietly, but the privy council irritated Whitgift by hearing the suits of disgruntled puritan ministers and sending them on to the archbishop for conferences. Whitgift bickered with the council that the government of the church had been expressly entrusted to him by Elizabeth and asked that his credibility not be impeached.⁹

Eventually he moderated somewhat and allowed ministers simply to promise to use the prayer book and that prayer book only, which caused many who had been holding out to subscribe at last. But now Whitgift turned his attention to another device. The queen had issued new letters patent in December 1583 to the high commission, and he used this recent commission to construct twenty-four articles to be administered *ex officio* to those puritan nonconformists who were suspected of being involved in unauthorised religious organisations.¹⁰ The articles were extremely unpopular and Burghley, among others of the council, complained. Whitgift had his way, however, and over the next five years he persevered in his disciplinary tactics, eventually rising from his initial unpopularity at Lambeth into the privy council itself.

⁷ Under Archbishop Grindal the prayer book was widely, even officially used, but there was no litmus test for ministers which forced them to subscribe to it. Collinson, *Elizabethan puritan movement*, 245.

⁸ Collinson, *Elizabethan puritan movement*, 246-7.

⁹ Collinson, *Elizabethan puritan movement*, 251-6.

¹⁰ See Usher, *Rise and fall*, ed. Tyler, appendices.

Whitgift was made a councillor in 1586 while Robert Dudley, earl of Leicester, was away in the Netherlands. Leicester was not only vigorous in the puritan cause, he wielded extensive power of patronage. But Leicester died in 1588, followed by the other moderate puritan councillors Sir Walter Milmay in 1589, and the earl of Warwick and Sir Francis Walsingham in 1590. By this time Sir Francis Knollys was very old, and Burghley was losing influence. Whitgift, on the other hand, was gaining supporters: in the aftermath of the 1588 defeat of the Armada Sir Christopher Hatton, one of Whitgift's solid allies for many years, spoke of puritans as being as dangerous as papists. Like Whitgift, Hatton was of the second Elizabethan generation of councillors who disliked even moderate puritanism, and had a distinctly authoritarian bent.¹¹ Hatton died in 1591, but there were other new faces on the privy council who shared his views. Lord Buckhurst and Lord Cobham, who had never liked Leicester or his circle, also joined forces with the archbishop against puritanism, as did Whitgift's clerical subordinates, Richard Cosin, Richard Bancroft, and John Aylmer.¹² These men saw disturbing trends in the parliamentary calls of 1584 and 1586 for a learned ministry, an end to subscription, and a new system of presbyteries. They resisted the first Elizabethan generation's slide to the left by moving sharply rightward, seeking the queen's direct authority for validation of their agenda. Between 1586, therefore, and 1590 the complexion of the privy council changed considerably. The first generation of conformists, 'men of business' who relied on strong links with the counties were replaced by a second generation of new-style conformists who disliked puritanism and did not generally rely on provincial patronage networks but tended to worked closely with the queen herself.¹³

These new conformists were alarmed at more than just puritan religious initiatives. Between 1586 and the end of the century, war and socio-economic conditions combined to produce some of the most threatening years in Elizabeth's reign. In 1603 the population of England reached about 4.5 million, a strong increase of about 35% since the beginning of the

¹¹ MacCulloch, *Later Reformation*, 44-6; Guy, 'Introduction', *Reign of Elizabeth I*, ed. Guy, 3, 6, 12; Guy, 'Elizabethan establishment', *Reign of Elizabeth I*, 129-30.

¹² Collinson, *Elizabethan puritan movement*, 385-7. Aylmer, though a somewhat radical protestant in the 1550s and 1560s, made a distinctive swing to the right in the 1580s after becoming bishop of London.

¹³ 'Men of business' were influential gentry who had close personal connections with privy councillors and acted as advisors, lobbyists, and informers to the council. See Collinson, *Elizabethan essays*, 59-86; also Tyacke, 'Anglican attitudes', *Journal of British Studies*, 35 (April, 1996), 139-67.

reign. Prices had also been rising since the 1520s, but the availability of food and employment lagged behind these increases.¹⁴ Grain harvests were generally good until 1594 when there began a series of bad years, particularly for wheat. In the same year the price of consumables rose sharply. Livestock prices had begun rising in 1588, peaking in 1594-5, and only tapering off slightly at the end of the decade, and the price of grain and consumables did not improve significantly until 1600.¹⁵ The worst of these years, when impoverishment, malnutrition, and starvation were at their highest, were 1596-8 and the death rate may have been as high as 6%.¹⁶ In other years when harvests were good, such as 1592, 1593, and 1603, there were outbreaks of the plague.¹⁷

The inflation and scarcity of food during the 1590s were also being compounded by the cost of war. England had intervened in the Netherlands in 1585, which precipitated the long war with Spain and the Catholic League. The campaigns to suppress rebellion in Ireland between 1593 and 1601 were particularly expensive commitments for the crown (over £1,000,000 against an annual income of roughly £900,000), besides which there were naval expeditions to support in 1589, 1591, 1595, and 1597 as well as defensive troops in northern France. The money for these foreign wars was generally raised by taxation, borrowing, and the selling of crown lands, all of which still could not balance the crown's books. In addition to raising the money for these foreign wars, Parliament overconfidently repealed anti-enclosure legislation in 1593. This encouraged landowners to convert arable land to pasture, which only amplified the effects of inflation and poverty when the first of a series of bad harvests (some of the worst of the century) came a year later.¹⁸

The crisis was not perceived only amongst the landless wage-earning poor. In 1595 Archbishop Whitgift described 'this tyme of Scarcitye & Dearth of Corne and Victualls', and in the same year the lord mayor of London informed Burghley that the shortage of grain was

¹⁴ Jim Sharpe, 'Social strain and social dislocation, 1585-1603', *Reign of Elizabeth I*, ed. Guy, 194; Paul Slack, *The English poor law* (London, 1990), 11.

¹⁵ D.M. Palliser, *The age of Elizabeth* (second edition; London, 1992) 456.

¹⁶ Paul Slack, *Poverty & policy in Tudor & Stuart England* (London, 1988) 49-50; Slack, *English poor law*, 13.

¹⁷ Slack, *Poverty & policy*, 139.

¹⁸ The restrictions against enclosure were enacted again by Parliament in 1597, but by then the damage had been done. Slack, *Poverty & policy*, 51; R.B. Outhwaite, *Inflation in Tudor and early Stuart England* (London, 1969), 43; Sharpe, 'Social strain', *Reign of Elizabeth I*, ed. Guy, 196; Palliser, *The age of Elizabeth*, 31-3; see also *The European crisis of the 1590s: essays in comparative history*, ed. Peter Clark and Paul Slack (London, 1985).

likely to be the ruin of many poor folk who had already been near the brink of starvation the year before.¹⁹ The social implications of dearth were just as disturbing to the authorities as to those who were suffering the most. There were food riots in London in the summer of 1595 which required martial order to quell and similar disturbances in Oxfordshire the same year. In fact, there were at least twelve grain riots between 1594 and 1598.²⁰ The number of wandering beggars and vagrants increased during the 1590s as well, as did bastardy, thefts, and felonies. Apparently as a result of this increase in crime, judicial authorities became more willing to use the death penalty than in the past.²¹

These socio-economic factors could not help but be stirred into the mix of church and state. The Somerset JP Edward Hext, the Kent JP and author William Lambarde,²² and the earl of Bath, among many others in authority, were afraid economic misfortune in the countryside was likely to produce major social disruption before long.²³ Sir Francis Bacon similarly believed that dearth was one of the 'causes and motives of sedition'.²⁴ Such fears of general social upheaval combined with fresh memories of puritan agitation in the 1580s fueled the new-style conformists in their drive for conformity and order.

But there were difficulties in suppressing religious dissent. In medieval England the threat and use of excommunication had usually been sufficient to keep the laity in line and terrorise them, if need be, into obedience. The reformation did much to weaken the efficacy of excommunication, however, and many an Elizabethan layman remained voluntarily excommunicate for years. The growing indifference of men towards excommunication was in part due to late Tudor religious defiance but also had to do with the fact that common law courts no longer stripped excommunicates of their right to initiate lawsuits.²⁵ In the face of these setbacks, ecclesiastical courts needed to harness new methods of enforcing discipline. The answer came in the form of the power to fine and imprison, and Whitgift, who tended to

¹⁹ R.B. Outhwaite, *Dearth, public policy, and social disturbance in England, 1550-1800* (London, 1991) 10-1.

²⁰ Palliser, *The age of Elizabeth*, 32; Outhwaite, *Dearth*, 48.

²¹ Slack, *Poverty & policy*, 49-50, 102; Sharpe, 'Social strain', *Reign of Elizabeth I*, ed. Guy, 201-2.

²² Lambarde was the author of *Archion, or a comentary upon the high courts of justice in England*, written in 1591 and dedicated to Sir Robert Cecil (though not printed until 1635). (STC² 15143).

²³ Sharpe, 'Social strain', *Reign of Elizabeth I*, 192-3, 203;

²⁴ Outhwaite, *Dearth*, 11.

²⁵ This was a result of the temporal courts' jealousy of the mushrooming jurisdiction of ecclesiastical courts. Usher, *Rise and fall*, ed. Tyler, 99-100, 182-3.

see upheaval in the church as 'an operational problem',²⁶ encouraged the high commission to make use of these sanctions soon after his elevation to Canterbury. Writing on this subject in 1607 the civil lawyer John Cowell observed, 'For the world being growne to that loosenes as not to esteeme the censure of excommunication, necessitie calleth for those censures of fynes to the prince and imprisonment, which doe affect men more neerely.'²⁷

The threat of instability posed by puritanism, socio-economic distress, and the apparently waning power of ecclesiastical courts to control religious dissent provided the new-style conformists with ammunition that they had lacked until the last decade of Elizabeth's reign. The puritans had taken the offensive early in the 1580s but having failed to achieve any substantial reforms in church government by the end of the decade, they were clearly running out of steam. The new-style conformists on the other hand, propelled by Whitgift's competent sense of direction and willingness to act swiftly and forcefully, began to mature. Whitgift deployed the high commission to enforce his vision of conformity to the established church, but there were other fronts to cover. The puritans were strong in Parliament and Whitgift was ever watchful of its proceedings. The day Morice introduced his bill against the high commission in the 1593 Parliament,²⁸ Whitgift wrote an animated letter to queen. In it he named Morice 'a great patron' of sectaries and accused him of using his bills for the protection of the same. He implored the queen to uphold the current ecclesiastical establishment which 'must of necessitie be continewed vnlesse we will suffer vice to abownd and sects, schimes [sic], and disorder to have the uppar hand'. With a piece of rhetoric that aimed not to flatter the queen by his personal devotion but to incite her to protect her state, Whitgift closed ruefully, 'for in the end your maiestie wyll find that those wich now impugne the ecclesiasticall Iurisdiction indevor also to impare the temporall and to bring even kings and princes vnder there Censure.'²⁹

Whitgift's interpretation of the conflict as a war that ranged the forces of law and order against the splintering power of faction became the mainstay of new-style conformist polemic

²⁶ John Guy, 'Elizabethan establishment', *The Reign of Elizabeth I*, ed. Guy, 139.

²⁷ John Cowell, *The interpreter*, sig. Q4v.

²⁸ Actually he had prepared two bills for consideration but only one bill was debated.

²⁹ BL, Additional MS 28571, fo. 172.

in the 1590s. In fact the puritans' views of civil authority, rather than their views of doctrine and liturgy, became the prime focus of the new conformist strategy.³⁰ After all, the meaning and interpretation of scripture and the fathers could be endlessly debated, but puritan opinions regarding civil authority touched closely on law, and law could (and would) be more certainly established. The conformists accordingly focused on this aspect of puritanism in their polemical writings and attacked the puritans as subversives.³¹ The 1590s writings of the new conformists, particularly the forceful, absolutist tones of Richard Bancroft and Hadrian Saravia, dispelled (at least in their own minds) any ambiguity that remained in the royal supremacy.³²

But the portrayal of the puritans as a threat to the peace of church and state was only half of the conformist strategy. They then proposed to subdue this threat by empowering the monarch on the grounds of preservation of order. This made simple political sense from the standpoint that the queen would be a shield against the frothing anticlericalism of the puritan laity,³³ but it also aimed at tilting real political power towards Elizabeth at the expense of the mixed polity by which England had operated for the first thirty years of her reign. This transformation was the end of the 'first reign' of Elizabeth and the beginning of the 'second reign' which lasted from the late 1580s until 1603 and was marked by a centralisation of authority in both church and state.³⁴

Leading the way for the new conformists were John Bridges, Thomas Cooper, Thomas Bilson, Hadrian Saravia, Richard Cosin, Matthew Sutcliffe, and Richard Bancroft. Bridges,

³⁰ This tendency is an interesting contrast to the identification of puritans during the reigns of James and Charles primarily by their views on doctrine and liturgy. Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 113-4.

³¹ Similarly, Charles I and Archbishop Laud believed that calvinism was subversive to the church and state because it encouraged smugness amongst the elect that reduced the need for obedience to earthly authority. They also saw anti-popery as an ultimately destabilising force. Nicholas Tyacke, 'Archbishop Laud', *Early Stuart church*, ed. Fincham, 65; Anthony Milton, *Catholic and reformed: the Roman and protestant churches in English protestant thought, 1600-1640* (Cambridge, 1995) 529-31.

³² Lake, *Anglicans and puritans?*, 102-13, 212. See also Hadrian Saravia, *Of the diuerse degrees of the ministers of the gospell* (London, 1591) (STC² 21749) II, 182-91; Richard Bancroft, *A suruay of the pretended holy discipline* (London, 1593) (STC² 1352) 250-81.

³³ There was a parallel here to the Submission of the Clergy in 1533. Professor Guy: 'Thus to politically alert bishops royal supremacy was the better of two evils: the clergy would not have to counter the approaching anticlerical backlash without the necessary filter of royal mediation.' John Guy, 'Thomas Cromwell and the intellectual origins of the Henrician revolution', *Reassessing*, ed. Fox and Guy, 173. There was also a further parallel with the late Stuart church's rejection of sacerdotalism. See Champion, *Pillars of priestcraft*, 93-8.

³⁴ The conscious division of Elizabeth's reign into two parts has been pioneered by Professors Guy and Collinson. See especially Guy, 'Introduction', *Reign of Elizabeth I*, ed. Guy, 1-19; and Collinson, 'The monarchical republic of Elizabeth I', *Bulletin of the John Rylands University Library*, 69 (1986-7) 394-424.

dean of Salisbury and later bishop of Oxford under King James, was the first conformist to advance the *iure divino* argument for episcopacy in his anti-calvinist *A defence of the gouvernement established* printed in 1587.³⁵ It was this massive treatise that sparked the publication of the outrageous Marprelate tracts, which were in turn answered by Cooper, the bishop of Winchester in *An admonition to the people of England* in 1589.³⁶ Saravia, a Dutch theologian who came to England in 1588, also made a powerful case for the divine right of bishops in his *De diuersis ministrorum euangelii gradibus* published in 1590.³⁷ By the early 1590s the new-style conformists were clearly on the offensive. The year 1593 saw an outpouring of important conformist works unparalleled in any previous year. Richard Bancroft's *Dangerous positions and proceedings* was a historical narrative dealing with attempts to bring presbyterianism into England under the pretense of reformation.³⁸ Shortly after the publication of this book, Bancroft was translated to the bishopric of London. Also in the same year Bancroft produced *A survey of the pretended holy discipline*,³⁹ in which he drew only from presbyterian sources (similar to what Cosin had done in his 1592 *Conspracie for pretended reformation*). Another signal conformist publication in 1593 was *The perpetual government of Christ's church* by Thomas Bilson,⁴⁰ warden of Winchester College, which argued eloquently against the presbyterian discipline in a disputative style, unlike Bancroft's historical narratives.⁴¹ The fourth book to come out that year was Cosin's *An apologie for sundrie proceedings ecclesiasticall*, which was substantially unlike anything the conformists had yet produced.⁴²

All of these works shared remarkably similar views about the government of the church and the secular state. With one voice the new conformists labelled presbyterianism as

³⁵ STC² 3734.

³⁶ STC² 5682. *DNB*, VI, 320-1.

³⁷ STC² 21746. So popular was Saravia's *De diuersis* that he was made a doctor of divinity at Oxford. After 1595 he was appointed to a prebendary of Canterbury where he became close friends with Richard Hooker. *DNB*, L, 300.

³⁸ STC² 1344.

³⁹ STC² 1352.

⁴⁰ STC² 3065.

⁴¹ Strype, *Annals*, 194-7.

⁴² Although Cosin's *Apologie* had first been published in 1591, this edition was only half as long as the 1593 edition and did not yet contain Cosin's responses to Morice's and Beale's tracts, nor did it contain the extensive part III that was the focus of the second edition. Furthermore, only about forty copies were printed and they were mostly retained by private individuals. Hence, it is not accurate to state that Cosin's *Apologie* made its mark until 1593.

refractory, defended the sovereignty of the royal supremacy by denying it was subject to democratic ratification, and attempted to enhance the status and authority of the clergy, chiefly via the *iure divino* argument for episcopacy but also by actively promoting clericalism and sacerdotalism.⁴³ But Cosin's arguments, though often sharing some of the assumptions of his fellow conformists, were clearly unique. Nothing like the *Apologie* had ever been attempted before in English history — a full-scale defence of ecclesiastical jurisdiction — but the flood of puritan treatises in the late 1580s and early 1590s lambasting ecclesiastical courts as repressive and illegal had necessitated a powerful response. While the religious arguments of the presbyterians were being scrupulously dealt with by other conformist polemicists, it was not until Cosin's *Apologie* was published that the high commission received a systematic (and badly needed) defence.

The significance of Cosin's *Apologie* in the religious debate of the 1590s can hardly be underestimated. Cosin managed to resuscitate the forgotten prestige of English canon law by showing that it was the equal of secular law, a parallel jurisprudence not repugnant to the prerogative of the monarch or the laws of the realm but an extension of the royal supremacy. The ramifications of the suggestion that common law was only one system among equals were to be rediscovered in 1628 during the debate over the Petition of Right.⁴⁴ Ever since the act confirming the Submission of the Clergy in 1534 (25 Henry VIII c. 19) when it was agreed that canon law was defective and in need of serious revision, Christopher St. German's implicit thesis that common law was superior to canon law had been generally received. The 'fall' of the canon law at the break with Rome and its subsequent failure to be amended seemed to confirm that it, along with its relative, civil law, were hopelessly 'Romish' and 'continental' and that common law was the only legal system suitably adapted for protestant England. The depths to which morale of ecclesiastical officers sank in the decades between the 1530s and the 1570s, evidenced by low levels of litigation in ecclesiastical courts, sloppy or inefficient record-

⁴³ Lake, *Anglicans and Puritans?*, 97-101; Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 114; Champion, *Pillars of priestcraft*.

⁴⁴ See Glenn Burgess, *The politics of the Ancient Constitution: an introduction to English political thought, 1603-1642* (London, 1992) 120, 194-9; Margaret A. Judson, *The crisis of the constitution: an essay in constitutional and political thought in England, 1603-1645* (second edition; London, 1988) 242-8; 257-62; John Guy, 'The origins of the Petition of Right reconsidered', *Historical Journal* 25 (1982), 289-312.

keeping, and a grim state of suspense about the future of the church, was a somber reflection on the apparent insignificance of canon law in England.⁴⁵

None of this aspect of ecclesiastical jurisdiction — the legitimacy of canon law — was addressed by other conformist polemicists. They generally rested their cases on the supposed theological errors inherent in presbyterianism and the divine right of episcopacy, but Cosin approached the problem differently. He reminded his adversaries that Tudor parliaments had always referred to the ‘queen’s ecclesiastical laws’ in discussing the government of the church. What else could this mean but that the canon laws which remained in operation were as legitimate as the temporal?

For if her Maiesties Supreme Royall auctoritie and power Ecclesiasticall granted by commission to others be as highly vested in her crowne as is her Temporall: then will it bee probably gathered, both of them being in their seuerall kindes supreme, and the exercise of them committed ouer to others vnder the great seale; that the one of them is not to be abridged, restrained, or controlled by the other.⁴⁶

In the process of reviving the authority and prestige of canon law Cosin had a definite goal in mind, which was to use this powerful conception of restored spiritual regency to justify the more controversial proceedings of the high commission, particularly the despised *ex officio* oath, which was the linchpin in the commission’s power to police the church. In doing this he had an extremely difficult task. As we noted in the last chapter, the legality of the *ex officio* oath in the 1590s is not a cut-and-dried issue, and in fact several historians are disagreed about whether the oath was legal, and at least a few are undecided.⁴⁷ Quintilian had observed that the deft usage of reason did not always produce consensus among wise men, and that there were cases when reason could be on both sides of a question, an opinion echoed by Tudor rhetoricians such as Henry Peacham.⁴⁸ It was thus necessary for Cosin, especially in defending the oath, to transcend the academic debate of precedents and laws for which he had been

⁴⁵ Helmholz, *Roman canon law*, 28, 42-3.

⁴⁶ Cosin, *Apologie*, III, 225-6. The same point is made in a different context in part III, 85.

⁴⁷ After much research and cogitation on the issue I am still inclined to agree with Professor Helmholz: ‘it was far from clear which side had the stronger argument’. Helmholz, *Roman canon law*, 157.

⁴⁸ Skinner, *Reason and rhetoric*, 97-8.

trained and to cultivate a fresh style of polemic that he had begun to develop in the *Conspiracie for pretended reformation*.

This new polemical style was the rhetoric of order and dominion, the 'reason of state'. In his 1589 *Of Reason of State*, Giovanni Botero had claimed that the most important duty of a prince was to become acquainted with the 'means appropriate to establish, maintain and enlarge a state' as well as to enrich its reputation. Botero's emphasis had not only drifted away from the renaissance standard of virtuous counsel of the prince but away from a call to the citizenry as well. The new reason of state was a language only for the few. The old politics had been deemed fit for the citizen of a republic, for the masses themselves. Renaissance civil philosophers, building on Plato and Aristotle, had encouraged all men to take part in the communal task of creating the just society. But the new language of reason of state only applied to the cabinet of the state, that is, the prince and his court. After all, the state did not belong to every man and woman but every man and woman to the state.⁴⁹

The English author, Anthony Nixon, similarly encouraged the 'reason of state' as a means of preserving the well-ordered commonwealth. In *The dignitie of man*, he warned that states were corrupted by 'the increase of private commoditie', that is, the petty concerns of private citizens at the expense of 'the publique profit' of the realm — which language closely resembled both Cosin's as well as Richard Hooker's.⁵⁰ Sir Francis Bacon also wrote in favour of state preservation in stark terms, suggesting that 'Necessity (the great god of the powerful), and peril of state, and communion of interest' were crucial weapons in the arsenal of any prince and ought to be used in times of need.⁵¹ Professors Peltonen and Skinner have established this trend toward authoritarian devices of statesmanship in the last decade of the sixteenth century and the first decade of the seventeenth by studying influential works on rhetoric and government, and a common theme emerges from this period. Those who offered

⁴⁹ Should ordinary citizens seek to involve themselves in matters of the state, they would destroy it, returning it to a republic. Viroli, *Reason of state*, 252-7, 259.

⁵⁰ When considering the machinery of state, Hooker addressed the danger of private reason usurping the public good of the commonwealth. See discussion of Hooker below in the conclusion, 264. Peltonen, *Classical humanism*, 154-6; Anthony Nixon, *The dignitie of man* (1612) (STC² 18584). Nixon's work was based partly on the 1605 anonymous publication, *Organon reipublicae: or the north starre of pollicie, by which the course of a common-wealth may be directed*.

⁵¹ Francis Bacon, *The advancement of learning* (STC² 1164); Francis Bacon, *Essays* (STC² 1137); Francis Bacon, *De sapientia veterum* (STC² 1127); Francis Bacon, *De dignitate et augmentis* (STC² 1108); Francis Bacon, *Novum organum* (STC² 1162); Peltonen, *Classical humanism*, 157-8.

advice to princes and rulers were increasingly advocating techniques of state preservation based on a dual standard of ethics. The traditional standard of private morality and justice continued to apply to private individuals, they argued, but in matters of state what might seem unjust in a private context might be justifiable in a public sense if the necessity of the state required it. Official government policies sanctioned by the new 'reason of state' included dissimulation, secrecy, even viciousness.⁵² These machiavellian overtones were undoubtedly made more palatable in light of the tense religious, social, and economic atmosphere of the 1590s we have been describing.

This shift in focus towards the prince and his court and away from the citizenry, a literary theme which noticeably flourished at the beginning of James' reign, marked an important change in officially-sanctioned English political literature. St. German printed his *Treatise concerning the division* in blackletter English for the express purpose of taking his message to the street, in fact hoping to gain the attention of Parliament. Morice similarly played to popular sentiment in *A briefe treatise of oathes*, hoping to exploit anticlerical prejudices and adopt the famous polemical styles of John Foxe and William Tyndale. Cosin's *Apologie*, on the other hand, was not pitched at the masses for the purpose of winning hearts and minds to the conformist way of thinking. It was a receding voice, spoken in defence of the exercise of ecclesiastical power even as the doors to public discourse on the subject were being closed by Whitgift. The *Apologie* was intended to be the last word.

Like Sir Thomas More who tried to profit from St. German's popular appeals by equating them with an affront to authority,⁵³ Cosin copiously portrayed his adversaries as variously misguided or seditious but universally dangerous, and he held up the lawfully instituted power of ecclesiastical jurisdiction as the only possible bulwark against a steadily rising tide of faction and chaos in the church. The preservation of the state as well as the church became Cosin's capital objective in the *Apologie*, and he often referred to 'the public interest' as an inseparable representation of the two.⁵⁴ The *ex officio* oath was ultimately

⁵² Peltonen, *Classical humanism*, 157-8.

⁵³ More, *Works*, ed. Trapp, IX, 99-100; More, *Works*, X, ed. Guy, Keen, Miller, McCugan, lxxxiii-lxxxiv.

⁵⁴ Examples of this throughout the *Apologie* abound. Cosin usually employed the term in conjunction with punishment, hence, 'the Common wealth hath interest to haue offences punished' (II, 46); 'the publike interest which the Church or Common welth hath, to haue crimes punished' (II, 81). The phrase and concept of the *rei publicae interest* was derived

justified in terms that comprised a strange synthesis of Cosin's rhetorical techniques of 'fatherly correction'⁵⁵ and the more forceful 'reason of state':

[The oath] may be vrged by a Magistrate and ought not to be denied by the subiect, where a common good to an whole Christian state is sought, and the parties owne reformation, by due correction and punishment, concurring besides with the lawes of the Lande that requireth this parte of obedience in all subiects.⁵⁶

The only alternatives were to allow his opponents their intended reforms: to determine the law based on conscience, thus allowing each man the opportunity to judge his own judges. To teach people to resist the laws ordained⁵⁷ in England would be very dangerous and wrong, and thus instructing men to resist an oath established and administered by the authorities could not be right. If men felt free to resist laws on the basis of 'conscience', no end of mischief would ensue.⁵⁸ Hence the alternative to the present state of ecclesiastical jurisdiction, as seen by Cosin, was the unravelling of all authority in short order. There were no middle ways.

Cicero and Quintilian had conceded that it was sometimes necessary to distract people from the truth in order to win them to the truth. Likewise, the English humanist Thomas Wilson confessed the occasional necessity of exaggeration and hyping the importance of the matter. George Puttenham and Francis Bacon made similar statements (Bacon favoured the word 'dissimulation'). Despite the ethical dubiousness of such approaches, Tudor rhetoricians agreed they must be used sometimes if we are to succeed in our arguments.⁵⁹ As we reflected in the last chapter, both Cosin and Morice availed themselves of these techniques, but outright fibs on both sides were rare; like most polemicists they employed subtle methods of redescription which were at once more subversive and believable than fabrications. Though

from the civil lawyer Julius Clarus who had borrowed it from medieval canon law tradition where the phrase was common currency. See Brundage, *Medieval canon law*, 145-6, as well as Richard M. Fraher, 'The theoretical justification for the new criminal law of the high Middle Ages: "rei publicae interest, ne crimina remaneant impunita"', *University of Illinois Law Review* (1984) 577-95.

⁵⁵ See above, 204, for a discussion of this technique used by Cosin.

⁵⁶ In this declaration there was both the gentleness of the priest and the iron rod of the ruler. Cosin, *Apologie*, III, 151.

⁵⁷ Cosin's use of the term 'ordained' is interesting; 'accepted into and affirmed' would have been a more accurate (but less useful) description of canon law, since its origin was entirely foreign to England.

⁵⁸ Cosin, *Apologie*, III, 132-3, 202.

⁵⁹ Peltonen, *Classical humanism*, 157; Skinner, *Reason and rhetoric*, 134.

there had been numerous warnings down the ages, not just from rhetoricians but also from poets and dramatists, against the moral dangers of rhetorical redescription, no suitable moral alternative seemed to have presented itself to late sixteenth century writers in political controversy.⁶⁰ Cosin and other conformists were consequently given to redescribing presbyterians as far more radical and dangerous than they actually were. Some, even Hooker, went so far as to doubt their civic loyalty, and recently Hooker scholars have found this unfair, since the vast majority of presbyterians had fully assimilated into Elizabethan society and were law-abiding and loyal citizens.⁶¹

But Cosin must also be implicated, considering the disparity between the moderate puritan tracts he used as sources and his spurious portrayal of them in the *Apologie* as extremist.⁶² Nevertheless, Cosin was more adept at rhetoric than Morice, not merely in light of his characterization of puritans as a threat to the state but also because of his slick treatment of English history, particularly the 1530s. Renaissance education stressed that the greatest way to become wise was to study moral philosophy and history, and Tudor and early Stuart humanists were particularly sold on the study of history as an indispensable tool in obtaining wisdom.⁶³ Both Morice and Cosin were aware of this, and they appealed to their own personal versions of English history which differed at crucial points, one of those being the 1530s and the significance of the Submission of the Clergy. It is necessary then to review some of the events of that decade which had a particular bearing on our present debate.

The second book of St. German's *Doctor and student* appeared in 1530, arguing more forcefully than the first that most of the jurisdiction currently exercised by the church ultimately related to property and rightfully belonged to temporal courts. The only obedience owed to the church was in matters of faith. He suggested that canon law be picked over and revised so that it only took cognisance of matters which it could rightly claim as its own

⁶⁰ Skinner, *Reason and rhetoric*, 157-63, 179-80.

⁶¹ Richard Hooker, *Of the laws of ecclesiastical polity*, ed. Arthur Stephen McGrade (Cambridge, 1989) xvii.

⁶² LPL, MS 2004 contains several puritan tracts (mostly against the *ex officio* oath) which do not really amount to a compendium of seditious or radical ideas. Even the tracts representing the opinions of Cartwright (fos. 49-59), Humphrey Fenn (fo. 83r-v), and Edmund Snape (fos. 85-7) did not appeal to radical legal principles such as 'conscience' but employed only standard, commonly-held puritan arguments against the oath, such as that it was contrary to scripture or Magna Carta. Cosin misrepresented the moderate nature of these essays by making them seem seditious.

⁶³ Skinner, *Reason and rhetoric*, 81-3; Peltonen, *Classical humanism*, 197-8.

jurisdiction. The implication was impossible to ignore: St. German was saying that common law was superior to canon law.⁶⁴ His strange anticlerical stance made his writings useful to Henry VIII, 'for it was becoming clear that the quarrel with Rome might be pressed to extremes, and the true extent of ecclesiastical authority was now a party question.'⁶⁵

Henry declared himself above canon law and to make his claim stick it was necessary to subvert the influence and prestige of canon law.⁶⁶ This was achieved by one of his most fluent polemicists, Edward Foxe, in his *De vera differentia* (1534).⁶⁷ Foxe argued (not unlike St. German) that scripture had never intended to furnish canon law with any jurisdictional authority other than control over merely sacramental matters. Furthermore, he described canon law as custom, suggesting it had grown through centuries of misguided reverence into law.⁶⁸ By destroying the potency of canon law (and abolishing the study of it at universities), Henry inevitably dampened its reputation in England. But although he had subdued the canon law, he never bothered to rehabilitate it or reform it, and the failure to enact the *Reformatio legum ecclesiasticarum* in the 1550s, as we have seen, seemed to indicate that canon law could not be assimilated into an England that had broken from Rome.⁶⁹

Despite this unpromising backdrop Cosin carefully reworked the history of the 1530s, airbrushing the 'fall' of canon law by ignoring the negative implications behind the Supplication against the Ordinaries and Submission of the Clergy. He argued a materialist interpretation of the Act for the Submission of the Clergy (25 Henry VIII c. 19), suggesting that it meant no more than it literally said: that those canons which were repugnant to the laws and prerogatives of the prince should be abolished. Those canons which were not repugnant, he asserted, remained in force with as much authority and antiquity as ever.⁷⁰ Cosin was careful to accept the assumptions behind the Acts of Appeals and Supremacy, both of which

⁶⁴ *Doctor and student*, ed. Plucknett and Barton, xx-xxv, 242-3, 309; see also St. German, *New Additions*, reprinted in *Doctor and student*, ed. Plucknett and Barton, 317-40.

⁶⁵ *Doctor and student*, ed. Plucknett and Barton, xii.

⁶⁶ Professor Brundage has observed, 'Critics of the Roman church frequently identified what they most disliked about the medieval religious establishment with canon law and canonists.' It was thus understandable that Luther chose to burn a copy of the canon law text *Liber extra* in 1520 to show his disgust with Roman authority. Brundage, *Medieval canon law*, 182.

⁶⁷ STC² 11218 or 11220 (1548 English translation by Henry Lord Stafford).

⁶⁸ Guy, 'Thomas Cromwell', *Reassessing*, ed. Fox and Guy, 170-1.

⁶⁹ For discussion of the *Reformatio legum ecclesiasticarum*, see above, 7-8.

⁷⁰ Cosin, *Apologie*, I, 2-4.

had been based on the *Collectanea satis copiosa*, though he turned them to a new purpose. They asserted that the king's *imperium* was antecedent to the jurisdiction of the clergy and that any privileges the clergy possessed had been lent them in the past by English kings and could be discontinued at will.⁷¹

Cosin extended this concept into Elizabeth's reign. The enabling clause of the Elizabethan Act of Supremacy which authorised the queen to empower the high commission via letters patent was the centerpiece of this argument, since it granted full authority to the high commission to order and govern the church according to the tenor of the letters patent. This demonstrated that ecclesiastical jurisdiction was now grafted on to the royal supremacy by statute (another paradox?). And since Elizabeth in her letters patent had chosen to give ecclesiastical courts wide latitude in their methods of enforcing religious uniformity, it stood to reason that the vehicle chosen by ecclesiastical courts to govern the church, canon law, was vindicated from ignominy. The queen had empowered the clergy by means of her royal supremacy and therefore they enforced the canon law *by right*.⁷² This theory was a far cry from anything yet heard by either puritans or conformists. Cosin's unabashed defence of canon law might indicate that the divine right argument for episcopacy being propagated by the likes of Bridges and Saravia masked an insecurity on the part of conformists about the status of canon law which they concealed with heavy-handed, dogmatised scriptural exegesis and pretensions to an almost absurdly theocratic absolutism. But Cosin's brand of royal supremacy exuded a confidence in three things: the unbroken legitimacy of canon law, the equality of all systems of law under the crown, and a hands-off royal endorsement of the high commission's methods of policing the church.

Cosin's redefinition of the Submission of the Clergy and the validity of canon law was a new chapter in the conformist campaign against puritanism in the last decade of Elizabeth's reign. Stated simply, Cosin put ecclesiastical jurisdiction back on the map, and in doing so he

⁷¹ Guy, 'The Henrician age', *Varieties*, ed. Pocock, 35-7; see also Graham Nicholson, 'The nature and function of historical argument in the English Reformation', Cambridge University thesis, 1977, *passim* but especially 175-273.

⁷² Like Hooker's theory of popular consent which asserted that kings ascended to power by the will of the people and yet once that will was expressed the king ruled by right, Cosin ascribed 'rights' to the high commission which were established once the queen's consent had been secured through her letters patent. For a discussion of Hooker's limited notion of 'consent', see Lake, *Anglicans and puritans?*, 203-5.

justified the controversial aspects of the high commission from a legal perspective. But the *Apologie* was not talk without action. The events of the 1590s bore out all of Cosin's pretensions regarding the imperial nature of Elizabeth's supremacy and the rediscovered authority of the church to deal with disorder and schism.

Richard Beacon, the author of *Solon his follie* (1594), asserted that there were two ways to govern a commonwealth wisely. The first was to employ rhetoric persuasively and the second was to use coercion. Though he believed force should only be used when other courses failed, Beacon unhesitatingly advocated state-sponsored coercion in times of crisis and cited Machiavelli's *Discorsi* as his authority.⁷³ Though perhaps Beacon's intended context was the conquest and reformation of Ireland, there were obvious internal parallels in England, and as we have seen, other late Elizabethan and early Stuart rhetoricians were advocating similar styles of authoritarianism. Cosin's *Apologie* was quite clearly a massive exercise in rhetoric which attempted to persuade at an academic level, but it was also declaratory of government policy, and the 1590s saw the fulfillment in practice of what Cosin propounded in theory.

The high commission and other courts, particularly Star Chamber, became increasingly involved in the government's campaign against nonconformity, resulting in a centralisation of power at Lambeth and Westminster over disciplinary matters in the church. Although Cartwright's case was a particular failure for the high commission,⁷⁴ Whitgift's astute removal of the case to Star Chamber brought the desired results: though never convicted, Cartwright's loyalty to the queen was brought into considerable doubt and his reputation forever sullied.⁷⁵ His subsequent imprisonment, though brief, was a sufficient advertisement to England that if the head of the classis movement could be brought to heel, anyone could. As important as Cartwright's case was, the verdict in Robert Cawdrey's Queen's Bench case in 1595 was equally momentous.⁷⁶ The judges, citing the Act of Appeals of 1533, recorded that England

⁷³ Peltonen, *Classical humanism*, 89-90.

⁷⁴ The commission had not yet evolved a procedure to prevent defendants' refusal of the *ex officio* oath from bringing the case to a halt. In the 1590s high commission defendants could only be convicted by their confession on oath. Refusal to take the oath therefore blocked this process and the only alternative left to the commissioners was to imprison the defendant for contempt. Not until the end of the first decade of the seventeenth century was the concept of *pro confesso* applied to such contumacious defendants, thereby equating refusal of the oath with implied guilt and thus confession. See Usher, *Rise and fall*, ed. Tyler, 247 footnote 2.

⁷⁵ For a fuller discussion of Cartwright's trial, see above, 164-5.

⁷⁶ The verdict in Cawdrey's case is fully discussed above in chapter seven, 219-23.

was an empire with two estates under one head, that ecclesiastical matters were to be decided by ecclesiastical judges just as temporal matters were by temporal judges, that foreign laws were legitimate if legally accepted into the realm, and that denial of any of these things was a denial of the sovereign's prerogative. The influence of Cosin's *Apologie* in this verdict, clearly demonstrated in the last chapter, illustrates that Cosin's polemic was not only accompanied by like-minded government action, it was helping shape government policy itself.

While the temporal courts were now supporting an imperial royal supremacy and acknowledging the authority of the high commission as parallel and equal to their own, Parliament proved less yielding. In 1593 James Morice declared to the house three indignities offered to the realm by ecclesiastical judges: an intolerable inquisition (*ex officio* procedure), lawless subscription (to the prayer book, Thirty-Nine Articles, and royal supremacy), and binding absolution (the oath of purgation). He submitted two bills for consideration which would finally put an end to these abuses, and a lengthy and well-recorded debate followed.⁷⁷ James Dalton from Lincoln's Inn, a former moderate puritan who had suddenly disassociated himself from the movement in 1584-5,⁷⁸ spoke first. He denied that any of the practices of ecclesiastical courts were illegal and suggested Morice's bill was nothing more than a device to protect puritans. More importantly he foreshadowed the judges' decision in Cawdrey's case by claiming that temporal and spiritual jurisdictions were distinct from each other and that temporal authorities should not seek to interpret ecclesiastical law. He asked for the bill to be tabled, but the house greatly disapproved of his speech by coughing and spitting.⁷⁹ Sir John Wolley, a solidly conformist privy councillor, spoke next. He warned the house that the queen had forbidden them to deal in ecclesiastical matters and seconded Dalton's motion to table the bill. The third speech was by William Lewin, himself a high commissioner. He condemned the bill, defended episcopacy,⁸⁰ justified inquisition and *ex officio* procedure, and condemned accusation as odious and dangerous.⁸¹

⁷⁷ The three main sources for this debate are Cambridge, Baker MS 40; BL, Cotton MS, Titus F.II, fos. 30v-34r; and LPL, MS 2019, fos. 3r-5v.

⁷⁸ Hasler, *Commons*, II, 8.

⁷⁹ Cambridge, Baker MS 40, fo. 61r.

⁸⁰ Lewin's approach is interesting in that nothing in Morice's speech or bills questioned the place of bishops or suggested presbyterian reform. It was typical conformist rhetoric of the 1590s in that it modified the terms of debate, causing the

Sir Francis Knollys was the first member to speak in favour of the bill.⁸² He approved of Morice's speech and clarified that the Essex lawyer had only spoken against abuses among the clergy, not the clergy themselves. He also sent a sharp rejoinder to commissioner Lewin that 'your Lawes', if they were repugnant to the laws of the realm, 'must stoope & submytt themselves.'⁸³ A certain Stephens spoke next and defended the bill but wished the queen to be consulted first,⁸⁴ and he was followed by Henry Finch. Finch, a presbyterian who had written at least five books on religion, noted that while innovation had been forbidden by the queen, 'renovation' had not. He spoke forcefully against Lewin's speech, citing Magna Carta and arguing that the antiquity of inquisition was not sufficient to justify it. The *ex officio* oath, he maintained, was contrary to the laws of the realm.⁸⁵ Finally Sir Robert Cecil spoke, commending Morice's character and his motivations but wished the queen to see the bills before they were read. He also disliked 'the newe contention (as hee toke it) betwene Dr Lewyn and Mr Fynche'.⁸⁶ And so the debate ended.

'Yet the house called for the reading of the bill.' The speaker, Sir Edward Coke, reckoned that the dispute had been lengthy and that no time was left to read the bill which was eight pages in length. He asked if the bill should be committed to some privy councillors, but he was advised that it was the custom of the house to have a bill kept safe until it was read. When Coke suggested that the bill be submitted to some privy councillors who were members

struggle to be seen in terms of a defence of the established government of the church against 'innovators' who wished to tear it down.

⁸¹ Cambridge, Baker MS 40, fo. 61r-v; LPL, MS 2019, fo. 3v. Lewin's dislike of the accusatorial method is highly reminiscent of chapter four of part II of the *Apologie*. Since the second edition of Cosin's *Apologie* appeared in print in March, 1593, it is likely that Lewin, being one of Cosin's colleagues, might have seen a pre-press manuscript of it.

⁸² The author of the account in Titus F.II inadvertently confused the order of the speeches, putting Knollys' before Lewin's. BL, Cotton MS, Titus F.II, fo. 31v.

⁸³ Cambridge, Baker MS 40, fo. 61v. Knollys was a long-time puritan on most issues, but he perhaps had a unique perspective on canon law being the only man in that parliament who had sat in the reformation Parliament of 1534.

⁸⁴ This was probably Richard Stephens from Newport-by-Launceston, a puritan Middle Temple lawyer rather than Thomas Stephens of Weymouth and Melcombe, though he was also from the Middle Temple. At this time Morice was master of the bench of the Middle Temple and was likely held in high esteem by his juniors. LPL, MS 2019, fo. 4r; Hasler, *Commons*, III, 444-5.

⁸⁵ Wilfrid Prest, *The Rise of the Barristers: A social history of the English bar, 1590-1640* (Oxford, 1986) 219; LPL, MS 2019, fo. 4r; BL, Cotton MS, Titus F.II, fos. 32v-33r; Cambridge, Baker MS 40, fo. 61v. Morice's account (Cambridge, Baker MS 40) placed Finch's speech immediately after Lewin's and immediately before Knollys', but the other two diarists place Finch after Knollys.

⁸⁶ Quotation from LPL, MS 2019, fo. 4r; see also BL, Cotton MS, Titus F.II, 33v; Cambridge, Baker MS 40, fo. 61v.

of the house, he was again opposed. At this point he promised to keep the bill himself and return it to the house the next day for reading.⁸⁷

The significance of this debate is that it was the last attempt by the laity in the 1590s to perpetuate the subjection of ecclesiastical jurisdiction to the temporal, a condition which had been accepted *de facto* since the 1530s with the exception of the Marian years (1553-8). Disguised behind the pleas for 'renovation' and 'reformation of abuses', Morice's bills were no less than an effort to undercut the high commission's power to enforce the oath. By extension this would have meant that the queen could not by letters patent empower the commissioners to govern the church according to their discretion. Thus, in seeking to strip the commission this power, Morice was also seeking to limit the queen's supremacy without looking like he was limiting the queen's supremacy. But the true implications of the bill were recognised by Whitgift who had been apprised of the debate in Parliament by one of his agents.⁸⁸ Not intending to repeat his personal appearance in Parliament as in 1585, he immediately wrote to the queen begging her to intercede and quash the bill. Though he had personally admitted to Morice in the spring of 1591 that he knew nothing about canon law,⁸⁹ Whitgift now alleged that the *ex officio* oath had been used in England 'ever sens your maiestie came to the crowne and long before tyme owte of mynde' and that its continued use by ecclesiastical courts was imperative. Using a style similar to Cosin's in the *Apologie*, Whitgift beseeched the queen in terms that described civil tumult and chaos.⁹⁰

Elizabeth reacted remarkably swiftly, summoning speaker Coke to court only two hours after Parliament had adjourned for the day with orders to bring the bill.⁹¹ Upon his arrival Coke was relieved of Morice's bill and given in return a letter from the queen to deliver to Parliament at its next session the following day. The purpose of this parliament, the queen

⁸⁷ LPL, MS 2019, fos. 4r-5r. One should appreciate the sensitivity of Coke's position here. Cawdrey's case was still being considered by the judges of Queen's Bench at this time with no verdict having been reached, yet Morice was hoping to buttress his own client's case by sponsoring legislation that would prove his contention: that the high commission's *ex officio* procedures were contrary to the laws of the realm. Coke surely was aware of this tangled business, and his attempt to involve the privy council in the consideration of the bill must have seemed the safest option.

⁸⁸ This agent is the anonymous author of the tract in Lambeth, MS 2019, fos. 3r-5v.

⁸⁹ This occurred when they met in London in February, 1591. PRO, SP12/238, doc. 75, fo. 107r.

⁹⁰ BL, Additional MS 28571, fo. 172r. Whitgift had by this time undoubtedly read the full text of the *Apologie* which he had commanded his former pupil to write in the first place. See Cosin's references to Whitgift's patronage in the *Apologie*, I, sig. A4r-v; I, 124; and III, 241.

⁹¹ BL, Cotton MS, Titus F.II, fo. 33v.

proclaimed in the letter, 'was not to make any newe Lawes, or to spend any tyme about other matters' but only to determine the best ways to assure the safety of the realm and the queen's person. And seeing that she had authority to summon and dissolve Parliament at will, 'so had shee likewise power to apoynt vnto them vpon what causes they were to treat of, and meant when those causes were dispatched, to dissolue the meeting and send them home to their contreyes'.⁹² Elizabeth's determination this time around was a contrast even with the rambunctious Parliaments of 1584 and 1586 and showed that she was not only determined to prevent the laity from interfering with her royal supremacy, but that any attempt by temporal assemblies to subjugate ecclesiastical jurisdiction was out of the question.

Morice was summoned before the privy council the next morning and chastised (though somewhat lightly due to Burghley's presence) and put under house arrest at Sir John Fortescue's house. There he remained for two months in relative comfort but without liberty, until he was finally released in April. Morice was finally summoned by Burghley and Lord Keeper Buckhurst, one of Whitgift's allies, and told that it was the queen's pleasure that he be released, 'thinckinge me notwithstandinge any thinge past, to be both a honest man & a good Subiect.' He was, however, admonished that if in the future 'ought were amisse in the Church or Comon wealth', he should not appeal to 'the Comon sort' but should bring his grievance directly to the queen.⁹³ He did not live to see another parliament, and in the last four years of his life he received no preferment though he petitioned Burghley, protesting his good faith and distinguished career.⁹⁴

Sir Robert Beale had also been removed from Parliament by the queen due to his troublesome opposition to the subsidy bill. Thus the sessions continued without Morice or Beale, and Nicholas Fuller and Henry Finch (both from the puritan-friendly Gray's Inn) tried to carry the puritans' banner in their absence.⁹⁵ But there was little hope. In the Parliament of 1584 the privy councillors Sir Francis Knollys and Sir Walter Mildmay had taken active roles in the Lords, supporting puritan plans for reform of the church, giving some measure of

⁹² LPL, MS 2019, fo. 5r.

⁹³ Cambridge, Baker MS 40, 130-2.

⁹⁴ BL, Lansdowne MS 82, doc. 68.

⁹⁵ Hamilton, *Shakespeare*, 62-3.

authority to the proposals, but no such picture emerged in 1593. Mildmay was dead, Knollys was silent after the crown expropriated Morice's bill, Fuller's reputation had been tarnished by representing Cartwright in the Star Chamber case, and Finch's presbyterianism was all too widely known. Two acts, one against recusants and the other against sectaries (both engineered by the bishops in the upper house), further strengthened the crown's position — at the expense of what Morice would have called 'libertie'.

The first, called 'An act against popish recusants', specifically allowed suspects to be administered an oath *ex officio* to answer truly whether they were jesuits or not.⁹⁶ The second statute punished those who degraded the queen's authority in ecclesiastical matters by imprisonment without bail.⁹⁷ Persistent offenders were to be forced into exile or hanged if they would not abjure the realm or if they returned unlawfully. (The ostensible impetus of this second bill, entitled 'To retayne the quenes subjects in obedience', was the hanging of the separatist John Penry and the imprisonment of his entire congregation.) The Lords passed the bill first, but the Commons would have none of it. The next morning two radical puritans who had been condemned to die and then given a reprieve, Henry Barrow and John Greenwood, were hanged as a message from the crown that it would like to see the bill passed. It finally passed in an amended form 'by earnest labouring of those who sought to satisfy the bishops' humours', but the amended version still included the penalty against persons speaking against the queen's authority in ecclesiastical causes and was thus materially unchanged.⁹⁸

The practical effect of this second bill was that nonconformists were treated harshly with long imprisonments and no trial.⁹⁹ The 1593 Parliament was thus an unmitigated disaster for the puritans and an unexpected one, but it was a stunning victory for the new breed of conformists. Not only had the specific reforms plotted by the puritans been put down, they were powerfully reminded of the consequences of meddling in ecclesiastical affairs. The puritans had finally forced the question of whether the church could be legislated through Parliament, whether common law was to be the favoured son to whom the inheritance of

⁹⁶ PRO, SP12/244, doc. 108.

⁹⁷ Neale, *Parliaments, 1584-1601*, 293-4.

⁹⁸ PRO, SP12/244, doc. 124.

⁹⁹ Hamilton, *Shakespeare*, 50.

protestant England would belong. The resounding 'no' returned by Elizabeth marked the beginning of a rebuilding of the clerical estate that has often been attributed to James I.

The key events of the early 1590s that we have mapped out thus far: Cartwright's defeat in Star Chamber in 1592, the decision in Cawdrey's case in 1595, and the Parliament of 1593 all demonstrate critical victories for the new-style conformists and a marked shift towards an imperial royal supremacy reminiscent of Henry VIII's. Thus Cosin's *Apologie*, while providing a rhetoric that defended ecclesiastical jurisdiction based on the 'reason of state', was accompanied by important political episodes which were either influenced by the *Apologie* or else were aligned with its claims, in effect, validating the conception of the royal supremacy as expounded in the *Apologie*.¹⁰⁰ The deaths of the moderate puritan privy councillors Leicester, Walsingham, Warwick (Leicester's brother), and Mildway between 1588 and 1590 certainly hastened the collapse of organised puritan political pressure,¹⁰¹ but the lapse into obscurity of Morice, Beale, and Cartwright after their release from confinement showed that even the pluckiest puritans no longer had any stomach for the fight. Conformism in its revitalised incarnation remained on the offensive throughout the decade. New canons in 1597 and 1604 empowered the bishops to impose the oath of supremacy, subscription to the Thirty-Nine Articles, and wearing of the surplice. In the Parliament of 1597 there were minor complaints against the *ex officio* oath but no bills were drawn up to disallow it. In the 1601 parliament there were no complaints at all.

William Barlow, who had paid for Cosin's education, is the only chronicler of the third session of the Hampton Court Conference in January, 1604 to have detailed how James discoursed about the power of the high commission with some of his lords. The question of the *ex officio* oath was debated but James announced that he was in favour of it completely. There was also discussion of extending the power of fining and imprisonment to bishops as well as commissioners and of extending the bishops' jurisdiction, while limiting the commission only to serious ecclesiastical offences. Nothing came of these ideas, though, and

¹⁰⁰ These things provide further evidence of Professor Tyacke's recent assertion of 'serious religious tensions' between the break with Rome and 1630, a claim denied by modern revisionist Anglican historians. See Tyacke, 'Anglican attitudes', *Journal of British Studies*, 35 (April, 1996), 139-67, especially 144-5.

¹⁰¹ Collinson, *Elizabethan puritan movement*, 387, 444.

there is no evidence that the commission was reformed in any way at all — the letters patent of 1605 were an exact word-for-word copy of the 1601 patent but with an increase in membership.¹⁰²

There were fresh attempts by the commission in 1604 to root out and punish puritan ministers. But the puritans sought an ally in the common law courts by playing upon their resentment of the high commission and they developed a system of obstruction which frustrated the commission's jurisdiction. The puritans were able to get prohibitions, writs of *habeas corpus*, or writs of trespass which had the effect of annulling their deprivations by the commission.¹⁰³ When the government finally noticed that the puritans were 'working the system' in an organized fashion, some of these ministers were called to account in Star Chamber. In the end, the high commission was exonerated and found completely justified in its proceedings. The Star Chamber judges held (quoting Usher) that 'the king...possessed "the Supream Ecclesiasticall Power which he hath delegated to the Commissioners whereby they had the power of Deprivation by the Canon Law of the Realm". The Act of Supremacy conveyed no new power, and therefore they held it clear that "the King without Parliament might make Orders and Constitutions for the government of the Clergy".'¹⁰⁴ Both the language and the guiding principles were scarcely different from the verdict in Cawdrey's case, the only novelty being the notable addition of the phrase 'the canon law of the realm', a concept first pioneered by Cosin in the *Apologie* ten years earlier.

Later in 1604 Convocation published new canons for the church (heartily approved by James) but the parliament of that year, which met immediately afterward, refused to approve them.¹⁰⁵ Both the Commons and Lords had to be stopped from considering bills which would have applied the penalties of *praemunire* to the clergy for ordaining canons without the consent of Parliament — further evidence that Cosin's desire for a potent, revitalised clergy was becoming a reality.¹⁰⁶ In 1610 Parliament issued a 'Petition of Grievances' to James, the

¹⁰² Usher, *Rise and fall*, ed. Tyler, 164-6.

¹⁰³ The high commission complained in the early years of James that there were more prohibitions in the last twenty years than there had been between then and the Norman conquest. BL, Cotton MS, F.1, fos. 107-58.

¹⁰⁴ Usher, *Rise and fall*, ed. Tyler, 167.

¹⁰⁵ J.P. Kenyon, *The Stuart constitution, 1603-1688* (second edition; Cambridge, 1986) 113.

¹⁰⁶ See John Morrill's essay, 'A British patriarchy? Ecclesiastical imperialism under the early Stuarts', *Essays in honor of Patrick Collinson*, ed. Anthony Fletcher and Peter Roberts (Cambridge, 1994) 209-37.

second article of which criticised the high commission. It asked for a 'convenient' remedy, but the letters patent issued by James in 1611 were hardly different. One final conference was held in 1611 between the common law judges and the bishops to discuss the question of the commission's authority, but again James was not convinced any changes needed to be made, and none were.¹⁰⁷

One remarkable feature of the last decade of Elizabeth's reign and the first decade of James' is the apparently seamless transition from one supreme head of the church to the next. In general James merely continued Elizabeth's practice of preventing Parliament from discussing ecclesiastical matters as well as allowing the high commission to govern the church freely. Like Elizabeth, James had high ideas about his own royal supremacy. He insinuated that anyone who had grievances against the high commission ought to approach him directly with their complaint rather than seek to undermine the commission's authority (which was really *his* authority) through parliamentary legislation or common law judicial activism. In protecting their absolute prerogative to regulate the church through whatever channels they wished, Elizabeth emphasized the unimpeachability of her letters patent while James offered to justify his ecclesiastical polity verbally and in person.¹⁰⁸ In this respect it could be argued that the last decade of Elizabeth's reign bore a closer resemblance to the first decade of James' reign than to the first three decades of her own.

Another interesting aspect is how the influence of Richard Cosin spanned the latter years of Elizabeth and the early years of the Stuarts and played a decisive role in rehabilitating the status and confidence of English divines. We have seen how Cosin's *Apologie* helped to shape political discussion and events in the 1590s, but what was Cosin's particular contribution to the status of the clergy and how did this contribution overflow into the Stuart period? Cosin's entire theory of ecclesiastical authority was ingeniously summarised in the following quotation from the *Apologie*:

¹⁰⁷ Levy, *Fifth Amendment*, 203, 214; Usher, *Rise and fall*, ed. Tyler, 205-7.

¹⁰⁸ John Guy, 'The "imperial crown" and the liberty of the subject', Bonnelyn Kunze and Dwight Brautigam, *Court, country, and culture: essays on early modern British history in honor of Perez Zagorin* (Rochester, N.Y.; 1992) 73-4.

And are not Ecclesiasticall persons nowe parte of the Queenes people? Are not the Liberties and Franchises that bee giuen and confirmed vnto them by the goodnesse of Princes for holding plea in certaine matters the vsages of this Realme? Are not the receiued Lawes, which lawfully they may practise, termed Ecclesiasticall Lawes of this Realme, no lesse then temporall be? And is not the Prerogatiue royall, in and for causes Ecclesiasticall as high, and as rightfully settled in the Prince and incident to her Highnesse Crowne and Regalitie as the same is for temporall power and authoritie?¹⁰⁹

Three key assumptions are apparent in the passage. First, Cosin accepted the standard politico-religious interpretation of the break with Rome: that the English sovereign was by right head of the Church of England. Second, that subsidiary authority in the church was derived directly from the sovereign's royal prerogative. Third, that ecclesiastical jurisdiction, being derived as directly from the crown as the temporal, was *equal* in all respects to the temporal. The 'receiued Lawes, which lawfully they may practise' meant the canon law, though a canon law severed from its papal origin and 'customised' for use in England. In expounding this view of the church, Cosin could not be successfully labelled 'popish' by his opponents even though he invested English canon law with extraordinary power. Except during Mary's reign, never since the break with Rome had any English cleric attempted to equate canon law with common law, but Cosin showed that the relative superiority of rival systems of law was not ultimately measured by reason, scripture, or tradition, but by the sovereign's determination of the utility of those law systems to maintain peace and stability in the realm. Elizabeth had given Whitgift and the high commission full sanction to use canon law to govern the church just as the temporal justices and courts were authorised to govern civil life by the common law. To deny that she could do this was to deny her supremacy.¹¹⁰ Hence Morice's and Beale's claims that the canon law should bow down to common law at all points of contradiction betrayed a fundamental misunderstanding of the royal prerogative.

The implications of Cosin's argument were far-reaching both for the status of ecclesiastical jurisdiction as well as for the clergy themselves. The increasingly audacious

¹⁰⁹ Cosin, *Apologie*, III, 87.

¹¹⁰ '...if this authoritie that is hereby impugned be (in trueth) a preheminence vnited and annexed to the Imperiall crowne...let him vse good aduisement how it may stand with such his oath and allegiance.' Cosin *Apologie*, I, 102. This was the same section of the *Apologie* paraphrased by the judges in Cawdrey's Queen's Bench case.

involvement of the laity in matters of church government in the last two decades of the sixteenth century had been predicated on a combination of Calvinist ideals of further reformation and a notion of the superiority of common law to canon law. The collapse of presbyterian political organisation in the 1590s through *ex officio* prosecutions in the church courts eliminated one of these pillars. Cosin's *Apologie*, with its novel emphasis on the equality of all systems of law in operation under the queen destroyed the other. English churchmen no longer needed to dodge the awkward question of that embarrassing legal stepchild, canon law. Even *iure divino* episcopacy, an uncertain theological device, was technically rendered unnecessary by Cosin's more compelling legal device, the continuing validity of canon law. The *Apologie* as well as the events of the 1590s had affirmed that the clergy's jurisdiction was one edge of a two-edged sword with which the sovereign ruled England, and for the first time in decades there was cause to feel important.

It is now rather easy to see the link between Cosin's influence in the 1590s and the revitalisation of the clergy that occurred under James. Andrew Foster has suggested that this process began in 1603, but his own arguments actually show that the real starting point was the last decade of Elizabeth.¹¹¹ It is quite true, however, that under James English divines enjoyed heightened prestige at court, increased pay, and began to be seen as a separate estate or *societas* for the first time since Mary's reign. They became regular counsellors to the king¹¹² (James named six bishops to the privy council), and were appointed justices of the peace. He restored the position of the clergy as interpreters of the laws of England and 'spoke openly of their rights and place in society.'¹¹³

Though Cosin died in 1597 he was seen by his immediate Stuart successors as an unequalled defender of the established church: *The polity of the church of England*¹¹⁴ was

¹¹¹ As evidence of this clerical renaissance Foster specifically cited conformist works by Bilson in 1585, Saravia in 1593, Bancroft in 1592, and Sutcliffe in 1590, all of which are well before 1603. He also noted that the huge range of grievances voiced in the Long Parliament of 1640 against the clergy and their ever-growing jurisdiction could be traced back to the 1590s. Andrew Foster, 'The clerical estate revitalised', *Early Stuart church*, ed. Fincham, 145-51, 159.

¹¹² Though junior members of the clergy at the Hampton Court Conference in 1604, Cosin's friends Lancelot Andrewes and William Barlow were invited, and there seems every reason to believe that Cosin, the author of the *Polity of the Church of England* which was presented to James in the same year, would have attended as well, had he lived that long. Tyacke, *Anticalvinists*, 20.

¹¹³ Fincham, 'Introduction', *Early Stuart church*, ed. Fincham, 11; Foster, 'The clerical estate revitalised', *Early Stuart church*, ed. Fincham, 141.

¹¹⁴ STC² 5824.

published for the first time in 1604 for presentation to James I, he was cited in high commission procedural manuals,¹¹⁵ and he was credited with reviving the reputation of civil law. Thomas Ridley, writing in 1607, paid tribute to ‘that famous man of worthy memory *Doctor Cosin*’ and ‘his learned Apologie for certeine proceedings in Ecclesiasticall Courts’.¹¹⁶ In 1632 Calibute Downing specifically praised Cosin as one of the pioneering civil lawyers who laboured in the days when ‘they knew they had but few friends, and themselues small in number...when there was such scarcitie of Civilians that the Vniversities tooke little notice of their degrees or profession, or the Courts of their practise.’ He further reported that although the study of civil law had been waning for many years, ‘now wee haue a most happy and hopefull increase’.¹¹⁷ Jacobean civil lawyers did not become interested primarily in common law as they might have done if common law had continued its march for judicial domination after 1593. They remained interested in and informed by continental canon and civil law, even recent glosses from the latter sixteenth century.¹¹⁸ Although James began a conscientious campaign to renew the fortunes of his clergy, the legal assumptions that justified that rehabilitation had been mapped out in the last decade of Elizabeth’s reign by Richard Cosin.

¹¹⁵ LPL, MS 2085, 80; Helmholz, *Roman canon law*, 131; Owen, *Medieval canon law*, 53.

¹¹⁶ Thomas Ridley, *A view of the civile and ecclesiastical law*, 109.

¹¹⁷ Calibute Downing, *A discourse of the state ecclesiasticall*, 30-1.

¹¹⁸ Helmholz, *Roman canon law*, 154-5.

Conclusion

In the last chapter we placed Cosin in the context of the final decade of Elizabeth's reign and examined his role in reshaping the royal supremacy and the ascendancy of the new-style conformist movement in the church. The conclusion of this thesis will step back again and view Cosin in the framework of the entire Elizabethan and early Stuart churches, placing his life and influence in a wider context of history.

In the wake of the accession of Queen Elizabeth there was a palpable need for the English church to justify itself to the outside world. What was immediately necessary was a defence of the Elizabethan Settlement against the church of Rome, which had just been driven out of England for the second time. In his famous sermon at Paul's Cross on 26 November 1559, Bishop John Jewel of Salisbury challenged anyone to prove to him that the early church had accepted the authority of the pope, administered the bread without the wine, believed in transubstantiation, or adhered to a number of other doctrines that the catholic church had affirmed at the Council of Trent as necessary for salvation. If anyone could prove these things, he offered to recant and become catholic. Jewel justified his challenge on the assumption that the church of Rome had, through its corruption, surrendered its right to be considered the true church. The church of England on the other hand had gained the right to be considered the true church, since it had shed the abuses of the catholic church and returned to the true faith. Jewel's so-called 'challenge sermon', which was heard by many members of court and which he was twice compelled by the government to repeat (once at Paul's Cross and once at court), had put the ball in the church of Rome's court, so to speak, hoping to force catholic polemicists onto the defensive. Before Jewel it had been the other way around, with English protestants reflexively taking up a defensive position against an attacking and skeptical catholic church. Jewel shifted the terms of the debate, claiming protestantism as the status quo that did not need to be defended.¹

The Elizabethan government recognised in Jewel someone who could provide a learned justification of the English church and sought to enlist him to publish this defence to the world. With the encouragement and supervision of William Cecil, Jewel produced *An apology*

¹ Collinson, *Elizabethan essays*, 230-1; White, *Predestination*, 70-1; J.E. Booty, *John Jewel as apologist of the church of England* (London, 1963) 15-9.

of the church of England, which was published in Latin in 1562. In the next year an English edition appeared, translated by Ann, Lady Bacon. Jewel's starting point in the *Apology* was the criticism of the English clergy brought by catholics that it was a heretical splinter of the true church. He denied the charges, saying they proceeded either from malice or ignorance and in the second chapter provided a positive case for the church of England by stating its doctrine rather than arguing the points of catholics. This affirmative position was the core of the *Apology*. In the later chapters he came to the aid of the continental reformed churches, defending them against catholic charges of schism. The sixth and final chapter justified England's supervision of her own reformation as well as her refusal to participate in the Council of Trent.² The massive success of Jewel's *Apology* is shown in the ecstatic reactions of Archbishop Parker and Edmund Grindal, the bishop of London. Grindal proposed that articles of religion for the English church be drawn from the *Apology*. Parker suggested the entire *Apology* simply be attached at the end of the articles.³

Jewel knew that the effect of the *Apology* on his Roman critics would be doubly powerful if England was united in matters of religion. He therefore refused to entertain notions of division within the established church. It was one, united faith and must remain that way. Jewel had liturgical and doctrinal affinities which, had he lived another decade, might have classified him as a moderate puritan, and he was thus a uniting factor between the establishment (Parker, Grindal, Cecil) and the early puritans.⁴ But he was shocked at the Genevan-style reform efforts he witnessed in the 1571 Parliament. Thus when he and Whitgift emerged as allies against the puritan programs for reform, the puritans were taken aback at his apparently sudden change of direction.⁵

Though the *Apology* provided a compelling argument for the autonomy of the church of England, it offered no ultimate solution to the problem of doctrinal authority. Indeed,

² Guy, *Tudor England*, 302-3; MacCulloch, *Later Reformation*, 35-6; Collinson, *Elizabethan essays*, 160, 224, 230-1; White, *Predestination*, 71-2; John Jewel, *An apology of the Church of England*, ed. J.E. Booty (Ithaca, N.Y.: 1963)

³ White, *Predestination*, 67; W.M. Southgate, *John Jewel and the problem of doctrinal authority* (Harvard, 1962) 55-62.

⁴ In a paper no longer extant entitled *Certain frivolous objections against the government of the Church of England* Jewel argued that the puritans should not destroy a whole church for the sake of a few minor flaws. This paper was included anonymously by Whitgift in his *An answer to a certain libel intituled, An admonition* (1572) (STC² 10847). In Cartwright's reply to Whitgift he recognised Jewel as the author of the paper and, though disagreeing, treated him with great respect for his 'learning and gravity'. Southgate, *Jewel*, 102.

⁵ Neale, *Parliaments, 1559-1581*, 180-1, 185, 191-207..

Jewel could not have formulated one without falling into the errors he accused the Roman church of committing.⁶ As a rule, however, Jewel appealed to the early church fathers as the best authorities that could be called upon; they should be our chief guide in interpreting the Bible. The church fathers themselves had relied heavily on reason in exegeting scripture, hence Jewel made reason his standard by which to judge all matters of doctrinal authority. This eminently rational approach permitted him to accept no authorities as infallible, not even the church fathers themselves.

The first major clash in the Elizabethan church concerned the wearing of vestments. Some protestants objected to the white surplice worn by ministers and wished it to be replaced by the black gown of Geneva. Archbishop Matthew Parker, who (significantly) was not a Marian exile, published his determination on the matter of vestments in a tract of 1566 entitled the 'Advertisements'. Ministers refusing to abide by the church's tradition of wearing both the surplice and the cap were either suspended or deprived of their ministry.⁷ This controversy passed without any serious fractures in the settlement of the church. But by the 1570s cracks were beginning to appear. The Admonition Controversy, a series of debates held at Cambridge between Thomas Cartwright and John Whitgift early in that decade over the nature of ecclesiastical government, as well as the appearance of a presbyterian force in the parliament of 1571 foreshadowed contentious days ahead.⁸ The suppression of the Northern Rising, a catholic rebellion sponsored by the conservative earls of Westmorland and Northumberland, as well as the anti-catholic acts of 1571⁹ and the execution of the duke of Norfolk in 1572 all reflected unified protestant defiance of Rome and catholicism, but as the decade progressed and the catholic threat dwindled, English protestant thought turned inward.¹⁰

⁶ Jewel, *Apology*, ed. Booty, 93.

⁷ Collinson, *Elizabeth essays*, 238, 240-1; MacCulloch, *Later Reformation*, 33-5.

⁸ See especially Lake, *Anglicans and puritans?*, 13-70 for a good summary of the Admonition Controversy; see Neale, *Parliaments, 1559-1581*, 191-207, for an account of the religious demands of the Commons in 1571.

⁹ The Treasons Act (13 Elizabeth c. 1) and the Act against Bulls from Rome (13 Elizabeth c. 2) were both a response to the papal bull *Regnans in excelsis* which excommunicated Elizabeth and put all of England under an interdict. Elton, *Constitution*, 73-7, 428-31.

¹⁰ MacCulloch, *Later Reformation*, 36-8.

Moderate puritans such as William Whitaker, who attacked Rome vociferously yet had surprisingly little to say about the details of the Elizabethan Settlement at home, were common enough in the 1560s and 1570s but became passé as Thomas Cartwright and other Cambridge-based presbyterians began to assert that the English church was only half reformed because it had not thrown off the popish government of bishops.¹¹ Suddenly the focus had become the church of England's reformed status measured not against Rome but against other reformed churches, especially Geneva. Cartwright became the *de facto* head of the presbyterian movement in England in the 1570s, but he eschewed separatism as a means of achieving the discipline. Separatists, said Cartwright, confused what was desirable in a church with what was absolutely necessary. Comparing the English church to a wife, he noted that disobedience in a wife did not mean that she was no wife at all, and therefore the English church, though defective in many points, was still a true church.¹²

But the presbyterian movement, indeed the entire movement for further reformation in England, was becoming crowded with unlearned men, men that had little in common with professional, university-educated men such as Cartwright, Laurence Chaderton, and Walter Travers. This populist wing of puritanism cared little about a 'learned ministry' and had no desire to appease the government with a show of loyalty to the church of England. With the advent of Whitgift's subscription campaign in 1583-4,¹³ puritan opposition to the established church became enflamed across the board, from the moderate puritan gentry on down. Whitgift was intentionally trying to drive a wedge between the radical and moderate wings of the puritan movement, and he was ultimately successful. Radicals and separatists became isolated by their refusal to reform, and as it turned out, they were small in number. But the moderate puritans, those who subscribed but still favoured the puritan bills in the parliaments of 1584 and 1586, were both numerous and well-supported at court. As we noted in the last chapter, however, conformism was evolving very strangely during these years, resisting both radical puritanism as well as the moderate puritanism of the gentry and privy councillors. Men such as Richard Bancroft were convinced that puritanism in general was a slippery slide where

¹¹ Lake, *Moderate puritans*, 55-65.

¹² Lake, *Moderate puritans*, 80-3.

¹³ See above, 230.

men could drift from being respectable moderates to hardened separatists; the leftward career of Francis Johnson had illustrated this very point.¹⁴

Thus, by the 1590s conformism had travelled a great distance from the days of Bishop Jewel. The death of Mary Queen of Scots, the passing of important anti-recusant laws in 1571, 1581, 1585, and 1593,¹⁵ the defeat of the Spanish Armada, and the likely accession of James had all reduced the fear of spontaneous catholic uprising or foreign invasion by catholic powers. The complete victory of protestantism in England seemed assured. Jewel could hardly have wished for more. But the corrosive internal battles of the Vestiarian Controversy, Admonition Controversy, and the proposals for presbyterian reform in the 1580s, were new dangers to conformism which required new responses. In addition, poor harvests in the 1590s, the fear of social disruption, and the sudden onslaught of opposition to ecclesiastical jurisdiction from the common lawyers intensified the need for authority and stability.

It is interesting to compare the responses of two new-style conformists, Richard Cosin and Richard Hooker, to this crisis of authority in the 1590s. Hooker, who received patronage from Jewel while at Oxford and held him in extremely high esteem (as did Lancelot Andrewes),¹⁶ still hoped for a consensus in religion so that there would be agreement in the law,¹⁷ and he hoped this could be achieved through reason. Reason was thus one of the fundamental links between Jewel and Hooker. They both had high expectations for the role of reason in the debate over the English church. Their rationalism differed, though, as Jewel's was implied by the example of his own arguments, but Hooker's was explicit, borrowed from the church fathers and given a life of its own.¹⁸ Hooker's doctrine of reason was also more complicated than Jewel's and must be seriously qualified.

Though tenaciously insisting that reason and persuasion might still bring unity, Hooker turned to law as the ultimate arbiter for the settlement of religion more decidedly than

¹⁴ Lake, *Moderate puritans*, 77-8; Bancroft, *A suruay of the pretended holy discipline*, passim.

¹⁵ 1571: Treasons Act (13 Elizabeth c. 1), Act against Bulls from Rome (13 Elizabeth c. 2); 1581: Act against Reconciliation to Rome (23 Elizabeth c. 1); 1585: Act against Jesuits and Seminary Priests (27 Elizabeth c. 2); 1593: Act against Popish Recusants (35 Elizabeth c. 2).

¹⁶ John Jewel, *Apology*, ed. Boorty, xliii.

¹⁷ Hooker defined the word 'law' as 'any kind of rule or canon, whereby actions are framed.' Hooker, *Laws*, ed. McGrade, I/3/1, 58.

¹⁸ Hooker's debt to Jewel was considerable, as was his reliance on the writings of Whitgift and Saravia. Cargill Thompson, *Studies in the Reformation: Luther to Hooker* (London, 1980) 143.

historians have been willing to admit. For this reason he has been seen by recent scholars primarily as a polemical writer rather than nobly ‘disinterested’, as the majority of Hooker scholars have seen him through the ages. Hooker’s reputation first began to be subject to a passionately whiggish interpretation in the eighteenth century. In the nineteenth century the leader of the Oxford Movement, John Keble, portrayed Hooker as the balanced mainstay against radical puritanism. Throughout most of the twentieth century he has been seen to embody the Anglican values of scripture, tradition, and reason. All of these centuries have seen Hooker not only in glowing terms but also as an essentially unpolemical writer above the fray of politics.¹⁹ To be sure, Hooker rooted his *Laws of ecclesiastical polity* in a vast array of ancient sources and this has earned him a conservative label, but he was in fact quite innovative. References to the ancients were obligatory in Hooker’s time, as philosophers needed to be seen as being grounded in the wisdom of the ages, but Hooker synthesized his views in an extremely novel way and should thus not be seen exclusively as a conservative thinker.²⁰ One easily reaches the same conclusions about Cosin’s *Apologie*, which is loaded with quotations and arguments from ancient and medieval thinkers, yet the selection and arrangement of Cosin’s citations were designed to serve a foregone conclusion he had settled upon before ever putting pen to paper — a defence of the high commission’s jurisdiction, specifically its right to exact the *ex officio* oath — which was arguably a judicially liberal position.

Hooker’s emphasis on reason has been overstated by historians. He did not accept scripture as self-authenticating. If it were, he maintained, then all men would receive it. It was the authority of God’s church (exercised through law) which was needed to verify that scripture is indeed the word of God. Though Jewel and Hooker shared a belief in rationalism — that rational men, coming together in positions of authority were capable of understanding God’s will and obeying it — Hooker especially emphasized collective reason, the reason of men in the established institutions of society rather than individual men. He knew that individuals, if left to their fancies, would bring the state and church into anarchy. The consent of the realm was embodied in the decisions of the civil and ecclesiastical magistrates, yet the

¹⁹ Hooker, *Laws*, ed. McGrade, xiv.

²⁰ Lake, *Anglicans and puritans?*, 225-6.

puritans had still refused to rest in the wisdom of these magistrates. They adhered to *private* reason, said Hooker, that conflicted with the public reason of the realm.²¹

Both Hooker's confidence in lawfully instituted authorities and his denigration of private reason closely mirrored Cosin's views in the *Apologie*. To the puritans' charge that it was ruthless and cruel to force men to divulge their secret thoughts and to discover their private conversations at home or with friends, Cosin declared that 'the law of their loue and felowship and *ius hospitale* towards such their priuate friends as haue receiued them; is by them more esteemed & accounted of; then either the publike lawes and statutes of the realme, or then their duetie to the Christian Magistrate, and to their countrey'.²² Thus reason was not as monolithic or universal for Hooker and Cosin as it had been for Jewel. They saw two levels of reason that existed in political discourse, one of which was superior. The concept of collective reason was, in practical terms, little different from Botero's 'reason of state' and applied only to the consensus of magistrates since, as Cosin put it, 'the law presumeth more stronglie for their integrities' than for the private reason of men who held no authority.²³ Unlike Jewel, Hooker and Cosin (particularly Cosin) accepted the irrevocable split in the church. Hooker still entertained elevated notions of the possibilities of reason as Jewel had, but his definitions were so qualified that in the end it was but a diversionary tactic: final authority was to be decided not by reason but by the authorities to whom power had been given by the consent of the realm.²⁴ Hooker's and Cosin's 'way forward' — through law rather than consensus — was an admission that faction was irreversible, and it showed the difference of thirty years of church politics.

²¹ Lake, *Anglicans and puritans?*, 154, 213. Despite Hooker's supposed conservatism, his warning to individual men against their involvement in the government of the state or to pretensions to 'reason' was identical to the civil philosophies of contemporary Italian humanists such as Giovanfrancesco Lottini and Giovanni Botero. See Viroli, *Reason of state*, 241-57; also above, 239.

²² Cosin, *Apologie*, III, 211.

²³ Cosin, *Apologie*, II, 59.

²⁴ Hooker believed that although laws were immediately made by the king, all laws ultimately derived from the people. 'Which laws being made amongst us are not by any of us so taken or interpreted as if they did receive their force from power which the prince doth communicate unto the parliament or to any other court under him but from power, which the whole body of this realm being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them...' This should not be confused, however, with monarchical republicanism. There was an insurance policy for the royal supremacy: once consent had been given by the realm (that is, by parliament and convocation) the king's supremacy was unimpeachable. Hooker, *Laws*, ed. McGrade, VIII/vi/11, 194-5.

In the 1590s the English church was under as serious attack from within as it had been from without in 1559. In light of the puritan threat to order, the need to solve once and for all the question of doctrinal authority was urgent. Or was it? Hooker dispensed with the need for a complete solution by embracing Jewel's ideas of tradition and reason as working tools for defining and explaining doctrine. This idea was actually rather appropriate since Elizabeth was secular-minded and did not really care about the question of doctrinal authority. She was content with any theory as long as it did not threaten her supremacy over the church. For this reason she could not accept the Roman or Genevan models of absolute doctrinal authority as they both subverted the royal prerogative to the power of the church.²⁵ Cosin's primary objective in writing the *Apologie* proved Hooker's contention: the threat to the church, Cosin argued, was not posed by the unanswered question of doctrinal authority but by forces which determined to lay waste to the royal supremacy and make off with the queen's scepter.²⁶ The question was not who *defined* doctrine but who *enforced* it. Cosin and Hooker concurred that the power to enforce doctrine lay with the established church, but what was the established church? After all, Thomas Cartwright had claimed that the established church included all believers and that there could be no head of the church but Christ alone.²⁷

Hooker's definition of the established church was again almost identical to Cosin's. Both invested Parliament and Convocation with supreme authority (including the king's person present in both).²⁸ Since Hooker believed that a truly godly commonwealth proceeded from true religion, he affirmed that the clergy should have a major voice in the affairs of the state. This could be achieved partially by Parliament, which he saw as quasi-ecclesiastical since it contained lords spiritual, and also by Convocation. The collective reason of these law-making bodies along with the person of the king, therefore, defined supremacy in the church. In emphasizing the power of clerical authority, Hooker consciously sought to augment the clergy's professional status. Like Cosin, he wished to see English clergymen treated with the dignity accorded to statesmen. Every other profession in England, he asserted, was allowed to

²⁵ Southgate, *Jewel*, 118.

²⁶ Cosin, *Apologie*, I, 4.

²⁷ W.J.T. Kirby, *Richard Hooker's doctrine of the royal supremacy* (New York, 1990) 92-4.

²⁸ Hooker, *Laus*, ed. McGrade, VIII/vi/11, 192; Cosin, *Polity*, table XVI.

reward its greater members with ornaments, honoraries, and various outward signs of greatness. Why could this not be extended to the clergy? If it were not, people from other nations would note that England did not esteem its clergy highly.²⁹

The question of doctrinal authority was a false idol, easily ignored as long as the political power of the church to enforce conformity to the prevailing doctrine could be specifically identified and preserved. In this respect Hooker and Cosin shared an understanding of the practical way the church operated in the last decade of the Elizabeth's reign. The need to defend the church against Roman critics was for all intents and purposes greatly reduced from the 1560s as we have already noted. And the explosion of internal protestant nonconformity in the 1580s and 1590s had turned the church's sights within, focusing attention on the need for conformity to some sort of statutory church polity. Hooker and Cosin provided a defence of the jurisdictional authority of the church, arming the clergy in the process with a renewed image of prestige and authority with which to combat the forces of puritan anticlericalism and presbyterianism.

We have thus far placed Cosin within the context of the Elizabethan church, briefly sketching his intellectual proximity to Jewel and Hooker and examining how the collapse of unity in the English church in the second half of the sixteenth century necessitated that Jewel's hope for a unified church of England should give way to the legalistic approaches of Cosin and Hooker. Now we must turn to the seventeenth century and address Cosin's relationship to the early Stuart church. Professor Lake has posited that Lancelot Andrewes is the 'ideological link' between Hooker and William Laud.³⁰ It will be useful for our purposes, however, to draw an additional, if parallel link, placing Andrewes as the intellectual stepping stone between Cosin and Laud. This proposed connection is not based on liturgy or theology, however, but on law and the power of the church to enforce conformity. Religious doctrine in early Stuart England is a crowded field already, but few have pursued the topic from a legal rather than liturgical standpoint. A study of the early Stuart church from a legal perspective seems eminently justified, considering how the focal point of authority in the church shifted irrevocably in the

²⁹ Lake, *Anglicans and puritans?*, 217-9.

³⁰ Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 114.

late sixteenth century away from reason and towards law, which as we have shown, was precipitated by the collapse of unity and the real threat of disorder.

The connection between Andrewes and Cosin is both personal and professional. Andrewes arrived at Pembroke Hall, Cambridge in 1571, eight years after Cosin and shortly after Cartwright had been deprived of his fellowship. Cosin had taken his B.A. in 1566 and his M.A. in 1569, receiving his LL.D. in 1580. He was thus involved in Cambridge life throughout the 1570s while Andrewes was a student. Andrewes took his B.A. in 1575 and his M.A. in 1578, and it seems likely from later evidence that they may have been acquainted with each other as early as the 1570s. Around 1587 Andrewes became chaplain to Whitgift as well as Queen Elizabeth.³¹ The inclusion of a lecture Andrewes gave in defence of the *ex officio* oath in the second printing of Cosin's *Apologie* in 1593 makes a Cambridge connection seem more tenable.³²

Andrewes' frequent business in London in the 1590s also would have brought him into regular contact with Cosin. In May, 1591 the privy council sent a letter to Whitgift requesting that the 'Deane of Paule's and Doctor Andrewes' be sent to confer with the nonconformists who were soon to be executed, Newman, Udal, and Hodgekins, to try 'by al good and earnest perswasions to drawe them to...an acknowledgment of their default'.³³ On March 30, 1593 during the intense parliamentary sessions which had seen the censure of Morice for trying to regulate the high commission, Andrewes preached a sermon in London before Queen Elizabeth marked by 'over-elaborated eulogy of the crown' in which we can see a glimpse of his future sermon style during the reign of James which was much imitated by other Jacobean court preachers.³⁴ In November of 1594 the queen asked Whitgift to 'inquire into the state of all the Ecclesiastical Courts in the Province of Canterbury.' The men Whitgift chose for this job were Lancelot Andrewes, Richard Fletcher (bishop of Worcester), and the high commissioner Edward Stanhope. These men were charged by Whitgift to administer an oath

³¹ Unfortunately there is almost no information about Andrewes' chaplaincy to Elizabeth. Paul A. Welsby, *Lancelot Andrewes 1555-1626* (London, 1958) 32-3, 67.

³² *Quaestionis: nunquid per ius diuinum magistratui liceat a reo iusiurandum exigere? & id, quatenus ac quousque liceat?* ('A determination whether by divine law magistrates may exact an oath of defendants and if so, how far?'). This short treatise appears at the end of Cosin's 1593 *Apologie*, at pages 243-55.

³³ *APC*, ed. Dascent, XXI, 125, 130.

³⁴ Welsby, *Andrewes*, 67-8.

to several high ecclesiastical officers 'faithfully [to] demean themselves towards the Queen's Majesty and her subjects, in the execution of their several offices and places'. Among the officials who were to take the oath of allegiance was Richard Cosin, the vicar-general of Canterbury. This investigation 'served much to stop the mouths of such as clamoured so much against the bishops for their Commissaries, Officials, etc., and the pretended abuses of their courts'.³⁵ Finally, Andrewes delivered the oration at Cosin's funeral in December, 1597.³⁶ These events show a strong personal connection between Cosin and Andrewes, but what were the similarities in their beliefs?

Perhaps most interesting is the inclusion of Andrewes' *Determination* at the end of Cosin's 1593 *Apologie*. In July, 1591 Andrewes read a theological treatise on the lawfulness of the *ex officio* oath in the divinity school at Pembroke Hall where he had become master in 1589.³⁷ Andrewes' lecture was intended to be a repartée against Cartwright and his associates who had published a defence of their refusal to take the *ex officio* oath before the high commission. In the *Determination* Andrewes maintained that magistrates possessed authority over both the souls and bodies of their subjects, concluding that administering an oath was legal as long as three conditions were fulfilled: first, that by the oath only the truth was required; second, that the defendant was only compelled to answer according to his own knowledge; and third, that the proceedings were deliberate rather than hurried. Andrewes' lecture put an unhappy end to any lingering hopes the Cambridge puritans might have had that he shared their sympathies.³⁸ In the *Determination* we find an exalted view of ecclesiastical jurisdiction nearly identical to Cosin's which complemented the *Apologie* nicely by providing a second opinion from someone whom the puritans had tentatively hoped might be an ally.

But before we discuss further the similarities between Cosin and Andrewes, we should be clear about what issues might have set them apart. Cosin was almost certainly a Calvinist. We

³⁵ Welsby, *Andrewes*, 67.

³⁶ Cooper, *Athenae Cantabrigiensis*, II, 230.

³⁷ There is an English edition of Andrewes' *Determination* in HMC, Hastings MSS, series 78, #2. Welsby, *Andrewes*, 41-2.

³⁸ H.R. Trevor-Roper, *Archbishop Laud, 1573-1645* (London, 1962), 29; Welsby, *Andrewes*, 39, 41.

know that Whitgift was clearly a Calvinist as the Lambeth Articles, printed in 1595, testify.³⁹ Christopher Barker, who published dozens of conformist tracts as well as both editions of Cosin's *Apologie*, also printed most of the English editions of the Genevan Bible in the latter sixteenth century. In fact, Calvinists arguably dominated the English church clear through the second decade of the seventeenth century.⁴⁰ Another difference between Cosin and Andrewes concerned their personal involvement in public controversy. When it came to 'the cut and thrust of temporal and ecclesiastical affairs', Andrewes' timid personality is well-documented. Though he was always ready to dispute with his theological opponents in sermons and writings, he was not known for his boldness in criminal prosecution in church courts.⁴¹ Very little is known of Andrewes' involvement in the high commission, although it seems he attended sessions regularly. In May, 1606 he reported to the Lords on the *ex officio* oath, substituting for the bishop of Bath and Wells who was sick that day.⁴² In 1621 he was said to be often employed by the commission.⁴³ But given these likely differences between Cosin's and Andrewes' theological views and their respective involvement in controversial politics, on the issue of authority in the church, there was solid agreement. Andrewes saw the puritans as fundamentally schismatic in the end and a threat to the peace of the church. He complained that they had reduced Christianity to gnosticism, so many ideas, disputations, and narratives, making religion nothing more than information to be affirmed. He disliked popularity of any sort in religion and associated presbyterianism with it. Irreverence against God or the monarch were in his mind the same, and one would inevitably lead to the other in due course.⁴⁴

Professor Lake has noted that issues of *adiaphora*, which had in the late Tudor and early Stuart church been left for the most part to the discretion of local bishops, were gradually (during the reign of James) found by the conformists to be issues that the church possessed the

³⁹ Tyacke, *Anticalvinists*, 30-1. Dr. White's assertion that the Lambeth Articles were intended to check both Calvinists and Anticalvinists is unconvincing mainly because of his definition of Calvinism. White, *Predestination*, xii, 101-9; Tyacke, 'Anglican attitudes', *Journal of British Studies*, 35 (April, 1996), 145-6.

⁴⁰ Tyacke, *Anticalvinists*, 3-7; Tyacke, 'Anglican attitudes', *Journal of British Studies*, 35 (April, 1996), 139-67.

⁴¹ 'In the Council, on the High Commission, in the House of Lords, at the Hampton Court Conference, he is a shadowy presence, and his thoughts are inscrutable.' As a privy councillor (beginning 1616) Andrewes, 'spake and meddled little in civil and temporal affairs, being out of his profession and element: but in causes that any way concerned the Church and his calling he spake fully and home to the purpose, that he made all know that he understood and could speak when it concerned him'. Welsby, *Andrewes*, 13, 228; Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 132.

⁴² *Journal of the House of Lords*, II, 428.

⁴³ Welsby, *Andrewes*, 221.

⁴⁴ Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 115-7, 119-20.

authority to regulate for the sake of unity. Under Elizabeth there had been a comparatively wide latitude of choice offered to ministers regarding worship styles although the outer limit of tolerance had to be drawn more than once, such as during the controversies over vestments and church government when Archbishops Parker and Whitgift enforced the strict will of the queen.⁴⁵ But the early Stuart church, influenced heavily by Lancelot Andrewes, experimented with ideas of more rigidly defined liturgy and ceremony, mandated by earthly ecclesiastical government for the sake of harmony. For example, it was deemed that people should kneel for the eucharist because it was reverent to do so, and also because it was an outward show of the unity of the church, (as opposed to some standing, some walking around, and some kneeling).⁴⁶ If the church were authorised to enforce right doctrine, it was surely a lesser, easier matter to enforce liturgy and external ceremony. The church had, in effect, finally found its 'law feet'.

Given Andrewes' and Cosin's views on authority, it was perhaps natural that they viewed the clergy as the particular recipients of this power over things indifferent. Andrewes' theology was completely Christo-centric; Christ was the beginning and end of all things, which was useful for working James I into the symbolic role of Christ as shepherd of the flock, a model which was also conveniently applied to bishops.⁴⁷ He also claimed that assurance of salvation was based on spiritual fruit, but that the determination of what constituted 'fruit' did not lay with the laity but with the clergy. These were the seeds of a notion that Andrewes eventually developed into a serious doctrine of priestly absolution.⁴⁸ Cosin's successful vindication of ecclesiastical jurisdiction in the 1590s, especially his thesis that canon law was equal (under the sovereign) to common law, made possible Andrewes' theological vindication of the church's power to regulate things indifferent. If canon law had never lost its potency and all ecclesiastical jurisdiction was united and annexed to the crown's prerogative, a justification of Andrewes' doctrines of priestly absolution and regulation of *adiaphora* was hardly needed.

⁴⁵ See also Professor Guy's 'The Henrician age', *Varieties*, ed. Pocock, 41-3.

⁴⁶ Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 129-30.

⁴⁷ Nicholas Lossky, *Lancelot Andrewes the Preacher (1555-1626)* (Oxford, 1991) 331.

⁴⁸ Lake, 'Avant-garde conformity', *Mental world*, ed. Peck, 123.

Having illustrated the personal and intellectual connection between Cosin and Andrewes, it is now a simpler step to connect Andrewes with William Laud. The significance of Andrewes in the Stuart church and his intellectual relation to Archbishop Laud has already been well established by Professors Lake, Fincham, and others. Andrewes seems to have been a favourite of John Buckeridge's and Laud's mainly because of his anti-Calvinist views, his high regard for the eucharist, and his belief in the availability of salvation to all. Laud particularly liked Andrewes' analytical process and made every attempt to copy it.⁴⁹ Laud defended his forceful policies regarding the beauty of holiness, the substitution of altars for tables, and even his campaign against sabbatarianism on the simple basis that the church had power to adjudicate policy over matters of *adiaphora*.⁵⁰ He sought power particularly for the purpose of ordering the church of England as he felt it should be ordered. Like Cosin and Andrewes, he envisioned a wealthier and more independent church, free from restrictions imposed by the laity,⁵¹ and to do this he recognised that the church's best hope lay in closer relations with the crown. Laud carried Whitgift's insistence on conformity a step further: there should be a national liturgy which would bind England together. This would include the sacrament as the centerpiece of worship rather than preaching, which had done more to divide the church than to unite it.⁵²

But although Laud augmented the aims of Whitgift, the real jurisdictional base of his authority was hardly changed from that of the Elizabethan church. Charles I's letters patent did not deviate much in wording or substance from the Jacobean patents, though under Laud the commission did increase its visitatorial functions. It is true, however, that the high commission in the 1630s was in practice more powerful than earlier commissions. The letters patent for the commission of 1625 enumerated powers almost identical to the letters patent of 1601, but the membership and quorum of the commission was significantly increased. This swell in numbers created the possibility of a subdivision of the commissioners into more

⁴⁹ Trevor-Roper, *Laud*, 45.

⁵⁰ Peter Lake, 'The laudian style: order, uniformity and the pursuit of the beauty of holiness in the 1630s', *Early Stuart church*, ed. Fincham, 183.

⁵¹ Laud complained in the 1630s that the church was still inextricably enveloped in common law regulations and was unlikely to be freed of them. Wilfrid R. Prest, *The rise of the barristers: a social history of the English bar 1590-1640* (Oxford, 1986) 226.

⁵² Nicholas Tyacke, 'Archbishop Laud', *Early Stuart church*, ed. Fincham, 58-9.

courts, which could sit more frequently and in more places than ever before. At the height of Laud's power, it seemed the high commission was sitting everywhere at once, yet it was still one commission, based on one issue of letters patent.⁵³ Laud used the commission as an instrument for driving 'backwardness in religion' out of England, and his order in 1634 that Cosin's *Polity* be reprinted at Oxford, showed that Cosin's vision of the hierarchy of the English church was identical to his own.

The Cosin-Andrewes-Laud connection is interesting and deserves further study, especially within the context of the church's authority to define and enforce conformity through ecclesiastical courts such as the high commission. The focus of recent historical research on early seventeenth century liturgy and theology has been most illuminating, although the legal angle of the church's jurisdiction still remains largely neglected. As I have endeavoured to show in this thesis, however, the influence and significance of Richard Cosin is a vitally important step in understanding the rehabilitation of the clerical estate during this crucial moment in the early modern English church.

⁵³ Usher, *Rise and fall*, ed. Tyler, 242-3, 331-2.

Appendix 1

Excerpts from Article VIII of the Elizabethan Act of Supremacy

(1 Elizabeth c. 1)

And that also yt may lykewise please your Highnes that it maye be established and enacted by thauctorite aforesayd, That suche Jurisdiccions Privileges Superiorities and Preheminences Spirituall and Ecclesiasticall, as by any Spirituall or Ecclesiasticall Power or Auctorite hathe heretofore bene or may lawfully be exercised or used for the Visitacion of the Ecclesiastical State and Persons, and for Reformation Order and Coreccion of the same and of all maner of Errours Heresies Scismes Abuses Offences Contemptes and Enormities, shall for ever by auctorite of this present Parliament be united and annexed to the Imperiall Crowne of this Realme; And that your Highnes...shall have full power and auctoritee by vertue of this Acte by lettre Patentes under the Greate Seale of Englande, to assigne name and auctorise...suche person or persons being naturall borne Subjectes of your Highnes...texercise use occupie and execute under your Hignes...all manner of Jurisdiccions Privileges and Preheminences in any wise touching or concerning any Spirituall or Ecclesiasticall Jurisdiccion within theis your Realmes of Englande Ireland <etc.>...and to visite refourme redres order correcte and amende all such Erroures Heresies <etc.>...whatsoever, which by any maner Spirituall or Ecclesiasticall Power Auctorite or Jurisdiccion can or maye lawfullye bee refourmed ordered redressed corrected restrained or amended, to the Pleasure of Almightye God...And that suche person or persons so to bee named assigned authorised and appointed by your Hignes...shall have full Power and Auctorite by vertue of this Acte and of the said lettres patentes, under your Hignes...texercise use and execute all the Premisses according to the tenor & effecte of the said lettres Patentes; Any Mater or Cause to the contrarye in any wise notwithstanding.

- source: *Statutes of the realm*, IV, part 1, 352.

Appendix 2

Memorandum defending oaths issued by ecclesiastical commissioners, 1591(LPL, MS 2004, fo. 65r-v)

[This memorandum is written in the high commission's clerk's hand, in which many of the other documents in LPL, MS 2004 are also written.]

Of Oathes in ecclesiasticall courtes.

All matters handled in cowrtes Ecclesiasticall, are eyther for duties and rightes there to be prosecuted or for punishinge of crymes by lawe there punishable.

All oathes vsed in any cowrte ecclesiasticall, are eyther taken by the partie suinge, by the partie convented or by witnesses.

There is no controversie in the lawe ecclesiasticall, but that witnesses are to testifie by oathe, both for duties ecclesiasticall in demaunde, and towchinge their knowledge of other mens crimes punishable there.

Neither will it be denied, but that the parties themselves that sue, or be sued, are to aunswere for rights and dewties in demaunde vpon their oathes.

Therefore whether, or how farre, the parties themselves may be examined by their oathe towchinge their owne crimes punishable in a cowrte ecclesiasticall; may onely seeme doubtfull.

In this behalf wee are to consider proceedinges either by Ordinaries, or by the Q. Ma/ties commissioners or delegates; who proceed accordinge to their commission warranted by Actes of parlement.

No man may be vrged to bewraye himselfe in hidden and secrett crimes, or simplie therein to accuse him selfe.

All crimes that be *prohibita quia mala*, as Simonie, Adulterie, and such lyke; are naturallie sought by the delinquents to be kept hidden, and are admitted secretlie, beeinge workes of darknes.

These are such as are hardelie to be proved by witnesses: yet when by circumstances (once knowne abrode) they become to be vehementlie suspected and offensive to the well disposed, and daungerouse to be suffered, as beinge ill examples in a well governed common-weale, and displeasinge the ma/tie god; they are meete by enquire and all good meanes to be discovered, that they may be reformed, the partie brought to penitencie, and others discouraged from admittinge the lyke.

The suspicion and fame of crimes come to the Ordinaries eares either by manie brutes of credible persons, called *clamosa insinuatō*; or by presentment of churchwardens and sidemen, sworne to enquire diligentlie, and trulye to present (from tyme to tyme) such crimes, or y/e fames thereof.

If the presentment be not so directlie set downe (throughe their ignoraunce or otherwise) as lawe requireth to prove a fame; and yet some scandall therevpon groweth: The Ordinarie by lawe ecclesiasticall and in good discretion may examine other neighbours thereof as witnesses, towchinge their knowledges of such crime or fame, warninge y/e partie suspected to be present at the takinge of suche depositions

If the fame be proved, or the first presentment be sufficient, whereby that (w/ch was secret before) is fownde to be so publicke,

as it becomes offensive: Then y/e Ordinarie of dutie, and for the public truste reposed in him, is to proceede againste the infamed, though no other man will prosecute w/ch the lawe termeth *Proceedinge by enquire speciall ex officio, ne maleficia remanent impunita, utq provincia purgetur malis hominibus*.

If anye other man besides the Ordinarie will prosecute, makinge him selfe partie to prove y/e crime then the partie convented, albeit he must aunswere on his oathe to other articles (not principally towchinge the verie crime objected) yet by lawe he is not bownde to aunswere vpon oathe anye articles of the verie crime it selfe.

But if the Ordinarie at no mans instance, vpon the fame presented proceede *ex officio*, if y/e party denye the crime objected; then he is by lawe enioyned his purgacion. At w/ch tyme of purgacion he must directlie aunswere in cleeringe or convictinge himselfe *de veritate vel falsitate ipso criminis obiecti*, and his compurgatores are to sweare *de credulitate* (weyinge his feare of god and conversacion in former tymes) that they beleewe he hath taken a true oathe. W/ch if they all doe, then he is holden cleere, and dismissed. If he fayle in his purgacion, then (*fictione juris* he is taken to be guiltie of the crime, and to be reformed.

The reason of this diversitie after a fame proved, the lawe assigneth to be this: *lice; nemo tenetur seu prodere; tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere, et seipsum purgare*.

The reason of that grownde of lawe in this behalfe is this; because penaunces enioyned by the Ordinarie are not taken in lawe to be *poenae*, but *medicinae*, or tendinge to the reformation of the delinquent, the example of others, and satisfaction of the church offended iustlye, at his lowde conversacion: And therefore they are not to make such scruple to discover them selves after fame.

These are vndoubted growndes in the lawe ecclesiasticall; accordinge to w/ch the proceedinges in all ecclesiasticall cowrtes in this Realme haue bene vsed, tyme out of mynde. And if anye Iudge ecclesiasticall haue proceeded otherwise, such proceedinges haue alwayes bene reformatable by appellation.

dr w Aubrey	Ric: Cosin J.	Jo: lloyd
Robert fforthe		
Tho. Byng	Edw. stanhope	W. Lewyn
	Daniel D	
Ny. stywarde		

Appendix 3

Richard Cosin's *Ecclesiae Anglicanae politeia in tabulas digesta*

(*Polity of the church of England*)(STC² 5824)

manuscript found at LPL, MS 324

Cosin's *Polity* is one of the great unstudied documents of the late Elizabethan church. He compiled it in 1589 and used parts of it as an outline for constructing the arguments of the *Apologie*, but it was not published until 1604, seven years after his death. It seems that one of the primary reasons for publishing the *Polity* was to present it to James VI and I as a counter-balance to the puritan agenda unveiled at the Hampton Court Conference. The message of the *Polity* was strictly conformist and could easily be interpreted as authoritarian, which makes it likely that it would have appealed to James. The *Polity* is structured as a series of sixteen flow-charts depicting, in Latin, the hierarchy and administration of the English church. As vicar-general of Canterbury, Cosin was eminently qualified to undertake such an exacting project. He divided the polity of the church into three categories: persons, possessions, and constitutions. Though they are no less important in Cosin's overall scheme, the latter two of these three categories were able to be briefly illustrated on Tables XV and XVI respectively. The persons category, on the other hand, makes up the bulk of the *Polity*, spanning Tables I through XIV.

According to Cosin, all authority in the category of persons flowed from the prince. He names her *tanquam supremus secundum Deum gubernator* and allows that she is empowered to erect anything in ecclesiastical causes by her commandment as long as it is not repugnant to the statutes or customs of the realm. Particular powers of the monarch include those powers mentioned by statutes of the realm as well as all traditional ecclesiastical privileges restored to the crown with the Act of Supremacy of 1559. Interestingly, Cosin includes within the particular powers of the sovereign the right to collect first-fruits or annates as well as annual tithes from ecclesiastical benefices — a detail that was of great interest to the early Stuart conformists. Other particular powers of the sovereign mentioned by Cosin include

nominations, appointments, presentations, visitations, and the power to reform all abuses and errors in the church as listed in the Act of Supremacy.¹

Table II and its branches (III, IV, V, XI, XII, XIII, and XIV) involve the administration of the church by persons other than the prince, foremost among them the two archbishops of Canterbury and York, and the vicar-general and official-principal. Peppered throughout these descriptions of the higher clergy are mentions of *privilegio*, *immunitates*, *libertates*, and *praerogatiuam*, which clearly derive from Cosin's understanding of chapter one of *Magna Carta*, which he comprehended as a bulwark protecting the rights of the church against the intrusions of the state. Tables III and IV detail the ceremonial and jurisdictional duties of archbishops in general (III) and the archbishop of Canterbury in particular (IV), and many of these such as interdiction, warnings, suspension, excommunication, sequestration, and deprivation are shared with ordinary bishops (Table V). Tables XI and XII address the lowest offices of ecclesiastical administration, namely those of ministers, deacons, subdeacons, chancellors, cantors, treasurers, and lectors. Regulations concerning calendars, rubrics, and sacraments that must be observed by ministers are found on Table XIII, while Table XIV details the duties of the laity, such as being custodians of church properties, maintaining charitable lifestyles in the community and parish, and presenting scandal or wrongdoing to ecclesiastical officers.

The early chapters of part I of Cosin's *Apologie* are drawn almost verbatim from Tables VI, VII, and VIII of the *Polity*, which address voluntary and contentious jurisdiction of bishops, that is, jurisdiction which is voluntarily accepted by the party or that which is resisted by the party.² Under the heading *contentiosa iurisdictio* on Table VIII the words *publici interesse* appear with respect to criminal proceedings against defendants in which there is no private accuser, showing again that most of Cosin's key arguments in the *Apologie* originated in the *Polity*.³ One branch of contentious jurisdiction details the persons involved in the judicial process (judge, presenter or accuser, defendant, and witnesses) while another branch, which becomes Tables IX and X, examines the judicial process itself. These two tables form

¹ See Appendix 1 above, 273.

² For Cosin's incorporation of these principles into the *Apologie*, see above, 79.

³ See also above, 121; 240, footnote 54; for discussion of the significance of 'the public interest'.

much of the backbone of part II of the *Apologie*, as Cosin tracks and explains each facet of ecclesiastical cases from warnings or citations through formal contestation, judgement, and sentence. For example, Table X is devoted entirely to the topic of exceptions taken by the defendant (*exceptio contra testium*) either to the testimony of witnesses or to their eligibility as witnesses.⁴

The second main category of the polity of the church, possessions or assets, is handled entirely on Table XV. This category Cosin divides primarily into public and private assets. Included in public assets are cemetaries and, interestingly, moveable and immoveable feasts. Private church possessions are divided into those which are civil or ecclesiastical in nature, corporate or incorporate, and these include urban and country dwellings, lakes, forests, arable and cultivated land, pastures and meadows, courts, markets, estates, and benefices, among others. The third main category, detailed on the last table of the *Polity*, Table XVI, is constitutions. Cosin divided *constitutiones* into written (statutes, provincial synods, and canons) and unwritten (customs). Provincials synods and canons are further explained by Cosin as being neither repugnant to the laws, statutes, or customs of the realm nor prejudicing or diminishing the royal prerogative.

Curiously, Cosin locates *canones* twice in the *Polity*. The second occasion is on Table XVI under the category of constitutions as mentioned above, but the first mention is on Table I. Here *Canones siue leges ecclesiasticas* are prominently placed not in the category of constitutions but of persons. In fact, they are portrayed by Cosin as a branch springing from the heading *Supremam magisque, absolutam, qui dicitur primatus Regius considerandus*, which refers to the supreme dignity of the crown, the highest locus of personal authority in the church. This is perhaps the most significant statement in the entire *Polity* in that the ultimate source of canonical authority is not placed under parliamentary statute or even the customs of the realm, but under the queen herself. This fact plus the other similarities between the *Polity* and the *Apologie* already mentioned offer definitive evidence to prove that Cosin's ecclesiology as expounded in the 1593 edition of the *Apologie* was already settled in his mind

⁴ For Cosin's incorporation of these principles into the *Apologie*, see above, 113.

by 1589 and that the *Apologie* was not so much a 'thinking exercise' for Cosin as it was a declaration of a mature intellectual position.

Appendix 4

Differences between the 1591 and 1593 editions of Cosin's *Apologie*

It will be helpful briefly to delineate the differences between the first and second editions of the *Apologie*. The first, or 1591, edition consisted of two parts, while the second, or 1593, edition contained three parts. The reason Cosin published the 1593 edition was for the purpose of answering the claims of Morice's *Treatise* and Beale's 'Notes' within the framework of the original *Apologie*. The 1593 edition was thus more than double the length of the 1591 edition, partly because of the incorporation of Cosin's answers to Morice and Beale and partly because Cosin chose to rewrite and expand certain portions of his original text (particularly part II) for greater clarification.⁵

Very little of part I of the 1591 edition was altered in the 1593 edition. Aside from the insertion of Cosin's rebuttals to the claims of his opponents at various points, the original part I is essentially duplicated in the second edition, although a few noteworthy changes were made. Cosin added a small section to chapter 2 to discuss more fully the powers of bishops to certify excommunications, this being part of their voluntray jurisdiction. Moreover, the final chapter in the first edition, which addressed whether a cleric could be deprived of his benefice and whether an excommunicate could be dealt with by ecclesiastical jurisdiction after forty days without a writ *de excommunicato capiendo*, was split into two larger chapters for the second edition. And finally, the chapters in the 1591 edition on prohibitions and *praemunire* which appeared in middle of part I were moved to the end of part I in the 1593 edition. Because of these rearrangements, insertions, and expansions, the length of the original part I was extended from 65 pages to 130 pages in the second edition.

In part II of the *Apologie* the changes were more extensive. First, Chapter 1 of the original edition was retitled as the preface to part II for the second edition. Of the 1591

⁵ For those wishing to comprehend the general drift of Cosin's answers to Morice and Beale without reading the entire 1593 version (which is over 500 pages long), the 'Epistle to the Reader', which appears at the beginning of the 1593 version, provides a short summary.

edition's twenty chapters which comprised part II, Chapters 9 through 20, which discussed the *ex officio* oath in particular, became the basis for part III of the 1593 edition. In the early chapters of the original part II, Chapters 1 through 8, Cosin explained the basic workings of the judicial process. In the second edition, however, he greatly expanded his discussion, taking the original Chapter 2 and dividing into three chapters (3, 5, and 6) to give fuller explanations of accusation, denunciation, and *ex officio* procedure. Another chapter (4) was also added in the second edition to detail the reasons why accusation had fallen out of use in recent centuries, according to Cosin. The rest of part II in the 1593 edition (Chapters 1-8 of the 1591 edition) is slightly rearranged for an unknown reason, and Morice's and Beale's assertions regarding the judicial process in ecclesiastical and common law courts are answered by Cosin in whole chapters (12, 14, and 16). With the additions, expansions, rearrangements, and removal of the original chapters 9-20, the 1593 edition of part II was sixteen chapters rather than twenty, totalling 140 pages to the original 130.

As stated above, part III of the second edition was derived from the last twelve chapters of the 1591 part II, but Cosin added more than double the length to this section in compiling part III for the 1593 publication. The new Chapters 1, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, and 16 represent the chapters taken from the first edition's part II, albeit much fuller in their explanations and examples than in the original, while the new Chapters 2, 7, 10, and 12 were entirely new chapters arguing against the claims of the puritans. Part III was 241 pages long, almost twice as long as the new and expanded parts I and II combined.

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