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ARTICLE

England's Erastus? Or, James Morice and the Law of Excommunication

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Abstract

The Elizabethan reign has lately emerged as a formative period for English ideas about the liberties of the subject and the 'ancient constitution' of the realm. Recent work has described the development of such ideas as having been driven by an organized campaign against the English ecclesiastical courts: a legal and intellectual effort that had emerged from the misgivings of certain 'puritan' lawyers about the powers claimed by new prerogative jurisdictions. The primary grievance of the campaign has been identified as having been the church courts' use of the oath *ex officio*, and the campaign's primary defensive tool has been identified as having been the twenty-ninth chapter of Magna Carta. But overlooked manuscripts reveal a more complex story. This article shows that the law of excommunication was as important to the campaign in question as Magna Carta. In addition, a re-examination of the life and work of James Morice, one of the principal lawyers responsible for the campaign, demonstrates that the law of excommunication deeply structured his understanding of the royal supremacy, and of the legal relationship between England's secular and ecclesiastical polities – particularly as they had existed in the distant medieval past.

I

Where did English 'ancient constitutionalism' come from? How did the medieval common law begin to be associated with personal liberty in early modern England; and how did certain conceptions of freedom start to become an integral part of what (for some) it meant to be English? Seeking to answer these questions, among others, historians have begun to take a new interest in an important but still mysterious Elizabethan synthesis of legal and religious ideas. Building upon work undertaken in the first half of the twentieth century, scholars in the first quarter of the twenty-first have begun to give a definite shape to the events that seem to have set that synthesis in motion.[1] Their currently conceived contours might be outlined as follows.[2]

[1]The first important works were Faith Thompson, *Magna Carta: its role in the making of the English constitution, 1300–1629* (Minneapolis, MN, 1948), pp. 216–30; and Mary Hume Maguire, 'Attack of the common lawyers on the oath *ex-officio* as administered in the ecclesiastical courts in England', in Carl Wittke, ed., *Essays in history and political theory: in honor of Charles Howard McIlwain* (Cambridge, MA, 1936), pp. 199–229.

[2]Synthesizing here John H. Baker, *The reinvention of Magna Carta, 1216–1616* (Cambridge, 2017); Christopher W. Brooks, *Law, politics and society in early modern England* (Cambridge, 2008), pp. 79–82; David

By the middle of the Elizabethan age, a small set of lawyers had become alarmed at ambitious assertions of criminal jurisdiction by the burgeoning prerogative courts. Among them were the lawyers James Morice, attorney of the Court of Wards and Liveries; the barrister Robert Snagge; and Robert Beale, clerk of the privy council. All had religious beliefs within the spectrum of ideas we have come to call 'puritan'. And they were, as the story goes, most concerned about the claims and activities of the high commissions for ecclesiastical causes. These were new ecclesiastical courts established by letters patent under the Act of Supremacy (1559) to deal with criminal matters, but with tools that had not traditionally been available to ecclesiastical jurisdictions, including powers of arrest, search, fine, and imprisonment. Like others of 'godly' sympathies, it has been suggested, the group's primary concern was High Commission's use of the oath *ex officio*: an oath sworn by defendants to answer any questions they might be asked, but before they had been told what the questions were to be.[3] Avowing the wrong private religious beliefs under compulsion could therefore lead to imprisonment – a concern that was heightened during the archiepiscopate of John Whitgift, when the oath *ex officio* came to be seen by many 'puritans' as the principal tool of a deliberate effort to purge the Elizabethan church of its more 'godly' ministers.[4] Troubled by such developments, the group of lawyers began to think intensively about medieval sources of authority with which they might challenge High Commission's claims and practices. The long-neglected twenty-ninth chapter of Magna Carta was retrieved from the dark caverns of the law, and taken up as a tool for protecting the liberties of the subject. It was a consequential development in the world of legal ideas; and, as John Baker has shown, in the 1580s it quickly found its way into legal practice.[5]

This existing depiction of the events and concerns that led to the investigation of medieval law is not inaccurate. But if one were to compare it to a landscape painting, then it would be fair to say that a missing companion picture could be reconstructed

Chan Smith, 'Remembering usurpation: common lawyers, Reformation narratives and the prerogative, 1578–1616', *Historical Research*, 86 (November 2013), pp. 619–37, at pp. 630–2; Alan Cromartie, *The constitutionalist revolution: an essay on the history of England* (Cambridge, 2006), pp. 111–14; and Rocco Giurato, 'The language of constitutionalism and the royal prerogative in the English parliament of 1593: James Morice's speech on the ex officio proceedings and his constitutional thought', *Parliamentary History*, 37 (2018), pp. 327–49.

[3]It has long been conventional to speak of 'the Court of High Commission' or 'the High Commission', especially when the intended referent is the commission for ecclesiastical causes sitting at London. I have, however, opted to omit the definite article, because the usage in question is incorrect and misleading. An array of commissions for ecclesiastical causes or 'High Commissions' existed in different parts of England at various periods of the Elizabethan reign, each with its own set of letters patent, and sometimes with different jurisdictional ambits. The use of the definite article erroneously conflates the whole assortment of such bodies with the London High Commission alone. The term 'High Commission' ought not, moreover, to be applied to a special commission of oyer and terminer for the trial of offences against the Act of Uniformity (1559).

[4]Ethan Shagan, for instance, writes that 'the real storm arose in response to Archbishop Whitgift's subscription articles promulgated in December 1583, authorized to be administered by the Court of High Commission to anyone suspected of puritan radicalism … upon their oaths *ex officio mero*': Ethan Shagan, 'The English inquisition: constitutional conflict and ecclesiastical law in the 1590s', *Historical Journal*, 47 (2004), pp. 541–65, at p. 544.

[5]Baker, *Reinvention of Magna Carta*, pp. 261–70.

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alongside the existing one with the aid of overlooked manuscript material. A complementary picture shows that the concerns of James Morice – perhaps the most important member of the group in question – were to a great extent personal, rather than merely abstract; began with civil duties, rather than religious grievances; in a more secular than sectarian fashion; with the mistreatment of the laity, rather than the ministry; at the hands of inferior ecclesiastical officers, rather than the prelacy;[6] and pertained to actions taken on behalf of lowlier courts of the English church, rather than in High Commission. It also shows that Morice's legal misgivings initially pertained less to features of inquisitorial procedure (such as the oath *ex officio*) than to issues of arrest and release from custody. Most significantly, a new picture reveals that the lawyers hit upon more than just the Great Charter. Another shield was retrieved from the bottom of the caves. Smaller than its sister shield Magna Carta, it offered protection only in a more limited set of legal situations. Yet in the right hands it was also a stronger safeguard, because of what it seemed to reveal about the legal past. This was the law of excommunication.

On the one hand, this article will show how a technical system of writs came to be exalted as a guarantor of the liberties of the English people. But, on the other, its purpose will equally be to recover a facet of James Morice's formative legal vision of the English constitution. Doing so opens the door to six subsidiary insights. The first is that, in the future, High Commission will need to be studied in connection with lesser ecclesiastical jurisdictions. The campaign against it was sparked by concerns that its new powers were enabling abuses by other courts. The second is that, for critics of church courts, concerns about oaths and the law of excommunication were closely linked, and not easily separated. The third is that the ecclesiastical lawyer Richard Cosin's theory of the English state was only developed by way of response to an equally deep and considered conception of the legal relationship between England's civil and ecclesiastical polities, and that accordingly Cosin's theory requires reappraisal.[7] The fourth is that the law of excommunication has been overlooked as an element of Elizabethan efforts to reconstruct the history of the English church and historicize the royal supremacy, themselves important elements of the development of English antiquarianism and historical thought. The fifth is that the phenomenon of 'ancient constitutionalism' needs to be re-understood as having emerged from attempts to understand the history not only of the civil but also of the ecclesiastical polity of England; and the historical nature of the legal relationship between them.[8] And the sixth, finally, is that certain Erastian views of England's ecclesiastical polity

[6]Compare with Patrick Collinson's appraisal of Robert Beale's developing views: shaped, he writes, by 'a process of progressive radicalization as [Beale] engaged in noisy wrangles with Whitgift face to face in his gallery at Lambeth, on paper, in parliament': Patrick Collinson, 'Puritans, men of business, and Elizabethan parliaments', *Parliamentary History*, 7 (1988), pp. 187–211, at p. 203.

[7]For Cosin's theory, see Shagan, 'English inquisition'.

[8]Building upon Alexandra Gajda, 'The Elizabethan church and the antiquity of Parliament', in Paul Cavill and Alexandra Gajda, eds., *Writing the history of Parliament in Tudor and early Stuart England* (Manchester, 2018), pp. 77–105; Christopher W. Brooks, 'Law and revolution: the seventeenth-century example', in Michael Lobban, Joanne Begiato, and Adrian Green, eds., *Law, lawyers and litigants in early modern England: essays in memory of Christopher W. Brooks* (Cambridge, 2019), pp. 292–326; Christopher W. Brooks, 'Religion and law in early modern England', in ibid., pp. 327–65; and Smith, 'Remembering usurpation'. Such work is complemented by Ian S. Williams's findings about Coke's Elizabethan work with

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were as intimately connected with excommunication as they were, originally, for Erastus himself.

The term 'Erastianism' has long been used to refer in general to theories of ecclesiastical polity in which the civil estate is wholly supreme over the spirituality. Yet the critique of ecclesiastical power originally advanced by Erastus in 1568 (first printed in 1589) specifically concerned the spiritual estate's authority to punish violations of ecclesiastical law by excommunication: Erastus thought it had no such power.[9] This article, then, will show that an important view of the ecclesiastical polity of England, Erastian in the more general sense, was also 'Erastian' in the more particular sense that it emerged from reflections upon the power of the civil estate to carry out sanctions concomitant to excommunication. But whereas Erastus argued from scripture, James Morice's theory of the relationship between spirituality and temporality was premised, quite independently, upon the historical nature of the law of excommunication peculiar to England.

II

What was it? In its secular aspect, the English law of excommunication governed the arrest, absolution, and release of noncompliant excommunicates: persons, in other words, who had overstayed their unwelcome. Our rehearsal will follow the respectively modern and Elizabethan accounts of F. Donald Logan and Richard Cosin.[10] The process of arresting a noncompliant excommunicate began with the relevant ecclesiastical ordinary's transmission of a writ of *significavit* to Chancery, after at least forty days had elapsed from the date of excommunication. The chancellor, under a statute of 1563 (5 Eliz. I, c. 23), would then transmit to the King's Bench a corresponding writ *de excommunicato capiendo*, which would be opened in the presence of the relevant sheriff. The sheriff, receiving the writ *de excommunicato capiendo*, would then arrest the person excommunicate, who would be disabled from taking any action at law (except to seek a writ of *supersedeas* overriding the initial *significavit*, or to appeal the sentence of excommunication to a higher ecclesiastical court).

The process by which excommunicates secured absolution and release was more complex, and depended upon the choices of the parties involved at different procedural stages. Two options were available to excommunicates upon imprisonment. They could either make *satisfaction* at or immediately upon release; or seek absolution by entering *caution*, a kind of obligation. Caution could take three forms: *cautio fideiussoria*, a kind of surety; *cautio pignoratitia* (or *cautio realis*), a kind of gage or deposit of valuable possessions; or *cautio iuratoria*, a corporeal oath. The third, according to Cosin, was only to be accepted if the excommunicate could offer neither of the other two cautions.[11] If the caution were accepted, then the excommunicate was duly absolved, and an order imposed for a form of penance. If the caution were rejected, then the excommunicate could seek release by petitioning Chancery for

secular legal and antiquarian sources, in 'The Tudor genesis of Edward Coke's immemorial common law', *Sixteenth-Century Journal*, 43 (2012), pp. 103–23.

[9]Thomas Erastus, *Explicatio grauissimae quaestionis utrum excommunicatio* ([London], 1589).

[10][Richard Cosin], *Apologie for sundrie proceedings by iurisdiction ecclesiasticall* (London, 1593); F. Donald Logan, *Excommunication and the secular arm in medieval England* (Toronto, 1968).

[11]Cosin, *Apologie* (1593), parts I and II, sigs. F1v–F2r.

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writs *de cautione admittenda*: the first transmitted to the bishop, and the second to the sheriff. Both writs warned that the bishop's refusal to admit the caution would require the sheriff to secure the excommunicate's delivery.[12]

In order to understand how this technical area of law came to interest Morice, it is necessary first to remediate some long-standing gaps in our knowledge of his life and intellectual development. Much of what has recently been written about him has focused upon his 1578 reading in the Middle Temple, which took for its subject the fiftieth chapter of the statute Westminster I: a short saving of the king's rights.[13] Morice's lecture on the clause offered an expansive view of the king's prerogatives and their limitations. Although the reading's importance was first recognized long ago, it is only recently that more historians have considered its constitutional, legal, and political implications, and its potential influence upon legal practice.[14]

This work has been excellent. But it has not satisfactorily connected the content of Morice's earlier reading with his later litigative and discursive campaign against ecclesiastical jurisdictions. Whereas the reading was given in 1578, information about Morice's campaign dates to the early 1590s. Between the two has yawned a gap both temporal and causal.[15] It is not clear that the ideas that Morice articulated in the reading would have prompted him to take any particular action against the ecclesiastical bodies of his day. As Christopher Brooks wrote, 'there is no indication that the views he expressed in 1578 were particularly controversial'.[16] To be sure, the reading's appraisal of the legal relationship between England's civil and ecclesiastical estates, frequently anti-clerical in tone, reveals Morice to have been in sympathy with a strain of thought that could be called 'puritan'. But it makes no particular or even general complaint about the practices of church courts at the time of its delivery. In that respect the reading is quite unlike Morice's later writings and activities. In the former, Morice identified specific wrongdoings by ecclesiastical judges in considerable detail; in the latter, he sought their redress (in courts of law and parliament; from prelates and counsellors of state). The campaign was politically risky to undertake; and by itself the reading does not adequately explain why Morice ultimately made the leap.

Historians have sought to close the gap between Morice's reading and his campaign in different ways: partly using the available fragments of information about Morice's work in the parliaments of 1584–5, 1586–7, 1589, and 1593 during the interval of his obscurity, but more often by attempting to perceive Morice through the work of Robert Beale, whose activities during the early and mid-1580s respecting the clerical establishment and ecclesiastical law are better documented than anything

[12]Logan, *Excommunication and the secular arm in medieval England*, pp. 150–1.

[13]Manuscripts include British Library (BL), Egerton MS 3376 (the most complete), and BL, Add. MS 36081, fos. 229r–274v. A third manuscript appears to have perished in the fire at Thoresby Hall in 1745: see *Catalogus bibliothecae Kingstonianae* (London, 1727), sig. Ccc1r.

[14]See above, n. 2. For the reading's discussion of the prerogative in relation to equitable jurisdiction, see Ian S. Williams, 'Developing a prerogative theory for the authority of the Chancery: the French connection', in Mark Godfrey, ed., *Law and authority in British legal history, 1200–1900* (Cambridge, 2016), pp. 33–59.

[15]The earliest-known component has been Morice's work as counsel for the deprived minister Robert Cawdray, beginning in 1590 or 1591: Baker, *Reinvention of Magna Carta*, p. 142.

[16]Brooks, *Law, politics and society*, p. 81.

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Morice may have done during the same timeframe.[17] The presumption has therefore generally been that – as with Beale – the crisis that roused Morice to action was the one that began with Whitgift's ministerial subscription campaign in 1583.[18]

III

Overlooked manuscripts challenge that presumption. One such document is a seldom-cited copy of Morice's last major work, his *Iust and necessarie defence* (1594). As the title indicates, Morice wrote it to rebut attacks that Richard Cosin's *Apologie* (1593) had levelled against his earlier *Briefe treatise of oathes* (1590).[19] The copy in question is shorter than the manuscript of Morice's *Defence* most commonly cited, and fewer of its chapters survive.[20] But it contains a unique preface in which Morice explained the origins of his campaign to his contemporaries.[21] In particular, Morice represented his campaign against the ecclesiastical courts as having begun in Essex with his duties as a justice of the peace: above all, with his efforts to redress abusive circumventions of the law of excommunication. As he saw things, he had not so much sought a fight with the ecclesiastical courts as he had been dragged into one by the obligations of office. In 1586 he and Sir Henry Graye, a fellow JP, had heard 'a greate and grieuous outcrie & complaint' regarding 'diuers wronges oppressions and extortions' in the archdeaconry of Essex. Morice's preface recounts eight initial, specific cases of abuse, sharing important features. A summoner for the archdeaconry, James Brooke, and one of the archdeacon's servants, Richard Aspden, had repeatedly sought to extract financial obligations in the form of sureties and gages from noncompliant excommunicates (and, in one case, from a *compliant* excommunicate). Many were poor, and some who refused the pair's demands had suffered imprisonment (in one case for eight or nine weeks). They included Richard Martin, Isaac Sexten, William Freemen, Francis Paperell, John Stykade, William Smith, William Lincoln, and Thomas Stoddard.[22]

Morice and Gray accordingly sought a meeting with the archdeacon, William Tabor. Having requested that Tabor explain the legal basis of the summoner's and the servant's actions, Morice was immediately shown 'a warrant or precept' signed by certain high commissioners. Directed to JPs, the sheriff, bailiffs, and constables – 'yea', Morice wrote, 'to all the Q. subiectes within the countie of Essex' – it ordered that they

[17]A few pieces of information about his activities have been known. Collinson noted, for example, that Morice joined in efforts to defend the Colcestrian preacher George Northey: Patrick Collinson, *The Elizabethan puritan movement* (London, 1967), p. 256. Yet what this says about Morice is not self-evident.

[18]See above, n. 4.

[19]The version most commonly cited is [James Morice], *Briefe treatise of oathes exacted by ordinaries and ecclesiasticall judges* ([n.p.], [n.d.]); Cosin, *Apologie* (1593).

[20]The more complete and familiar copy, which was given to Whitgift, is now Lambeth Palace Library (LPL), MS 234.

[21]The manuscript probably came directly from Morice's own papers, having arrived at Harvard as part of his grandson Arthur Turnour's collection.

[22]Harvard Law School (HLS), MS 120, fos. 4r–6r. ('Aspden' is misspelled as 'Apsden' throughout.) Morice's concern for these people is consonant with his later misgivings, discussed by Brooks, about abuses of vulnerable people in London diocese during the 1590s: Brooks, *Law, politics and society*, pp. 405–7.

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> should arrest and attache by their bodies all such personns as stood excommunicate by tharchd[eacon] of Essex take bondes of them with suertie for their apparance before the said Archd[eacon] and for the obeyinge of his order concerninge their offences, and farther to certifie those obligacions to the said commyssioners; yf anye suche refused to become bounde than to send him up prisoner unto them.

Morice replied that the document was 'contrary and repugnant' to English law for five reasons. Three concerned the law of excommunication. One was that it was unlawful for any excommunicate to be 'Iustified or [corporeally] arrested' except by the relevant sheriff's execution of a valid writ *de excommunicato capiendo*. Any other means of arrest contravened the royal prerogative and 'the liberties of Ingland'. Another was that the precept denied excommunicates the period of forty days afforded by statute.[23] And another was that arrests by such a 'new deuise', for which the writ *de cautione admittenda* offered no remedy, served to weaken the regal power of the sovereign over the clergy and the ecclesiastical estate. The queen's regality encompassed a power to command that ordinaries 'admitte sufficient caution' tendered by an excommunicate. Allowing ecclesiastical commissioners to command that excommunicates be sent up to them would place excommunicates beyond the writ's reach, thereby empowering ordinaries and ecclesiastical judges 'to doe what they lyst[ed] withowte controwlement of Lawe'. Two further objections touched Morice personally in respect of his office as a JP. One of them was that the precept ordered JPs and constables to take bonds and obligations for appearance and performance on the archdeaconry's behalf, and to imprison the noncompliant. Neither the laws of the realm nor High Commission's letters patent could authorize such commands or acts. And the other was that High Commission had no authority to order that JPs arrest or attach any excommunicate person for noncompliance; and no power to grant or delegate any such authority.[24]

Morice requested that Archdeacon Tabor convey his misgivings to the archbishop of Canterbury, John Whitgift. Tabor promised that upon his return he would relate Whitgift's reply, and departed. But Tabor did not keep his word. Instead of updating Morice, he had made 'threatning' comments to others, suggesting (among other things) that Morice should 'be dealte withall well Enoughe'. Catching wind of it, Morice 'thought [him]selfe bounde in the dutie of a Magistrate' to proceed against Tabor and his servant Aspden. He sent for Aspden by warrant; examined him as to the cases; and bound him over to the quarter sessions, at which indictments were 'framed' against the servant and the archdeacon both. But other JPs ('freindes to the Archdeacon') had sought a stay of the proceedings, of which they notified Whitgift. The JPs sent for Morice during the succeeding judicial term. To Morice's surprise, the JPs spoke of how Whitgift had '[m]arueyled' at his 'boldenesse in medling', and at how Morice 'could haue notice what might be donne by authoritie of the highe commyssion', since the contents of its letters patent were 'knowne unto verie few'. It had seemed, the JPs said, that Whitgift intended to complain about Morice to the

[23] 5 Eliz. I c. 23.

[24] HLS, MS 120, fos. 6r–7r.

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queen. They advised Morice to explain himself to Whitgift, lest he suffer 'farther inconvenience'.[25]

Morice, confident in the propriety of his actions, ignored them. Shortly thereafter he received a precept of *quorum nomina*, whereby JPs

> were commannded to arrest and send up as presoners (withowte declaracion of the offences) those personns whose names were underwritten, whereas in deed there was no name of anye personn to be arrested, subscribed therein, but on the backside of the paper in a scribled hand (not by the Commissioners them selues, or by their direction, but by the Archd[eacon's] apparator (as that seemed)[)] some few names were sett downe.

The precept ordered that Morice forcibly apprehend an excommunicate 'that kept his house for feare of the Archd[eacon's] arrest'.[26]

Morice knew that the document was a test.[27] But he refused to acquiesce. Continuing to believe (so he said) in Whitgift's 'Integritye', and that the archbishop would not have countenanced such an instrument, he complained to Whitgift about the archdeaconry's abuses, emphasizing that he had proceeded against Archdeacon Tabor and Tabor's servant out of neither 'sinister affecc[i]on' nor 'malice', but rather in conformity with 'the dutye of a Magistrate'. Hearing this explanation, Whitgift had seemed, Morice wrote, 'to be well satisfied', and had sent Morice away with apparent 'good fauor'.[28]

But Morice was quickly disquieted by other incidents. Soon after the meeting, he received another order to do the archdeaconry's bidding. A man in Morice's village named Richard Durrington had been proceeded against *ex officio mero* because 'in priuate speache he [had] likened the Surplas on the personns backe to a white sheete': 'ffor which heynous offence', Morice remarked sarcastically, Durrington was required to confess his remorse publicly.[29] Since Durrington had failed to do so, Morice was commanded in writing 'to assiste that his ecclesiasticall censure and cause it to be executed'. But Morice ignored the order, deeming it illegal and 'void of Authoritie'. As a result, Durrington was excommunicated. Morice said that, according to the act book, it was for failure to appear. But in fact Durrington had made his appearance, and (accordingly) been examined upon interrogatories and sentenced. Morice told Archdeacon Tabor that the proceedings against Durrington were unlawful – yet to no avail.[30]

Morice had also been troubled by similar abuses in Essex by the bishop of London and his commissary. They had additionally 'extorted' oaths *ex abrupto*, namely,

[25]Ibid., fo. 7r–v.

[26]Considered a form of contempt since the late middle ages: Logan, *Excommunication and the secular arm in medieval England*, p. 46.

[27]Before getting the precept, he had received 'some incklinge' that he would be sent one, 'with warninge to be well aduised what [he] did or saide': HLS, MS 120, fo. 8r.

[28]Ibid., fo. 8r–v.

[29]Morice did not give Durrington's first name; see, however, Essex Record Office (ERO), D/AEA 13, fos. 31r, 34r.

[30]HLS, MS 120, fo. 8v.

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'where no courte or iudiciall seate was kept', and indeed 'where no secreate complaynt or insynuacion, no rumor or fame of a cryme' preceded it. Some of those who had refused to swear such oaths had been 'commytted to publike stockes & cages, others sent to the common gaoles, there to remayne at the Bishoppes pleasure withowte Bayle or mayne pryse'.[31]

Finding such wrongdoings to be inquirable by JPs, Morice wrote that he had acted doubly. Firstly, his oath and duty had compelled him to lay the abuses out in a charge at quarter sessions. Secondly, supposing that the ecclesiastical commissioners were proceeding in the same manner as the other three courts, he had written his *Brief treatise*. This was a 'priuate' work, he said, 'published not to the view of euery man'. He had 'priuate[ly]' passed it to an ecclesiastical commissioner, hoping that it might help England's ordinaries and ecclesiastical judges to 'see, and reforme their Errors and abuses'.[32]

IV

Morice often emphasized the legal principle that none may be judge in their own cause.[33] In the same spirit, we should regard autobiography, including Morice's preface, with a healthy scepticism. The preface merits particular scrutiny, not only as a work of apology but also because it omits to mention a circumstance that Morice would elsewhere identify as having prompted the *Treatise*'s production.[34] That was the civilian profession's production of a response to the ruling in Dr Hunt's Case in 1590, in which John Hunt, commissary of the archdeacon of Norfolk, had been indicted at the general sessions on five counts of offences similar to those that Morice alleged in Essex.[35]

Records from a variety of archives verify the preface's account and enrich it with additional detail. They enable an independent examination of Morice's claims about the use of precepts, about specific abuses by the archdeaconry of Essex, and about Morice's efforts to redress such abuses. Firstly, High Commission precepts of the kind that Morice's preface described were being used in the way alleged. Indeed, it would be surprising if that were not so. Elizabethan ecclesiastical lawyers were interested in ways of imprisoning noncompliant excommunicates without *significavit*. In 1600, an official of the St Albans archdeaconry wrote to the bishop of London, asking that he think up a less expensive means of 'correcting' impoverished noncompliant excommunicates.[36] Cosin complained that the costs of the writ were prohibitive; and *praxes* suggest that the process was expensive.[37] And the problem of precepts without names on them was one of which civilians were aware.[38] One set of Elizabethan

[31]Ibid., fo. 9r.

[32]Ibid., fo. 9r–v.

[33]See e.g. LPL, MS 234, fos. 31v–32r.

[34]LPL, MS 234, fo. 99r–v.

[35]Brooks, *Law, politics and society*, pp. 104–5.

[36]Calendared in H. R. Wilton Hall, ed., *Records of the old archdeaconry of St Albans: a calendar of papers* (St Albans, 1908), p. 104.

[37]Cosin, *Apologie* (1593), part I, sig. T2r. Fees were paid by the diocese in causes of mere office; for a table, see BL, Harley MS 4117, fo. 21v.

[38]'Civilians' is here used to refer to members of the profession of civil and ecclesiastical lawyers, in keeping with Elizabethan usage.

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procedural notes instructed its reader to 'Award noe quorum nomina but you see there [*sic*] names putt in before lest they put in other then you can iustyfye'.[39]

But there is no need to speculate about such practices. High Commission precepts *were* being addressed to JPs to enable the arrest of excommunicates on behalf of archdeacons, sometimes without naming anyone in particular. A 1583 precept from the London high commissioners in the archives of the archdeaconry of St Albans is a clear example. Like the precepts in Morice's account, the document is addressed to 'all Justices of peace, maiors, Sheriffes, Baylives, Constables and all other her Ma[jes]tes officers and subiecte[s]'. It appears to have been drawn up to enable an archidiaconal circumvention of *significavit*. Acknowledging the high commissioners' receipt of 'credible enformacion' about the disobedience of excommunicates within the archdeaconry's jurisdiction, it ordered recipients to apprehend (or effect the apprehension of) 'all and singuler the persons whose names and severall dwellinge places [had been] wryttin on the other syde' in the hand of the commissioners' register. Yet no names were ever written anywhere on the original, signed and sealed document. Had such a document been transmitted to the Essex archdeaconry, one of its officials could readily have written names of his choosing on the dorse before sending or showing it to the addressees.[40] The St Albans precept does differ from the precept that Morice received in that its text incorporated a cause of arrest (namely, contempt). But another extant High Commission precept does not specify an offence. Sent to the bailiffs of Colchester in 1579, it merely stated that those named were '[t]o aunswere unto such matters as [would be] obiected against them'.[41]

The archives of the Essex archdeaconry also lend credence to Morice's account of the events from which he claimed his campaign had emerged. Indeed, records survive for all of the cases that Morice identified. The messy and laconic character of the documents makes it impossible to confirm every detail of Morice's descriptions, but the two generally match, even as the records present a surprise. One might expect that Morice, in taking up the cases, had sought to counter efforts to punish religious nonconformity. But most of the cases had little, if anything, to do with puritanism. Of the eight cases initially brought to Morice's attention, at least six included allegations of moral offences. Richard Martin, John Stykade, William Smith, Francis Paperell, and Isaac Sexten were all suspected of incontinency. Sexten was also suspected to be a drunkard, like William Freeman, and he was later accused of '[r]ailing', inebriated, against the churchwardens of his parish in 'filthie' language.[42]

[39]Cambridge University Archives, Collect.Admin.6c.

[40]Hertfordshire Archives and Local Studies, D/ASA 5/1, pp. 163–6, calendared in Wilton Hall, *Records of the old archdeaconry of St Albans*, p. 24. The precept probably went to the archdeaconry before it was shown to other addressees. That was the practice elsewhere. A 1578 letter signed by William Bingham shows that High Commission precepts were passing to the bailiffs of Colchester via the archdeaconry of Essex: ERO, D/Y 2/6, p. 61. Moreover, the hand of the London commissioners' register was not always easily identified: see Kent History and Library Centre, DCb/PRC/44/3, p. 147.

[41]ERO, D/Y 2/6, p. 71. The document named two specific people, although a blank space was deliberately left in place of the latter's given name.

[42]ERO, D/AEA 12, fos. 267v, 311ar, 323r, 351v, 352r, 353r, 371v. For other entries regarding these defendants, see ibid., fos. 269v, 315r, 322v, 351r, 359r, 359v, 365r; ERO, D/AEA 13, fos. 15v, 20r, 23v, 84v, 97r, 158r.

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Morice omitted to mention these accusations. But he probably knew about them, not least because he advertised some familiarity with the content of the archdeaconry's records.[43] Perhaps he believed the allegations to be mere pretexts for the punishment of nonconformity. In a few cases there were whiffs of potentially 'puritan' acts; and Morice had expressed clear concerns about how the evidentiary standards of the ecclesiastical courts, which he perceived to be inappropriately relaxed, invited false accusations of moral offences.[44] Still, it seems unlikely. Secular officials had already identified Sexten as a drunkard. JPs had previously proceeded against him for frequent drunkenness, and his having been a 'usual haunter of alehouses' and disturber of the peace, among other things. Morice was even present at a session of gaol delivery at which Sexten was released from custody.[45]

The likeliest possibility is that Morice simply thought that 'ungodly' behaviour did not make the archdeaconry's violations of procedural rules any less objectionable. In fact, there are strong reasons to believe that his legal concerns were independent of sectarian motives. It would be surprising, firstly, if Morice had been at odds with the archdeacon of Essex for any ideological reason. Jay Anglin has described William Tabor as having been 'studiously tolerant towards nonconformists'.[46] And it seems still less likely that Morice's legal misgivings were tied to ideological differences when one considers that Morice had previously stood up for defendants with whose lifestyles and beliefs he would not have been in sympathy. In 1583 he had maintained a rigorous approach to the law even when presented with an opportunity to marshal it against a serious enemy. The bailiffs of Colchester had written to him about what to do with Thomas Debell, a suspected Catholic sympathizer in their custody. In his response, Morice acknowledged that Debell was 'a notable papist, and a lewde and busy fellowe'. But he declined to make a cudgel of the law. Instead, he wrote that the things Debell had said were neither 'of soch moment, nor so offensyve to the Lawes of this Realme' as to warrant abnormal proceeding. Little could be done. One remark was beyond the limitations of the relevant statute. Others were 'folishe', yet 'not ponishable by any lawe'; showing Debell to be 'a man greatly addicted to papistry', yet not 'directly against any lawe or statute'. Morice suggested that Debell be re-examined and that bonds be taken of him for good behaviour. But he retracted even this advice in a subsequent message.[47]

Further records verify Morice's claims about his own activities. Quarter sessions rolls confirm that Richard Aspden, the archdeacon's servant, was arrested on behalf of JPs in 1586. The rolls preserve no indictment that could confirm the nature of the

[43]HLS, MS 120, fos. 4v–5r, 8v.

[44]As mentioned above, Paperell was eventually charged for an issue relating to the eucharist. For Morice's concerns about the tendency of ecclesiastical evidentiary standards to invite false allegations of moral offences, see e.g. LPL, MS 234, fo. 42r.

[45]F. G. Emmison, *Elizabethan life: disorder* (Chelmsford, 1970), p. 212, presumably referring to ERO, Q/SR 71/22. For the gaol delivery session, see ERO, T/A 418/40/5. I have yet to consult the originals of these two records and have instead relied upon the ERO's electronic calendars.

[46]Jay P. Anglin, 'The Essex puritan movement and "bawdy" courts', in Arthur J. Slavin, ed., *Tudor men and institutions* (Baton Rouge, LA, 1972), pp. 171–204, at p. 194.

[47]ERO, D/Y 2/8, pp. 319, 323; BL, Stowe MS 150, fo. 34r. Laquita Higgs, citing the same correspondence, draws a similar conclusion about Morice's approach to law: Laquita M. Higgs, *Godliness and governance in Tudor Colchester* (Ann Arbor, MI, 1998), pp. 246–7, 291–2.

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allegations. But they do contain a recognizance – signed by Morice – and a document showing that Aspden's fees were paid by a certain Bingham (presumably William Bingham, the archidiaconal official).[48] Material elsewhere confirms that Morice had sought to redress the archdeaconry of Essex's unlawful proceedings against excommunicates at around the same time. A Chancery order book shows him petitioning, in 1588, for a writ of *supersedeas* on behalf of at least three people, none mentioned in his preface. All had been the subjects of writs *de excommunicato capiendo*. Each, Morice argued, was invalid, having been issued on the basis of a bad *significavit*: made not by the relevant ordinary (as required by 5 Eliz. c. 23) but rather by the archdeacon of Essex, William Tabor, without certifying any specific cause of excommunication. Consulting the master of the rolls, the chancellor found in Morice's favour and granted writs of *supersedeas*, discharging the writs of *significavit*.[49]

V

So, Morice's story checks out, and the records that back it up distinguish his motives from those of other 'puritans' with whom historians have often associated him. But an obvious question remains. If Morice's grievances about excommunication had sparked his campaign against ecclesiastical jurisdictions, then why did he say almost nothing about them in his *Treatise* (1590)? Why was the *Treatise* instead focused almost entirely on oaths?

The answer is that Morice's *Treatise* was not focused almost entirely on oaths. It in fact discussed excommunication in some depth. But the *Treatise* that historians have hitherto studied is not quite what Morice wrote. It was neither quite the text that Richard Cosin attacked, nor quite the text that Morice later defended. The familiar text – of the printed *Treatise* and most manuscripts – differed significantly from the text that originally circulated. The now-standard text omitted several passages present in the original.[50] One such passage stands out for its length and importance, and is powerfully explanatory. It shows, in particular, how Morice understood unlawful uses of oaths to be linked with illegal proceedings against excommunicates and attempts to circumvent the secular process. The passage also vividly illustrates how Morice contextualized his complaints within his general understanding of England's anatomy of state; and the way in which the law of excommunication shaped his conception of the English body politic.[51] It was directly quoted by Cosin,[52] and copies of

[48]ERO, Q/SR 96/14, 96/2.

[49]The National Archives (TNA), C 33/77, fo. 35r, extracted in Cecil Monro, *Acta cancellariae* (London, 1847), p. 585. The relevant Chancery file series does not contain the writs of *significavit* in question, but Tabor's name appears on others within it: see TNA, C 85/126, mm. 13, 15.

[50]Perhaps because it was not produced at Morice's behest. Morice indicated to Burghley that he was not involved in its printing: BL, Lansdowne MS 82, fo. 150r. Manuscripts omitting the passages include e.g. BL, Cotton MS Cleopatra F.1, fos. 55r–72v, and LPL, MS 445, pp. 452–505, 508–9.

[51]The passage would have been located at the first paragraph break from the top of sig. E3v of the printed *Treatise*.

[52]See e.g. Cosin's quotation of Morice's unprinted phrase 'over troublesome & full of unnecessary circumstances': Cosin, *Apologie* (1593), part I, sig. T2r. The same occurs at BL, Harley MS 5247, fo. 23v, and at Inner Temple Library (ITL), Petyt MS 538/54, fo. 304r, respectively. James Hampson noted Cosin's quotation of passages not present in the printed *Treatise*: James Hampson, 'Richard Cosin and the rehabilitation

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Morice's *Defence* reproduced it in full.[53] Annotations by Whitgift establish that the archbishop read it too.[54]

In the passage, Morice criticized the claim that ecclesiastical commissioners had the authority to order JPs to 'arrest & attach, the queenes people excomunicate by Archdeacons or officials, and either to send them up as prisoners, or to take bond for their apparance before themselues or to abyde the order of those inferiour Iudges eccle[siastical]'. To do so, he explained, would not only be to order unlawful and unjust acts in an unlawful and unjust manner. It would also be to substitute with a 'short & compendious new devise, all due significacion of excomengement'; to thereby reject the queen's 'princely lawes' and 'writts *de excomunicato capiendo*'; and to 'seclude' the queen of her 'regall power & prerogatiue' to command absolution upon sufficient caution.[55] Such concerns reflect the preface's conceits.

The missing passage also shows that the royal supremacy connected Morice's complaints about excommunication with those he had made about oaths. As the passage explained, the Act of Supremacy (1559) had united 'noe iudisdiction, priviledge, or preheminence whatsoever' that was either 'repugnant or contrariant' to the law of God or 'the princely pr[e]rogatiues', or that did not 'stand' with the 'comon law & pollicy' of England. One might argue, Morice noted, that the letters patent had given ecclesiastical commissioners powers of immense scope. But if the letters patent were more expansive than the common law had previously permitted, it was not by authority of the Act of Supremacy. He urged that ecclesiastical judges examine the statute with 'a more narrow ey'. While they had understood the seemingly 'liberall and generall' clause granting the ecclesiastical commissioners 'such jurisdictions, privileges, superiorities, and preeminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority ha[d] [t]heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same' to be a large grant of authority, they had not noticed that the grant was 'restrained' by the 'effectual word' *lawfully*. 'According to the pleasure of the prince', Morice wrote, letters patent might be more or less expansive. But they were never to extend 'beyond the lymitts & p[re]cintes of lawfull iurisdiction ecclesiastical or the lawes of this comonwealth'.[56]

For Morice, such boundaries were set by the common law. The Act of Supremacy had stated that all spiritual privileges, superiorities, pre-eminences, jurisdictions, power, and authority should 'for ever by the authority of the Parliament be united & anexed to the imperiall crowne of the realme'. Thus no learned man would be 'so simple' as to claim that the Act, by *uniting* the spiritual power to the civil, would 'thrust out of place' any civil right, pre-eminence, or jurisdiction, or otherwise 'be derogatory to the common law'. For *that* would be 'not to conioyne or unite, but to seuer & set aperte' the two parts of the body politic: quite impossible. The kingdom's civil and ecclesiastical jurisdictions – 'although distinckt & diverse in nature' – were

of the clerical estate in late Elizabethan England' (Ph.D. thesis, University of St Andrews, 1997), p. 96, n. 105, and p. 104, n. 135.

[53]Excepting BL, Harley MS 1694, fos. 57r–119v, which consists only of the *Defence*'s second chapter.

[54]LPL, MS 234, fos. 148v–153v.

[55]BL, Harley MS 5247, fo. 23r–v.

[56]Ibid., fos. 24r–25v.

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not 'contrary'. Indeed, the Act in Restraint of Appeals (1533) had stated (as Morice quoted it): 'we see herby the iursdictions of the spirituallity & temporallity, to be divers & distinct (not contrary or repugnant) but coioyned nevr ye lesse in mutuall help & assistance, for the due administration of iustice in the body politicke of this Empire'. That the Act of Supremacy had succeeded the Act in Restraint of Appeals did nothing to diminish its interpretive utility, since the former had been no 'gyfte, grant, or accesse of princely power'. Instead, as its title suggested, the earlier act had been 'a law of restitution': a restitution of the lawful power that the crown had *always* possessed over the spiritual estate, by divine and common law alike.[57] The Act of Supremacy was affirming what had preceded it: so the Act in Restraint of Appeals was the basis for the structure of England's ecclesiastical polity. In short, the royal supremacy had reunited the spiritual jurisdiction to the crown of the realm forever. But it had *only* united to the crown those jurisdictions that were *lawful*. The consonance of the state, and the integrity of the body politic – which the Act in Restraint of Appeals had earlier affirmed – meant that, with the Act of Supremacy, those jurisdictions that were *unlawful* had been rejected.[58] *Nothing could be united to the crown that would divide it against itself.*

This was the principle that linked Morice's grievances about oaths and excommunication. Anciently, as Morice believed, the English civil state had reserved the power to arrest excommunicates unto itself. And the royal supremacy had, moreover, reunited unto the crown only those jurisdictions that had theretofore been lawful. Thus if one granted that the power to imprison excommunicates after *significavit* were merely temporal, and 'appertayning' to the prince 'in respect of civill & temporall iurisdiction & authority', then certain questions arose for England's ecclesiastical lawyers. For Morice, the questions revealed the link between the two different forms of abuse.

The first such question was why the statutory reaffirmation of the immemorial royal supremacy should have united to the crown any new and separate spiritual power to arrest excommunicates – not least by forms of process that differed from those which were long established, and were thus contrary to the common law. Had the Act of Supremacy done so, it would have created an intolerable tension between the spiritual and ecclesiastical estates: a tension that had already been foreclosed by the structure of the English state that had been articulated and affirmed (but not created) by the Act in Restraint of Appeals. A second question arose too. '[B]y what authority spirituall or ecclesiasticall', Morice asked, could English subjects be imprisoned for refusing either to swear general oaths or to answer questioning 'without due & legal accusation or presentment'? His implication was that there was no reason for such contempts to be treated differently from excommunication: in other words, that the power to arrest such persons rested with the secular estate, just as it did in the case of excommunicates. Morice mused that civilians would require

[57]In the Harleian manuscript of the *Treatise*, the word 'rather' (which appears in the Petyt manuscript) was mistranscribed as 'neither'. The latter word, which would make little grammatical sense, was struck through and corrected to 'rather' by an early reader: BL, Harley MS 5247, fo. 24v; ITL, Petyt MS 538/54, fo. 305v.

[58]BL, Harley MS 5247, fo. 24r–v.

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more time to formulate an answer' to the question than ecclesiastical judges allowed English subjects 'to consider ... their catholicke othes'.[59]

VI

This article has said much about the arrest of noncompliant excommunicates, but comparatively little about the other half of England's secular law of excommunication: the writ *de cautione admittenda*. In fact, the writ's importance to Morice was more profound. A notable common feature of Morice's surviving discursive works is their assertion of the English sovereign's immemorial, regal power to command the absolution of his or her subjects by writ *de cautione admittenda*.[60] The writ's medieval usage, after all, seemed to substantiate the royal supremacy's antiquity in a way that the writ *de excommunicato capiendo* could not. To be sure, the long-standing secular controls upon the arrest of noncompliant excommunicates were significant for what they said about the relationship between England's two estates. But they were above all a demonstration of the limitations that the temporality had historically placed upon the spirituality's invocation of civil power, and therefore (in light of Reformation legislation) disproof of High Commission's specific legal claims. Such controls were not in themselves a demonstration that the royal supremacy had stretched into the distant past. Yet the writ *de cautione admittenda* was. It, by contrast, evinced the English prince's historical power in an incontestably spiritual sphere: an ability to command sentences of absolution from the realm's ecclesiastical estate. The writ's medieval history was more than a demonstration that the prince had reserved certain powers to the temporal estate. It showed that the spiritual and temporal realms of England had always been ruled by the same sovereign.

Of course, they had not. But Morice's conceit is easier to comprehend when one examines the legal sources in which he anchored his understanding. His views were grounded in texts of universally recognized authority, including Fitzherbert's *Nouel natura brevium*, St German's *Doctor and student*, and the Year Books. Fitzherbert offered the writ's text. It read, in part, 'vobis mandamus quod accepta a prefato *A* cautione predicta': an unambiguous command to accept the caution that *A* had tendered, and thus that he or she be absolved.[61] Perhaps it ought to have been read as a threat that temporal power would be exercised to the disadvantage of the recipient if they did not comply, rather than as an assertion of spiritual authority. But the latter interpretation was affirmed by *Doctor and student*. St German wrote that if an 'excommengement bee of recorde in the kinges courte then the kinge maye write unto the spirituall Iudge commaundynge hym that he make the party his letters of absolucion upon payne of a contempt', and that otherwise the excommunicate might 'haue his accion agaynst the iudge spirituall' for refusing to absolve him. Morice quoted St German on the latter point. 'That this is no newe opinion or construction', he wrote,

[59]BL, Harley MS 5247, fo. 25r. The implication was explicitly enunciated in the *Defence*: 'this contempt ageinst the Church ... is to be corrected by the seculer arme and power of the prince that is by her majesties writte of *excommunicato capiendo* and not otherwise': LPL, MS 234, fo. 14r.

[60]Even the reading of 1578 did so: BL, Egerton MS 3376, fo. 58r.

[61]Anthony Fitzherbert, *Nouvelle natura brevium* (London, [1560]), sig. H7r–v. Morice cites Fitzherbert on the writ: BL, Harley MS 5247, fo. 29r–v.

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'wee finde ... that learned man Saint *Germaine*, in his booke of *Doctor* and *Student* well agreeing'.[62]

The place of the writ's pre-Reformation usage in Morice's historical thinking is clearest in his analysis of Year Book cases. His comments make it easy to see how he came to understand the canon law as a foreign imposition, the royal supremacy as immemorial, and a power to command absolution as an integral part of the prince's regality. One such case – discussed in the *Defence* – explains that papal excommunications could not be certified in the king's courts because the pope was a foreigner beyond the seas, and therefore not subject to the king's regal power. The king's courts could take account *only* of those excommunications that had been made by persons from whom the king could command the absolution of his subjects. The pope, as a foreigner beyond the realm, was not one such; so it was no good. Morice invoked the Year Book case after describing three others that had involved regal writs commanding absolution.[63] 'The king commaundeth, but whome?' he asked. 'Suche Iudges', he answered, 'as are subiect unto him and under his aucthoritie', since 'otherwyse his commaundement weare of no force'. Here was the writ's power to explain history. 'Judges Ecclesiastical therfore of this Realme are and euer weare as aforesaid the kinges Iudges and theire courtes the kinges courtes thoughe not Immediate'. Papally certified excommunication 'was neuer allowed' in England, because the pope was 'a forreyne Iudge', to whom the king could neither 'wryte to give absolucion nor ponishe ... for his contempte yf he should refuse'. Having cited one further Year Book case, Morice wrote: 'By this therfore that hath byn said, it is evident that the kinges of this realme are and euer weare supreame patrons, gouernors, protectors, yea and ordinaryes of the churche of Ingland.'[64]

VII

Important corollaries attended this historical perspective. Beyond the subject of absolution itself, it opened up other clauses of Magna Carta to a favourable interpretation, and strengthened the power of the twenty-ninth chapter. It helped Morice to rebut Cosin's claims about the charter's first chapter, which had ordained, as Morice put it in his *Defence*, 'foreuer, that the churche of Ingland [should] be free, and shall haue all her whole rightes and liberties unhurte'. The royal supremacy's immemoriality allowed it to fit within the general scheme of his ideas: 'The churche of Ingland shall be free', he wrote: '[w]hat greater fredom than exemption from the bondage & thraldome of forreyne power & pontificall lawes?' 'Shall we entend', he asked, 'the churche had any right or libertie preiudiciall to the common wealthe?' Morice pointed out that Cosin's construal of the word 'freedom' as relative to the

[62]Christopher St German, *Dyaloge in Englysshe bytwyxt a doctoure of dyvynyte and a student in the lawes of Englande* (London, 1554), sigs. P6v–P7r; BL, Harley MS 5247, fos. 30v–31r.

[63]LPL, MS 234, fos. 246v–247r, with the case in question YB Mich. 8 Hen. VI, pl. 8, fo. 3a–b. Others were YB Mich. 22 Edw. IV, pl. 9, fo. 29a–b; YB Hil. 14 Hen. IV, pl. 4, fo. 14a–b; YB Hil. 13 Hen. VII, pl. 15, fo. 16b; and YB 30 Lib. Ass. pl. 19, fo. 177a. Morice had earlier cited the first and second of the cases in his reading, although rather for what they said about the king's power to seize episcopal temporalities, and to commit bishops to prison for contempt of prohibitions: BL, Egerton MS 3376, fo. 60r.

[64]LPL, MS 234, fos. 246v–247r.

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civil estate, rather than foreign power – critical to Cosin's claim that chapter 29's provisions applied only to the temporal sphere – sat poorly alongside legal judgments before the reign of Henry VIII. A Year Book from the reign of Henry VII provided that 'of thinges spirituall mixt with the temporaltye an Acte of perliament maye make a lawe'. Would not Cosin's construal, read alongside the Year Book, therefore mean that 'the churche lost that libertie it had before'?[65]

Morice raised the stakes further. The immemoriality of the royal supremacy – proven, in part, by the earlier use of the writ *de cautione admittenda* – meant that, in addition to Magna Carta, the Constitutions of Clarendon (1164) had been set down by the supreme governor of the church.[66] He used the Constitutions to show that the English sovereign had not only possessed the power to command that ordinaries accept the cautions of his excommunicate subjects and provisionally absolve them, but also to *decide* what qualified as sufficient caution in the first place. The Constitutions had involved, he said, 'no new matter or deuise but certayne auncient customes and liberties of the kinges [and] his predecessors'. Here was another ancient affirmation of still more ancient custom: an affirmation older, even, than Magna Carta. In this view, the fifth clause of the Constitutions took on new force.[67] Its assertion was that neither *cautio iuratoria* nor *cautio realis* was to be required of excommunicates as a condition of absolution: *cautio fideiussoria* would suffice.[68]

All of Morice's concerns thus came together, enmeshing his better-known misgivings about oaths with his less familiar qualms. The financial 'oppressions' of the Essex archdeaconry were not merely reprehensible predations but grave violations of long-established law – since the requirement that defendants surrender material goods as a precondition of provisional absolution had been anciently prohibited by the sovereign of the English church. So too had the church's sovereign forbidden ordinaries from requiring that excommunicates submit to a corporeal oath as a precondition of absolution. And the sixth clause of the Constitutions, when read with the understanding that the royal supremacy had been immemorial, bore upon oaths *ex officio*.[69] The clause, Morice wrote, allowed one to 'plainly perceyve' that ecclesiastical judges were not to convent or proceed against the English laity 'but uppon certayne and lawfull accusation, not *ex officio iudicis mero*, nor to be constreyned by theire owne oathe to discouer theire offences, but the same to be proued by certayne and sufficient testimony of others'; or, in the event that none would provide such testimony, to be established by the inquest of twelve men.[70] All of these ideas about different aspects of ecclesiastical criminal proceedings converged in Morice's mind:

[65]LPL, MS 234, fo. 251r, with the case being YB Hil. 21 Hen. VII, pl. 1, fos. 1a–5a.

[66]Morice's 1578 reading discussed the Constitutions in relation to ecclesiastical patronage: BL, Egerton MS 3376, fos. 47r–48r.

[67]Given in William Stubbs, ed., *Select charters and other illustrations of English constitutional history*, rev. H. W. C. Davis (9th edn, Oxford, 1913), p. 165.

[68]Morice underscored the age of the Constitutions with an antiquary's eye. He had seen the 'auncient customes and liberties' recorded not only by Matthew Paris but also 'in a greate perchement boke': LPL, MS 234, fo. 251r–v.

[69]Stubbs, ed., *Select charters*, p. 165.

[70]LPL, MS 234, fos. 251v–252r.

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> Let our ordynaryes and inferior Iudges ecclesiast[ical] soe often warned leaue at the laste these their uncharitable and vyolent proceedinges for meere toyes and trifles, and the proces of *excomm*[*unicato*] *cap*[*iendo*] will sufficientlie serue for the correccion of disobedyence, and that without such excessiue charges as the Doctor [Cosin] speaketh of. Their lawes indeed intangle the poorer sorte as flies in a spiders webb, but the ritch breake throughe like the humble bees.[71]

VIII

In sum, Morice's better-known concerns can only be understood in conjunction with those that modern historians have overlooked. His concerns about excommunication not only sparked his campaign but also structured his understanding of the English state's historic legal character and provisions for the liberties of the subject: his 'ancient constitutionalist' thought, if one will. Although we have had to retrieve them from unpublished and obscure sources, Morice's more recently missing ideas had some influence in the wider world of their own day. In the first place, it was the full version of Morice's *Treatise* that Richard Cosin read and to which he responded. Cosin considerably expanded his arguments about excommunication between the publication of the 1591 and the 1593 editions of his *Apologie*, during which interval he read Morice's *Treatise*.[72] Readers of the second edition encountered Morice's ideas about excommunication through the dark glass of rebuke. And while Morice's understanding of the royal supremacy was his own, other Elizabethans were also interested in the secular law of excommunication, for reasons that appear similarly historical. They included not only Robert Beale but also Robert Gynes, whose preface to a 1568 Inner Temple reading on tithes circulated in manuscript and perhaps shaped Morice's thinking. The writings of both men deserve further study.[73]

More substantially, however, one can see that Morice's peers directly encountered such ideas in the speech in the parliament of 1593–4 for which Morice has most generally been famed. In that oration Morice argued that one of the three ways in which England's ecclesiastical judges had dishonoured God and the kingdom; perverted and violated law and common justice; and had injured English subjects in their 'free & lawfull liberties', was what he called 'binding absolution'. Oftentimes, he proclaimed, excommunicates who had submitted themselves 'to the Censures Ecclesiastical [were] not absolved, [and were] not dismissed [from] their lingrynge & costlie Courts, before they [had] taken [an] Oathe to be obedient to all the Lawes Ecclesiasticall & the lawfull commandment of ... their Ordinarie'. Ecclesiastical judges, commencing their proceedings 'with wrested & extorted oathes of Examinations', ended them 'with the abuse of Gods holye name in their absolutions, byndinge' subjects 'to performe the Lawes they knowe not, & if they

[71]LPL, MS 234, fos. 169v–170r.

[72][Richard Cosin], *Apologie of, and for sundrie proceedings* (London, 1591), sigs. I4r–K1r; Cosin, *Apologie* (1593), parts I and II, sigs. T1v–T3v.

[73]BL, Harley MS 48064, fos. 166v–167r; BL, Harley MS 813, fos. 115r–116r. For other manuscripts of Gynes's work, see John H. Baker, *Readers and readings in the Inns of Court and Chancery*, Seld. Soc. supp. 13 (London, 2000), p. 86.

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were knowne, yet impossible to be performed'. Excommunications, *cautiones iuratoriae*, and oaths *ex officio* were as linked here as they were in Morice's less widely disseminated writing.[74]

Equally present in Morice's speech were the ideas that he had articulated in the *Treatise*'s unprinted sections about the royal supremacy. Morice accused the ecclesiastical commissioners of seizing upon their commission, and the Act of Supremacy upon which it had purportedly been framed, 'altogether in vayne': for the statute had merely restored the crown's 'auntient Iurisdiction over the state Ecclesiasticall'. To the crown it had 'unit[ed] onlie such Jurisdictions & Priviledges Spirituall, as heretofore were lawfully used' and could not license their 'so well doinge [such] so badd Actions'. Like the *Treatise*, Morice's speech used the figurative framework of the Act in Restraint of Appeals to underscore the historical importance of England's civil and ecclesiastical unity. Morice interwove it with his sense that freedom was England's peculiar glory. 'No Spartane Kinge, or Venetian Duke', the kingdom's prince was 'free from accompt & Cohercion of anye'. Yet she was 'guyded & directed' by law. It was thus that England's subjects were 'borne & brought upp in due obedience, but farre from Servitude & bondage, subject to lawfull aucthoritye & commaundment, but freed from licentious will & Tyrannie'. Approaching his conclusion, Morice exalted 'the Lawes, Liberties, & Customs of this our Countrye' as 'the Sinnewes & bindinge Bands of our Bodye Politique'. 'If the Sinnewes be weekned', he asked, 'shall not the whole Bodye be enfeabled? Yf the bands be broken', he asked, 'will not dissolution ensue?' He implored his fellow MPs to prevent so disastrous a turn, lest they allow their 'Posterity ... to fall into extreame thraldome'.[75]

Morice finished his speech, and the first of the two bills that he had brought with him was read. Entitled 'An act agenst unlawfull Oathes, Inquisitions, and Subscriptions', its themes were those for which Morice has been best remembered. But we ought to think carefully about the second bill, 'An acte ageinst unlawfull Imprisonment and Restraynt of Libertie'. It was not read. Before the Speaker – Edward Coke – managed to begin, he was interrupted; and a lengthy exchange ensued. The bill was postponed to the following day by the Speaker, who said he would until then keep them in confidence. But Morice related that he had heard Coke 'was in the meane time commaunded to come with the Billes to the Court', and that 'accordinglie he did'. 'What became of them after', Morice wrote, Coke knew best.[76] The contents of the second bill remain unknown. But some idea of their nature may be deduced from the recollection, over two decades later, of the man last known to possess the bill. In 1615, Coke recalled that excommunication was among the bill's concerns.[77]

[74]Cambridge University Library, MS Mm.1.51, fos. 55r–58v, at fos. 56v–57r. See also LPL, MS 2019.

[75]Cambridge University Library, MS Mm.1.51, fos. 57v–58v.

[76]Ibid., fo. 61r–v. Morice was imprisoned shortly afterward.

[77]Baker, *Reinvention of Magna Carta*, p. 273, n. 122, citing HLS, MS 109, fo. 65v. Brooks, noting Coke's custody of the bills, also speculated about the impact of Morice's thinking on Coke, albeit upon the basis of similarities between Coke's report of Cawdray's Case (1591) and Morice's 1578 reading, rather than in connection with Morice's ideas about the law of excommunication: see Brooks, 'Religion and law in early modern England', pp. 338–9.

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It might be in no way coincidental that the last-known custodian of Morice's bills was Coke, upon whom the bills clearly made some impression. Coke would rank among the most important exponents of the ideas that Morice had advanced about the liberties of the subject during the succeeding century. Between 1593 and 1615, Coke would have been reminded of such linked ideas – about excommunication, the royal supremacy, and personal freedom – on numerous occasions. He would not have needed to wait until 1607, when such ideas reappeared in the arguments of Nicholas Fuller, with whom Morice had worked on Cawdray's Case (1591).[78] Morice's ideas were taken up in legal argument much earlier than that: indeed, no later than two years after Morice's death in 1597. They were partially repeated in the Court of Common Pleas by Justices Walmsley and Glanville, speaking in Mary Barham's Case (1599); and repeated more extensively in John Smith's Case (1600).

Both cases discussed the writ *de excommunicato capiendo* in relation to arrests by precept of High Commission.[79] Coke made notes about the latter case in his commonplace book. The court's justices, he wrote, had found that a person's arrest under this precept was unlawful. They had held that the Act of Supremacy (1559) had served 'to unite and annex all the old jurisdiction and power' of an ecclesiastical nature to the crown, rather than to create any new jurisdiction or to 'ordain or prescribe a new form of proceeding'. An imprisonment effected by such a High Commission precept was an injury to the sovereign and the subject. After all, the subject 'arrested by a writ *de excommunicato capiendo*' had 'an ordinary means by course of law to obtain his liberty', by writ *de cautione admittenda*; and yet, 'if such imprisonments' by High Commission precept 'were to be lawful, then the subject might be in perpetual prison by the pleasure of the commissioners and would have no ordinary remedy for his deliverance'. That, held the court, 'would be unacceptable and greatly against the liberty of the subject'. Coke concluded his entry with the finding that the commission's letters patent were limited by the force of statute. 'The queen', said the judges, could not 'by her letters patent alone alter the course either of the ecclesiastical law or of the common law'. 'For every subject has an inheritance and interest in the laws by which he is governed', one that 'may not be abrogated, altered or changed except by act of Parliament'. The court affirmed what had been said in the reign of Henry IV: 'neither the king nor the pope may change the law'.[80]

Morice's life closed upon a bleak scene. His bills had vanished, and his refutation of Cosin's *Apologie*, as he despaired, remained unprinted and obscure.[81] It is easy to imagine that Morice believed himself to have been silenced. He would not have been

[78] *The argument of Master Nicholas Fuller, in the case of Thomas Lad, and Richard Maunsell, his clients* ([n.p.], 1607), especially (but not only) sigs. A1v–A3r. Stephen Wright has noted that Fuller argued in terms that were 'almost identical' to those of Morice's speech: Stephen Wright, 'Nicholas Fuller and the liberties of the subject', *Parliamentary History*, 25 (2006), pp. 176–216, at pp. 203–4.

[79] John H. Baker, *Sources of English legal history: public law to 1750* (Oxford, 2024), pp. 340–2.

[80] John H. Baker, ed. and trans., *Reports from the notebooks of Edward Coke*, Seld. Soc. 140 (London, 2023), pp. 1048–51. Without tying the arguments to excommunication, Baker has noted that the claims about the royal supremacy in Coke's report of John Smith's Case (1600) mirrored the theory of the supremacy that Morice had offered in his 1593 speech. They stood, as Baker notes, in stark contrast with the arguments that Coke had made as attorney general in Cawdray's Case (1595): Baker, *Reinvention of Magna Carta*, pp. 291–2.

[81] BL, Lansdowne MS 82, fo. 150v.

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entirely correct. One might follow Morice's words from mouth to mouth, forward from one era into another. But one might equally look backward at the earlier words and deeds of his contemporaries. Efforts to historically contextualize the law of excommunication formed only one component of that broader Elizabethan attempt to understand the structural joinery that had united the civil and ecclesiastical polities of England into a single kingdom: not only in the wake of the Reformation but also in the more distant past. It was from *that* attempt that 'ancient constitutionalist' thought emerged.

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