II

THE LIMITS OF CONFORMITY IN LATE ELIZABETHAN ENGLAND: A PLEA FOR A PRIEST

Edited by Michael Questier

https://doi.org/10.1017/S0960116315000329 Published online by Cambridge University Press

HISTORICAL INTRODUCTION

The Elizabethan settlement of religion of 1559 required that the queen's subjects, whatever their disposition in religion, should conform to specific statute-based aspects of that settlement. The consensus among scholars nowadays seems to be that the 1559 ecclesiastical legislation was relatively limited in its scope although the Elizabethan acts of supremacy and uniformity served as the groundwork for much of the subsequent, and more wide-ranging and coercive, law relating to the established Church.

The regime's conformist agenda went through a series of step changes in the 1560s, 1570s and 1580s with a number of acts which extended the law of treason and also the penalties for separatism. The best survey of the development of Catholic separatism/recusancy as a legal topic and offence is Hugh Bowler's introduction to his volume on the 1592–1593 exchequer recusancy roll, and it would be superfluous to replicate his conclusions here.[1] The leading work on the evolution of the law of treason in Elizabeth's reign remains in typescript: the PhD thesis of Leslie Ward. She demonstrates how, in the statutes of 1563, 1571 and 1581, a number of new offences were defined as treason.[2]

Since, however, this is very substantially the topic of the document I have edited and here discuss, it may be worth setting out in some detail the regulatory structure which the writer of the manuscript reproduced here was seeking to subvert, and the way in which the relevant legislation phrased the link between Catholicism and treason.

The 1571 act (13 Eliz. c. 2) was formulated in the context of the rebellion in the North during late 1569 and early 1570. That episode had seen Catholic clergy offering absolution from the sin of schism to

The MS of 'A plee for a prieste . . . ' is to be found in the Archives of the Archdiocese of Westminster, Series A, VII, no. 104.

I am very grateful to Michael Bowman for discussions of this topic. Without his sage advice, based on years of legal training and practice, it would have been virtually impossible to take this project to a conclusion.

[1] H. Bowler (ed.), *Recusant Roll No. 2 (1593–1594)*, Catholic Record Society, 57 (London, 1965), vii–cxiv.

[2] L.J. Ward, 'The law of treason in the reign of Elizabeth I 1558–1588', PhD thesis, Cambridge, 1985, ch. 1.

https://doi.org/10.1017/S0960116315000329 Published online by Cambridge University Press

those who had taken part in the rising, and the enterprise had received papal endorsement via the notorious papal bull of excommunication of Elizabeth (*Regnans in Excelsis*). As Ward points out, the 1571 statute was derived from the act of supremacy of 1559 and from 5 Eliz. c. 1 of 1563, though its penalties were much more stringent and it created five new treasons, including reconciling to or being reconciled to Rome. The principal feature of the act was that it connected the carrying or promulgation of papal bulls or edicts (i.e. assertions of papal authority) directly with 'absolution or reconciliation'. After the publication of the 1570 bull of excommunication, 'conversion implicitly involved withdrawal of obedience from the queen to the papacy' and so 'to use any bull for any purpose' or even 'to . . . possess a bull, or to convert the queen's subjects, constituted outward aid to the papacy' and this was an extension of the 1352 treason act which defined treason as adhering to an enemy of the crown.[3]

The 1571 statute was made 'agaynste the bringing in and putting in execution of bulls and other instruments from the sea of Rome'. The statute claimed that some 'seditious and very evell disposed people', disregarding their duty to God and the queen, had conspired, 'as it should seeme, verye seditiously and unnaturally' to bring the realm and crown into 'thraldome' to Rome and 'also to estraunge and alienate the myndes and hartes of sundry her majesties subjectes from their . . . obedyence, and to raise and stirr sedition and rebellion within this realme'. To do this they had procured written instruments from the bishop of Rome 'the effect wherof hath ben and is to absolve and reconcile all those that wilbe contented to forsake their due obedyence' to the queen, 'and to yeld and subjecte themselves to the said fayned, unlawfull and usurped aucthoritie, and by color' of the same written instruments to practise 'in such partes of this realme where the people for want of good instruccion are moste weake, simple and . . . ignorant, and thereby fardest from the good understanding of their duties towardes God' and the queen. The result was that those persons had 'been contented to be reconcyled to the saide usurped aucthoritie of the sea of Rome and to take absolution at the handes of the said naughtie and subtill practysers'. In this fashion, there had 'growne greate dysobedience and boldnesse in manye, not onely to withdrawe and absent themselves from all dyvyne service nowe moste godly set forth and used within this realme' but such people had also 'thought themselves dyscharged of and from all obedyence, duetie and allegiaunce to her majestie, whereby most wycked and unnaturall rebellyon hath ensued, and to the further daunger of this realme is hereafter very lyke to be renewed yf the ungodly and wycked

[3]Ward, 'Law of treason', 50–53, 54.

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attemptes in that behalf bee not by severitie of lawes in tyme restrayned and brydeled'. Anyone reconciling or reconciled to the see of Rome in these circumstances 'shalbe deemed and adjudged highe traytors'.[4]

The 1581 statute (23 Eliz. c. 1) was a response to the interventions made by the Jesuits Edmund Campion and Robert Persons after they arrived in England in mid 1580. It clarified the 1571 statute. As Ward phrases it, this new act, relying on 13 Eliz. c. 2, created three treason offences in extension of the earlier measure. It became high treason to 'possess, feign to have, or to practise by any means, the power to absolve, influence, or withdraw any of Elizabeth's subjects from their due obedience and the established religion', that is to the religion of the Church of Rome; secondly to 'persuade any subject to profess allegiance to the papacy or to any other foreign ruler . . . or to accomplish the same by any open action'; thirdly, voluntarily to convert or withdraw 'obedience to the crown' and to affirm 'allegiance to the papacy or any power other than the queen'.[5] The 1581 statute stated that

> divers evell affected persons have practised contrarye to the meaninge of the said statute, by other meanes than by bulles or instrumentes written or

[4]A. Luder et al. (eds), *Statutes of the Realm*, 11 vols, (London, 1810–28) [*SR*], IV, 528–529. The statute provided that 'to prevent the greate myscheefes and inconvenyences that thereby maye ensue',

> yf any person or persons after the fyrste daye of July next comming shall use or put in ure in any place within this realme or in any the queenes domynions any suche bull, wryting or instrument, written or prynted, of absolution or reconciliation at any tyme heretofore obtayned and gotten, or at any tyme hereafter to be obtayned or gotten, from the said bysshop of Rome or any his successors, or from any other person or persons aucthorized or clayming aucthoritie by or from the said bysshop of Rome, his predecessors or successors, or sea of Rome; or yf any person or persons after the said fyrste daye of July shall take upon him or them by color of any such bull, writing, instrument or aucthoritie to absolve or reconcyle any person or persons, or to grante or promisse to any person or persons within this realme or any other the queenes majestyes dominions, any suche absolution or reconciliation by any speache, preaching, teaching, writing or any other open deede; or yf any person or persons within this realme or any the queenes domynions after the said fyrste daye of Julye shall wyllingly receave and take any suche absolution or reconciliation; or els yf any person or persons have obtayned or gotten synce the laste daye of the parliament holden in the fyrst yere of the queenes majestyes raigne, or after the said fyrst daye of July shall obtayne or get from the said bysshop of Rome or any his successors or sea of Rome any maner of bull, writinge or instrument written or prynted, contaynyng any thinge, matter or cause whatsoever; or shall publishe or by any waies or meanes put in ure any suche bull, writyng or instrument; that then all and every suche acte and actes, offence and offences, shalbe deemed and adjudged by the aucthoritie of this acte to be hyghe treason.
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> *SR*, IV, 529

[5]Ward, 'Law of treason', 59–60.

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> printed, to withdrawe divers the queenes majesties subjectes from their naturall obedience to her majestie, to obey the said usurped aucthoritie of Rome, and in respecte of the same to perswade great nombers to withdrawe their due obedience to her majesties lawes.

To remedy this problem, it was now declared that

> all persons whatsoever which have, or shall have, or shall pretend to have power, or shall by any wayes or meanes put in practise to absolve, perswade or withdrawe any of the queenes majesties subjectes or any within her highenes realmes and dominions from their natural obedience to her majestie, or to withdrawe them for that entent from the relygeon nowe by her highenes aucthoritie established within her highenes domynions to the Romyshe religeon, or to move them or any of them to promise any obedience to any pretended aucthoritie of the sea of Rome, or of any other prince, state or potentate, to be had or used within her dominions

should be adjudged traitors, as would those who 'by any meanes be willinglye absolved or withdrawne as aforesaid, or willinglye be reconciled, or shall promise any obedience to any suche pretended aucthoritie, prince, state or potentate as ys aforesaid'.[6]

The other principal class of offence which became treason in this period was the action of returning into the realm following ordination abroad, that is as a Roman Catholic priest. The 1585 statute, 27 Eliz. c. 2, entitled 'An Act againste Jesuites Semynarie Priestes and such other like disobedient Persons', caused 'to be adjudged a traytor' 'any Jesuite, seminarie priest . . . or [any] religious or ecclesiasticall person whatsoever, being borne within this realme or any other her highnesse dominions', ordained by Rome's authority, who should 'come into, be or remayne in any parte of this realme'.[7]

Predictably, these coercive measures triggered a debate about how far the legal formulae in them could really define as treasonable what Catholics themselves claimed were matters which lay exclusively within the forum of the individual conscience and not within that which properly belonged to the temporal power of the queen and parliament.[8]

This redrawing of the law was so controversial, however that, in late 1581, when the Jesuit Campion and a number of co-defendants were

[6] *SR*, IV, 657.

[7] *SR*, IV, 706–707. See also the royal proclamation of 1 April 1582, P.L. Hughes and J.F. Larkin (eds), *Tudor Royal Proclamations*, 3 vols (London, 1969), II, no. 660; J. Bellamy, *The Tudor Law of Treason* (London, 1979), 72.

[8] See, e.g., William Allen, *An Apologie and True Declaration of the Institution and Endevours of the two English Colleges* . . . (Rheims, 1581); William Cecil, *The Execution of Justice in England* (London, 1583).

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put on trial, they were arraigned under the fourteenth-century treason legislation rather than the 1581 statute, even though that statute had been drafted and passed in response to the challenge represented by these clergy, and under which they could have been indicted.[9]

William Allen's *True, Sincere, and Modest Defence of English Catholiques of 1584* (his reply to Lord Burghley's *Execution of Justice in England*) runs through recent martyrdoms and condemns for example the conviction of Everard Hanse 'only upon a statute made in the last parliament . . . by which it is made a crime capital to persuade any man to the Catholic religion'. According to Allen, the martyr priests Richard Kirkman, James Thomson, William Hart and Richard Thirkeld who had been executed in York were 'never charged nor suspected of any other treasons than of hearing confessions, absolving and reconciling sinners to the favour of God and to the unity of the Catholic Church . . . which both in the priest that absolveth and in the party that is absolved they have made to be the crime' of treason 'under this false and most unjust pretence: that all parties so reconciled are assoiled of their obedience to the queen and do adhere to her enemy, and admit foreign jurisdiction, power and authority, which is exercised in confession for remission of sins'.[10]

Technically, after the passage into law of the 1585 statute mentioned above, the proof of the fact of a defendant's ordination, as long as he was one of the queen's subjects, was enough for prosecuting counsel to secure a conviction. Though most of the trials where the indictment was framed according to the 1585 statute were not, as far as I am aware, recorded in detail, the chances are that counsel for the crown made the case against the accused, if he was a seminary priest, also in part by reference to his alleged treasonable purposes and intentions, that is in addition to the fact of his ordination. On at least one occasion, at Chichester in 1588, we can find crown counsel arguing that the new statute was in effect a piece of enabling legislation rather than a legal novelty. The attorney Thomas Bowyer declared to the jury on this occasion (the trial of four seminary priests, indicted under the 1585 statute):

> the treasons whereof they were to be convicted were in ded treasons by the commen lawes of the realme, and that [*sic*] verie same treasons were mencyoned in the statut of 25 E. 3 as the adhearinge to her Majesties enemyes, compassinge

[9]Ward, 'Law of treason', 248–251.

[10]William Allen, *A True, Sincere, and Modest Defence of English Catholics* . . . (London, 1914), ch. 1, 12, 13–14. For the arguments over this issue at James Bell's trial in 1584, see J.H. Pollen (ed.), *Unpublished Documents relating to the English Martyrs 1584–1603*, Catholic Record Society, 5 (London, 1908), 75, 77. For Hanse's indictment, which Ward argues was under the 1571 treason statute for uttering traitorous words, see Ward, 'Law of treason', 299–300.

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> and imagining the deprivation of the queen from her regall authorit[i]e and lyfe was not to be doubted to be theyr entent and purpose, which intent and treasons were sufficyent to prove the partie guyltye though the act were not executed because yt would be to[o] late to punnyshe the offence after the act [was] executed.

Bowyer added that 'this entent of theirs by the commen lawe is to be proved by the overt fact, and only for the ease and satisfaction of the country at tryall to prove the overt fact this statut was made'. No one could doubt that the pope was the queen's 'capitall enemy'. The defendants, by going out of the realm and 'there adhering to the pope and by or under his authorit[i]e taking an order of priesthood and returninge to wynne the queenes subjectes to their factyon were without any question even by the commen lawe to be adjudged traytours, all which by their owne severall examinatons appered to be true'.[11]

The State's case was, in other words, that the fact of ordination and the facts, as far as they were known, of the other offences of those indicted could not be kept logically separate. Questions such as these were almost certainly debated on each and every occasion that a clergyman and his patrons and harbourers were indicted under the new statute law. In early 1590, on trial, the priest Christopher Bales challenged the judges as to whether St Augustine of Canterbury, sent to England by Pope Gregory, was a traitor and, if not, why should he (Bales) be one since he came for no other purpose than Augustine had done.[12] At Winchester in mid 1591, Roger Dickenson was told 'thou wilt perswade poor soules from Gods religion' and he answered that 'he never did anything but to use my office and that I hope was no offence'. To this, the court replied: 'thou art made a priest beyond the sea according to the Church of Rome', only for Dickenson to retort that 'I was made a priest as other priests are and have been before me'.[13]

The Jesuit Robert Southwell argued at his trial in 1595 that it was impossible for it to be treason to be a priest *per se*, but Sir Edward Coke replied that the provable treasons of separatist Catholic clergy showed that the 1585 statute 'was not made but upon urgent cause'. Southwell's argument here was the same as appeared in his work entitled 'An Humble Supplication', a reply to the royal proclamation of 18 October 1591. (It circulated in manuscript, and did not appear in print until five

[11]The National Archives (TNA), SP 12/217/1, fo. 3[r]; Ward, 'Law of treason', 290; R.B. Manning, *Religion and Society in Elizabethan Sussex* (Leicester, 1969), 145.

[12]Pollen, *Unpublished Documents*, 178; R. Challoner, ed. J.H. Pollen, *Memoirs of Missionary Priests* (London, 1924), 160.

[13]Archivum Britannicum Societatis Jesu (ABSJ), Stonyhurst MS Collectanea M, 146[b].

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years after the regime executed him.) 'All Christendome', Southwell said, 'hath these fifteene hundred yeeres honoured for pastours and governours of their soules those that nowe are more than unfavourably termed traytors'. For 'if they that harbour, relive or receive any such be worthy to bee deemed fellons, then all the glorious saintes of this lande whose doctrine and virtue God Almightie confirmed with many miracles were no better than traitours and their abettours fellons'. Thus (the same point that Bales had made) 'Saint Augustine and his companions that converted our realme in Saint Gregories time were' themselves within 'the compasse of treason' since 'theyr functions and ours were all one equally' derived 'from the sea of Rome'. Southwell imagined the coming of the 'day of general resurrection in your Majesties time', as it might do, and he conjured up the astonishment of 'so many millions of prelates, pastours and religious people . . . that . . . honoured and blessed this kingdome with the holiness of their life and excellencie of their learning'; they would be 'amazed to see their relikes burned, their memories defaced', and their monasteries either destroyed or desecrated, 'but more would they muse to find their priesthood reckoned for treason, and the releefe of priesthood condemned for felonie, these being the two principall testimonies of devotion that theyr ages were acquainted with'. The see of Rome was 'in the selfe-same state' as before, and 'indued with the same authoritie, and neither the manner of our creation, or priesthood it selfe is any thing altered from that it was'. So 'why should it be more treasonable to be made priestes in the midsomer day of your first yeare than the next day before, or the last of Queene Maries reigne?'[14]

Henry Walpole likewise insisted in 1595 that ordination was not treason; priesthood was 'a dignity and office instituted by our Lord Jesus Christ, and given by Him to his apostles, who were priests, as were also the holy fathers and doctors of the Church who converted and instructed the world', as too were those who first brought the gospel to England. In reply, the trial judge Francis Beaumont conceded that 'merely being a priest or Jesuit' was not treason but the additional facts of, in Walpole's case, returning into the realm (which was all that was necessary for a conviction under the statute) and in addition his having been 'with the king of Spain' and his conversing with Robert Persons, William Holt and 'other rebels and traitors' were sufficient.[15]

[14]Pollen, *Unpublished Documents*, 334; Robert Southwell, *An Humble Supplication to her Maiestie* (n.p., 1595 (printed secretly in England, 1600–1601)), 53–56.

[15]Challoner, *Memoirs*, 225. John Aveling suggests that there was a 'clear tendency' at the treason trials in the North Riding in 1582–1583, i.e. after the 1581 statute but before that of 1585, 'to argue that ordination overseas or receiving or reconciliation by authority from

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In 1601 Mark Barkworth rhetorically asked the lord chief justice 'can any one maintain that to be a priest is treason?' for 'was not our Saviour a priest according to the order of Melchisidech?'; and 'will anyone say that He was a traitor?'[16]

The regime's proceedings were, however, informed by a sense that ordination and reconciliation were expressions of ideological commitment that could be validly regarded as treasonable. How far that was the case in practice is not easy to say. In April 1591, a young man called Robert Weston (whose father was a noted London Catholic lawyer) was arrested and confessed that there was, as Lucy Underwood describes it, 'a public rite, with set formulae' for reconciling someone to Rome. Those to be reconciled had to make certain statements, on oath, about sensitive political issues; they had to deny the royal supremacy and they then swore, *inter alia*, that 'our byshopps, preachers and mynisters are lymes of the devill permitted by God to tempte his electe'. Then 'this question is demaunded of the preist to hym, if anie dissention . . . should arise' between the queen and the Church of Rome, 'which parte' would he take? And 'upon his oath he must confesse to spend his lyffe and goodes in defence of theire church'. He also had to confirm that there were seven sacraments and that the pope could not only 'forgive sinnes' but also 'excommunicate princes', and so on, after which the priest can reconcile the penitent. Depending on how far one credits Weston's statement (Underwood suggests that Weston was 'probably mingling truth, lies and hearsay'), this might be reckoned to be close enough to the claims made by government officials about the treasons involved in the supposedly spiritual ministrations of the seminarist clergy.[17]

The line taken by the regime's own apologists and pamphleteers was expressed by Francis Bacon in an unpublished piece (which probably circulated in manuscript) written in reply to Richard Verstegan's *A Declaration of the True Causes* . . . of 1592. Ventriloquizing the position of Lord Burghley, he argued that seminary priests were sent to 'reconcile' the queen's 'subjects from their obedience' and that this turned Catholics from papists of conscience into 'papists of faction'. Bacon

Rome was tantamount to breach of the act of 1559 and of the old treasons acts', J.C.H. Aveling, *Northern Catholics* (London, 1966), 138.

[16] Challoner, *Memoirs*, 254.

[17] TNA, SP 12/238/126, i–iv, quotations at no. iv, fo. 189[r]; L. Underwood, 'Persuading the Queen's Majesty's subjects from their allegiance: Treason, reconciliation and confessional identity in Elizabethan England' (forthcoming in *Historical Research*, 2015). I am grateful to Dr Underwood for allowing me to see this paper in draft. For John Hambley's rather different account of (his) reconciliation to Rome by the priest John Ballard in London in 1583, see TNA, SP 12/192/46, i, fo. 71[r–v].

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linked this directly to Catholic separatists' refusal to attend church.[18] In other words, becoming a recusant was a visible sign of precisely this kind of otherwise invisible conspiracy.

This was the argument made at the trial of James Bird at Winchester. Here the presiding judge, Sir Edmund Anderson, claimed that the fact of Bird's recusancy was enough to prove that he had been reconciled to Rome in the manner delineated by the current law of treason. Anderson allegedly said that 'a recusant is one who refuses to go to church. This no one does except those who have been reconciled to the Church of Rome; but he that is reconciled to the Church of Rome is a rebel and a traitor' and in effect ordered the jury to convict, which they did. (It was presumably known that Bird had, as Challoner says, been a seminarist at Rheims.)[19]

The eventual execution of Bird (on 25 March 1593) may in fact have been a response to the passing of anti-sectary legislation in the 1593 parliament at more or less precisely that point.[20] On and after 11 March, the puritan separatists Henry Barrow and John Greenwood, with others, had been proceeded against under the 1581 act against seditious words. This was undoubtedly shocking for some Protestants since that statute had been formulated in response to Catholic critiques of the regime. Barrow and Greenwood were convicted and executed, and their executions, evidently against the will of Lord Burghley, were provoked in part by puritan protest in the Commons against the new anti-sectary law, that is as it touched puritans.[21] The Winchester trial may have been staged in order to reinforce the claim that the extant law against offences committed by Catholic separatists should not be applied to puritans, and puritanism should under no circumstances be equated with popery.

Bird's conviction and execution were possibly also a response to the expression of harder-line Catholic opposition to occasional conformity, of exactly the sort that we know was being pumped out by the Jesuit Henry Garnet in opposition to the likes of the seminarist

[18]Francis Bacon, 'Certain Observations made upon a Libel published this Present Year, 1592', in J. Spedding, R. Ellis and D. Heath (eds), *The Works of Francis Bacon*, 14 vols, London, 1857–1874), VIII, 179–180, cited in P. Lake, *Bad Queen Bess* (forthcoming), ch. 15; V. Houliston, *Catholic Resistance in Elizabethan England: Robert Persons's Jesuit Polemic, 1580–1610* (Aldershot, 2007), 53.

[19]Pollen, *Unpublished Documents*, 231–232; Challoner, *Memoirs*, 188.

[20]The presiding judge Sir Edmund Anderson's hostility to Catholic separatism was, it seems, the product of religious conservatism; he was equally hostile, by turns, towards both Catholics and puritans; *ODNB*, *sub* Anderson, Edmund (article by D. Ibbetson).

[21]W. Richardson, 'The religious policy of the Cecils, 1588–1598', DPhil, Oxford, 1993, 100–111. They had been imprisoned under 23 Eliz. c. 1, i.e. for refusing to attend church, *ODNB*, *sub* Barrow, Henry (article by P. Collinson).

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Thomas Bell who had himself recently gone over to the Church of England.[22]

Exactly how controversial the Bird case was may be deduced from the long delay between verdict and execution of sentence. The significance of the case locally can be picked up from the memory of the argument that Bird had with the sheriff seconds before death when he tricked him into appearing to admit that he, Bird, was being hanged only because he refused to go to church. There was a story in circulation too that Bird's severed head had bowed to his father, a conformist Winchester office holder, which proved that Bird junior knew what true obedience was.[23]

At John Rigby's trial in 1600 the crucial issue was, again, the interpretation of the statute law on reconciling. Rigby rehearsed several of the reasons why he could not be found guilty. He alleged that

> whereas I am charged in my indictment that I was reconciled – it is very true; to God Almighty so I was, and I think lawfully might be; and, as I remember, it is also allowed in your book of common prayer, in the visitation of the sick, that if any man find himself burthened in conscience he should make his confession to the minister, which confession manifesteth a breach between God and his soul, and by this humble confession he craveth pardon of his sins, and reconciliation to God again, by the hands of his minister.

And, secondly, 'whereas I am charged, that I was reconciled from my obedience' to the queen 'and to the Romish religion, I will depose the contrary; for I was never reconciled from any obedience to my princess, for I obey her still; nor to any religion, for although I sometimes went to church against my will, yet was I never of any other religion than the Catholic, and therefore needed no reconciliation in religion'. Thirdly,

> whereas, in my former answers, I said I went to church, it is true, for fear of temporal punishment I so did, but never minded to fall from the old religion, and therefore needed no reconciliation.

Fourthly he suggested to the judges that they should 'explicate the meaning of the statute to the jury: if the meaning thereof be to make it treason for a man fallen into the displeasure of God, through his sins, to be reconciled to God again, by him to whom God hath committed the authority of reconciliation, if this be treason, God's will be done'.

[22] P. Lake and M. Questier, *The Trials of Margaret Clitherow* (London, 2011), chs 7, 8.

[23] Pollen, *Unpublished Documents*, 231–232; Challoner, *Memoirs*, 188; Underwood, 'Persuading'.

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'Then', said both the judges, 'it was by a Romish priest, and therefore treason'. Rigby answered that it was

> by a Catholic priest, who had the liberty of the prison, and was free for any man to come to him to relieve him; and, therefore, by the statute, no treason. Again, my lords, if it be not inquired of within a year and a day, there can be no advantage taken against me by this statute, if you wrong me not. Whereto replied one that sat under the judge; all this will not serve thy turn, for the jury must find it treason,

as indeed they did, although Justice Gaudy tried to persuade Rigby to conform.[24]

All of these issues were publicly brought together by the trial and execution of the priest Robert Drury and of the alleged murderer Humphrey Lloyd in 1607. Drury argued, 'at the barre', that 'if it were treason in him to be a priest, then it was the like in Saint Augustine, S. Bernard, and other reverend fathers of the Church, who received their priesthood by authority from God, and so did he presume to have doone the like'. To this the court replied that there was a great difference between his priesthood and that of the fathers of the Church, 'yet priesthood solie was not imputed to him for treason, for that profession, (though neither liked nor allowed by us) he might use and exercise in the parts beyond the seas, keeping himselfe there'. But it was not allowable, having been ordained in the Roman communion, 'to com home again into this land, and (in meere contempt of the king and his lawes) to reconcile, seduce and alienate loyall subjects harts, from love, just regard and dutie to their soveraigne'.[25]

This argument continued under the Tyburn triangular cross beam itself. Drury alleged his conviction was only for his ordination while a

[24]Challoner, *Memoirs*, 240–241 (Challoner's narrative is based on Thomas Worthington, *A Relation of Sixtene Martyrs: glorified in England in twelve monethes: With a Declaration: That English Catholiques suffer for the Catholique Religion: And that the Seminarie Priests Agree with the Iesuites* (Douai, 1601), sigs $A2^{r}$–$C7^{r}$). Protestant polemicists of course denied the validity as much as the lawfulness of sacramental reconciliation to Rome; see, e.g., Lewis Bayley, *The Practise of Pietie*, 11th edn (London, 1619), 763–765.

[25]*A True Report of the Araignment, Tryall, Conviction, and Condemnation, of a Popish Priest, named Robert Drewrie* (London, 1607), sigs $A4^{r}$–B^{r}. For similar arguments at the trials in 1610 of Roger Cadwallader and John Roberts, see Challoner, *Memoirs*, 300–301; J.H. Pollen (ed.), *Acts of English Martyrs* (London, 1891), 151–153. As Challoner relates it in Cadwallader's case, Bishop Robert Bennett 'seemed much to insist upon this one point, that Christ was the only sacrificing priest of the New Testament, in that proper signification of the name, priest, which is not common to all Christians; so to free himself from being a priest. Which made the blessed martyr return him this witty answer: "make that good, I pray you, my lord, for so you will prove that I am no more a priest than other men, and consequently, no traitor or offender against your law" ', Challoner, *Memoirs*, 300–301.

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Protestant minister present 'shewed some papers', allegedly signed by Drury, to prove, that it was for treason more conventionally understood. Once Drury had been hanged and dismembered, 'the minister told the people they should now heare his horrible treason for which besides his refusing the oath of alleageance . . . he was worthily executed' and he pulled 'out his papers to reade' but then said there really was not time, 'others being to suffer', that is to hang for other offences; 'neither would it be greatly material because they should see very shortly in printe the whole discourse of all his treasons', that is the printed pamphlet which is the principal source for the regime's prosecution of Drury; he then 'putt up his papers againe into his pocket, whereat the people laughed and one gentl[e]man amongst the rest sayd alowde, "By God, thou hast made one of the foolishest speeches that . . . ever was made at Tyburn." '[26]

These papers were the basis for the *True Reporte of the Araignment, Tryall, Conviction, and Condemnation, of . . . Robert Drewrie*. One of the clinching pieces of evidence which the pamphlet cited for the bad mind and treasonable intentions of the priest was his pronouncing absolution over Humphrey Lloyd, who was hanged on the same day. According to the pamphlet, on 18 January 1607, Lloyd had met Thomas Morris in Aldersgate Street. Morris was 'one of the ordinary yeomen of his majesties guarde'. They drank in the Half Moon tavern and 'some speeches concerning religion passed betweene them, wherein Morris touched Lloyd to be a dissembler'. The long and the short of it was that subsequently they met again and quarrelled, and Lloyd killed Morris. Although the pamphlet more or less admitted that there was fault on both sides, it stressed Lloyd's 'cruell and bloodie hatred' and claimed that he had been involved in recent Catholic conspiracies, including the Gunpowder Plot.[27]

But the 'other' side of the story, as it were, was narrated by the Jesuit Richard Blount. Blount claimed that Morris had 'sayd' that 'papists were traytors' and Lloyd 'answered that they were as good subjects as any the king had'. Morris drew his sword and Lloyd killed him 'in his owne defence'. Lloyd 'had served the State in warrs many yeares very faithfully and had great friends', yet he was hanged 'because he professed himselfe Catholick and would not yield to goe to church', even though the renegade priest John Scudamore, a client of Archbishop Richard Bancroft, came and tried to persuade him to conform.[28]

[26] ABSJ, Stonyhurst MS Collectanea M, 99[b], 100[a].
[27] *True Report of . . . Robert Drewrie*, sig. B2[r]–3[v].
[28] ABSJ, Stonyhurst MS Collectanea M, 100[a].

https://doi.org/10.1017/S0960116315000329 Published online by Cambridge University Press

The Present Document and its Origins

This manuscript position paper ('A Plea for a Priest') which is reproduced here in its full and often tedious entirety is essentially a series of legal cases, questions and quibbles, argued if not by a lawyer then by someone with at least some experience in thinking about statutory interpretation. It makes several of the arguments advanced by clergy and their harbourers when they were indicted under the new treason legislation, although, perhaps surprisingly, it does not mention any specific instance of a recent treason trial.

I should point out that I have not established the author of this piece.[29] Nor have I worked out the exact date of, or reason for, its composition. Since it refers to Lord Burghley as the 'late lord treasurer' it must have been written after Burghley's death on 4 August 1598; and, obviously enough, it was written before the end of Elizabeth's reign on 24 March 1603. It is located therefore somewhere in the middle of the disputes among, and the toleration petitioning by, Catholics in the late 1590s and up to the accession which we tend, for short hand purposes, to refer to as the Archpriest (or Appellant), controversy, and which anticipated the accession of James VI of Scotland as James I of England and Great Britain. In that one can conjecture at all about the purpose of its composition, the author seems to say that he is writing it as a position paper for someone else to use (pp. 550–551), perhaps in debates among Catholics on these topics.[30] There are

[29]Michael Bowman suggests that, since the only precedent cited in this text is *Hambleton's Case*, perhaps the author had a civil-law rather than a common-law training, though, as he remarks, there were very few precedents of any use to defendants in treason trials anyway. Mr Bowman suggests also that this text might have been compiled in connection with actual legal defences in court of indicted Catholics. Successful defences in treason trials were rare, and none is recorded on the basis of the arguments advanced here. On the other hand, although there were very few precedents of any use to a defendant on a charge of treason, a treason trial was one of the occasions when the court might grant the right to counsel – in other criminal trials the defence had no right to call witnesses and a defendant might be represented by a barrister only on questions of law. Mr Bowman advises (and this seems absolutely right) that even if the arguments advanced in the text were were unlikely to be successful while the trial was in progress, their real usefulness might be as a basis for a plea for clemency.

[30]Thomas McCoog has shown that on 3 June 1598, there was a meeting of Catholics in London. They wished to take advantage of the recent Franco-Spanish peace negotiations and they discussed which of the penal statutes should be abolished if France and Spain imposed on Elizabeth sufficiently to grant toleration. I am grateful to Dr McCoog for alerting me to this fact and to the relevant manuscript citation (Archivio Segreto Vaticano, Segr. Stato Nunz, Diverse 264, fo. 233^{v}: 'Quae Catholici Anglicani ex suorum jurisconsultorum consilio petunt ne nominatim revocentur a Regina in concedenda religionis Catholicae tollerantia'). Obviously this meeting predated the composition of the manuscript printed below, but it may be that this manuscript and its summary of the case against the penal

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certainly echoes of these arguments in the pamphlet literature in and around the Archpriest dispute and the toleration agitation of the same period. For example, Richard Broughton's *An Apologicall Epistle* of 1601 argues that, 'as appeareth by our auntient lawes of King Edward the third' 'nothing is remembred' to be treason 'but that which tendeth either to the betraying of the king or countrey'. The character of priesthood has not changed: 'nothing is, or can be changed in that sacrament, howsoever the mindes and proceedings of Protestants doe change. The same priesthoode which was given to Saint Peter, and the apostles, the same which Saint Augustine, and his associates hadde that converted England, the same which hath beene so honored of al English kings since then, is the same'. Unless 'the state of England bee not the same it was', priesthood must still 'be honourable'. Moreover,

> there is not any poynt of civill regiment in that sacrament, being wholie spirituall and supernaturall, nothing concerning a temporall commonwealth, no renouncing or deniall of any authority in England, no conspiracie to prince, no betraying of a kingdome, of whome no one worde or mention is made, or can bee intended; no matter given in charge, no authoritie communicated, but to offer sacrifice, to pray, to preach, minister sacraments, and such priestly functions,

and precisely as the writer of 'A Plee for a Prieste . . .' argues, these things are 'but such as the ministers of England imitate the like'. Broughton insists that the functions of reconciling and excommunicating cannot be *per se* treasonable, since the Catholic diaconate is also treasonable under the Elizabethan statute of 1585.[31]

After the regime had radically changed course, in the run-up to the parliament of 1604, over how far Catholics might enjoy royal tolerance, Thomas Morgan wrote to Sir Robert Cecil on 26 April on behalf of the loyalist priest Jonas Meredith and remarked that 'thordre of priestehoode (what accompte so ever your lordship makethe thereof) is so ancient in Christes Churche and of that force as it will have

code against aspects of Catholic separatism came out of the same speculation about the possibility of some form of regime-sponsored tolerance.

[31] Richard Broughton, *An Apologicall Epistle serving as well for a Praeface to a Booke entituled, A Resolution of Religion: as also, containing the Authors most lawfull defence to all estates, for publishing the same* (Antwerp (imprint false, printed secretly in England), 1601), 95–96. Andrew Willet answered Broughton that Catholics' denial of the ecclesiastical supremacy is enough to constitute treason; even under the treason statute of Edward III, papist clerics 'that maintaine a forraine potentate, a knowne enemie to prince and countrie, are found to be traytors: for they which are adherent "to the kings enemies in his realme, giving them ayde and comfort within the realme, or elsewhere", are by that statute judged traytors', Andrew Willet, *An Antilogie or Counterplea to an Apologicall (he should have said) Apologeticall Epistle published by a Favourite of the Romane Separation, and (as is supposed) one of the Ignatian Faction: Wherein two hundred Untruths and Slaunders are discovered* . . . (London, 1603), 222–223.

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continuance to the worldes ende notwithstandinge any humaine devise to the contrarie' that it would do no good to keep deporting them out of their native country'.[32]

During the Archpriest dispute, the claim had been that the Jesuits and their friends had, through their questionable political activities, made all Catholics more liable to become targets of the new laws. But, some argued, if the power of the Society of Jesus and its patrons could be hacked back or even rooted out completely then the state would have little reason to engage in a persecution of the, as the appellants claimed, majority of Catholics who were not by any stretch of the imagination a danger to the queen and the state. Of themselves, these were not particularly new arguments. One imagines that something like them must have been in circulation ever since the relevant legislation passed onto the statute book.[33] The question of how far the function of the (Catholic) clergy, properly understood and performed, was a purely spiritual one was, therefore, central to the *fin-de-siècle* debates about religious toleration and conformity.

It seems certain that this manuscript was intended as a contribution to these debates even though it does not touch directly on the issues generated by the Archpriest controversy. The author's principal claim is that existing statute law does not automatically condemn as treasonable the functions of the English Catholic clergy even though some Protestants had always said that they were. After a good deal of preliminary discussion of technical legal points as to how a Catholic may evade an indictment, its core argument is that Catholics can, even under the extant law, be reckoned to have a defence against some of the charges brought against them under the new treason statutes.

Thus, for example, the author declares that the current statutes, even as they stand, have been misconstrued; they do not mean what the judges often take them to mean, for example over the question of sacramental reconciliation. The argument here is that reconciliation is no different in its import from baptism or absolution from excommunication pronounced in an ecclesiastical court; these things are accomplished by the power of the ordained priest which

[32]TNA, SP 78/51, fo. 150^{r}; M. Questier, *Catholicism and Community in Early Modern England: Politics, Aristocratic Patronage and Religion, c.1550–1640* (Cambridge, 2006), 271–272.

[33]As far back as May 1586 we can find the loyalist priest Edward Gratley arguing to Sir Francis Walsingham that 'reconciliation imports' no more than 'a change of a man's mind from a state of sin to a state of grace, by contrition, and purpose of amendment, with submission to the authentical power of a true priest, authorized by Christ to remit sins'. Anyone who suggested that 'reconciliation binds one to the pope or Rome, excluding obedience to the prince or governor' was 'either grossly blinded or maliciously incensed', R. Lemon and M.A.E. Green (eds), *Calendar of State Papers, Domestic Series*, 12 vols [for 1547–1625] (London, 1856–1872), *Addenda 1580–1625*, 178 (TNA, SP 15/29, fo. 165^{r}).

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is derived directly from God and not from the royal supremacy.[34] The 1571 statute itself 'doth shewe there be dyvers absolutions and reconciliations; or at leaste more than one'.[35]

The advice falls, then, roughly into two parts. In the first section, it argues that statutory prohibitions of Rome's clergy in England rest on a flawed definition of papal ecclesiastical primacy. The legal foundations of the English national Church cannot be taken to exclude the conventional understanding of a much broader Christendom. In effect, the author argues that the clergy who minister in the Church of England are part of this wider Church. The authority to perform their clerical functions cannot be derived solely from the exercise of the royal supremacy. If so, the carrying out of the Catholic clergy's functions cannot be treasonable *per se*. All bishops within the Catholic apostolic Church have authority to ordain priests. That ordination confers a priesthood the character of which is not derived in the first instance from the see of Rome.[36]

The writer maintains that the English state recognizes these arguments, whatever some of its spokesmen said. This was in part because all the relevant legislation, passed since the Henrician break with Rome, treated the different aspects of papal authority disjunctively, defining the pope as bishop of Rome but rejecting his additional assertion of papal authority. The writer contends also that the Roman Catholic clergy in England are not necessarily exponents of papal assertions of ecclesiastical primacy, at least as it is now interpreted by English statute law (pp. 515–521).

In the second part, relying on the disjunctive definitions of ecclesiastical authority in the first part, the writer says that the exercise of the Roman Catholic clergy's functions in England, principally the action of reconciling sacramentally to Rome, does not fall automatically within the scope of the treason statutes of 1571 and 1581 because by that action there is no intention, of itself, to withdraw from their allegiance her majesty's subjects, which intention the writer argues is required for a conviction under these statutes.

In the context of the 1590s, of course, much of this case seems highly artificial. But there are real echoes here not just of some of the more radical appellants' claims about the ways in which there might be confessional coexistence in England but also of the

[34]Archives of the Archdiocese of Westminster [AAW], A, VII, 526.

[35]AAW, A, VII, 527.

[36]There is an obvious compatibility here with the contemporary arguments which were deployed in order to make the case for *jure divino* episcopacy even though defenders of what one might term a high version of the supremacy would, obviously, argue that powers conferred by ordination were not ones that were to be exercised by the monarch; see e.g. J.P. Sommerville, *Politics and Ideology in England 1603–1640* (London, 1986), 208–210.

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campaign (associated particularly with the appellant programme) for Rome to institute direct domestic episcopal government over English Catholics, where the principal claim was that the function of such bishops would be spiritual only and would not be in any sense a challenge to monarchical authority. It may also be possible, if rather speculatively, to draw a line between all this and the origins of what scholars have discerned (using a range of terms – everything from avant-garde conformity to 'Arminianism *avant la lettre*'[37]) as a more aggressive reaction inside the Church of England to the problem of puritanism. We can see, for example, some of these Catholic ideas and arguments surfacing in the 1614 conversion motives pamphlet of the royal chaplain Benjamin Carier, someone who is often taken as an outlier for the expression of so-called Arminian opinions in the mid-Jacobean period. Carier reminded King James that he recognized 'the Church of Rome to be mother Church, and the bishop of Rome to be the chiefe bishop or primate of all the westerne Churches, which I doe also verily believe; and therefore I doe verily thinke he hath, or ought to have, some spirituall jurisdiction in England'. Carier implied that a certain sort of Church of England cleric had always had doubts about the doctrine of the supremacy 'although, in my yonger dayes, the fashion of the world made me sweare as other men did (for which I pray God forgive me) yet I ever doubted, and am now resolved, that no Christian man can take that oath with a safe conscience'. There was also a 'statute . . . made by Queene Elizabeth', confirmed by King James, 'that it is death for any English man to be in England, being made a priest by authoritie derived, or pretended to be derived, from the bishop of Rome'. But Carier said: 'I cannot believe that I am a priest at all, unlesse I be derived by authority from Gregory the Great, from whence all the bishops in England have their being, if they have any being at all'. There was 'another statute in like manner made and confirmed that it is death to be reconciled by a Catholike priest to the Church of Rome', but Carier was 'perswaded that the Church of Rome is our mother Church and that no man in England can be saved that continues wilfully out of the visible unitie of that Church, and therefore I canot choose but perwade the people to be reconciled thereunto, if possibly they can'. Of course, by the stage that this pamphlet was written, Carier had formally separated from the national Church and we cannot be sure how far these views expressed in print really reflect his former opinions. But, if they were, then it may be that he was taking reasonably familiar Catholic positions on the statute law which had helped to define the independence of the

[37]See e.g. N. Tyacke, *Anti-Calvinists: The Rise of English Arminianism c.1590–1640* (Oxford, 1987), 5–7.

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English Church but was pushing them further than the author of this 'Plea for a Priest' was prepared to do.[38]

Even if there is no straight line between late sixteenth-century arguments for toleration and, say, the rise of (as some scholars term them) avant-garde conformity, Arminianism and even Laudianism, the claims advanced here are far from nonsense. There was always a sense that the Elizabethan additions to the treason law had, as it were, pushed the envelope and that, in many instances, the case made by the prosecution at treason trials was highly controversial. While, as we have already remarked, there is in fact no sound legal basis for the arguments set down in this document, or at least, as far as we know they were never accepted as such in a court of law, they may have reflected the sense and direction of a strand of public opinion (and not necessarily an exclusively Catholic one) which was not fully convinced by the mid and late Elizabethan regime's defence of the queen and state by reference to the threat from popery.[39]

[38]Benjamin Carier, *A Treatise written by M^r. Doctour Carier* . . . (Brussels, 1614), 11–12. For George Hakewill's reply to Carier, see George Hakewill, *An Answere to a Treatise* . . . (London, 1616), esp. at sigs $F3^v$–$H4^v$. See also M. Questier, 'Crypto-papism, anti-calvinism and conversion: The enigma of Benjamin Carier', *Journal of Ecclesiastical History*, 47 (1996), 45–64. There is a family likeness between Carier's arguments here and the case made by other Jacobean converts, notably Theophilus Higgons who, we know, had links with another alleged 'Arminian', Humphrey Leech; see Theophilus Higgons, *The First Motive of T. H. Maister of Arts, and lately Minister, to suspect the Integrity of his Religion* . . .(Douai, 1609); Humphrey Leech, *A Triumph of Truth, Or, Declaration of the Doctrine concerning Evangelicall Counsayles* . . . (Douai, 1609); Questier, 'Crypto-papism', 59–60.

[39]For this issue, see, e.g., P. Lake and M. Questier, 'The public politics of regime change: Thomas Digges, Robert Parsons and Sir Francis Hastings contest the religio-political arithmetic of the Elizabethan *Fin de Siècle*' (forthcoming in *Historical Journal*).

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