

# A Godly Law? Bulstrode Whitelocke, Puritanism and the Common Law in Seventeenth-Century England

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*Debates surrounding both the church and the law played an important role in the conflicts that marked seventeenth-century England. Calls for reform of the law in the Civil Wars and Interregnum complicated the apparent relationship between puritanism and the common law, as the first fragmented and the second came under attack in the 1640s and 1650s. This article first analyses the common lawyer Bulstrode Whitelocke's historical and constitutional writings that defended the common law against demands for its reform and argued that its legitimacy derived from its origins in, and resemblances to, the law of Moses. Refraining from the radical application of this model employed by some contemporaries, Whitelocke instead turned to British history to make his case. This article then examines Whitelocke's views of the relationship between common law and ecclesiastical jurisdiction in his own day, showing how, both as a lawyer and as a puritan, he navigated laws demanding religious conformity. Whitelocke's career therefore demonstrates how lawyers could negotiate the fraught relationship between the church and the law in the aftermath of the reconfigurations provoked by the Civil Wars and Restoration.*

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This article explores the relationship between puritanism and the common law in mid-seventeenth-century England, as both were re-forged in the crucible of the Civil Wars. In that conflict, puritanism fragmented into its competing elements of godly discipline and individual spirituality, as institutional and theological norms broke down. This political and religious chaos also disrupted the common law, which came under attack from various demands for reform

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ranging from procedural improvement, through claims that it was an instrument of oppression, to demands that it be reduced to the law of God.<sup>1</sup> In this period, old assumptions about the superiority of the common law had to be re-examined and newly defended. The arguments that resulted prompt a reconsideration of the relationship between puritanism and the common law. The predominant stress in previous accounts of this relationship has been on how they were associated (or at least allied) against claims to authority made by monarchs and the Church of England in the late sixteenth and early seventeenth centuries. An older whiggish approach would interpret such behaviour as a search for religious and political liberty, fought along the twin fronts of ‘puritanism’ against ‘Anglicanism’ and ‘constitutionalism’ against ‘absolutism’. While these simplistic binary divisions have been removed, the emphasis on puritan-common law associations survives. In challenging the jurisdictional claims of High Commission and its *ex officio* process, aggressively using prohibitions to restrict ecclesiastical courts and claiming that *praemunire* could apply to courts within England, men such as James Morice, Robert Beale, Nicholas Fuller and Edward Bagshaw represented the partnership of godly religion and common law practice.<sup>2</sup>

Yet, as Christopher Brooks has noted, ‘while the history of English law had come to be inscribed in parallel with the history of the English church’, there were many different ways to represent and interpret the details of their relationship.<sup>3</sup> This article explores how one puritan common lawyer, Bulstrode Whitelocke, envisaged that relationship in a career that spanned the period from the 1620s to

<sup>1</sup> For surveys, see Donald Veall, *The Popular Movement for Law Reform, 1640–1660* (Oxford, 1970); Blair Worden, *The Rump Parliament, 1648–1653* (Cambridge, 1974), 105–18; and n. 13 below.

<sup>2</sup> For a nuanced account of Elizabethan and early Stuart lawyers and ecclesiastical law, see Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008), 93–123; see also Ethan Shagan, ‘The English Inquisition: Constitutional Conflict and Ecclesiastical Law in the 1590s’, *HistJ* 47 (2004), 541–65; John Guy, ‘The “Imperial Crown” and the Liberty of the Subject: The English Constitution from Magna Carta to the Bill of Rights’, in Bonnelyn Young Kunze and Dwight D. Brautigam, eds, *Court, Country and Culture: Essays on Early Modern British History in Honor of Perez Zagorin* (Rochester, NY, 1992), 65–88. For older views relating to Weberian or Marxian frameworks, see David Little, *Religion, Order, and Law: A Study in Pre-Revolutionary England* (Oxford, 1970); Christopher Hill, *Society and Puritanism in Pre-Revolutionary England* (Harmondsworth, 1964).

<sup>3</sup> Brooks, *Law, Politics and Society*, 123.

the 1670s; that is, one that saw the breakdown and reconstitution of both puritanism and the common law. Whitelocke provides an excellent case study of a legal practitioner who also wrote about law, history and the constitution, who was concerned about the relationship between temporal and ecclesiastical jurisdiction, and whose own puritanism was multifaceted. This article will explore how he sought out ‘resemblances’ to the common law in the ancient British past and sacred history in order to affirm its status and how he, compared to others, dealt with its perceived relationship to the law of Moses, setting this in the context of his spiritual commitments. In so doing, it encourages reflection on the ways in which periods of crisis may provoke new ways of thinking about religion, law and the relationship between them, and highlights how the same examples of this relationship could be deployed in radical or moderate ways, depending on the legal, religious and historical preconceptions and circumstances of the person using them.

Until 1640 Whitelocke’s legal career took a standard path. During the 1620s, he followed some of the judges on circuit, and ‘took notes of the most remarkable things and passages’. Even at this stage his wide-ranging interests were as much chorographical as legal; holy wells jostle assizes.<sup>4</sup> He wrote reports on the prerogative court of Star Chamber in the 1630s, and his account of his experience in putting cases in the vacations of the Inns included ‘the imitation of Starre chamber proceedings’. As Whitelocke’s career developed, so too did his legal knowledge broaden: to the law of justices of the peace and forest law.<sup>5</sup> A moderate parliamentarian and peace negotiator in the 1640s, Whitelocke’s legal skills remained in demand. He chaired the committee on the impeachment of Charles I’s leading minister, the earl of Strafford. He drafted the bill against dissolving parliament without its own consent and gave legal counsel, and he drafted ordinances (laws passed by parliament’s authority without the royal assent). Nonetheless, he saw his promotion to be one of the commissioners of parliament’s seal in 1648 as being ‘as badde newes as ever came’ and skilfully sidestepped involvement in drawing

<sup>4</sup> *The Diary of Bulstrode Whitelocke, 1605–1675*, ed. Ruth Spalding, RSEH n.s. 13 (Oxford, 1990), 56, 51. On this, see Blair Worden, ‘The “Diary” of Bulstrode Whitelocke’, *EHR* 108 (1993), 122–34; Jonathan Fitzgibbons, ‘Rethinking the English Revolution of 1649’, *HistJ* 60 (2017), 889–914.

<sup>5</sup> *Diary*, ed. Spalding, 58, 70, 98; BL, Add. MS 37343, fol. 131<sup>r</sup>.

up the articles of treason against Charles I.<sup>6</sup> After the regicide, Whitelocke was appointed one of the three Commissioners of the Great Seal, who acted as the judges in the Court of Chancery. He avoided exemption from the Act of Indemnity at the Restoration, but failed to regain a position. Instead he turned to writing, composing (*inter alia*) an account of the writ of summons to parliament, a history of Britain, and that favoured genre of failed politicians, his memoirs.<sup>7</sup>

#### GODLY LAW

A new godly republic provided both motivation and opportunity for a new godly common law. Those who sought such an object might think they had a prominent contemporary example of a legal system directly employing a scriptural model, the Massachusetts law code of 1648. 'About nine years since', this explains, 'wee used the help of some of the Elders of our Churches to compose a modell of the Iudiciall lawes of Moses with such other cases as might be referred to them.'<sup>8</sup> Even this, however, was not a pure application of a biblical code. The following guide, arranged alphabetically, with internal cross-referencing, focused on legislation from the 1640s. Only one section, on capital crimes, cited the Bible in support of the death penalty for idolatry, witchcraft, blasphemy, murder, rebellion and being a rebellious son.<sup>9</sup> The mixture of case and statute law with a cluster of biblical authorities in this document both drew on and contrasted with John Cotton's *Abstract* of the law, dubbed by one contemporary 'Moses his Judicials', arranged thematically, which only ever cited the Bible.<sup>10</sup> Still, as Bernard Capp has shown, Fifth Monarchists and other radicals turned to the colony for detailed accounts of how to

<sup>6</sup> *Diary*, ed. Spalding, 207.

<sup>7</sup> For his biography, see Ruth Spalding, *The Improbable Puritan: A Life of Bulstrode Whitelocke, 1605–1675* (London, 1975). This says little about Whitelocke's Restoration career and ideas, for which see my article, 'Bulstrode Whitelocke and the Limits of Puritan Politics in Restoration England', in Justin Champion et al., eds, *Politics, Religion, and Ideas in Seventeenth- and Eighteenth-Century Britain* (Woodbridge, 2019), 81–99.

<sup>8</sup> *The Book of the General Lawes and Libertyes concerning the Inhabitants of the Massachuset [sic]* (Cambridge, MA, 1648), sig. A2<sup>r</sup>.

<sup>9</sup> *Ibid.*; George Lee Haskins, *Law and Authority in Early Massachusetts* (New York, 1960).

<sup>10</sup> [John Cotton], *An Abstract of the Lawes of New England* (London, 1641); for the title, see Haskins, *Law and Authority*, 124.

implement the judicial law of the Old Testament in their own day. To at least one member of the Barebones parliament of 1653, the lay preacher Samuel Highland, Massachusetts provided the model for a new law based on that of God.<sup>11</sup>

Such hopes never came to fruition in England, despite the chances for law reform that had seemingly existed after the regicide and the establishment of England's new republican government. Some contemporaries saw Whitelocke as a potential sponsor of reform. Peter Ball wrote to him in December 1649, enclosing proposals for 'remagnifying the Law, & rendering it perfectly intelligible to the professors and acceptable to the people'. Ball planned to maintain the substance of the law, but to translate it into English and organize it into 'one ... scientificall method' of definitions, divisions, principles and exceptions, combining it into one volume and funding a public reader of the resulting 'Pandected' law. He saw Whitelocke as the man who could make this vision reality.<sup>12</sup> Whitelocke sat on the committee that appointed the Hale commission to reform the law, and was jointly responsible for receiving the commission's recommendations.<sup>13</sup> His papers include a copy of a letter nominating commissioners, previously cited for its suggestion of moderate rather than radical reformers,<sup>14</sup> but noteworthy too for its proposing certain nominees on the basis of their knowledge of other legal systems. As late as April 1654, there were complaints about the lack of Whitelocke's presence (he was on an embassy to Sweden) when chancery reform was mooted.<sup>15</sup> Yet when this was proposed in April 1655, Whitelocke refused to implement it and was dismissed as Lord Commissioner, although he did not totally lose Cromwell's favour.<sup>16</sup>

<sup>11</sup> Austin Woolrych, *Commonwealth to Protectorate* (Oxford, 1982), 271–3; Bernard Capp, *The Fifth Monarchy Men* (London, 1972), 157–71, especially 164, 170–1; William Aspinwall, *The Legislative Power* (London, 1656), 30–1; Hugh Peters, *Good Work for a Good Magistrate* (London, 1651), 32.

<sup>12</sup> Longleat House, Whitelocke Papers, vol. 10, fol. 80<sup>r</sup>; Wilfred Prest, 'Law Reform and Legal Education in Interregnum England', *HR* 75 (2002), 112–22.

<sup>13</sup> On the Hale commission, see Mary Cotterell, 'Interregnum Law Reform: The Hale Commission of 1652', *EHR* 83 (1968), 689–704; Alan Cromartie, *Sir Matthew Hale, 1609–1676: Law, Religion, and Natural Philosophy* (Cambridge, 1995), 58–73; and items in n. 1 above.

<sup>14</sup> Worden, *Rump Parliament*, 272; see also *ibid.* 111 on Ball.

<sup>15</sup> Whitelocke Papers, vol. 10, fols 159<sup>r</sup>–160<sup>r</sup>; vol. 15, fol. 138<sup>r</sup>.

<sup>16</sup> For his representation of this episode, see Bulstrode Whitelocke, *Memorials of the English Affairs: Or, an Historical Account of what passed from the Beginning of the Reign*

Donald Veall argues that Whitelocke was the one person who might have reformed the law, and it was decisive that he did nothing.<sup>17</sup> Why not? Even if J. G. A. Pocock's claims about a parochially insular common law mind have been challenged, many common lawyers, supporters of a mixed polity and a significant role for parliament in the seventeenth century, used the history of the 'ancient constitution' to back up their claims, albeit their arguments about Anglo-Saxon parliaments and the inclusion of the commons therein, and the lack of fundamental change in 1066, were of dubious historical accuracy, as contemporary royalists and tories increasingly pointed out.<sup>18</sup> Whitelocke did discuss medieval history and was concerned about possible points of discontinuity in the common law. But he also saw, and employed, many 'usable pasts', not least early British and sacred history, in defending the common law. His claims about England's legal and constitutional 'resemblances' to ancient Israel included an emphasis on one particular historical moment: when the early British king Lucius had taken the law from the Old and New Testaments. For Whitelocke, however, taking a law 'out of *Moses' Law*' was something done a millennium before, not something to start again from scratch. Analysis of his arguments underlines the religious dimensions of historical cases for the legitimacy and superiority of the common law. The crucial question was not whether to have a godly law or not, but whether one already existed or needed constructing.

At times, Whitelocke offered the sort of defences of the common law that might be expected, especially regarding 1066. In November 1649 he told the House of Commons that the multiplicity of suits and consequent delays were due to England's flourishing trade, not to the law itself.<sup>19</sup> A year later, he temperately endorsed the idea

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*of King Charles the First, to King Charles the Second his Happy Restauration* (London, 1682), 606; Stuart E. Prall, 'Chancery Reform and the Puritan Revolution', *AJLH* 6 (1962), 28–44.

<sup>17</sup> Veall, *Popular Movement*, 122–3.

<sup>18</sup> J. G. A. Pocock, *The Ancient Constitution and the Feudal Law ... A Reissue with a Retrospect* (Cambridge, 1987); Janelle Greenberg, 'The Confessor's Laws and the Radical Face of the Ancient Constitution', *EHR* 104 (1989), 611–37; Brooks, *Law, Politics and Society*, 83–7, 121–3; Paul Christianson, 'Young John Selden and the Ancient Constitution, c.1610–1618', *Proceedings of the American Philosophical Society* 128 (1984), 271–315; Mark Goldie, 'The Ancient Constitution and the Languages of Political Thought', *HistJ* 62 (2019), 1–32.

<sup>19</sup> Whitelocke, *Memorials*, 415–17; BL, Add. MS 37345, fol. 24<sup>r-v</sup>.

that law French (and court hand) be abolished, as he thought this would do no harm, but he argued against the idea that it was a relic of Norman tyranny. William I had vanquished Harold, but never conquered England, being admitted on condition that he maintain the laws. Here Whitelocke made a classic case for common law continuity: 'our laws appear in many particulars to have bin the same before the Norman invasion, as they are att this day'.<sup>20</sup> He made the same point a decade later, in the *Notes* on the writ of summons to parliament that he dedicated to the restored monarch Charles II. Here he argued that William had called a body of representatives from each county to show him what the English customs were and that English laws had been applied to Normandy, not vice versa. For Whitelocke, the Normans were just one of many examples of how a change in governors might have altered or added a few things, but left the body of the law intact. '[The] antient home borne native lawes ... [are] the same that they were att the first being of any commonweale in this island, and ... little or nothing altered by the incursions of conquerors.' Even the Saxons, those heroes of freeborn, pre-Norman-yoke law to some Civil War radicals,<sup>21</sup> had not introduced the law, for they were uncivilized pagans, and the common law was for civilized Christians. The *merchenlage* and *westsaxonlage* were, Whitelocke claimed, older British laws, deriving from the second century, when 'Lucius the first british king' founded the laws 'upon the holy scriptures, divers of them continuing to this day'. These Britons ultimately came 'from Japhet and his posterity', giving the seventeenth-century common law the status of the least changed and most original law there was.<sup>22</sup>

In defending the common law, Whitelocke had a favoured strategy and favoured word: 'resemblances'. These resemblances pointed back to the pre-Saxon era and to the religious underpinning of the common law. In his *Notes upon the Kings Writt*, Whitelocke compared the division between unwritten common law and statute to the position of the Israelites before and after the Ten Commandments. He thought there were 'some resemblances' between the judges

<sup>20</sup> BL, Add. MS 37343, fol. 236<sup>v</sup>.

<sup>21</sup> Most famously described by Christopher Hill, 'The Norman Yoke', in John Saville, ed., *Democracy and the Labour Movement, Essays in Honour of Dona Torr* (London, 1954), 11–67.

<sup>22</sup> *Whitelockes Notes upon the Kings Writt for choosing Members of Parlemtent*, ed. Charles Morton, 2 vols (London, 1768), 1: 408, 424, 427–8, 430–1.

pronouncing common law and Moses giving judgment, although he said these had been inherited elsewhere too, for example among the Swedes and the Goths. The word is found again in his two-volume history of Britain from Brutus to the end of Roman government: at the end of the first volume, in chapter 81, resemblances to British government; and in chapter 29 of volume 2, resemblances to Jewish laws and government, in which Whitelocke worked through the Bible, book by book, finding similarities. Chapter 78 explored resemblances to British manners, chapter 79 those to Roman government, although Whitelocke firmly rejected any idea that English law derived from Roman law. While admitting that the names of legal entities derived from Latin, he gave a number of reasons why Roman law would not have been imposed: it was not Roman policy to do this (even when, eventually, Britain was made a province, because it was too uncivilized for the Romans to bother doing so); Roman law was not settled at the time the Romans governed Britain; and no trace of it seemed to be extant. Citing the fifteenth-century common lawyer Sir John Fortescue, Whitelocke firmly associated Roman law with absolute and arbitrary government, and so deemed it ill suited to the English 'mixed, not absolute, government'. Common law was 'much more free', much more appropriate.<sup>23</sup> Quoting John Selden (perhaps the most historically sophisticated early Stuart lawyer), Whitelocke insisted that 'all laws in generall are originally equally ancient' as they all derived from natural law; in England, the common law came from King Lucius and the Scriptures, and its model was not the law of Rome but that of Moses.<sup>24</sup>

It was not unusual to deny the influence of Roman law on England, but it is intriguing that Whitelocke buttressed this position by twisting an example usually cited to show the English church's autonomy into one deployed to defend legal autochthony. King Lucius was a figure whom sixteenth-century Protestants frequently referenced. According to them, when he converted to Christianity he had asked the bishop of Rome, Eleutherius, for guidance. Eleutherius had supposedly replied that papal authority was not necessary, for 'you be God's vicar in your kingdom'; a brilliant,

<sup>23</sup> *Writt*, ed. Morton, 1: 412; BL, Add. MS 37342, fol. 151<sup>r-v</sup>.

<sup>24</sup> *Writt*, ed. Morton, 1: 430, 413; BL, Add. MS 37342, fol. 152<sup>r</sup> (ch. 28). Selden's comment comes on p. 17 of his 'Notes on Fortescue', in John Fortescue, *De laudibus legem Angliae* (London, 1616).



if historically dubious, early endorsement of royal ecclesiastical supremacy. As Felicity Heal has shown, Lucius was an extremely pliable figure in the sixteenth century, cited by Catholics as well as Protestants.<sup>25</sup> Yet the role that Lucius could play in *legal* arguments has been less often noticed. Whitelocke's account brings it to the fore, as when he argued:

[That] the Roman laws were not then in use here, appears by the letter sent from the king, to Eleutherius Bishop of Rome desiring to have the Roman laws, sent into Britaine, that the people might be governed by them ... by the Answer of Eleutherius, the Roman & civil laws wee may alwayes reject, out of the Testaments by the Councell of your Realme, take a law, &c. ... Lucius & his State, did accordingly consulte & consider to supply and take lawes out of Moses' lawe for it is very apparent (as may be more particularly showed elsewhere) that many of our positive & written lawes are grounded upon Moses lawe, & at this time was the most generall & certaine ground layd both of our positive & written lawes that continue yet ...<sup>26</sup>

Here, godly monarchy was used to demonstrate how neither canon nor civil law was admissible if it ran against the common law, although these might be useful (Whitelocke said vaguely) if the municipal law failed. The manuscript in which this account was given formed the opening to Whitelocke's quasi-autobiographical, quasi-historical 'Annales'. In the preface to them, dated July 1664, Whitelocke told his intended audience, his children, that he had included 'some (though weake) vindications, of the antiquity, iustice, and honour of the English lawes, & people Custumes & gouernment'. To say that laws and rights were introduced by heathens and conquerors was a great blot on them; despite some alterations and additions, they were still very near the laws of the Hebrews.<sup>27</sup>

For Whitelocke, attention to early British history and the Old Testament served to legitimize more than revolutionize common law. His position on the constitution was similar. Although he rejected absolute monarchy as illegitimate on the basis of his

<sup>25</sup> Felicity Heal, 'What can King Lucius do for you? The Reformation and the Early British Church', *EHR* 120 (2005), 593–614, quotation at 598.

<sup>26</sup> BL, Add. MS 37342, fols 147<sup>r</sup>–153<sup>v</sup>, especially 149<sup>v</sup>, 151<sup>v</sup>–152<sup>v</sup>. Brooks, *Law, Politics and Society*, 107, notes that Beale and Morice cited Lucius when arguing about ex officio jurisdiction and incorporated consultation with lawyers into the narrative.

<sup>27</sup> BL, Add. MS 4992, fols 5<sup>r</sup>, 7<sup>r</sup>.

interpretation of the warnings to the Israelites who demanded an earthly king in 1 Samuel 8, this was a far cry from the exclusivist republican claim that all kingship was illegitimate because it was idolatrous.<sup>28</sup> In arguing that the three estates of the realm were king, lords and commons (a contentious position associated with Civil War parliamentarianism, for it reduced the king to an estate and omitted the bishops) he drew on a range of comparisons, and again cited the Hebrew constitution as the crucial explanatory model: 'This mixture of three estates, in supream counsell, we find amongst the Hebrewes, and most other nations in imitation of them.'<sup>29</sup> That King Lucius and his public council had taken the laws of the kingdom from the Old and New Testaments<sup>30</sup> was, for Whitelocke, the exemplification of how to blend the ancient constitution, British history and scriptural models. It also meant that radical reconstitution of the common law was unnecessary: it was, at root, a godly law already.

#### COMMON LAW, ECCLESIASTICAL JURISDICTION AND THE PROSECUTION OF NONCONFORMITY

What did this vague origin in sacred history mean, in Whitelocke's eyes, for the relationship between common law and ecclesiastical law? This was particularly contentious during this period both in theory and in practice, given its implications for the prosecution of Protestant Nonconformity. Whitelocke emphasized how important it was 'that the true religion established may be mainteyned' when giving a charge to the grand jury of Abingdon in the 1630s. This duty, their 'speciall care', would involve enforcing sober morality, detecting Jesuits and seeking out 'conceited Sectaries'.<sup>31</sup> But Whitelocke himself might have felt some sympathy towards the last group, as he refused to enforce statutes governing conformity to the Church of England in 1634. According to the modern edition of his

<sup>28</sup> Republican exclusivists (like Milton) read rabbinical commentaries on the book of Samuel as suggesting that all kingship was idolatrous: Eric Nelson, *The Hebrew Republic* (Cambridge, MA, 2010), 23–56. For more on Whitelocke's view on this, see my 'Whitelocke and the Limits of Puritan Politics'.

<sup>29</sup> *Writt*, ed. Morton, 2: 57; Michael Mendle, *Dangerous Positions: Mixed Government, the Estates of the Realm, and the Making of the Answer to the XIX Propositions* (University, AL, 1985).

<sup>30</sup> BL, Add. MS 37342, fols 57<sup>r</sup>–58<sup>v</sup>.

<sup>31</sup> Whitelocke Papers, vol. 5, fol. 230<sup>v</sup>.

*Diary*, when summoned to the privy council to explain himself, he told the earl of Holland, the high steward of Abingdon, that 'he might have bin censured to inroach upon the jurisdiction & rights of the Church, if as a Justice of peace he should have taken cognisance of them'. Yet this tones down the more expansive manuscript, which includes him being accused of complying with (as well as countenancing) the puritans, and depicts Whitelocke as explaining that he 'knew no common Lawe, nor Statute, in force, for the punishment of them, especially by Justices of the peace, & that the complainers did not preferre any Indictment against them. & privately, I acknowledged ... that I was not convinced of their crimes'.<sup>32</sup>

Respect for the boundaries of ecclesiastical jurisdiction (not something for which common lawyers were famed) was exposed as a mere excuse when, several months later, Whitelocke gave a charge to the Oxford Quarter Sessions on the power of temporal courts in ecclesiastical questions ' & the antiquity thereof'.<sup>33</sup> While the text of this charge is not extant, his later essays argued that all ecclesiastical jurisdiction derived from monarchs (citing Lucius in support), that there had been mixed ecclesiastical / temporal courts before 1066, that fathers of families had once exercised ecclesiastical jurisdiction, and that both they and kings were priests who could and should preach.<sup>34</sup> Forms of ecclesiastical usurpation of royal authority should be prosecuted, but Dissenters should not be punished. This radical collapsing of the distinction between ecclesiastical and temporal authority would be a fixture of Restoration anticlerical writing, occasionally coupled with demands (not spelled out by Whitelocke, but a necessary feature of 1650s law reform debates due to the collapse of the ecclesiastical courts) for temporal courts to judge marriage and probate. Such arguments were sometimes deployed in church courts seeking to prosecute Nonconformity, including claims that no ecclesiastical process should be recognized if it did not run in the king's name (as per a defunct statute of the 1540s), that the canons were not valid because not ratified by parliament, that the entire Anglican system was therefore guilty of *praemunire* and that it should be taken over and governed by a lay viceregent.<sup>35</sup>

<sup>32</sup> *Diary*, ed. Spalding, 90–1, 92–3; BL, Add. MS 37343, fols 5<sup>r</sup>–7<sup>r</sup>.

<sup>33</sup> BL, Add. MS 37343, fol. 131<sup>r</sup>.

<sup>34</sup> Bulstrode Whitelocke, *Essays Ecclesiastical and Civil* (London, 1706); BL, Add. MS 21099.

<sup>35</sup> Jacqueline Rose, *Godly Kingship in Restoration England* (Cambridge, 2011), 194–202.

Most Dissenters probably contented themselves with less explosive (but more effective) strategies of finding technical errors in the process summoning them. Whitelocke gave free legal advice to Baptists and ‘fanatics’ (his term), and to the French church in London (unspecified, but probably in the wake of demands that it conform to Anglican ritual).<sup>36</sup> Unfortunately, none of the content of this advice seems to survive, leaving historians with just one example of Whitelocke’s argument on a case of religious Dissent, and that not a typical one. The case was that of the Quaker James Nayler, tried by parliament in 1656 for re-enacting, in Bristol, Christ’s entry into Jerusalem. Whitelocke thought Nayler’s views ‘strange’. He asserted that magistrates and Christians had a duty to ‘bear ... testimony against these abominable crimes’. The ‘wicked fellow ... deserves all punishment’. But he opposed the death penalty on several grounds. The commonwealth’s survival was not dependent on executing Nayler, so death was not justified under natural law. By divine law, a blasphemer should die. Here Whitelocke turned to the stoning demanded in Leviticus 24, just as Massachusetts did. Where the colonists cited verses 15 to 16 to insist on the death penalty, however, Whitelocke referred instead to verse 12 (‘they put him in ward, that the mind of the Lord might be shewed them’) to argue that one should wait on God in a doubtful case. Moreover, this case *was* doubtful. Nayler’s behaviour was not heresy according to the first four general councils of the church. What counted as blasphemy under human law changed. In the course of showing this, Whitelocke cited the Bible, Gregory of Tours, the royalist John Spelman, the Calvinist political theorist David Paraeus, a case from Bordeaux, the 1648 Blasphemy Ordinance, *De haeretico comburendo* and the cases of Strafford and Laud. Most importantly, to try Nayler would be to create a retrospective law, a dangerous proceeding. A Catholic government might have punished the Quaker, but that was no precedent for Protestants to follow.<sup>37</sup>

<sup>36</sup> *Diary*, ed. Spalding, 743, 753, 754, 832, 682; Larry J. Kreitzer, ‘William Kiffin and the Nonconformist Response to the Conventicle Act of 1670’, in idem, *William Kiffin and his World*, part 2 (Oxford, 2012), 173–204, at 169, 173, hints at the emphasis on procedural errors; for other Dissenters’ strategies, see Craig W. Horle, *The Quakers and the English Legal System, 1660–1688* (Philadelphia, PA, 1988).

<sup>37</sup> *Cobbett’s Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors*, 5 [1650–61] (London, 1810), cols 821–8 (Lev. 24: 12 for waiting on God); *The Diary of Thomas Burton*, ed. John Towill Rutt, 4 vols (London, 1828), 1: 32, 57–8; cf. *Book of the General Laues*, 5.

Whitelocke's position on Nayler was somewhat ironic given his later life. If we turn from the legal to the spiritual dimensions of that life, we find evidence of puritanism in transition from what is sometimes termed church-type to sect-type behaviour: from a national reformed church to individual gathered congregations. Whitelocke exhibited what might be deemed some traditional puritan characteristics. His writings repeatedly praise models of sober living, such as Job, and condemn drunken excess. He partly attributed William I's victory in 1066 to Harold's army spending the night before the battle drinking and debauching rather than praying. He was also a firm believer in the action of Providence in his own life as well as on this macro-historical canvas, filling his diary with accounts of how God blew the tiles off a new building when Whitelocke was grumpy, and eased his bowel movements when godly clergy joined him in prayer.<sup>38</sup> While ill in 1670, he wrote a 'History of Persecution', in large part an abridgement (albeit running to over two hundred double-column folios) of John Foxe's *Acts and Monuments*. Deeply indebted to Foxe though this narrative was, it diverged from the Tudor martyrologist in its employment of the language of 'liberty of conscience' to describe the Israelites' desire to follow their religion in Egypt. Tellingly, Whitelocke used the term used to denote temporary toleration in the Restoration in stating that Pharaoh would not grant this 'indulgence'.<sup>39</sup>

It may be no coincidence that Whitelocke turned to this specific project months after the passage of the viciously intolerant Second Conventicles Act, for he firmly rejected the strict uniformity of the Restoration church. While still attending his parish church, he sheltered ejected Presbyterians, met the leading Independent John Owen and had increasing contact with the Quaker William Penn. He took out a licence under the Indulgence of 1672 to allow Nonconformist meetings at his house and continued to host gatherings of over a hundred people even after the Indulgence was withdrawn in 1673.<sup>40</sup> Furthermore, Whitelocke would himself preach or 'speak' to his household with increasing regularity from the late 1660s, or have

<sup>38</sup> *Writt*, ed. Morton, 1: 324–8; BL, Add. MS 37342, fols 129<sup>r</sup>–130<sup>v</sup>, 37<sup>v</sup>, 9<sup>r</sup>; BL, Add. MS 37341, fol. 28<sup>r</sup>; *Diary*, ed. Spalding, 762, 804.

<sup>39</sup> Whitelocke Papers, vol. 27, fols 10<sup>v</sup>, 9<sup>r</sup>; for more on this work, see my 'Whitelocke and the Limits of Puritan Politics'.

<sup>40</sup> The licences were not recalled until 1675. The legal limit was five attendees from outside the household.

his son read out his sermons if he was ill.<sup>41</sup> Here was the changing nature of puritanism embodied: while Whitelocke reinscribed Foxe, some of his own sermons were posthumously published by Penn.<sup>42</sup>

### CONCLUSION

The crisis of the Civil Wars exposed the tensions within both puritanism and the common law, and placed their apparent partnership under severe strain. Different visions of that relationship had existed before, but were now multiplied as a campaign to reform the common law sometimes took the form of demands for a new godly law. Even those puritans and parliamentarians who were willing to work for the new republic, however, could defend the common law as sufficiently rooted in godliness already. This was more than a reflexive or insular common-law mind. If Whitelocke's praise of common law partly represented a predictable pride in its antiquity, it was framed in historical terms that went beyond pre-Norman and Saxon history to the ancient British past and a moderate interpretation of a Hebrew model. The context of the Civil Wars and their aftermath rendered these historical bases for the common law particularly contentious. For Whitelocke, the law of Moses granted legitimacy to seventeenth-century common law, but was not a model by which to replace it, just as the Hebrew constitution pointed in the direction of moderate mixed monarchy, not of republican exclusivism.

The plurality of puritanism is now a familiar refrain in early modern historiography. Much has been written, too, about common law in the Elizabethan and early Stuart period, but its nature and the intellectual milieu of its practitioners during the Civil Wars, Interregnum and Restoration remain relatively uncharted territory. Educated in the golden age of the early Stuart Inns of Court, but practising law and writing its history into the Restoration, Whitelocke bridges this division. His combination of common law practice, historical writings and disgust at religious intolerance suggests a new avenue for exploration: how the relationship between religion and the common law developed in the mid-to-late

<sup>41</sup> For details, see the Restoration years of the *Diary* and my 'Whitelocke and the Limits of Puritan Politics'.

<sup>42</sup> Bulstrode Whitelocke, *Quench not the Spirit*, [ed. W. Penn] (London, 1711). Penn also edited the 1709 edition of the *Memorials*.

seventeenth century, as both lawyers and puritans reconstituted their beliefs in the aftermath of the puritan revolution. From this, we may learn not only about different visions of the connections between the church and the law, but also about how an established pattern of associations changes into a new relationship between them.