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Catholics, property, and the experience of the penal laws in eighteenth-century England: Evidence from the Vincent Eyre Manuscripts

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This article seeks to nuance our understanding of how the penal laws against Roman Catholics were interpreted in eighteenth-century England and how English Catholics of the era experienced their status as a penalised minority. Using evidence from Ushaw Library's Vincent Eyre Mansucripts, it examines how propertied Catholics navigated proscriptions against owning and selling property. Although much scholarship has emphasised the flexibility that the statutes afforded Catholics, this article focuses not on the enforcement of these laws but on the pressure they exerted on Catholics' daily consciousness. Vincent Eyre, a Derbyshire conveyancer, trained under Catholic conveyancers in London and worked as agent for the tenth Duke of Norfolk in Sheffield. His manuscripts, which consist principally of legal opinions and briefs on conveyancing cases, testify to the pervasive uncertainty under which Catholics laboured as they sought to assert a 'good title' to property, protect their faith from legal discovery, and assert their standing as subjects despite laws that disabled them from full belonging to the nation. This article builds on recent work that charts Catholics' affective experiences in eighteenth-century Britain as their dynamic contributions in the period are increasingly recognized.

Keywords: penal laws, Catholicism, conveyancing, Vincent Eyre, eighteenth-century

This article seeks to nuance our understanding of how the penal laws against Roman Catholics were interpreted in eighteenth-century England and how English Catholics experienced their status as a penalised minority. Underlying the analysis is an assumption that the existence of an extensive if miscellaneous body of penal legislation affected

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Catholics' sense of belonging to the nation even if the enforcement of that legislation was uneven both geographically and temporally. Though sources such as diaries or letters might seem a natural place to look for traces of that experience, this article turns instead to evidence from a three-volume set of legal precedents and other miscellaneous documents, compiled by a Derbyshire Catholic family, that sheds light on how propertied eighteenth-century Catholics navigated their legal landscape. Chiefly focused on issues of land-holding and conveyancing, the Vincent Eyre Manuscripts held at Durham University's Ushaw College lend insight not only into the practical steps that this segment of English Catholic society took to defend itself from key penal statutes, but also some of the assumptions held and worries experienced by these families. Catholics' ability to evade the statutes that barred them from inheriting and purchasing real property has often been noted, but although these manuscripts suggest some of the flexibility that Catholics enjoyed in this area, they also indicate that the manoeuvring required by their evasions was often shadowed by a pervasive uncertainty about the likely outcome of their claims and, more fundamentally, about their ability to hold a 'good title'.

Discussion of the penal laws has often focused on their enforcement, which tends to be described as capricious and not incompatible with the English Catholic community's development in the period.[1] Any sense that the penal laws hovered like a Damoclean sword over English Catholics has certainly been dispelled, and Alexandra Walsham's warning that scholars of the period need to eschew the tendency 'to experience vicariously the empowerment that accompanied victimisation' is well-taken.[2] At the same time, some more

[1] For a detailed study of the enforcement of a particular penal law (against Catholic ownership of horses valued at more than £5), see Anthony R.J.S. Adolph, 'Papists' Horses and the Privy Council 1689-1720', *Recusant History* (hereafter *RH*) 24 (1998): 55-75, which argues that enforcement was particularly acute in the years following the Glorious Revolution and while the possibility of a Jacobite return remained plausible. For arguments that focus on the English Catholic community's development in the context of penalisation, see for example Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England, 1500-1700* (Manchester: Manchester University Press, 2006) and Gabriel Glickman, *The English Catholic Community, 1688-1745: Politics, Culture, and Ideology* (Rochester, NY: Boydell, 2009). In general, the historiography of the penal laws in Ireland has been more fully developed: an early revisionist work emphasizing the Catholic community's development is Maureen Wall, *The Penal Laws, 1691-1760* (Dublin: Dublin Historical Association, 1967); see also Louis Cullen, 'Catholics under the penal laws', *Eighteenth-Century Ireland* 1 (1986): 23-36 and Thomas Bartlett, 'The penal laws against Irish Catholics: were they too good for them?' in Oliver P. Rafferty, ed. *Irish Catholic Identities* (Manchester: Manchester University Press, 2013), 154-168.

[2] Walsham, *Charitable Hatred*, 314. In the Irish context, James E. Kelly provides a useful overview of the development and revision of the view that the penal laws sought to extirpate Catholicism entirely. He observes that although questions have been raised about the validity of seeing the Irish penal laws as a coherent code, a popular understanding of the assorted penal statutes as a relatively organized body of law seems to have existed in England from the late seventeenth century. James E. Kelly, 'The historiography of the Penal Laws', *Eighteenth-Century Ireland Special Issue 1: New Perspectives on the Penal Laws* (2011): 27-52, at p. 32.

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sanguine views of the situation of eighteenth-century Catholics may both overstate the degree of freedom they enjoyed and overlook the fundamental importance of landed property as an anchor of identity across the upper levels of society. Significant concern also existed that sanctions against elite members of the Catholic community would negatively affect the wider circles of everyday Catholics, especially in rural areas, who depended on them.[3] Most importantly for the present argument, such views underestimate the toll exacted by what Colin Haydon has termed the 'low-key' but 'painful' persecution to which Catholics were subject across the century.[4] Carys Brown has recently marshalled evidence to show that '[w]hether or not the *force* of the laws was suspended in the localities, a legally sanctioned language of anti-Catholicism remained part of the everyday'.[5] In our own time, we have recently begun to understand the pernicious effects of systemic prejudice and bias against, for instance, those with a minority sexual identity. Such understanding can usefully illuminate a further reappraisal of the experiential impact of Catholics' understanding of themselves as suffering under discriminatory laws even when those laws were not rigorously enforced. That experiential dimension of penalisation has remained largely unexamined, even as the era's reputation as one of stolid endurance has been updated by scholars who point to Catholics' ongoing dynamic engagement in the economic and political issues of their day.[6] Attention has begun to be paid in eighteenth-century Irish studies to the more intangible costs exacted by penalisation: 'could the true impact of the penal laws', Thomas Bartlett has

[3] John Bossy's emphasis on gentry Catholic households in *The English Catholic Community: 1570-1850* (London: Dartman, Longmans and Todd, 1975) has been updated by accounts that emphasize more popular forms of Catholicism; see for example J.J. Scarisbrick, *The Reformation and the English People* (Oxford: Blackwell, 1984).

[4] Colin Haydon, *Anti-Catholicism in Eighteenth-Century England, c. 1714-1780: A Political and Social Study* (Manchester: Manchester University Press, 1993), 15. Overall, Haydon writes, '[w]hilst popery was still condemned as wicked and abhorrent, the behaviour of papists became an increasingly insignificant matter in the legislature's eyes'. However he acknowledges that the legislature was often in advance of popular feeling on this issue. *Ibid.*, 54. For an example of a sanguine assessment of Catholics' situation with respect to the penal laws pertaining to property, see J. C. H. Aveling's claim that 'Between 1697 and 1791 Catholic landowners bought land with impunity, in spite of the law to the contrary'; J. C. H. Aveling, *The Handle and the Axe: The Catholic Recusants in England from Reformation to Emancipation* (London: Blond and Briggs, 1976), 279. David Butler offers a more typical and moderate assessment when he observes that ' the penal laws did not bite as sharply as they seemed to read'. David Butler, 'The Catholic London District in the Eighteenth Century', *RH* 28 (2006): 245-68, at p. 247.

[5] Carys Brown, 'Everyday Anti-Catholicism in Early Eighteenth-Century England', in Claire Gheeraert-Graffeuille and Geraldine Vaughan, eds. *Anti-Catholicism in Britain and Ireland, 1600-2000* (Cham, Switzerland: Palgrave, 2020), 60.

[6] See for example Glickman, *The English Catholic Community* and Michael C. Questier, *Catholicism and Community in Early Modern Britain: Politics, Aristocratic Patronage and Religion c. 1550-1640* (Cambridge: Cambridge University Press, 2006).

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wondered, 'lie in their psychological effects?'[7] In the English context, some aspects of the affective dimensions of early modern and eighteenth-century Catholicism have begun to be explored, but much work remains to be done on this front, especially on the issue of Catholics' penalised status.[8]

As our contemporary situation again lets us see, laws need not be rigorously enforced to have effects. To return to the example above, policies forbade LGBT individuals from serving in the armed forces but went unenforced until being officially lifted a few years ago; these created ultimately untenable conflicts for all concerned.[9] Several eighteenth-century sources highlight contemporaries' own view that the penal statutes were calculated to threaten more than to harm, and that in this ability to threaten lay their main function and force. Although in his *Commentaries on the Laws of England* (1765-9) William Blackstone disputed Montesquieu's assessments that the penal statutes 'do all the hurt that can possibly be done in cold blood', he conceded that 'it ought not to be left in the breast of every merciless bigot to drag down the vengeance of these occasional laws'.[10] In 1768, Lord Mansfield noted that the 'penal laws were not meant to be enforced except at proper seasons, when there is a necessity for it; or, more properly speaking, they were not meant to be enforced at all, but were merely made *in terrorem*'.[11] Mansfield was instructing a jury how to weigh the case of a man accused of saying Mass, and given the man's exoneration, their tenor may seem to support the argument that the penal laws, at least late in the century, served more to warn than to punish Catholics. Writing in 1780 to campaign for the repeal of the penal laws, however, Joseph Berington asked his readers 'Shall I sit down satisfied, because the good humour of a magistrate chooses to indulge me; whilst there are laws of which any miscreant has daily power to enforce the execution? My ease, my property and my life are at the disposal of

[7] Bartlett, 'The penal laws against Irish Catholics', 162. See also Richard Fitzpatrick, 'Catholic inheritance under the penal laws in Ireland', *Irish Historical Studies* 44 (2020): 224-247, at p. 247 where 'the psychological impact of the penal laws' is described as 'deeply personal', involving persistent 'fear, if not outright panic' at particular times of risk. I am indebted to Dr. Liam Chambers for pointing me to Fitzpatrick's essay.

[8] For work that enlarges our understanding of how Catholics experienced their status as a minority religious community, see Liesbeth Corens, *Confessional Mobility: England Catholics and the Counter-Reformation* (Oxford: Oxford University Press, 2018) and James E. Kelly and Susan Royal, *Early Modern English Catholicism: Identity, Memory and Counter-Reformation* (Leiden: Brill, 2017). On the creation of Catholic 'emotional community' in this period, see Claire Walker, 'Political Ritual and Religious Devotion in Early Modern English Convents', in Merridee L. Bailey and Katie Barclay, eds. *Emotion, Ritual and Power in Europe, 1200-1920* (London: Palgrave, 2017), 221-239.

[9] "Services gay ban lifted," *BBC News* 12 January 2000, http://news.bbc.co.uk/2/hi/uk_news/politics/599810.stm Accessed 20 December 2021.

[10] William Blackstone, *Commentaries on the Laws of England*, 4 vols (Oxford: Clarendon, 1765-9), 2:4.57.

[11] John Lord Campbell, *The Lives of the Chief Justices of England*, 2 vols (London: John Murray, 1849), 2:515; cited in Haydon, *Anti-Catholicism*, 48.

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every villain [...] it is surely better *not to be* than to live in a state of such anxious and dreadful uncertainty'.[12] Berington's words suggest that we might see the law's power to operate '*in terrorem*' as evidence not of its mildness but its insidious force. 'Anx[iety]' and 'dreadful uncertainty' may not themselves be penalties, but the laws were widely understood as designed to undermine Catholics' faith, as Berington's sense of their power to foster perpetual unease implies. Berington's complaint bears out the view of Richard Burn, author of the standard mid-century work on law enforcement, that the penal laws, though 'in the present age [...] permitted to sleep in a great measure [...] are suffered nevertheless to continue in force; perhaps that it may appear to the enemies of our constitution, that if they are spared, it is not for want of power, but of inclination to punish'.[13] When seen through the lens of Walsham's claim that tolerance in this period is often shadowed by intolerance, this statement can be taken to imply not so much a spirit of liberality as a tacit threat.[14]

Using the emphasis on the law's ability to inspire fear as a point of departure, this article explores how such fear may have registered on a particular aspect of eighteenth-century English Catholic consciousness: the claim to land and by extension to a specific sense of national belonging. Underlying the argument is the assumption of an exchange, which seems implicit in much eighteenth-century culture, between having property and having a full claim to belong to the body of the nation. Although the penal laws' threat to Catholics' property rights can be understood in purely pragmatic terms, the extent to which the statutes sought to undermine Catholics' claim to property arguably suggests the tacit premise that property and national belonging are intertwined, and that the penal laws' limitation of the former is part and parcel of a case against the latter. Scholars have shown that anti-Catholic prejudice is a constitutive element of Britishness in this period and that this prejudice hinged partly on assertions of Catholics' foreignness, rooted in their alleged allegiance to foreign powers.[15] The argument here thus implies that the struggle to hold onto property rights was both practical and existential, part of an ongoing desire by English Catholics to assert the compatibility of their faith and national identity. Admittedly, this restricts the argument's scope to an elite subset of the English Catholic population. Nonetheless, the

[12] Joseph Berington, *The State and Behaviour of the English Catholics, from the Reformation to the Year 1780* (London, 1780), viii.
[13] Richard Burn, *The Justice of the Peace, and Parish Officer*, 2 vols (London, 1755), 2:275.
[14] Walsham, *Charitable Hatred*.
[15] On anti-Catholicism as a constitutive element of the English character, see for example Linda Colley, *Britons: Forging the Nation 1707-1837* (New Haven: Yale University Press, 1992). On the charge of foreignness against Catholics, see for example Peter Lake, 'Anti-popery: The Structure of a Prejudice', in Richard Cust and Ann Hughes, eds. *Conflict in Early Stuart England* (London: Routledge, 1989), 79.

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documents in this archive do afford glimpses of broader areas of concern, notably the lingering possibility of a charge of recusancy that could have affected any Catholic attempting to practice the faith. The vulnerability displayed by even the relatively privileged voices contained in the archive, moreover, can thus be taken as an illustration, if not a representative sample, of the kinds of uncertainty and unease to which eighteenth-century English Catholics were exposed.

That uncertainty surfaces in cases by turns practical and farcically grotesque. In 1760, a family is concerned about their vulnerability to one of the recusancy statutes introduced in the 1580s. In 1767, a Catholic landowner faces off against a vicar who, having refused to allow the man's dead son's body to be brought to the parish church for burial, threatened him with prosecution under the penal laws.[16] Overall, the archive suggests that the English Catholic land-holders who sought the legal advice it contains felt a lingering unease about their legal rights. More broadly, then, the evidence in these cases and queries suggests that circumventing the penal laws did not always amount to the ability to 'sit down satisfied' with one's place at the table of English life. The archive thus offers insight into the reach of laws that did not have to bite to have an effect.

The Vincent Eyre Manuscripts: context

Before turning to some of the technical legal issues explored in the archive, a brief overview of the penal laws in the eighteenth century and the Eyre family's involvement in property issues will be useful. At the turn of the eighteenth century, English Catholics remained affected by penal statutes stretching back over one hundred years. They were also faced by a fresh set of laws that significantly affected their ability to inherit and sell property. Elizabethan recusancy statutes that focused on religious conformity were still in force, as were statutes from the early years of the seventeenth century that sought to discourage the education of Catholics overseas by abridging the property rights of both parents who sent their children abroad and children so educated, as well as anyone travelling overseas without royal license.[17] Throughout the Restoration period, shifting pressures to

[16] Vincent Eyre Manuscripts, Ushaw College Library, GB-0298-UC/P28 (hereafter UC/P28), 2/20(2) and UC/P28/2/40.

[17] The recusancy statutes proper begin with 1 Eliz. I, c. 2, the Act of Uniformity (1559). A fine for educating children abroad was introduced by 27 Eliz. I, c. 2 (1584), which was extended under James I (1 Jac. I, c. 4, 1603). By 3 Car. I, c. 2 (1627), parents could be deprived of property rights, and 3 & 4 Jac. 1, c. 5 (1605-6) prevented children educated abroad, as well as those educated in Catholic seminaries, from inheriting, possessing, or enjoying the profits from land. For a detailed discussion, see J. Anthony Williams, *Catholic Recusancy in Wiltshire 1660-1791* (London: Catholic Record Society, 1968). I am indebted to an anonymous peer reviewer for this reference.

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relax, enforce, and expand the penal laws came at different times from the monarch, Parliament, and the Privy Council. Following the accession of William and Mary, 'constructive recusancy' — incurred not only by those who were convicted of recusancy but by those who failed to take the required oaths — widened the scope of those vulnerable to penalties.[18] Two key developments of the 1690s put special pressure on Catholic landholders. In 1692, 4 Will. & Mar., c. 1 doubled the land-tax on Catholics who did not take the oaths of allegiance and supremacy. Despite the amount of consternation and complaint this new levy caused, the penal statute that had the most significant impact on eighteenth-century Catholics' property rights was 11 & 12 Will. 3, c. 4, 'An act for the further preventing the Growth of Popery', known colloquially as the Popery Act (1698-9), which reiterated and extended earlier penalties on inheritance. Perhaps most importantly, from 1700 forwards this act banned Catholics from purchasing land. Carys Brown has argued that the crafting of these statutes owed much to contemporary anxiety 'that Catholics were hoarding the country's wealth in order to bring down the Protestant succession and reinstate the Catholic church'.[19] Like earlier statutes, this one gave rights to the enjoyment of the land and its fruits to the Protestant next of kin, allowing them to keep any profits during the time they held the land and only stipulating that they not commit waste.

Questions have and should be raised, of course, about the frequency, consistency, and severity of these laws' enforcement. J. Anthony Williams has observed that, with respect to such issues, 'the position of the Catholic nobility and gentry in the eighteenth century bristles with warnings against generalization'.[20] Unquestionably, many Catholic landholders thrived despite these penalties. Yet, if histories of the penal laws seem to outline what seems like nothing so much as an elaborate game of cat and mouse between Catholics and the state, it is worth considering that such games look rather different from the perspective of the mouse than they do from that of the cat. As noted above, moreover, this essay's focus is not so much on the penal laws' enforcement as on the pressure they exerted on Catholics' sense of their identity in the emergent English nation. As will be shown below, the penal statutes collectively caused ongoing disquiet and confusion in the Catholic community, not least because of the tensions they threatened to create between English Catholics and their Protestant neighbours and family members. It is that sense of unsettledness in the face of a constantly evolving landscape of restrictions that will be the principal focus here.

[18] See Williams, *Catholic Recusancy*, 45-6.
[19] Brown, 'Everyday Anti-Catholicism', 66.
[20] Williams, *Catholic Recusancy*, 52.

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The Eyre family's history intersects with that of the evolving landscape of penal legislation in several ways. The focus on conveyancing issues in the archive seems to arise from a long-standing family connection between this branch of the Eyre family and the Dukes of Norfolk.[21] Nathaniel Eyre (1713-1781), father of the Vincent Eyre (1744-1801) whose name is attached to the archive, served the ninth Duke as the steward at Worksop Manor near Sheffield and seems likely to have been one of the original compilers of the three-volume set of manuscript precedents, legal opinions, and miscellaneous documents. The connection with the Howard family would offer one reason why the archive has a strong focus on questions of conveyancing, whether of landed property or advowsons—rights of presentation to a church living that were legally considered a form of real property and to which penal statutes were also applied. The archive is full of enquiries put forward by Catholic families about whether and how their property could be protected from the reach of the penal laws. The responses — many by well-known Catholic conveyancers such as John Maire, James Charles Booth, and Nathaniel Pigott, as well as by sympathetic Members of Parliament Nicholas Fazkerley and Randle Wilbraham — illustrate how, ironically, the penal laws fostered the careers of practitioners who could help Catholics evade them, even as the laws themselves pushed Catholics out of the legal profession.[22]

More narrowly, the Eyres' family history illustrates both the pressures exerted by the penal laws and the latitude that nonetheless remained for families committed to the faith and for individuals who wanted to pursue professional careers. Nathaniel Eyre educated all of his four sons overseas, first at the boys' school at Esquerchin founded by James Talbot, and then at Douai College.[23] Three of the brothers became priests, and the youngest son, Thomas Eyre

[21] The Derbyshire Eyres were a minor gentry family whose recusancy can be traced to at least the first half of the seventeenth century. An Edward Eyre of Newbold, possibly the great-great-great grandfather of Vincent Eyre, is listed as paying a fine for recusancy in 1632; see Clare Talbot, ed. *Miscellanea. Recusant Records*, Catholic Record Society Record Series 53 (1961), 352. Rosamond Meredith notes that this branch of the Eyre family 'was only very remotely connected with the Hassop Eyres', whose fortunes she detailed in 'A Derbyshire Family in the Seventeenth Century: The Eyres of Hassop and Their Forfeited Estates', *RH* 8 (1965): 12-77 and 'The Eyres of Hassop from the Test Act to Emancipation', *RH* 9 (1968): 267-287.

[22] 7 & 8 Will. 3, c. 24 (1696) prohibited Catholics from practicing as barristers and was repealed in 1791 by 31 Geo. 3, c. 32. For further information on the work of English and Irish conveyancers in eighteenth-century London, see John Bergin, 'The Irish Catholic Interest at the London Inns of Court, 1674-1800', *Eighteenth-Century Ireland* 24 (2009): 36-61.

[23] Details of the Eyre brothers' lives and careers can be found in John Kirk, *Biographies of the English Catholics in the Eighteenth Century*, eds. John Hungerford Pollen, S.J., and Edwin Burton (London: Burns & Oates, 1909), 74. Kirk states that Vincent Eyre studied at Douai for four years, returning to England in 1764. Douai College documents list Vincent and Edward as being admitted together from Esquerchin in June 1760, with John and Thomas following a year later. The last mention of Vincent seems to be in the 1763

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(1748-1810), is best remembered as the first president of Ushaw College, having been entrusted with the care of the students from the Northern District who escaped from Douai College during the French Revolution. Vincent Eyre's work on behalf of the tenth and eleventh Dukes of Norfolk (the latter of whom renounced his Catholicism in 1780) illustrates the kind of flexibility afforded Catholics within the constraints created by the penal statutes, for his care for the Duke's estates led to roles as a town trustee in Sheffield and Treasurer to the Commissioners in the 1790s.

Despite these achievements, the archive of papers that bears his name testifies to the repetitive nature of Catholics' concerns over the eighteenth century about the vulnerability of their property rights. Although the conveyancing work undertaken by Vincent Eyre and mentors such as Maire and Booth, in whose chambers he studied, was able to mitigate such concerns, Brown notes that it also aggravated suspicions about the deviousness of Catholics.[24] Certainly, several documents in the archive suggest that Catholics' evasions of the penal statutes were marked more by an air of circumspection than brazenness, and that the need for such chicanery produced a sense of strain. In one document advising a Catholic nervous that his claim to land will be voided, Maire described how to arrange the sale of his lands in a way that will defeat a later claim by a Protestant heir-at-law.[25] Such 'covinous' arrangements were frequent, but the tone in which these cases are discussed is not sanguine. In a related type of case that included extensive speculation that a similar ruse would be detected, a lawyer advised that it could work only if carried out 'with proper secrecy and caution'.[26] Despite the difficulties and the risks, as Richard G. Williams has highlighted, gentry Catholics felt compelled to do all that they could to preserve their claims to property: 'At stake', he writes, 'was the passing on through many generations, intact, of the estates on which the status and significance of the client's families depended, and with it the status of the Catholic community if its power and influence were not to decline'.[27] The extensive legal work Catholics might commission to preserve their claim to land, moreover, could constitute a significant expense.[28] The Vincent Eyre Manuscripts

Prefect of Studies Book. See P. R. Harris, *Douai College Documents, 1693-1764*, Catholic Record Society Record Series 63 (1972), 221, 228, 232.

[24] Brown, 'Everyday Anti-Catholicism', 68.

[25] UC/P28/2/39.

[26] UC/P28/2/20 (2).

[27] Richard G. Williams, 'Mannock Strickland (1683-1744): The Life and Career of a Catholic Jacobite Counsellor-at-Law' (Ph.D. Diss., Birkbeck College, University of London, 2000), 98. I am indebted to Dr. James Kelly for pointing me to Williams's work.

[28] Williams observes that 'there was good money to be made in a career in the law' and proposes a range for 'overall fees' for conveyancing work 'from £14 to £40 … though it is possible that this range is on the high side'. Williams, 'Mannock Strickland', 19, 112.

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document the tensions that Catholic families experienced as they sought to secure their title to landed property and the extent of the contemporary confusion about how the penal laws did and did not impugn that title.

The obligation to discover one's faith

The archive foregrounds a handful of issues central to or implicit in arrangements for the transfer of property that illustrate complexities in the way that Catholics' legal identity was construed and experienced in this period. One basic and important question was whether Catholics or their heirs were obliged to reveal or 'discover' their faith to the courts. The persistence of this question highlights both the threat to Catholics who were not convicted recusants, that either they or their heirs could have their claims to property challenged, and also the penal laws' ability to sow division within families and communities. 11 & 12 William 3, c. 4, like some earlier penal statutes, had established rewards for information leading to the conviction of priests, those who taught the Catholic faith, and those who sent their children abroad to be educated. In one item in the archive, a commenter on this statute predicted that the law would 'breed great Confusion, lawsuits, & perpetuall animositites in families'.[29] Malicious prosecutions that involved the enforcement of the sixteenth-century recusancy statutes are either anticipated or recorded in several documents in the archive. Although opinions on two such cases in 1759 and 1760 noted that such prosecutions are 'not much countenanced', one author conceded that they 'may still be brought', and the subsequent advice points to the reality that Catholics harassed in this way needed to plan how to respond to such prosecution.[30] In other cases, Booth hoped that a hostile neighbour 'co[ul]d be brought into any Disposition' to accept 'a Composition', and a counsellor 'who Is very violent ag[ain]st the Caholicks' threatened to invoke the penal laws if the double land tax was not paid 'quietly'.[31]

Given this context, it is interesting to see how often the archive testifies to Catholics' ability to shield themselves from discovering their faith to the authorities. In the important 1736 case *Smith v. Read*, presided over by Philip Yorke, Lord Harwicke, a key precedent was set that, within the courts of equity at least, the obligation to discover one's faith – when it was demanded, for instance, by a Protestant next of kin – could be denied. This precedent suggests a legal position in which Catholics' faith was only one element of their legal personhood

[29] UC/P28/2/79.
[30] UC/P28/2/20 (2).
[31] UC/P28/2/19; UC/P28/1/85.

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and did not always eclipse their right to property. In *Smith v. Read*, Hardwicke's judgement for the defendant that the loss of an estate due to the penalty imposed by 11 & 12 Will. 3, c. 4, would be equivalent to a forfeiture implicitly denied the plaintiff's claim that the estate in question had never vested in (and thus could not be forfeited by) the Catholic who subsequently conveyed it to the defendant. Paradoxically, a forfeiture here registers the Catholic's underlying claim of ownership, which the Protestant plaintiff had denied. The case seems to have concerned a woman who, according to the summary of the case, 'lived and died a papist' but whose faith was 'difficult to prove at law'.[32] Hardwicke's determination in favour of the person to whom she had devised her property acknowledged some degree of title in the Catholic landowner, and his assertion that 'there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty', served as an important precedent in subsequent cases.[33] Detailed notes on the case lend insight into how Catholics' rights could be both negotiated and contested. The defendant's counsel notes that the relevant statute 'and other Acts of Parliament made against papists creating disabilities and penalties were hard laws made to restrain people in the exercise of their religion according to their conscience and therefore would be never helped in a court of conscience.'[34] In rejoinder, the plaintiff's counsel argued 'that it was not their business to examine whether the Acts of Parliament made against papists were hard laws or not; they were laws and that was sufficient for their purpose; that this was not the case of a forfeiture but it was to discover a fact which if true the estate was never in' the plaintiff's ancestor in the first place due to the penal laws' strictures.[35] Hardwicke's reasoning seems to have had both principled and practical grounds:

> Here is a disability imposed by Act of Parliament by way of penalty upon a particular set of men upon the account of their religion, the discovery of that fact subjects them to a penalty, and this is not like the case of an alien or bastard who are incapable by the general laws of the land to inherit, besides what sways with me much is the great inconvenience that would follow should this plea be disallowed, we sho[ul] d have nothing in this court but bills of discovery whether such and such persons were papists or not, and no body knows what confusion must follow'.

The plea, the summary tersely concludes, 'was allowed'.[36]

Jones v. Meredith (1739) offers another case of inheritance in which the defendants' faith was shielded from inquiry, although their attempt

[32] UC/P28/1/50.
[33] John Tracy Atkyns, *Reports of Cases Argued and Determined in the High Court of Chancery*, 3 vols. (London, 1765), 1:527.
[34] UC/P28/1/50.
[35] UC/P28/1/50.
[36] UC/P28/1/50.

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to block a Protestant next of kin from redeeming and thereby taking possession of their mortgaged estate failed. In the account of the case in the archive, drawn up before it was argued, Booth built on the precedent in *Smith v. Read* when he speculated that the decision in the current case would hinge on the court's reluctance actively to participate in the penalisation of defendants: 'it is not to be imagined', he commented,

> but that these courts will interpose, not to carry penal laws actually into execution but to prevent Acts of Parliament from being grossly evaded, and to let them have their natural current.... I cannot but flatter my self that the p[lain]t[if]fs may at least in the event of the land, fail of success.'[37]

Although Booth was proved wrong when the plaintiff was enabled by the decision to defeat the claim by the Catholic heirs, it was not as a Protestant specifically but as a receiver of part of the profit of the land that he succeeded. In one of the published reports of *Jones v. Meredith*, it is noted that the penal statute 1 Geo. 1, c. 55 did create certain obligations to discover one's faith so that the system of estate registration might work effectively, but the inference drawn here is that such a stipulation 'seems to admit they would not otherways be liable to make such discovery; for if they had, there had been no need of such a provision. ...'[38] The ordinary workings of property law in the equity courts here precluded examination into religious faith.

In the final important case on the topic of discovery mentioned in the archive, *Harrison v. Southcote and Moreland* (1751), Hardwicke, revisiting some of the same issues he had confronted more than a decade before, slightly expanded the realm of a Catholic's legal privacy with respect to his faith. In this case, Hardwicke again ruled that a Catholic did not need to discover his religion, this time clarifying that the principle applied even if such discovery only potentially subjected him to a penalty. The recurrence of questions about discovery in these cases allows two points to be made: first, that the equity courts preserved a view of Catholics as having legal standing separate from their religious faith; second, that Catholics likely felt themselves vulnerable to such inquiries with some regularity. The decisions that imply that Catholics' faith could not always trump their claims to property show the extent to which legal arguments could be used by Catholics to deflect the full weight of the penal laws. At the same time, the amount of time spent contemplating the possibility of having to 'discover one's faith' suggests that it persisted as a source of concern.

[37] UC/P28/1/23.
[38] John Comyns, *Reports of Cases Argued and Adjudged in the Courts of the King's Bench, Common Pleas and Exchequer* (London, 1744), 664-65.

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Property law and Catholic identity in the Vincent Eyre Manuscripts: 'A good title'

A large number of cases in the archive turn on the questions of the nature of Catholics' title to their property, which several penal laws sought to limit but did not entirely abrogate. The question of title emerges as both a conceptual and practical problem in opinions that seek to resolve where, exactly, title went when a property-holder was disabled under penal laws. The question mattered because the laws sought to encourage sales of property, which were thrown into confusion by doubts about Catholics' title. Two Hanoverian laws frequently mentioned in the archive, 1 Geo. 1, c. 55 (1715) and 3 Geo. 1, c. 18 (1716), sought to reassure Protestant purchasers that all sales of property 'for a full and valuable consideration' would be held good in law. To the extent that title to land is seen to be a significant element of civic personhood, these cases illuminate areas of ambiguity and confusion for Catholics and Protestants about the nature of Catholics' identity as subjects. Though the practical issues at stake could usually be and were often resolved, that underlying ambiguity suggests another source of strain on Catholics throughout the period.

Across the body of penal statutes, Catholics' title to property was suspended in key ways but not wholly cancelled by the disability that their faith created. As 1 Jac. 1, c. 4 stated, the disability attached 'in respect of him or her self only, and not to or in respect of any of his Heirs or Posterity', and limited the ability 'to inherit purchase take have or enjoy' real property, but not the right to transmit the title onward.[39] In his *Commentaries*, William Blackstone explained that 'This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred'.[40] The Protestant who gained a claim to land thus had the right to 'enjoy' it in the Catholic's stead, but the claim went no further. Throughout the briefs and opinions in the archive, a key preoccupation is the ambiguity this situation creates about where, exactly, the title to property had gone. The question was a legal problem 'of considerable nicety', as one later commentator put it, and one that took time to sort out.[41] At stake seems to have been a larger question about how Catholics' status as subjects was to be understood, and the courts' decisions reveal a tension between the impulse to conserve that aspect of Catholics' standing that derived from the claim to land and the view that their faith was incompatible

[39] Alexander Luders, ed. *The Statutes of the Realm*, 11 vols (London: Dawsons of Pall Mall, 1819; rptd. 1963), 4, Pt 2:1021.
[40] Blackstone, *Commentaries*, 2:257.
[41] Montagu Chambers, ed. *The Law Journal Reports for the Year 1860* (London, 1860), 29, n.s., Pt 2:46.

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with full membership in the nation. This tension was a painful one for some Catholics: writing in reference to 11 & 12 Will. 3, c. 4, one legal adviser lamented that 'Though the act lets the nobility descend, yet the taking away the Estate from the nobleman is in effect a degradation and a disgrace'.[42]

Writing after the passage of the same act and anticipating its effects, one commentator predicted that 'This act will prevent papists from selling their lands to Protestants for if the father by this law becomes tenant for life he cannot make a good title to any purchaser'.[43] This statement proved prescient: as the century progressed, the question of how to make 'a good title' was raised consistently. Though, as one contemporary law report noted there was precedent for the idea that an estate's title could 'cease for a Time, and afterwards revive', the presence of the living Catholic and potentially his equally disabled heirs during the tenancy of the Protestant heir at law created a unique conceptual pressure, and also practical problems for Catholics who wanted to alienate property.[44] The conceptual problem was distilled in a brief for *Harrison v. Southcote and Moreland*, in which are quoted a lawyer's comments from 1738 in the case *Marlom v. Bringloe*:

> The inheritance must be somewhere; it can't be in the King for it is given to another, it can't be in the next of kin for he has but the pernancy [taking] of the Profits. … It can't be in the Heir for Nemo est heres viventis [no one is the heir of a living person].[45]

In the eyes of Catholic conveyancers, the title remained with the Catholic landowners who, as Booth asserted in in an opinion in the 1760s, 'had never lost the possession' of 'their ancient patrimony'.[46] A key precedent for this view was Tredway's Case (1615), which dealt with the inheritance by a woman who had become an Augustinian sister in Douai. Preserving her half-brother's right to transmit his estate to her, the case held that 'his estate remains'.[47] At stake was the distinction between 'taking' a property, or having full legal possession of it, which 3 Jac. 1, c. 5 had not barred outright, and taking only its 'benefit', or profit, from which the Catholic heir was indeed disabled.[48]

[42] UC/P28/2/71.
[43] UC/P28/2/79.
[44] Comyns, *Reports of Cases Argued and Adjudged*, 216.
[45] UC/P28/2/45. The case is variously known as *Marlom v. Bringloe*, *Mallom v. Bringloe*, and *Matlem v. Bingloe* and was presided over by Chief Justice John Willes. See *The English Reports* (Edinburgh: William Green, 1912), 125, Common Pleas III: 1063-7.
[46] UC/P28/2/1.
[47] Henry Hobart, *The Reports of that Reverend and Learned Judge, the Right Honorable Sir Henry Hobart*, 5th ed ([London] In the Savoy, 1724), 74.
[48] Hobart, *Reports of that Reverend and Learned Judge*, 73.

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The idea that a Catholic retained a fundamental though qualified right to title was upheld in the eighteenth century but was not uncontroversial. In *Thornby v. Fleetwood* (1712), a printed report of which is preserved in the archive, the right of a Catholic heir educated abroad to inherit was affirmed, it being determined that a lay Catholic 'is not dead in law, nor subject to an absolute incapacity, for he shall enjoy the lands after conformity'.[49] Summarizing the judgment in *Jones v. Meredith*, one brief noted 'Determined, that though a Papist educated or professsed, the seizin of estate is still in him.'[50] In *Fairclaim v. Newland* (1741), however, only the title of Catholics who came to property as minors was determined sufficient to authorize a sale to a Protestant purchaser. Interpretations of the case by Booth, Wilbraham, and Fazakerly suggest their frustration about the ambiguities the laws created for Catholics and Protestants alike. Doubts about the security of a Catholic's title could make the sales the laws sought to encourage seem risky. Protestant purchasers often proceeded with caution, fearing that a sale would later be questioned by a Protestant next of kin claiming a prior right.

There were technical as well as theoretical reasons why a Catholic's title might be deemed defective. This problem could arise if an estate had not been properly registered under 1 Geo. 1, c. 55, passed after the first Jacobite rebellion, which required such registration, or if a Catholic had come to property under one of the forms of conveyance that, though it had not been contested at the time, might technically render them 'purchasers' under 11 & 12 Will. 3, c. 4 and thus liable to prosecution. The archive contains multiple references to the case of *Roper v. Ratcliff* (1713), which was held to have established as a precedent that a devise or disposition of real property in a will 'is a purchase' within 11 & 12 Will. 3, c. 4; that this principle was not self-evident is suggested by the fact that one mid-century brief summarizes seven other cases concerning whether a devise constituted a form of purchase and could thus be challenged under the act.[51] Complexities in these modes of conveyance could be treated as loopholes ripe for exploitation: in one case that cited *Roper v. Ratcliffe*, it was determined that 'a devise of the residuum [of an estate] to a papist, after payment of debts and legacies out of a real estate [was] void, for that the papist might pay the debts and legacies and keep the estate which is evading the act and shall so not be'.[52] Although this ploy of reserving a part of

[49] Comyns, *Reports of Cases Argued and Adjudged,* 211. The printed copy in the archive is UC/P28/1/5.
[50] UC/P28/2/45.
[51] UC/P28/2/45. For commentary on 'the great case of *Roper* and *Ratcliff*', see William Peere Williams, *Reports of Cases Argued and Determined in the High Court of Chancery*, 3 vols ([London] In the Savoy, 1740), 2:4-6.
[52] UC/P28/2/45.

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the estate for a Catholic heir highlights conveyancers' dexterous manipulation of the laws, multiple briefs suggest that Catholics who sought to dispose of property in good faith were dogged by genuine legal uncertainty. In one of the more technical cases, Booth advised a Catholic client who wanted to sell property to pursue a recovery with double voucher — a rather complicated feint involving fictitious tenants, pursued in order to disencumber an estate of an entail — arguing that doing so will allow her to assert her own right to the use of the property, thereby effecting a 'modification of the old estates tail' but not actually acting as a legal purchaser.[53] In another case in which the goal seems to be to reach clarity rather than circumvent the law, the question was raised about whether an heir who was not Catholic when a will was made in his favour could now receive the property despite his conversion.[54]

The assertion in *Marlom v. Bringloe* that 'the inheritance must be somewhere' suggests the dislocation to which Catholics were subject as they sought to define their legal standing on a fundamental issue. Though legally held to be landowners, they were unable to act fully in that capacity, being entitled, as the case noted, only '*sub modo*', subject to their future conformity.[55] Despite this ambiguity, briefs prepared for cases concerning claims to title frequently repeated the power of Catholics to retain a 'good title', though this repetition highlights rather than amends the paradox that the conflicting case law had created. Catholics, Wilbraham asserted, 'may make a good title, although they had not a good title themselves'.[56] The repetition of this phrasing in multiple case briefs suggests both its utility as an argument and the frequency of concern on the point at issue. Wilbraham left intact the puzzle that the penal laws created. That a Catholic could 'make' but not 'have' a good title creates the impression of a kind of prestidigitation, a conjuring of something from next to nothing. To some extent, expedience seems to be the operative principle: penalising Catholics' property rights was certainly shrewd, and facilitating their ability to sell was transparently the goal. Yet, the paradox arguably ran deeper, implying a split legal perspective on the land-holding Catholic subject. In *Smith v. Read*, Hardwicke offered his view that the defect in a Catholic's title is real, 'but then it is a defect arising from a penalty. … there is a difference where the disability arises from the rules of law, and where it is imposed as a penalty'.[57] Here, the artificiality of the disability that impairs Catholics' title is suggested.

[53] UC/P28/1/81.
[54] UC/P28/1/21.
[55] UC/P28/2/45.
[56] UC/P28/1/9.
[57] Atkyns, *Reports of Cases Argued and Determined*, 1:527.

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Hardwicke may not have been criticizing that artifice, but his comment allows us to glimpse a legal conception of how a good (propertied) English subject might persist in the person of a disabled Catholic. Thus, the ability to 'make' a good title may be seen not as simply a legal shell game but the trace of a Catholic's civic personhood that the law found worth preserving.

Faith and disability

Underlying the various conceptual and practical problems faced by penalised Catholics was the disabling force of the penal statutes. Catholics' disability installed a basic tension between their faith and their standing as subjects, and it did so in an acute way by framing the disability as self-incurred through the refusal to swear an oath of allegiance. The self-incurred and also 'curable' nature of Catholics' disability is closer to the disability of married women rather than, say, the disability of infants, aliens, or bastards. Catholics' ability to cure their disability through conformity is analogous to the divorce or widowhood that would cure the disabilities imposed by coverture on a married woman. Yet this analogy highlights the double bind in which both women and Catholics were placed as the law positioned them as desiring and electing their own exclusion from full subjecthood. Frances Dolan has pointed out that anti-Catholic polemic frequently feminised Catholics relative to the rest of the nation, and the structural parallel between women's and Catholics' disability bears out the underlying conception of Catholics as having an ambivalent relationship with citizenship.[58]

Though the nature of faith as a curious sort of disability does not arise as a distinct issue in the archive, it is present obliquely in the discussions of when Catholics incur their disability. These discussions often turn on the issue of faith as a choice that must be made upon mature deliberation. In one case, a grandfather who wishes to leave bequests to his minor grandchildren on condition that they not follow his son in espousing Catholicism is advised that 'infants of tender years are not capable of serious an act as that of professing a religion, which requires maturity and judgment'.[59] Commenting on the same case, Fazakerley observes that, although the will 'requires an ability to take by being Protestants', there is no clear precedent for enforcing such a stipulation in the case of a minor heir, for 'it wo[ul]d be too hard a construction to disable children of such tenders years as 7, or 8, because their profession of any religion must be more from example

[58] Frances E. Dolan, *Whores of Babylon: Catholicism, Gender, and Seventeenth-Century Print Culture* (Notre Dame, IN: Notre Dame University Press, 1999), 8.
[59] UC/P28/2/33.

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than choice'.[60] In a 1759 opinion on the presentation of a living, Wilbraham notes that 'religion is not presumed to be a matter of chance but of choice upon deliberate judgment'.[61] The idea of faith as a considered choice might seem to belong to what Charles Taylor has identified as a distinctively modern view of religious belief,[62] but it is worth considering how the penal statutes' requirement that Catholics affirm the oaths of allegiance and thus abjure their faith had the advantage of figuring that faith as an aspect of their identity that was in some sense optional. Catholics' rejection of that tacit premise might then be seen to create a necessarily ironic relationship between themselves and the state that denied their ability to be the faithful subjects they were often trying to be.

Although the archive lacks evidence that Catholics wanted directly to contest the construction of faith as a choice, some cases do register the paradox of being offered the choice to disable oneself, and cases concerning advowsons show the state's overt interest in constraining the agency of Catholics under the guise of asking them to choose a faith. In *Thornby v. Fleetwood*, the argument is made that a minor educated abroad in the Catholic faith who stands to lose the profits of his estate ought still to be considered 'the innocent issue' who should be able to reclaim his full rights upon conformity rather than be debarred from them for life.[63] The tacit idea that this 'innocen[ce]' would be lost by an heir who confirmed his Catholicism is not disputed, but again the point here is the irony that such arguments made on behalf of Catholics create between citizenship and faith. In a 1738 opinion, Fazakerley gives voice to the paradox involved when he advises a client that devises to children should hold good, 'for children of papists of tender years are incapable of professing the popish religion, and until they be capable, they are under no disability to take by the will'.[64] Minor Catholics' 'capability' here is that which will guarantee their legal disability — a capability of an unusual kind. The law concerning advowsons was 'more severe', as Wilbraham noted, in imputing to minors their Catholic parents' faith in order to debar them from presenting to livings: by 12 Ann., c. 14, presentations by minors were void because 'this infant being supposed to be under the influence of his parents or parent or others of that religion, the law which generally presumes the contrary … supposes that the child is a papist and

[60] UC/P28/2/33.
[61] UC/P28/2/35.
[62] On the construction of religious belief as a choice in modernity, see Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press, 2007).
[63] UC/P28/1/5.
[64] UC/P28/2/14.

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incapable, unless the child can prove himself to be a Protestant'.[65] This statute thus makes more visible the law's ability to constrain the agency of Catholics in ways that – again, as the analogy between Catholics and married women helps to clarify – is imperfectly masked by their emphasis on choice and affirmation.

Conclusion

Overall, this article has sought to demonstrate that some of the legal penalties to which propertied Catholics were subject for the majority of the eighteenth century must have affected their daily experience of being English subjects, in ways worth exploring, if difficult to gauge. The legal briefs and opinions in the archive might seem a counter-intuitive source to look for evidence of such effects. The broad patterns of concern and uncertainty they reveal, however, give some sense of how a segment of the English Catholic population registered the shadow cast by the penal statutes. Glickman, who gives a relatively sanguine assessment of the gentry's reaction to their situation in this period, does note their concerns over the insidious effects of the revivified penal legislation that marked the reign of William III, quoting Henry Jerningham's 1720 lament that the updated statutes 'have laid us under the power of every lackey and beggar in the streets to put the laws into execution against us, whenever their Malice or the Devil shall promote them'.[66] Evidence in the archive consistently shows that although Catholics grew dexterous at avoiding the weight of the penal statutes, needing to do so, and doing so effectively, were pervasive concerns. This evidence thus suggests one way to begin to assess how, in Haydon's words, the 'everyday … pressures' on Catholics in this period might abrade and wear away at their consciousness, forming if not deforming their sense of both their religious and political identities.

[65] UC/P28/2/35. For a case involving the 1703 Irish *Act to Prevent the further growth of Popery* (2 Ann., c. 6), which went further than the English acts and specified that 'the children of papists are taken to be papists', see UC/P28/3/38.
[66] Cited in Glickman, *The English Catholic Community*, 58.

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