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REDISCOVERING ANGLICAN PRIEST-JURISTS: I

Robert Owen (1820 - 1902)

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This journal has published two distinguished series on the lives and careers of individual jurists in the history of English church law, from the medieval period to the late nineteenth century: one by Professor Sir John Baker on ‘famous English canonists’ (1988-97); and the other by Professor Richard Helmholz on ‘notable ecclesiastical lawyers’ (2013-17).² Most prepared for their professional careers with the study of the civil law at Oxford or Cambridge (and before the Reformation also in canon law). Many practised as judges, advocates and proctors in the church courts (until statute ended much of their jurisdiction in the 1850s). Some wrote treatises on church law. A small number were also priests, but less so as the centuries unfolded. Whilst these professional canonists and civilians may have had a monopoly in practising church law, they did not have a monopoly in thinking or writing about it. The clergy, who never trained or practised as lawyers, also had things to say about church law. But the clerical profession has been somewhat neglected by scholarship as a class contributing to the history of church law and jurisprudence. From diocesan bishops through parish priests to clerical scholars in the universities, their books, pamphlets, sermons, letters and other materials often deal with the nature, sources and subjects of church law. Their aims vary: from the educational through the historical or theological to the practical and polemical. These priest-jurists – fathers-in-law, they might quip – contributed much to the intellectual development of church law. One is Robert Owen, a Welsh scholar cleric whose books include *Institutes of Canon Law* (1884). No scholar has to-date unveiled Owen as a notable Anglican priest-jurist – strangely, he has been lost to scholarship as among those he himself chided as ‘eminent Canonists’ who ‘hide themselves’ and remain ‘veiled Prophets’.³

THE LIFE AND CAREER OF ROBERT OWEN

Robert Owen was born at Dolgellau, Merionethshire, in the Diocese of Bangor, 13 May 1820, third son of David Owen (surgeon) and Ann (née Evans). Educated at Ruthin Grammar School, Denbighshire, like so many Welshmen before and since, he matriculated in 1838 at Jesus College, Oxford.⁴ He was elected to a scholarship in 1839, graduated BA in 1842 (with a third class *literae humaniores*), proceeding to MA in 1845 and to BD in 1852.⁵ Owen was ordained deacon in 1843 (by the Bishop of Oxford), and priest in 1844 (by the Bishop of Bangor).⁶ He served briefly as a curate of Llanrhaidr near Denbigh until he returned to Jesus

¹ I am very grateful to the Principal and Fellows of Jesus College Oxford for a short-term Visiting Fellowship to prepare for this study, and to Robin Darwall-Smith, College Archivist, and Owen McKnight, College Librarian.

² The former was later published as J.H. Baker, *Monuments of Endlesse Labours: English Canonists and their Work 1300-1900* (London: The Hambledon Press with the Ecclesiastical Law Society, 1998).

³ R. Owen, *Institutes of Canon Law* (London: John Hayes, 1884) v.

⁴ E.G. Hardy, *Jesus College* (London: F.E. Robinson, 1899) 185: ‘The College was almost exclusively Welsh’, its members mixing with those of other colleges ‘to a very small extent’. The college was founded in 1571.

⁵ *The Register Book of Jesus College, 1824-1882* (hereafter *Register Jesus Coll*) 15 Nov. 1839 and 7 Dec. 1839:

‘1 Robert Owen of the Parish of Dolgelly in the County of Merioneth and Diocese of Bangor was admitted Scholar of Jesus College, having first taken the oaths required by the Laws of the Realm and the Statutes of the said College’. See also 2 Mar 1857: Owen is allowed to defer proceeding to DD. See also *Alumni Oxonienses, The Members of the University of Oxford 1715-1886*, by J. Foster, III (Oxford: Parker, 1888) 1052.

⁶ *Crockfords Clerical Directory* (London: Horace Cox, 1865), Third Issue, 476.

College, being elected as a fellow in 1845, where he remained as such until 1864.⁷ Whilst at Oxford, Owen came under the spell of the Tractarians.⁸ In 1847 he edited for the Anglo-Catholic Library an early eighteenth-century book on the Eucharist.⁹ In *An Apology for the High Church Movement on Liberal Principles* (1851), he considers that the movement does not propose ‘submission to Rome’ but rather ‘a reconciliation of all Christians...on the basis of the primitive Church, before it was unhappily split into rival Communions’; he defends the Church of England as a branch of the Catholic Church of Christ, argues that its ‘subserviency to the temporal powers has seemed to overlay her spiritual growth’, and thinks that its rule by statute results in ‘the humiliating reproach of being called “an Act of Parliament Church”’.¹⁰

1858 saw publication of *An Introduction to the Study of Dogmatic Theology*, his book on: the sources of theology; Holy Scripture; Creeds; attributes of God; created things; the church; and the sacraments.¹¹ For one contemporary review (in the high church tradition), although not cast in ‘popular form’ the book ‘supplies what has long been wanted by the theological student, and supplies it well’, especially for clergy and their ‘shelves of working books’. He is praised for: the breadth of his patristic, Roman and Protestant sources; the ‘multitudinous references given in the footnotes of every page’; and his study of sacraments which ‘may worthily stand beside the labours of those great men who have been the means of restoring to the Church of England her full heritage of catholic doctrine’; also: ‘We believe its author to have felt the great responsibility which attached to its compilation, and to have put down nothing lightly’, so representing ‘best and most concisely the belief of the Church at large’.¹²

As a fellow, Owen participated fully in life at Jesus College. In turns he was elected to the college offices of Latin lecturer, catechetical lecturer, dean, Welsh reader, modern history lecturer, and librarian,¹³ and served as a university Public Examiner in Law and History.¹⁴ He dutifully attended college meetings, being a signatory to decisions on, for example: providing scholarships and fellowships endowed to benefit ‘natives of Wales’; criticism of appointing Englishmen to ‘very high positions of dignity in Wales’ in so far as the Principal and Fellows ‘know by experience that such appointments have not tended to the advancement of the interests of either the Church or of Education in Wales’; reforms to college statutes proposed by the University Commissioners; dividing chapel services between the Welsh and English languages; and dismissing a missionary fellow for ‘delaying’ when called by the Bishop of London to take on ‘the cure of souls’ in Her Majesty’s plantations;¹⁵ he also served on a committee to renovate the chapel with a new sacrarium arch, nave paving, and reredos.¹⁶ Owen’s use of the college buttery, kitchen, coal, ale, letters, messenger, porter, laundry, and

⁷ *Register Jesus Coll*: 3 Sep. 1845: election of ‘Robert Owen MA Clerk to the North Wales [Fellowship]’; he was admitted probationary fellow on 25 Sep. 1845 and actual fellow 25 Sep. 1946.

⁸ There are 24 lines in the *Oxford Dictionary of National Biography* on Owen written by D.L. Thomas and revised by G.M. Murphy in 2004: Owen had ‘an occasional correspondence’ with Newman.

⁹ R. Owen, editor: *John Jonson, Theological Works*, Volume 1, *The Unbloody Sacrifice* (1714), Library of Anglo-Catholic Theology (Oxford, 1847).

¹⁰ Published at Oxford by John Henry Packer: Pusey House Library Oxford, Catalogue Number 5615, Pa. 284.

¹¹ Published in London by Hayes, 1858 (2nd ed., 1887).

¹² *The Ecclesiastic and Theologian*, Vol. XX, April 1858, 145-154 at 145: the reviewer is not identified.

¹³ *Principal’s Register* (Jesus College Archives Catalogue RE7): see respectively 2 Nov. 1846; 1 Nov. 1848; 1 Nov. 1849; 17 Oct. 1857; 6 Oct. 1858; initially he was Librarian for a short time resigning 16 Feb. 1861.

¹⁴ For 1859-160: see e.g. *Crockfords Clerical Directory* (1865) 476.

¹⁵ *Register Jesus Coll*: 7 Dec. 1853; 24 April 1856; 21 Nov. 1856; 17 Oct. 1857; and 23 May 1849.

¹⁶ *Register Jesus Coll*: 15 June 1863; *Jesus College*: Reprinted from the Victorian History of the Counties of England, Oxfordshire Volume III (no date): p. 276. The work may be seen today.

cruets is recorded for each week of his twenty-six years there in the college records.¹⁷ Owen spent some summers away from college with leave, often to travel abroad. One such was a visit to northern France in July 1851,¹⁸ with a fourth-year Jesus student, Griffith Arthur Jones (1827-1906, later leading Anglo-Catholic cleric in Cardiff) who writes amusingly of Owen; they remained friends for life.¹⁹ He is also remembered favourably in diaries of another Jesus student John Richard Green (1837-83, later eminent historian) who knew Owen as ‘Bob’.²⁰

It is difficult now to identify precisely what stimulated Owen’s interest in canon law. He was perhaps influenced by his college contemporary David Lewis (1814-95), Fellow and Vice-Principal (1839-46), curate to Newman at the university church, and once described as ‘a student of canon law’;²¹ Lewis resigned as fellow in 1846 to become Roman Catholic, and published in 1847 a pamphlet on royal supremacy and ecclesiastical jurisdiction (not unlike Owen’s in 1851).²² In any event, Owen developed interest in canon law from 1844 to 1854. Three commonplace books from this decade survive at Bangor University, with 1,288 pages in his own hand all testifying to an extraordinary breadth and depth of reading under headings such as church biography, polemical theology, moral philosophy, ecclesiology, metaphysics, poetry, natural philosophy, and archaeology; each has extracts from his reading, commentary, lists of authors read and indices.²³ His reading of church law included: Richard Hooker; Jean Mabillon (1632-1707), the French Benedictine scholar, and his *Traité des études monastiques* (1691) which he found of ‘incalculable benefit’; and in study of Canon Law, Gratian whom he ‘carefully perused’, Giovanni Paolo Lancelotti (d. 1590), *Institutiones iuris canonici* (1563),²⁴ and legal history works by Claude Fleury (d. 1723).²⁵ All are cited in his *Institutes*.

Owen remained active at Jesus College until October 1864.²⁶ However, the register for 8 November 1864 reads: ‘The Principal communicated to the meeting a letter from Mr. Robert Owen resigning his Fellowship: the resignation was accepted, and the fellowship declared vacant’.²⁷ No reason is given here or in other college records and no letter of resignation exists in the archives. Nevertheless, some light may be shed on the resignation in three letters by Edmund Ffoulkes (fellow at Jesus at the same time as Owen) written in 1867 to Walter Kerr Hamilton, Bishop of Salisbury.²⁸ The letters are worth presenting *in extenso* in giving perhaps the best remaining insight of Owen’s character. In the first, Ffoulkes asks Hamilton for an interview to discuss ‘a clergyman of the Church of England and late brother-fellow of

¹⁷ He is billed for all these except laundry: *Buttery Book*, e.g. MS BB.a.181 (1838), 183 (1840), 188 (1845), 201 (1854), 217 (1862), 219 (1863), 220 (1864); Owen is not ‘on the books’ in BB.a.223 (1865): see below.

¹⁸ *Register Jesus Coll*: 2 July 1851; see also e.g. 9 June 1853; 21 June 1854; 31 May 1856.

¹⁹ For extracts from Jones’ diaries, see J.W. Ward and H.A. Coe, eds., *Father Jones of Cardiff* (London: A.R. Mowbray, 1907) 3-4: Owen praised French ‘liberty’; 14 and 59. I thank Rhidian Jones for this connection.

²⁰ Jesus College Archives, Formerly MS 216: J.R. Green, *Diary* (1859-64): pp. 55, 58-59, 60-61. See also J.N.L. Baker, *Jesus College Oxford: 1571-1971* (Oxford: Jesus College, 1971) 49, 52, 58.

²¹ C.S. Dessain and E.E. Kelly, eds., *The Letters and Diaries of John Henry Newman* (London: Thomas Nelson and Sons, 1971) XXI, 551-552.

²² D. Lewis, *Notes on the Nature and Extent of the Royal Supremacy in the Anglican Church* (London: James Toovey, 1847) pp. 96: Pusey House Library Oxford: Pamphlets 6436, Pa 316.

²³ Bangor MSS, General Collection, Volume One, 1-1,000, MSS 72-74: Commonplace Books of the Rev. Robert Owen, BD, Fellow of Jesus College, Oxford, covering the years 1844-1847, 1853-1854, and 1854.

²⁴ MS 72: p. 2: June 1844: ‘I finished reading Hooker, *On the Laws of Ecclesiastical Polity*’ (Keble edition), the first 4 books in Jan., fifth in April, and others May and June; p. 413: 7 June 1847: Mabillon, Gratian, Lancelotti.

²⁵ MS 72: p. 337ff: 2 March 1847. In MSS 73 and 74 he returns to canonical themes.

²⁶ *Register Jesus Coll*: he attends meetings 9 April, 7 May, 17 June, 2 July, and 13 Oct. 1864.

²⁷ *Register Jesus Coll*: 8 Nov. 1864, signed Charles Williams, Principal.

²⁸ Pusey House, Oxford: Archives Catalogue No. 13, Hamilton Papers, Rt. Revd Walter Kerr Hamilton and Family, compiled by P.M. Meadows, 1989, revised by K.E. McNab, 1996, p. 192. Ffoulkes resigned as fellow to become Roman Catholic in 1850 but returned to Anglicanism as vicar of the university church in Oxford.

mine at Oxford who is in distress. I am soliciting this favour quite unknown to him'.²⁹ In the second, he writes: 'The individual, for whom I should have pleaded, had I been fortunate as to have seen your Lordship, is a late Fellow of Jesus College, the Revd. R. Owen. He was tempted into some serious improprieties of conduct: but as he resigned his Fellowship at once on being charged with them, I do not think they were ever judicially investigated to the full'. He continues: 'But be that as it may, I feel I could stake my own character on his not being a depraved one - but like most of us he was surprised into wickedness more or less against his better self, and then unlike most of us, his sin, instead of remaining a secret became known. I resolved on finding him out the earliest opportunity: and I must say I never witnessed greater humiliation than his. Since then we have corresponded by post from time to time, and as far as I can judge, his life has been consistently that of a penitent'. However: 'as I have told him, living alone will never restore him to the place in society which he has forfeited. He must put himself into the hands of someone who will appoint him what to do, and answer for him to others in the end, that he has redeemed his character'. So: 'I ventured to urge him to throw himself unreservedly on your...consideration. This he would do gladly, were he certain you would not object to communicate with one so unworthy. My opinion of him is that eccentric as he is in many ways, he is much too valuable to be lost to the service of Christ and His Gospel...this is my sole reason [in] asking whether you would be willing to hear from him'.³⁰

In the third, Ffoulkes writes: 'I have just heard from Mr. O. He is still at Barmouth...I did not tell him I had seen you at all: as I wanted merely to ascertain first whether a letter would still find him there - and now I feel rather inclined to give your Lordship the option of writing as it were "proprio motu", before I say another word to him...Should you wish me to prepare him however for a letter from you I will gladly do so: otherwise if I do not hear from you I shall assume that you will take the matter into your own hands so that even when I write next, I shall not name having seen you - but merely continue to recommend his having recourse to you in a general way. If after some time of probation, he could manage to marry respectably, he would perhaps be doing the best thing for himself'.³¹ As we shall see, Ffoulkes succeeded.

Robert Owen returned to Wales, to Barmouth in the county of his birth, where he owned a small estate. As well as his book on canon law, he wrote a book on the theology of saints, which he developed in an essay on the communion of the saints as 'all the whole Church' animated by the 'imaginative faculty' through which revelation penetrates the depths of humans, and the 'judicial faculty', 'the common-sense and conscience of humankind' - he advocates greater freedom for the English Church to exercise these under the constraints of its establishment, greater tolerance within the church, and 'the sacred cause of the Re-Union of Christendom'; this was followed by a verse book on pilgrimage.³² His last book was a history of the Welsh including studies on their influence, language and literature, with lists of the counterparts of Welsh vocables in French and English.³³ Owen did not marry nor did he relinquish his holy orders - nor did he disown his former association with Jesus College Oxford.³⁴ Owen died on Sunday 6 April 1902 - and he was buried at Llanaber, Barmouth.³⁵

²⁹ Ibid: HAM 6/55/1: Letter of 18 April 1867.

³⁰ Ibid: HAM 6/55/2: Letter of 22 June 1867.

³¹ Ibid: HAM 6/55/3: Letter of 17 August 1867: he also wrote that Owen considered moving from Barmouth.

³² R. Owen, *Sanctorale Catholicum or Book of Saints* (London: C. Kegan Paul, 1880); *Essay on the Communion of the Saints* (London: C. Kegan Paul, 1881); *Pilgrimage to Rome* (1883).

³³ R. Owen, *The Kymry: Their Origin, History and International Relations* (Carmarthen: W. Spurrell, 1891).

³⁴ *Crockford's Clerical Directory* (1893) p. 1003: The title page of *The Kymry* (1891) styles him: 'Rev. Robert Owen BD, Sometime Fellow of Jesus College Oxford; Senior Public Examiner in Law and Modern History'.

ROBERT OWEN AND HIS *INSTITUTES OF CANON LAW*

Ffoulkes' intervention with Hamilton in 1867 worked. Robert Owen opens the preface to his *Institutes* of 1884 with: 'The present work was commenced near twenty years ago at the instance of the late Bishop of Salisbury, the saintly Walter Kerr Hamilton. He complained to the writer that his clergy continually put questions to him, which "the faintest tincture of Canon Law" on their part might have obviated'.³⁶ Owen then offers the book 'as a tribute of respect and affection to the only Anglican prelate, whose friendly regard I could in any sense claim. Whether he would have endorsed my judgments herein expressed, I cannot say'.³⁷ The following deals with the *Institutes* - its scope, thesis, purpose, topics, sources, and methods.³⁸

Owen seeks to elucidate 'the profitable application of the Canon Law'. He does not focus on 'ecclesiastical law', that is, 'the product of legal rulings and Statute Law' – for this he exhorts us to consult Cripps and Phillimore: 'I know nothing of it, and do not pretend to interpret the ways of the Establishment'. Rather: 'My province is to call attention to the principles and rules, whereby the Catholic Church grew to maturity. If much thereof still survives in usages of the English Church, it is well. But Acts of Parliament and decisions of lawyers are not germane to the constitution of the Church of God'.³⁹ He is, therefore, critical of books on English church law which he sees as either 'ever in humble vassalage to the Statute Law' (naming the *Codex Iuris Ecclesiastici Anglicani* 1713 of Edmund Gibson) or else 'spoilt by homely vulgarity' (he cites *A Collection of All Ecclesiastical Laws* 1720 by John Johnson).⁴⁰

His thesis is that the Church of England is 'a National Church claiming to form an integral portion of the whole, that is, the Catholic Church, bound in matters of doctrine and essential discipline by the judgment' of the latter.⁴¹ For Owen, the establishment, 'as the Reformation statutes have left it' – withdrawal from communion with Rome, the royal supremacy, the legal power of Parliament in ecclesiastical matters (exercisable in consultation if appropriate with the Convocations of Canterbury and York) – means that there are insufficient matters in church life 'formally and directly reserved for the judgment of the whole or Catholic Church' – the Church of England has become 'an Anglican Paddock' (a term he borrows from Gladstone), which is 'fenced off from the field [of God] by national legislation' - 'the slave of the Civil Power' - in all this, ecclesiastical law is the 'Charter of the Church's Slavery'.⁴²

³⁵ *Bye-Gones, relating to Wales and the Border Counties* (Oswestry: Woodall, Minshall, Thomas and Co., 1902) 350 (obituary): also: 'Mr Owen had retired for many years at Barmouth, where he owned considerable property'. But his last home was modest: Tan-y-Graig, 4 Cambrian Street. His wealth at death: £11,525 16s. 1d.

³⁶ I found no letter from Owen in Hamilton's papers at Pusey House: see above n. 29. There is no reference to Owen in H.P. Liddon, *Walter Kerr Hamilton: Bishop of Salisbury* (London: Rivington, 1869): Hamilton had a keen interest church law: 44-45, 52, 76, 81, 89-92; 78: Hamilton did not 'dread' separation of church and state.

³⁷ *Institutes*, v-vi: on Hamilton's death in 1869, he 'shrank from prosecuting an ungrateful task'; but 'Warned by the evening-star of life', resumed it; and: 'Events have come to pass, which call for an out-spoken utterance on subjects, which usually demand and obtain a decorous, even timid, reserve. I write with the full sense of my responsibility to God'; 'undeterred' by likely reactions to it, he looked 'only to the last remuneration'.

³⁸ *Institutes*, v-vi: 'In those days one rarely met with any who paid attention to the subject: now we hear of "most eminent Canonists" in our midst, yet somehow they manage to hide themselves, and remain veiled Prophets'; an exception is e.g. J.F.M. Lequeux (1796-1866), *Manuale Compendium Juris Canonici* (1850).

³⁹ *Institutes*, vi.

⁴⁰ *Institutes*, viii.

⁴¹ *Institutes*, x.

⁴² *Institutes*, xi-xii, xxv; see also 100.

Therefore, Owen rejects ‘Erastian doctrine, which makes the Church stand only by the law of the land and not by God’s law’.⁴³ The establishment signifies that: ‘The Providence of God has now brought the Church of England face to face with the revolution wrought by her forefathers, through the criminal supineness of the clergy, [and] the daring assumption of the laity’ – the Reformation legislation effected: ‘the subjugation of the clergy to the laity in the spiritual sphere; the submission of the teachers to the taught, [and] of the pastors to their flocks’, rather than allowing ‘a return to the avowed principle of the English Reformation restoration of a decayed fabric on the lines of primitive Christianity’.⁴⁴ On the basis of the idea that establishment was destructive of the catholic character of the Church of England, he conceded ‘many will come to feel...that Disestablishment is a necessity’; he later supported disestablishment of the Church of England in Wales (which occurred in 1920).⁴⁵ Indeed, when he discusses the rule that patrons are forbidden to present to a benefice a clerk who cannot understand and speak the language of the people, he states: ‘The neglect of it in Wales has largely contributed to the alienation of the Cymric people from the Church of England’.⁴⁶

As to purpose, for Owen, the historic study of canon law provides an essential understanding of the constitution of the Catholic Church: ‘The Canon Law is a mirror which reveals the true nature of the cleavage in our continuity with the Catholic Church, which we are now invited to perpetuate’.⁴⁷ In other words, as expressed in his *Apology* (1851), he suggests that ‘the English nation...be tried by the principles of the canon law’.⁴⁸ In point of fact, Owen recognises ‘no distinction of “Roman” and “English” Canon Law’. Rather, the canon law is a normative manifestation of the catholicity of the church universal of which the Church of England is but one part. Therefore: ‘the most part of the Roman Canon Law is merely the tradition common to both the East and West’; and so much of ‘English’ canon law - e.g. medieval Constitutions of Papal Legates for the ‘guidance’ of English bishops - formed part of Roman canon law; so ‘the profession of Catholicity should lead us to points of union rather than of divergence’ among churches - he considers it is ‘a great inconvenience to attempt to set aside...Papal enactments which have been allowed...even in Protestant jurisprudence’.⁴⁹

With regard to its structure and topics, the book has seventy chapters in two parts. Part one consists of short chapters set out sequentially without sub-division, but ordered thematically on two topics: governance and ministry. First, Owen discusses sources and the nature of law and the church: law, natural law and divine law; canonical scripture; canon law; the Catholic Church; mystical church (Kingdom of God); and national churches (1-6). Secondly, authority: the voice of the Catholic Church (expressed e.g. in general councils) which ‘binds’ national churches; national councils, custom, jurisdiction, and coercive jurisdiction (7-13). Third comes episcopacy: its origin; the ancient primacy of Rome in Britain; metropolitans (14-21); the election, confirmation, postulation, examination, consecration, and functions of diocesan bishops (22-27); bishop-clergy relations (28-33); and suffragans, archdeacons, and rural deans (34-36). Fourth, the clergy: their examination, spiritual capacities, continence or celibacy, life, discipline, trial (37-41). Fifthly, he studies benefices: institution; resignation; parishes; patronage; and spiritual capacities of laity (44-49). Then he addresses Church-State

⁴³ *Institutes*, xvi: ‘In our day we witness the triumph of this fatal principle in the Public Worship Regulation Act’ 1874 and proposals for a ‘supreme tribunal of laymen’ in spiritual cases.

⁴⁴ *Institutes*, xxi.

⁴⁵ *Bye-Gones, relating to Wales and the Border Counties* (1902) 350: I thank Revd Roger Brown for this.

⁴⁶ *Institutes*, 58: he cites the Council of Château-Gonthier 1231, Canon 16; the practice to appoint Englishmen commenced under the Plantagenets but was ‘corrected under the Tudors, and revived by the House of Hanover’.

⁴⁷ *Institutes*, xxv-xxvi.

⁴⁸ *Apology*, 81.

⁴⁹ *Institutes*, vi-vii.

relations: Christian princes' authority over a national church, the invasion of ecclesiastical jurisdiction by the civil power, and the alliance of church and state in England (50-52).⁵⁰ Part two is shorter - twenty-five chapters on: rites: baptism, confirmation, Eucharist, confession, unction of the sick, and marriage (1-6); consecration of times and places, worship, and common prayer (7-12); property: burial, tithes and alienations (13-16); offences/sanctions: simony, heresy, schism, irregular ministrations (e.g. ordinations), sorcery and witchcraft, usury, excommunication in general, and excommunication of rulers in particular (17-25).⁵¹

Owen draws on a wide range of sources, primary and secondary. The primary legal sources are used on the basis that, for him: "Canons" signify the rules ordained for the government of the Church by the Holy Fathers, chiefly, of the primitive Church, who bore rule as Bishops, and met in General and Provincial Councils to decree dooms on matters of faith and discipline' – and it was Justinian who decreed that the canons of the first four General Councils 'should obtain the force of Law'.⁵² In turn, the 'stream of the Canon Law' flows through, for instance: the Apostolic Canons; the collections of Dionysius Exiguus; the Code of the Church of Rome, presented by Pope Hadrian I to Charlemagne; the 'Greek canons, published by Bishop Beveridge with the notes of Balsamon and Zonaras'; the '*Decretum* of Gratian'; the decretals of Gregory IX; the *Sext* of Boniface VIII; the *Clementines* of Clement V; and the *Extravagantes* of John XXII. Owen often cites these.⁵³ Needless to say, such sources were also applied in England: 'The fifth and sixth General Councils, supplementing the above, together with the decrees of the Roman pontiffs, the canons of many foreign Provincial Councils, if generally received and approved of, as well as those of English Provincial Councils and Constitutions of Papal Legates and of Archbishops, went to make up in England the substance of the Canon Law'; and: 'That Law still operates as supplying precedents and rules, where not abrogated by solemn Acts of this Church and Realm'.⁵⁴

His range of secondary sources is also impressive; he uses works of: well-known medieval canonists, like Panormitanus, Durandus, Guido Baysio, Hostiensis, and Zabarella, and less well-known, such as Henri Bohic (d. 1357), Petrus de Ancharano (d. 1416), Filippo Franchi (d. 1471), and Byzantine canonist Balsamon (d. 1195). From English canonists he cites, for example: John Ayton (d. 1348), William Lyndwood (d. 1446), and Edmund Gibson (d. 1748), and the legal-theological work of Herbert Thorndike (d. 1672) – of whom, 'I know not his equal' - Thomas Hobbes (and his *De Cive* (1642) on Christian rulers deferring to clergy in matters of faith), and William Beveridge, Bishop of St Asaph (d. 1708), and his *Synodikon* (1672), and *Codex canonum ecclesiae primitivae* (1678). Among the more modern continental writers, he often cites, for instance: Giovanni Paolo Lancelotti (d. 1590), *Institutiones iuris canonici* (1563); Zeger-Bernard Van Espen (1646-1728), author of e.g. *Ius ecclesiasticum universum* (1753); Louis D'Héricourt and his *Les lois ecclésiastiques de France* (1771); and Dominic Schram (d.1797) author of *Institutiones iuris ecclesiastici publici et privati* (1774).⁵⁵

Owen uses various juristic methods – but a recurrent consideration is to uncover the reasons for the canon law,⁵⁶ often employing explanations from theology and history - and he is ever

⁵⁰ *Institutes*, 1-114.

⁵¹ *Institutes*, 115-178.

⁵² *Institutes*, Justinian, Novel 131; namely: Nicaea, Constantinople, Ephesus and Chalcedon.

⁵³ *Institutes*, 5: for the latter, he cites a Decretal of Gregory III, Tit. 49, c. 6.

⁵⁴ *Institutes*, 3-4: he does not discuss here the Submission of the Clergy Act 1534.

⁵⁵ The breadth of his sources is unsurprising given his reading recorded in his Commonplace Books: see above.

⁵⁶ But: 'seeing that the Canon Law has no practical independent working among us [as it is subsumed in English ecclesiastical law], I have not touched the complex machinery once employed in its operation': *Institutes*, vi.

alert to divergent opinions, typically opening a discussion with: ‘On this point canonists greatly differ’, which differences he then examines.⁵⁷ First, Owen describes, discusses, and speculates. Much of the book is purely descriptive, such as: ‘Confirmation or the Laying on of Hands, in the view of the Canon Law, is a Sacrament reserved to Bishops only; because it is regarded as the completion of Baptism’.⁵⁸ Equally, much is discursive: he often begins a discussion by stating a rule (footnoting its source), discusses its meaning, presents its origins, and offers reasons for it. For instance: ‘If a bishop ordains a priest...without assigning him a title for his support, he is to grant him means to live till he provides him with a benefice’ – Canon 5 Fourth Lateran Council. Next he defines ‘title’ - a ‘benefice or other means of honestly supporting a clerk’. As to its origin: ‘This ordinance originated in the Council of Chalcedon, Canon 6, which annuls an ordination without a title’. Then he gives the reason: ‘it was intended to save the clerical order from the disgrace of mendicancy’.⁵⁹ Often, his reasons for rules are speculative; for instance, using *ius commune*: ‘By common law, a bishop may not be a Canon in his own cathedral, nor assist in chapter as a Canon; for the rights of a Prelate and Canon are distinct. Where the contrary obtains, the custom was perhaps brought in to facilitate business by aid of the Prelate’s experience; and therefore it is only local’.⁶⁰

Second, Owen is comparative, evaluative and critical. For example, he compares the doctrine of the reception of canon law in England with that in France: ‘Papal Decretals, inserted in the body of the Canon Law, were not regarded in France save as written reason; nor observed, when contrary to the usages and liberties of the French Church’.⁶¹ Moreover, in the Church of England: ‘If it be alleged that the Canon Law is out of date, as to force of law; yet must it be maintained, that, in face of the divisions that have long prevailed in the Church, that man and that Church, who order themselves by the uniform tenour of these rules, shall be those who make not, but suffer, the guilt of schism. The Appeal to Antiquity, which is the plea offered by the Anglican Church for *her* Reformation, is no device of the modern position’.⁶² Owen also identifies areas of canon law which need greater clarification; this is the case with canonical obedience, and the oath taken by clergy to obey the lawful and honest directions of their diocesan bishop: ‘Bishops are forbidden to exact oaths or engagements of obedience which ensnare the conscience’, for which he cites the Council of Châlons, Canon 13; but: ‘The nature and extent of canonical obedience require authoritative explanation, so that it be not the plaything of despotic prelates or of refractory priests’.⁶³ As a basic criterion to be used to reform canon law, Owen shares the medieval opinion that: ‘the Church ought to do as a good physician; and, if a medicine upon trial doth more hurt than profit, remove it’.⁶⁴

Third, Owen is in turns rational, radical, and realistic. By way of illustration, priests ought not to receive at Holy Communion those from another parish ‘if they resort to them out of contempt for their own priest. If however they have a legitimate cause, suppose he is a notorious sinner, they would not sin; because the contempt would be grounded on law’. Indeed: ‘Parish churches should not be forsaken for a light reason...But people may always lawfully resort to the cathedral, because the bishop has the spiritual charge of all throughout his diocese’.⁶⁵ Perhaps radically for the time, after he lists ‘holy women’ in biblical passages,

⁵⁷ *Institutes*, 67: here on majority etc voting in a cathedral chapter – he cites e.g. Bartolus.

⁵⁸ *Institutes*, 118: he likens it to the confirmation of a bishop, as belonging to ‘superiors’.

⁵⁹ *Institutes*, 56: he cites e.g. Johann Georg Reiffenstuel (1641-1703).

⁶⁰ *Institutes*, 58: he cites Panormitanus.

⁶¹ *Institutes*, 4: he cites e.g. D’Héricourt and Van Espen.

⁶² *Institutes*, 4-5.

⁶³ *Institutes*, 69.

⁶⁴ *Institutes*, 72-75: this is in a discussion on celibacy in which he cites Panormitanus.

⁶⁵ *Institutes*, 94: he cites Panormitanus.

‘it seems a duty to point out how the sexes meet together as equals in Christ, and build up His spiritual temple’ and so women should be consulted in spiritual matters; and: ‘a layman may, in case of necessity, baptize and hear confession’, be the assessor of an ecclesiastical judge in a spiritual cause but not dictate a spiritual sentence in spiritual causes, and ‘a layman may exercise jurisdiction’ over clerks ‘guilty of schism’ and who ‘subvert the faith’.⁶⁶ Owen is also realistic, not least in terms of the need for deference to civil law in the areas of the proper competence of the State: ‘Names of an improper character should not be imposed on children at baptism; if it be done, it should be corrected by the bishop that confirms’ – here he cites Lyndwood - however: ‘It is obvious this cannot be done, if against the Law of the Realm’.⁶⁷

THE *INSTITUTES* IN CONTEXT: OTHER BOOKS ON CHURCH LAW

There are arguably five distinct periods in the historical development of English ecclesiastical law. In the medieval period there is a basic but limited partnership between the common law (as it touched on the ecclesiastical jurisdiction) and canon law (papal and native). The Reformation sees absorption of canon law into the ecclesiastical law of the realm (and the imposition of legal disabilities on dissenters). The Restoration heralds the rise of toleration (and the gradual lifting of dissenters’ legal disabilities). The nineteenth century witnesses the piecemeal common law development of religious freedom. In the twentieth century we see the creation of a new legislative body for the established church (by statute in 1919) and the enactment of a positive statutory right to religious freedom in the Human Rights Act 1998.⁶⁸

Secondary literature on church law across the centuries broadly reflects these periodic developments in terms of its own purposes, sources, subject-matter, and method. In many respects, Owen’s work is very like that of medieval canonists (a host of whom he cites) in his topic coverage and juristic techniques (not least in his quest for reasons for laws).⁶⁹ Owen’s *Institutes* is like another priest-jurist Hooker, whose *Laws* similarly uses an extraordinary range of scriptural, patristic, early conciliar, medieval canonical, and theological sources to defend the Church of England as it developed at the Reformation - but Owen, whose focus is not English ecclesiastical law in that sense which includes state-made church law (though he occasionally cites statutes), is very unlike Hooker who offers the first systematic treatment of the ecclesiastical law (but like Owen in the tradition of natural-divine law thinking).⁷⁰ For much the same reason, Owen may be contrasted with Restoration jurist Godolphin whose focus is the ecclesiastical law of the realm - but, like Owen, Godolphin surveys the history of English ecclesiastical jurisdiction.⁷¹ By the late eighteenth century, books on ecclesiastical law do not focus simply on the government, ministry, doctrine, liturgy, rites, and property of the Church of England – they also treat laws applicable to other churches and religions; this was the case, e.g., with Burn - Owen does not do so (save to the extent that he recognises the

⁶⁶ *Institutes*, 98-100: he cites Balsamon on consulting women; but there are limits: women may not exercise ministerial functions and ‘Laymen should not assume the office of preaching without authority of the clergy, unless perhaps they be inwardly moved by Divine grace’: he cites Gratian and e.g. Council of Trullo, Canon 70.

⁶⁷ *Institutes*, 118-119.

⁶⁸ For the application of this sort of (contested) ‘periodisation’ to the development of religious freedom in England, see e.g. R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011) 17-38.

⁶⁹ See e.g. N. Doe and S. Pulleyn, ‘The durability of maxims of canon law: from regular iuris to canonical principles’, in T.L. Harris, ed., *Studies in Canon Law and Common Law in Honor of R.H. Helmholz* (Berkeley: The Robins Collection, 2015) 303-336.

⁷⁰ See e.g. N. Doe, ‘Richard Hooker: priest and jurist’, in M. Hill and R.H. Helmholz, eds., *Great Christian Jurists in English History* (Cambridge: Cambridge University Press, 2017) 115-137.

⁷¹ J. Godolphin, *Reportorium Canonicum, or An Abridgement of the Ecclesiastical Laws of This Realm* (1678).

ecumenical utility of canon law), and there are parallels between on the one hand Gibson and Burn and on the other hand Owen in their shared use of ‘maxims’ or ‘axioms’ of canon law.⁷²

In turn, Owen may be distinguished, if not as to topic coverage then in terms of focus and technique, from his nineteenth-century contemporaries whose works on the ecclesiastical law of the realm are more positivist, black-letter, and descriptive rather than programmatic, namely - the lawyers: Cripps, who seeks ‘to enunciate rather than to criticise the law’;⁷³ Stephens, whose book (of 1,622 pages) is for use by the ‘Clerical and Legal Profession’ as ‘a practical Treatise of Clerical Law’;⁷⁴ Phillimore, whose work (1,883 pages), to elucidate the ‘general principles of the law of the Church of England’, also appeals to historical canons and statutes, and laws on ‘other churches’;⁷⁵ Whitehead, on ‘church law’, whose ‘dictionary’ of statutes, canons, regulations and decided cases, is ‘less voluminous than the great treatises on the subject’;⁷⁶ and Sturge, whose book originated in answers to clerical correspondents in the *Guardian* newspaper.⁷⁷ Again, Owen the cleric is more discursive, critical and theological than these lawyers, and two other priest-jurists who may be noted here: Blunt whose province is the Church of England, as ‘governed by a system of jurisprudence made of: Common Law; Canon Law; and the Statute Law’;⁷⁸ and Lacey, who seeks ‘to state the principles underlying the practice of Church Law’ for those ‘in the administration of the Church’ and writes: ‘I have tried to keep to my subject, not invading the province of the moralist or...ritualist. The question for me is not what ought to be done with an approving conscience, but what is required or allowed to be done. The conscience may demand much more, or may forbid...what is in itself lawful’.⁷⁹ Owen may not have approved - but that is another story.⁸⁰

Conclusion

Robert Owen is one in a class of individuals thus far largely neglected in modern scholarship on those who have contributed to the intellectual development of church law in Anglicanism: the priest-jurists. Owen followed the academic path of so many others from Wales in the nineteenth century, to Jesus College, Oxford, where, aside from ordination and a curacy, for twenty-six years he was engaged as a student and then as a fellow – according to the college records, he discharged his duties and offices conscientiously and productively, publishing a notable work on dogmatic theology. It was in the decade 1844-54 that he seems to have developed his interest in canon law, shaped by his own experience of and loyalty to the high church movement. His resignation as fellow – and, in the absence of hard evidence, one must speculate about the details of the ‘serious improprieties of conduct’ which stimulated this – has, however, resulted in a great benefit to canonical learning, also made possible in part by the sympathy he received from his former ‘brother-fellow’ Ffoulkes and the kindness of Bishop Hamilton. Owen’s *Institutes of Canon Law* (1884) was indeed a product of his time in the sense that it was driven from within the Oxford movement by his conviction that the

⁷² R. Burn, *Ecclesiastical Law*, 4 volumes (1763); see above n. 71 for maxims and axioms in Gibson and Burn.

⁷³ H.W. Cripps, *A Practical Treatise on the Law relating to the Church and Clergy* (1st ed., 1849; 8th ed., 1937).

⁷⁴ A.J. Stephens, *A Practical Treatise of the Law Relating to Clergy*, 2 Vols. (1848).

⁷⁵ R. Phillimore, *Ecclesiastical Law*, 2 volumes (1st ed., 1873; 2nd ed., 1895) 1749-1818: ‘other churches’.

⁷⁶ B. Whitehead, *Church Law, being a concise dictionary of statutes, canons, regulations and decided cases affecting the clergy and laity* (London: Stevens, 2nd ed., 1899): it also touches on ‘dissenters’.

⁷⁷ C.Y. Sturge, *Points of Church Law and other writings illustrative of the law of the church* (1907).

⁷⁸ J.H. Blunt, *The Book of Church Law, being an exposition of the Parochial Clergy and the Laity of the Church of England* (1872) pp. 497.

⁷⁹ T.A. Lacey, *A Handbook of Church Law* (1903).

⁸⁰ It would be instructive to place Owen intellectually in the Oxford movement: see S.J. Brown, P. Nockles, and J. Pereiro, eds., *The Oxford Handbook of the Oxford Movement* (Oxford: Oxford University Press, 2017).

Church of England was increasingly becoming an 'Act of Parliament Church' to the detriment of its catholicity. Nevertheless, the book deserves closer inspection as a lesson in the juristic analysis of canon law in stating the rule, identifying its authority, explaining its origin, elucidating its reasons, and evaluating its utility. Owen's work also has something of a prophetic character, not just in its sense of the disestablishment of the Church of England in Wales which was to come eighteen years after he died, but, above all, in its original, unique, and scholarly use of the historic canon law as a measure of the catholicity of ecclesial life and its unifying potential as an instrument of ecumenical endeavour for visible Christian unity.