

LEGAL REVOLUTION:
ST. THOMAS MORE, CHRISTOPHER ST. GERMAN,
AND THE SCHISM OF KING HENRY VIII

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INTRODUCTION

As the headsman's axe descended on St. Thomas More on Tower Hill on July 6, 1535,¹ much more came to an end than the life of an exemplary Renaissance humanist. More's execution symbolized the schism of English religious life from Catholic Europe. While the Catholic Church's influence in England would temporarily revive under Queen Mary I, Catholicism gradually was reduced to a relatively clandestine existence, a half-world of shadows marked by sporadic outbreaks of ferocious persecution followed by interludes of half-hearted and haphazard enforcement of penal laws primarily enacted under Queen Elizabeth I and King James I.

St. Thomas More's death also marked the culmination of a fundamental shift in the understanding of law that prevailed in England until the schism engineered by King Henry VIII between 1529 and 1535. On one level, More's opposition to these changes was driven by his commitment to Catholic doctrine concerning the indissolubility of marriage and the pope's dispensing power. His resistance, however, was also linked to concerns about the legal significance of Henry VIII's policies. In part, this was associated with More's fears concerning how these policies would impact England's ability to resist heresy. But it equally reflected More's views about the Catholic Church's nature and its relationship to the temporal realm.

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1. J.A. GUY, THE PUBLIC CAREER OF SIR THOMAS MORE 203 (1980) [hereinafter GUY, PUBLIC CAREER OF MORE].

This became most evident in More's debates with the Tudor legal scholar Christopher St. German between 1532 and 1533.

St. Thomas More has a well-established reputation as the graceful author of morally charged works such as *Utopia*² and his unfinished *The History of King Richard III*.³ He is also remembered as an able controversialist, most notably as a result of his lengthy critiques of the ideas associated with Martin Luther and other "new men." More employed these controversialist abilities in his *Apology*⁴ and *The Debellation of Salem and Bizance*,⁵ in which he questioned St. German's proposals for, first, altering the relationship between canon law and English common law and, second, revising the legal procedures for addressing heresy.⁶ While More's debate with St. German went to the heart of the conflict between the Catholic Church and the English Crown, his beheading underlined not only England's separation from the See of Peter, but also a fundamental change in the English understanding of law and the relation between the spiritual and temporal realms. This Article outlines the pre-Reformation background to these developments and examines the implications of Luther's rebellion for the dominant understanding of law—particularly the relationship between civil and ecclesiastical law—then prevailing throughout England and much of Western Europe. The reaction of Catholic English scholars such as More to these changes is then considered before I demonstrate how the ensuing debates influenced the theological, political, and legal controversies that engulfed England as Henry VIII relentlessly pressed his case for a divorce.

2. ST. THOMAS MORE, *UTOPIA* (Edward Surtz, S.J. ed., Yale Univ. Press 1964) (1516).

3. ST. THOMAS MORE, *THE HISTORY OF KING RICHARD III* (1557), *reprinted in* 2 *THE COMPLETE WORKS OF ST. THOMAS MORE* 1 (Richard S. Sylvester ed., 1963).

4. ST. THOMAS MORE, *THE APOLOGY* (1533) [hereinafter MORE, *APOLOGY*], *reprinted in* 9 *THE COMPLETE WORKS OF ST. THOMAS MORE* 1 (J.B. Trapp ed., 1979).

5. ST. THOMAS MORE, *THE DEBELLATION OF SALEM AND BIZANCE* (1533) [hereinafter MORE, *DEBELLATION*], *reprinted in* 10 *THE COMPLETE WORKS OF ST. THOMAS MORE* 1 (John Guy et al. eds., 1987).

6. John Guy, *Introduction* to 10 *THE COMPLETE WORKS OF ST. THOMAS MORE*, *supra* note 5, at xv, xx, lxxiii–lxxix [hereinafter Guy, *Introduction*] (discussing St. Thomas More's *Debellation of Salem and Bizance* and St. German's *Salem and Bizance*).

I. CHRISTENDOM, CANON LAW, AND COMMON LAW

The Catholic Church from its very beginning has been embroiled in disputes about the respective authority of church and state. In *Law and Revolution*, Harold J. Berman maintains that the eleventh-century investiture controversy that pitted pope against emperor decisively shaped the legal systems prevailing throughout Western Europe until the sixteenth century and even beyond.⁷ The irony is that Pope St. Gregory VII's proclamation of the Catholic Church's ecclesiastical autonomy from, and superiority over, the secular arm in his *Dictatus Papae*⁸ did not, as Berman observes, achieve either objective.⁹ The outcome was a negotiated arrangement between the papacy and the emperor in 1122,¹⁰ and a series of compromises between the Church and other secular rulers.

In England's case, the relationship between church and state—and, more particularly, the respective jurisdictions of ecclesiastical and secular courts and the different competencies of canon, common, and statutory law—was not settled until the crisis that followed the struggle between King Henry II and Archbishop Thomas Becket and the latter's assassination in 1170.¹¹ The subsequent resolution did not, however, engender an especially tidy situation.¹² Ecclesiastical courts, Berman notes, claimed jurisdiction over:

- (1) all civil and criminal cases involving clerics, including all cases involving church property;
- (2) all matrimonial cases;
- (3) all testamentary cases;
- (4) certain criminal cases, such as heresy, sacrilege, sorcery, usury, defamation, fornication, homosexuality, adultery, injury to religious places, and assault against a cleric; and
- (5) contract, property, and other civil cases, where there was a breach of a pledge of faith (called "perjury," that is, violation of an oath).¹³

7. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 22–23 (1983).

8. POPE GREGORY VII, *Dictatus Papae* [*Sayings of the Pope*] (1075), in *THE REGISTER OF POPE GREGORY VII 1073–1085*, at 149, 149–50 (H.E.J. Cowdrey ed. & trans., 2002).

9. See BERMAN, *supra* note 7, at 23.

10. *Id.*

11. See *id.* at 260–61, 268–69.

12. See FREDERIC WILLIAM MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* 60–61 (The Lawbook Exch., Ltd. 1998) (1898).

13. BERMAN, *supra* note 7, at 260–61.

Given the number of cases potentially subject to ecclesiastical review, it is little wonder that secular courts constantly disputed jurisdictional claims by Church officials.¹⁴ The situation was further complicated by the fact that the secular authorities were responsible for enforcing the decisions of ecclesiastical courts.¹⁵ The secular arm had certain obligations, for example, concerning the detection and punishment of heresy, but neither the monarch nor his courts determined what was and was not heretical.¹⁶ The handling of marriage cases reflected a similar division of duties, with the secular authorities enforcing the decisions of ecclesiastical courts concerning the validity of marriages.¹⁷

Further complications ensued from Henry II's successful effort to extend the jurisdiction of royal courts to civil and criminal matters that previously had been subject to local and feudal courts administering local and feudal law. Organizationally, this took form in the creation of the Court of Common Pleas in 1178, which was empowered "to hear the people's complaints,"¹⁸ and the Court of King's Bench, whose jurisdiction covered criminal offenses and any civil case affecting the monarch.¹⁹ The establishment of these courts was followed by a systematization of the chancellery's legal work. The Lord Chancellor—holder of the great seal of England and able to give orders in the king's name—and his officials were empowered to issue writs and a range of other legal instruments that initiated court action.²⁰

Despite the monarchy's augmentation of its legal powers, the ecclesiastical courts existing in England at the time preserved their independence from the state. This reflected the fact that they were part of a legal system that extended as far as the Catholic Church. Though plaintiffs could not appeal, for example, from the Archdiocese of York's courts to those of the Archbishop of

14. See MAILLAND, *supra* note 12, at 56–57.

15. For example, the sentence of excommunication was enforced by the secular power. *Id.* at 58–59.

16. *Id.* at 79–80.

17. See *id.* at 57.

18. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 147–48 (5th ed. Little, Brown & Co. 1956) (1929) (H.W.C. Davis ed., 9th ed. 1921) (1870) ("ad audiendum clamores hominum remanent").

19. *Id.* at 149–50.

20. See *id.* at 683–84.

Canterbury, they could petition higher tribunals in Rome.²¹ This was often difficult in practice, and secular laws limited the types of cases subject to appeal. Nonetheless, the system gave concrete form to what St. Thomas More would refer to at his trial as the “laws of God and his Holy Church”²² and England’s integration into a legal apparatus transcending English common law.

II. THE LUTHERAN CHALLENGE

Though figures such as Archbishop Becket and King Henry II disagreed about the precise lines separating secular and ecclesiastical jurisdictions and quarreled about issues such as taxing the clergy and appointing bishops, it would not have occurred to them to question the Catholic Church’s understanding of the nature of Christianity, its authority on matters of faith and morals, or that it was divinely invested with such authority. While heretical movements certainly existed in England before King Henry VIII’s reign, none attracted significant and lasting followings.

The English reaction to the advent of Martin Luther and his proposals was more muted than the enthusiastic response of the German nobility and peasantry.²³ Lutheran books first appeared in England in 1519, but do not appear to have sold well.²⁴ This did not prevent the Lord Chancellor, at the time Thomas Cardinal Wolsey, from prohibiting the entry of Lutheran books into England in 1521.²⁵ Cardinal Wolsey’s action may have been sparked by a letter from Archbishop William Warham of Canterbury warning Cardinal Wolsey that Lutheran ideas were circulating at Oxford University.²⁶ In any event, Cardinal Wolsey was sufficiently moved to have Bishop John Fisher of Rochester deliver a sermon denouncing Luther as a

21. See BERMAN, *supra* note 7, at 261.

22. E.E. REYNOLDS, *THE TRIAL OF ST. THOMAS MORE* 121 (1964).

23. Cf. Preserved Smith, *English Opinion of Luther*, 10 HARV. THEOLOGICAL REV. 129, 129–31 (1917) (describing the heated rejection of Luther by the English people and nobility after “the infection of certain . . . members” of Oxford and Cambridge with Lutheran ideas).

24. See Carl S. Meyer, *Henry VIII Burns Luther’s Books, 12 May 1521*, 9 J. ECCLESIASTICAL HIST. 173, 174, 176–77 (1958).

25. See Summary of Letter from Pope Leo X to Thomas Cardinal Wolsey (Mar. 16, 1521), in vol. 3, pt. 1 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 450, 450 (J.S. Brewer ed., London, Longmans 1867) [hereinafter 3.1 LETTERS AND PAPERS].

26. See Summary of Letter from Archbishop William Warham to Thomas Cardinal Wolsey (Mar. 8, 1521), in 3.1 LETTERS AND PAPERS, *supra* note 25, at 449, 449.

heretic in St. Paul's churchyard on May 12, 1521, before joining the bishop to preside over a public burning of Lutheran texts.²⁷ At the same time, Henry VIII, because he was "more powerful than his predecessors" and enjoyed "the great authority of England with the Emperor and the German princes,"²⁸ was urged to dispatch correspondence to Holy Roman Emperor Charles V asking him to repress Lutheran heresies, Luther's books, and their author.²⁹

This was not the end of the reaction of the English religious and civil authorities to the Lutheran heresies. Henry VIII himself chose to author a book, *Defence of the Seven Sacraments*, which refuted Luther's attack on Catholic sacramental theology.³⁰ While writing such a text was not beyond the King's abilities, he received assistance from a committee of theologians, possibly including Archbishop Warham, Bishop Cuthbert Tunstall of London, and Bishop Fisher.³¹ In the spring of 1521, St. Thomas More was appointed to edit the book.³² Copies were eventually sent to the Pope and the thirty cardinals in Rome.³³ For all his efforts, of which this book was one, Henry VIII was awarded the title *Defensor Fidei* by a papal bull promulgated on October 11, 1521.³⁴

In July 1522, Luther's reply, *Contra Henricum regem Angliae*, was published.³⁵ Its argument was, even for the standards of the time, expressed in terms of extraordinary aggression and vulgarity.³⁶

27. See Entries for Martin Luther's Books and Writings (May 12, 1521), in 3.1 LETTERS AND PAPERS, *supra* note 25, at 485, 485; see also Meyer, *supra* note 24, at 184–86.

28. See Summary of Letter from Lorenzo Cardinal de Medici (Mar. 30, 1521), in 3.1 LETTERS AND PAPERS, *supra* note 25, at 454, 455.

29. See *id.*; see also Summary of Letter from Lorenzo Cardinal Campeggio to Thomas Cardinal Wolsey (Mar. 30, 1521), in 3.1 LETTERS AND PAPERS, *supra* note 25, at 455, 455.

30. J.J. SCARISBRICK, HENRY VIII 110 (1968).

31. See JOHN GUY, THOMAS MORE 115 (2000) [hereinafter GUY, THOMAS MORE] (positing a "committee of theologians possibly steered by Archbishop Warham or Bishop Tunstall"); see also Preserved Smith, *Luther and Henry VIII*, 25 ENG. HIST. REV. 656, 659 (1910) (noting that German historians "appeal to the fact that the [*Defence*] is found in an early edition of Bishop Fisher's works, with the note that he helped the king"). But see SCARISBRICK, *supra* note 30, at 112 (stating flatly that Bishop Fisher did not contribute to the preliminary work).

32. GUY, THOMAS MORE, *supra* note 31, at 114–15.

33. See SCARISBRICK, *supra* note 30, at 111, 116 (indicating that Cardinal Wolsey sent a "luxurious presentation" copy of the *Defence of the Seven Sacraments* to Rome along with almost 30 copies for the cardinals).

34. *Id.* at 115–17.

35. Smith, *supra* note 31, at 660.

36. See GUY, THOMAS MORE, *supra* note 31, at 115 ("Luther attacked the *Defence* with a vituperative tirade . . ."); SCARISBRICK, *supra* note 30, at 113 ("Luther . . . wrote a notoriously

Erasmus of Rotterdam commented that the book's tone lost Luther the sympathy of many.³⁷ It provoked a reaction from many quarters, including the Catholic theologians Thomas Murner and John Eck.³⁸ It also produced a royal letter dated January 20, 1523, from Henry VIII to the Saxon dukes.³⁹ Here, he spelled out the wider implications of Luther's doctrines, including what he declared would be their deleterious effects not only upon the administration of law but the very nature of law itself.⁴⁰ Luther's claim—later substantially modified⁴¹—that no person, regardless of his office, could impose a law on a Christian without that individual's consent, may have been an example of what Henry VIII had in mind. This would have meant that no one was obliged to obey a law one did not like, including thieves who presumably had no interest in consenting to laws prohibiting their profession. Henry VIII's letter was written as a document of state correspondence rather than an academic treatise.⁴² Nonetheless, some have speculated that it reflected themes dear to St. Thomas More,⁴³ who was at the time a member of the King's court as Under-Treasurer of the Exchequer but was also serving as a supernumerary king's secretary to both Henry VIII and Cardinal Wolsey.⁴⁴

In the following years, More and Bishop Fisher became the most prominent Englishmen involved in the Catholic offensive against

virulent reply . . . trounc[ing] the king as 'deaf adder', 'miserable scribbler', 'fool', and worse."); PETER ACKROYD, *THE LIFE OF THOMAS MORE* 227 (Anchor Books 1999) (1998) ("Luther . . . describe[d] the king as a pig, dolt and liar who deserved, among other things, to be covered in excrement."); Smith, *supra* note 31, at 660 ("Many of [Luther's] friends . . . were repelled by its violence."); RICHARD MARIUS, *THOMAS MORE* 280 (Harv. Univ. Press 1999) (1984) ("It is unlikely that any tract addressed to any king in Christian Europe had ever been as insulting, as vitriolic, as obscene as Luther's little book entitled *Against Henry, King of the English*.").

37. See Letter from Erasmus of Rotterdam to Marcus Lavinus (Feb. 1, 1523), in 9 *COLLECTED WORKS OF ERASMUS* 365, 393 (James M. Estes ed., R.A.B. Mynors trans., 1989).

38. See SCARISBRICK, *supra* note 30, at 113–14; Smith, *supra* note 31, at 661.

39. Smith, *supra* note 31, at 660.

40. See Summary of Letter from King Henry VIII to Frederick, John, and George, Dukes of Saxony (Jan. 20, 1524), in vol. 4, pt. 1 *LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII* 17, 17 (J.S. Brewer ed., London, Longman & Co. 1870).

41. See generally F. EDWARD CRANZ, *AN ESSAY ON THE DEVELOPMENT OF LUTHER'S THOUGHT ON JUSTICE, LAW, AND SOCIETY* 73–112 (1959) (examining how Luther reoriented his ideas on justice, law, and society between 1518 and 1530).

42. See John M. Headley, *Introduction* to vol. 5, pt. 2 *THE COMPLETE WORKS OF ST. THOMAS MORE* 713, 728–29 (John M. Headley ed., Scholastica Mandeville trans., 1969).

43. See *id.* at 729.

44. See GUY, *PUBLIC CAREER OF MORE*, *supra* note 1, at 24.

Lutheranism. While Bishop Fisher's works, such as his *Defensio Regie assertionis contra Babylonicam captivitatem*⁴⁵ and *Sacri sacerdotii defensio contra Lutherum*,⁴⁶ focused on claims made by Luther before the publication of Henry VIII's book, the argument generated by the King's text and Luther's response was continued in More's *Responsio ad Lutherum*.⁴⁷ Here, More pseudonymously answered Luther's claims in detail but also in a tone that would have appeared unseemly for a king or bishop.

Responsio ad Lutherum focuses on the central issue raised by Luther, and indeed, the whole sixteenth-century schism: the matter of authority. How did a Christian know the true Gospel? This issue was crucial to answering other important questions: How were Christians saved? How should Christians worship and live? Against Luther's *sola scriptura*, More defended Henry VIII's use of non-scriptural authorities, including the Church Fathers, decrees of Church Councils, and papal statements.⁴⁸ More also emphasized the indispensability of Catholic Tradition, which he understood as the unwritten oral tradition that Christ passed on to his apostles and thus to the rest of the Church.⁴⁹ The Gospel of Christ, More held, had been revealed in its fullness to the Catholic Church before that very same Church had definitively established the canon of Scripture.⁵⁰ In More's mind, it was therefore impossible to dispute the Catholic Church's authority when it came to interpreting scripture and it was fallacious to root conscience in anything else but the consensus of Christendom.⁵¹

45. JOHN FISHER, *DEFENSIO REGIE ASSERTIONIS CONTRA BABYLONICAM CAPTIVITATEM* [A DEFENSE OF THE ROYAL DECLARATION AGAINST "THE BABYLONIAN CAPTIVITY"] (Colonie: Petrus Qwentel 1525), *microformed on Fiche* 201-203, Nr. 579 (Inter Documentation Co.).

46. JOHN FISHER, *SACRI SACERDOTII DEFENSIO CONTRA LUTHERUM* [A DEFENSE OF THE HOLY PRIESTHOOD AGAINST LUTHER] (1525), *reprinted in* 9 *CORPUS CATHOLICORUM: WERKE KATHOLISCHER SCHRIFTSTELLER IM ZEITALTER DER GLAUBENSSPALTUNG* [THE BODY OF CATHOLIC WRITERS: WORKS OF CATHOLIC WRITERS IN THE AGE OF THE REFORMATION] 1 (Hermann Klein Schmeink ed., 1925).

47. ST. THOMAS MORE, *Responsio ad Lutherum* [*Response to Luther*] (1523) [hereinafter MORE, *Responsio*], in vol. 5, pt. 1 *THE COMPLETE WORKS OF ST. THOMAS MORE* 1 (John M. Headley ed., Scholastica Mandeville trans., 1969).

48. *See id.* at 101-11, 605-07, 629-33.

49. *See* Headley, *supra* note 42, at 735-37.

50. *See* MORE, *Responsio*, *supra* note 47, at 89-91.

51. *See id.*

More additionally argued that Luther's theological positions could only splinter the unity of Christendom.⁵² More would have been conscious that books of canon law were consigned to the flames by Luther on December 10, 1520, along with Pope Leo X's papal bull *Exsurge Domine*,⁵³ the document condemning Luther's writings and calling him to repentance.⁵⁴ Luther sought to end the idea of the Church as a hierarchical, visible, and legal community and wanted to replace it with a concept of the Church as a purely spiritual community, even though he acknowledged that such propositions represented a departure from the writings of Church Fathers such as St. Augustine and St. Jerome.⁵⁵

In legal terms, Luther's ecclesiology implied an end to the Gregorian settlement that specified that the spiritual and temporal realms were autonomous but interacted with each other.⁵⁶ Luther's position—again, modified in later years—was that talented magistrates inspired by the Word would always be more just than the rule of law, regardless of whether the laws were secular or ecclesiastical in origin.⁵⁷ This way of thinking held, for example, that adherence to precedents established by man-made laws would tend to blind lawgivers to whatever insights that attention to Scripture might arouse in them at a given moment. In Luther's view, the Word and the law were not only separate but opposed.⁵⁸ Arguing before Thomas Cardinal Cajetan in Augsburg in 1518, Luther asserted that Roman canonists emphasized their own legal precedents and

52. *See id.* at 643.

53. Pope Leo X, *Exsurge Domine* [*Papal Bull Condemning the Errors of Martin Luther*] (June 15, 1520), available at <http://www.ewtn.com/library/papaldoc/l10exdom.htm>.

54. *See* Letter from Martin Luther to Georgio Spalatino (Dec. 10, 1520), in 2 D. MARTIN LUTHERS WERKE: KRITISCHE GESAMTAUSGABE [THE COMPLETE WORKS OF D. MARTIN LUTHER: A CRITICAL EDITION] 234, 234–35 (1931).

55. *See generally* MARTIN LUTHER, A COMMENTARY ON ST. PAUL'S EPISTLE TO THE GALATIANS (1531), reprinted in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 99, 143–45 (John Dillenberger ed., 1961) (setting forth his belief in a divide between the law and the gospel).

56. *See generally* CRANZ, *supra* note 41, 41–72 (discussing Luther's belief in a divide between the law and the gospel).

57. *See generally* MARTINUS LUTHERUS [MARTIN LUTHER], DE CAPTIVITATE BABYLONICA ECCLESIAE PRAELUDIUM [A PRELUDE ABOUT THE BABYLONIAN CAPTIVITY OF THE CHURCH] (1520), reprinted in 6 D. MARTIN LUTHERS WERKE: KRITISCHE GESAMTAUSGABE [THE COMPLETE WORKS OF D. MARTIN LUTHER: A CRITICAL EDITION] 497, 497–502 (Weimar, Böhlau 1888) (arguing that persons inspired by the Word of God have a better understanding of what is just than secular authorities).

58. *See* CRANZ, *supra* note 41, at 95–98.

decisions at Scripture's expense.⁵⁹ As a result, the Church had assumed a juridical character that made unnecessary claims upon the faithful.⁶⁰

Luther's desire to rescue, as he saw it, Scripture from the interpretation of Church canonists could only, in More's view, result in the abolition of the entire ecclesiastical system, including the papacy.⁶¹ While passing over the issue of the papacy's power as an initiator of legislation, More professed that the Church had the authority to make laws based on the common consensus of Christian truth that could only be found in the Catholic Church.⁶² It was erroneous, according to More, to suggest that it was only through the consent of every individual Christian that the Church could impose any law.⁶³ To underline this point, he cited instances of Church legislation from patristic and scriptural sources.⁶⁴ More even avowed that the Church's authority in religious matters was greater than the demands of civil law—a claim that would be central to his later disputes with King Henry VIII: “[T]he custom of the Christian people,” More wrote, “in matters of the sacraments and of faith has the force of a more powerful law than has any custom of any people whatever in civil matters, since the latter relies only on human agreement, [while] the former is procured and prospers by divine inspiration.”⁶⁵

As John M. Headley remarks, not only does this passage identify the authoritative basis for the ecclesiastical practices that Luther regarded as merely human traditions, it also illustrates More's vision of the divine inspiration working within the Catholic Church and securing the collective rational consent of its members.⁶⁶ In contrast to Luther's vision of the Church as defined by each individual's inner faith, More presented the Catholic Church as a body constituted by the consensus of faithful Christians in all times and places.⁶⁷ This same Church, More later added, was governed by the pope because

59. JOHN M. HEADLEY, LUTHER'S VIEW OF CHURCH HISTORY 79–80, 99 (1963).

60. *See id.* at 80.

61. *See* MORE, *Responsio*, *supra* note 47, at 607–11.

62. *See id.* at 605, 609, 625.

63. *See id.* at 609.

64. *See id.* at 627–31 (citing Luther's own reference to the Council of Nicea as an example).

65. *Id.* at 415.

66. *See* Headley, *supra* note 42, at 756.

67. *See id.*

Christ foresaw what would happen to a headless church.⁶⁸ To this end, the pope acted as Vicar of Christ and enjoyed jurisdiction over the faithful.⁶⁹ By virtue of this role of unifying the Church, More noted, the papal office and its jurisdictional powers gave order to Christian society.⁷⁰

More's theological disputation with Luther thus led him to formulate an understanding of the Church's nature that in turn caused him to explicate a particular vision of the Church's legal powers and their role in the social order. At the time, this was not a view that would have been disputed by civil and ecclesiastical leaders in England. Yet within less than ten years, More would find that such thinking about the Church's legal status was under challenge by many, including the author of the well-known legal treatise entitled *Doctor and Student*, Christopher St. German.⁷¹ Though their dispute concerned relatively technical questions of legal procedure, it went to the heart of the legal transformation facilitated by Henry VIII and his advisors—an upheaval that in turn relied upon a radical rewriting of the understanding of Christianity.

III. POLITICS, HERESY, AND THE KING'S GREAT MATTER

On May 16, 1532, one of King Henry VIII's closest theological advisors, Edward Foxe, wrote to a correspondent: "Sir Thomas More has resigned the chancellorship, and Parliament is prorogued until the 5th Nov."⁷² St. Thomas More's resignation marked the end of his active involvement in a political life that had come to grief over his disapproval of the course undertaken by the King to resolve his "Great Matter"—the King's desire to divorce Queen Catherine of Aragon and marry Anne Boleyn.

Much had transpired since More's penning of his various treatises against the "new men." More's steady rise in King Henry VIII's favor had continued, culminating in his appointment as Lord Chancellor on

68. See MORE, *Responsio*, *supra* note 47, at 140–41 (noting that the Christian world would not want to learn "by experience at its own risk" what would happen to a headless Church).

69. See *id.* at 193–97.

70. See *id.* at 140–41.

71. See J.L. Barton, *Introduction* to CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT*, at xi, xii–xiii (William S. Hein & Co., reprint ed. 1996) (T.F.T. Plucknett & J.L. Barton eds., 1975) (1530).

72. Summary of Letter from Edward Foxe to William Benet (May 16, 1532), in 5 *LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII* 470, 470–71 (James Gairdner ed., London, Longmans & Co. 1880) [hereinafter 5 *LETTERS AND PAPERS*].

October 25, 1529.⁷³ His advancement did not, however, distract More from his campaign against heresy. On the contrary, More's activism grew. Intellectually, this manifested itself in More's continued authorship of works such as *Letter to Bugenhagen*⁷⁴ and *A Dialogue Concerning Heresies*.⁷⁵ He also did not show any inhibitions about employing the full force of the law against heresy. More's legal basis for doing so was the 1401 Act *De heretico comburendo*, which forbade the printing and distribution of works contrary to Catholic doctrine and specified the respective responsibilities of Church courts and the secular arm in addressing such incidents.⁷⁶ Appointed Chancellor of the Duchy of Lancaster in 1525,⁷⁷ More helped the King's Council promulgate a Star Chamber order against heresy and heretical preaching in July 1527.⁷⁸ Six months prior to that promulgation, More had led government raids on the German Steelyard in search of illicit Bible translations and Lutheran texts brought into England by Hanseatic merchants.⁷⁹

As Lord Chancellor, More made the struggle against heresy an official priority.⁸⁰ He assumed office shortly after Henry VIII issued a proclamation reminding people of statutes suppressing heresy and describing heresy as sedition.⁸¹ The proclamation made extensive reference to a 1414 statute that obliged the Lord Chancellor and all secular officials to swear that they would help the Church by taking heretics into custody, handing suspects over to ecclesiastical courts for trial, and carrying out sentences determined by those courts.⁸² In technical terms, this meant ecclesiastical courts tried and passed

73. See GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 32.

74. ST. THOMAS MORE, LETTER TO BUGENHAGEN (1568), *reprinted in* 7 THE COMPLETE WORKS OF ST. THOMAS MORE 1 (Frank Manley et al. eds., Frank Manley trans., 1990).

75. ST. THOMAS MORE, A DIALOGUE CONCERNING HERESIES (1530), *reprinted in* vol. 6, pt. 1 THE COMPLETE WORKS OF ST. THOMAS MORE 1 (Thomas M.C. Lawler et al. eds., 1981).

76. *De heretico comburendo*, 1400–01, 2 Hen. 4, c. 15, *reprinted in* 2 THE STATUTES OF THE REALM 125–28 (photo. reprint 1993) (1816).

77. GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 26.

78. *Id.* at 13.

79. *Id.*

80. *Id.* at 103.

81. See HENRY VIII, PROCLAMATION ENFORCING STATUTES AGAINST HERESY; PROHIBITING UNLICENSED PREACHING, HERETICAL BOOKS (1529), *reprinted in* 1 TUDOR ROYAL PROCLAMATIONS 181, 181–82 (Paul L. Hughes & James F. Larkin eds., 1964).

82. *Id.* at 181 n.1, 181–86 (proclaiming the King's will concerning treatment of heretics); see also GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 104 (paraphrasing provisions of the 1414 statute).

judgments on heretics while the secular arm was responsible—presuming the accused did not abjure their views—for burning convicted heretics.⁸³ Several months later, More secured a decree and royal proclamation at a meeting of the King’s Council in Star Chamber that labeled several books as heretical works and provided for the reinforcement of censorship policies established by his predecessor Cardinal Wolsey.⁸⁴ Prudently justifying his policies by many references to King Henry VIII’s own horror of and actions against heresy,⁸⁵ More used his powers to the fullest extent possible and more rigorously than had Wolsey.⁸⁶

When More became Lord Chancellor in 1529, Lutheran ideas appeared to be relatively confined to parts of London, a number of Oxbridge scholars, and the Boleyn faction at Court.⁸⁷ The legal movement against heresy was, however, gradually complicated by King Henry VIII’s desire to divorce Queen Catherine in order to marry Anne Boleyn. By 1529, the two questions had become intimately linked following the papal legate’s referral of King Henry’s case to Rome on the instruction of Pope Clement VII.⁸⁸ David Daniell—in his biography of one of Luther’s earliest English followers, William Tyndale—claims that Anne Boleyn gave King Henry VIII a copy of Tyndale’s *Obedience of a Christian Man*,⁸⁹ which, among other things, pronounced that ecclesiastical legal matters could be placed under the King’s authority.⁹⁰ Having perused the text, King Henry VIII reportedly stated: “This is a book for me and all kings to read.”⁹¹

83. GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 104; *see also* 1414, 2 Hen. 5, c. 7, *reprinted in* 2 THE STATUTES OF THE REALM, *supra* note 76, at 181–84 (requiring secular authorities to destroy heresy, which includes punishing heretics).

84. HENRY VIII, PROCLAMATION PROHIBITING ERRONEOUS BOOKS AND BIBLE TRANSLATIONS (1530), *reprinted in* 1 TUDOR ROYAL PROCLAMATIONS, *supra* note 81, at 193, 194 (prohibiting books like *The Obedience of a Christian Man* and “divers other books”); *see also* GUY, THOMAS MORE, *supra* note 31, at 121 (stating over one hundred titles were “formally proscribed on an index of heretical books”).

85. GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 103–04.

86. *Id.*

87. *Cf. id.* at 107 (noting the only minor appeal of Lutheranism).

88. SCARISBRICK, *supra* note 30, at 226–28.

89. William Tyndale, *The Obedience of a Christian Man* (1528), in 5 CHRISTIAN CLASSICS SERIES 33 (Richard Lovett ed., 1888).

90. *Id.* at 92–93.

91. DAVID DANIELL, WILLIAM TYNDALE: A BIOGRAPHY 242 (1994).

The divorce question was thus entangled with the question of the Church's independence in England, and much of the point of forcing the Church's Convocation (its ecclesiastical parliament) to submit to the King was to allow implementation of the divorce plan. Still, it was only when Anne Boleyn became pregnant in December 1532 that Henry VIII appears to have committed himself irrevocably to the ideas of *Collectanea satis copiosa*.⁹² This suggests that he at least understood the full theological, political, and legal ramifications of such a course.

Ecclesiastical liberty from the secular arm was enshrined in the English constitutional system by chapter one of *Magna Carta*, which stated that "*quod Anglicana ecclesie libera sit*" ("the English Church shall be free") and have its rights undiminished and liberties unimpaired.⁹³ This came to mean that the Church was free to operate its own courts as well as legislate for itself through its own convocation. To justify overturning this principle, some of Henry VIII's advisors compiled a collection of legal documents and precedents known as the *Collectanea satis copiosa*.⁹⁴ This collection included evidence—ranging from ancient Saxon texts to Geoffrey of Monmouth's *History of the Kings of Britain*⁹⁵ and the Donation of Constantine—that purportedly proved that England was an empire. The implication to draw was that King Henry VIII was the emperor, exercising supreme authority over both church and state in England in a Byzantine-like fashion.⁹⁶ The objective, at least in the short term, of assembling what one of his biographers dismisses as legend⁹⁷ was to allow the validity of the King's marriage to be determined by ecclesiastical judges that he had appointed and in ecclesiastical courts of which he was the legal apex. Under these new arrangements, John Guy notes that he "could, for example, commission the metropolitan archbishops and some other bishops to judge the merits of his case,

92. See GUY, THOMAS MORE, *supra* note 31, at 167.

93. *Magna Carta* § 1 (1215), *reprinted in* J.C. HOLT, *MAGNA CARTA* app. 6, 441, 448–49 (2d ed. 1992).

94. See GUY, THOMAS MORE, *supra* note 31, at 149.

95. GEOFFREY OF MONMOUTH, *HISTORY OF THE KINGS OF BRITAIN* (Charles W. Dunn ed., Sebastian Evans trans., E.P. Dutton & Co. 1958) (1138–39).

96. See ALISTAIR FOX & JOHN GUY, *REASSESSING THE HENRICIAN AGE: HUMANISM, POLITICS AND REFORM 1500–1550*, at 157–60 (1986).

97. Cf. SCARISBRICK, *supra* note 30, at 270–72 (discussing how King Henry may have sought to derive his imperial dignity from legends, such as Arthurianism, as an alternative to an "ultra-papalist" theory of sovereignty).

and then certify before himself in Chancery. Judgment could thus be promulgated (after exemplification) in Chancery, enrolled on the Patent roll and proclaimed nationally by letters placard.”⁹⁸

Henry VIII and his advisors also recognized that ending the Catholic Church’s judicial and legislative autonomy would make it legally impossible under English statute and common law to argue that parliamentary acts did not bind all of the King’s subjects.⁹⁹ This was the reason for, as Guy notes, those “acts of appeals, supremacy, succession and treasons”¹⁰⁰ that constituted the essence of the legal revolution implemented, above all, by one of the King’s most powerful advisors, Thomas Cromwell. Though it took several years, Cromwell was instrumental in passing through Parliament a number of statutes that gave legal form to the England-as-empire theory¹⁰¹ despite considerable opposition from much of the clergy, some bishops, and the Queen’s supporters—known as the Aragonese faction (after Catherine of Aragon)—in both houses of Parliament and the Church’s Convocation.¹⁰²

Signs of the government’s forthcoming legal offensive began to manifest themselves in 1529. In autumn of that year, Henry VIII forbade the exercise of any foreign authority in England on the basis of his royal prerogative.¹⁰³ Only two weeks before More’s appointment, Cardinal Wolsey had pleaded guilty before the Court of King’s Bench to promoting the pope’s jurisdiction in England illegally—a crime of *praemunire*¹⁰⁴—when acting as a papal legate to the detriment of the royal prerogative.¹⁰⁵ In August 1530, King

98. GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 135.

99. *See id.* at 143.

100. *Id.*

101. *See generally* FOX & GUY, *supra* note 96, at 151–78 (examining Cromwell’s role in the “Henrician revolution”).

102. *See* GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 141–42.

103. *See* G.W. BERNARD, THE KING’S REFORMATION: HENRY VIII AND THE REMAKING OF THE ENGLISH CHURCH 36–37 (2005) (“The act of pluralities of autumn 1529 forbade anyone to ‘procure and obtain at the Court of Rome or else where, any licence or licenses, union, toleration, dispensation to receive and take any more benefices with cure than is above limited’, a precise restriction of papal powers in England.”).

104. *Praemunire* was a term used to denote fourteenth-century parliamentary statutes that sought to prevent appeals from the royal courts to Rome. Under the terms of the original acts, *praemunire* embraced a very limited number of cases until the parameters were drastically widened by acts passed during Henry’s parliament as it took England into schism. *See* REYNOLDS, *supra* note 22, at 52 n.2.

105. GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 127.

Henry VIII's ambassadors in Rome were instructed to suggest to Pope Clement VII that no Englishman—including the King—could be required to appear before Roman courts because English laws and custom prohibited the practice of permitting foreign courts from summoning Englishmen to appear before them.¹⁰⁶ A royal proclamation, issued on September 12, 1530, prohibited the reception into England of any papal bulls that might be regarded as infringing on the royal prerogative.¹⁰⁷

The first months of 1531 saw an acceleration of King Henry VIII's program. When Parliament and the Church's Convocation met, all the clergy of the provinces of York and Canterbury were indicted for *praemunire* simply for exercising their jurisdiction on spiritual matters.¹⁰⁸ Both Parliament and the Convocation were then asked to acknowledge the King's claim to the title of "protector and only supreme head of the English Church."¹⁰⁹ The immediate threat, however, was averted by the addition of the crucial words, "in so far as the law of Christ allows," to the King's new title.¹¹⁰ This effectively neutralized any implicit claims on the King's part to spiritual authority over the Church. But it did not stop him from intervening to overturn a guilty verdict issued by Archbishop Warham and the English bishops against an accused preacher in a heresy trial in March 1531.¹¹¹ Many recognized that King Henry VIII and his advisors regarded formal schism as a real option, as is evident from the Aragonese faction's activities in the Church's Convocation. In 1531, for example, the Convocation drew up a definition of the monarch's supremacy which claimed that King Henry VIII's new title did nothing to impinge upon papal authority, Christendom's unity, or the liberty of the Catholic Church and its courts.¹¹² The document went further, however, and stated that any more additions to the King's

106. See Summary of Letter from King Henry VIII to Jerome Ghinucci, William Benet, and Gregory Casale (Oct. 7, 1530), in vol. 4, pt. 3 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 3004, 3004–05 (J.S. Brewer ed., London, Longman & Co. 1876).

107. HENRY VIII, PROCLAMATION PROHIBITING BULLS FROM ROME (1530), *reprinted in* 1 TUDOR ROYAL PROCLAMATIONS, *supra* note 81, at 197, 197–98.

108. See J.B. Trapp, *Introduction* to 9 THE COMPLETE WORKS OF ST. THOMAS MORE, *supra* note 4, at xvii, xxxv.

109. See SCARISBRICK, *supra* note 30, at 274–75.

110. See MARIUS, *supra* note 36, at 379.

111. See Letter from Eustace Chapuys to Emperor Charles V (Mar. 22, 1531), in 5 LETTERS AND PAPERS, *supra* note 72, at 68, 68–69.

112. SCARISBRICK, *supra* note 30, at 277–78.

title that impinged upon papal authority, canon law, or the Church's liberty could only result from evil intentions.¹¹³

Over the next four parliamentary sessions (1532 to 1534), Cromwell oversaw the passing of legislation that slowly broke the ties of the Catholic Church in England with Rome. One statute, the Conditional Restraint of Annates,¹¹⁴ cleverly played upon anticlerical feelings to stop the payment of certain revenues to the pope. The significance of the Act was less about the money it prevented from going to Rome than the fact that it amounted to a *de facto* severance of the Catholic Church in England from the rest of Christendom. The Act's wording was such that Parliament's consent amounted to denying the pope's jurisdiction in England. It was the first piece of legislation that suggested that the King-in-Parliament could, by virtue of its statute-making power, renounce Rome's authority. The Act passed only after overcoming considerable opposition in both houses of Parliament.¹¹⁵

The next step was the Supplication of the Commons against the Ordinaries, a petition passed by the House of Commons that expressed its grievances against Catholic Church courts and the clergy and requested the King to unify his subjects, clerical and lay, by subjecting all of them to royal jurisdiction.¹¹⁶ But having voted in favor of this petition, the Commons also asked that the parliamentary session be prorogued, perhaps because this relieved them of any immediate responsibility for passing legislation to enforce its request.¹¹⁷ Henry VIII's response was to pass the Supplication to the Church's Convocation, hoping to expedite the Catholic Church's acceptance.¹¹⁸ On May 15, 1532, the Convocation agreed to his demands that the Crown could review and veto all legislation passed by the clergy in convocation, that canon law could only be changed with the Crown's approval, and that the Crown could prevent

113. *See id.* at 278.

114. The Conditional Restraint of Annates, 1532, 23 Hen. 8, c. 20, *reprinted in* 3 THE STATUTES OF THE REALM 385 (photo. reprint 1993) (1817).

115. *See* Summary of Letter from Eustace Chapuys to Emperor Charles V (Mar. 26, 1532), *in* 5 LETTERS AND PAPERS, *supra* note 72, at 422, 422.

116. *Cf.* G.R. Elton, *The Commons' Supplication of 1532: Parliamentary Manoeuvres in the Reign of Henry VIII*, 66 ENG. HIST. REV. 507, 507 (1951) (summarizing the Supplication's call for the abdication of the Church's independent jurisdiction).

117. *See id.* at 512. The House of Commons also asked for the dissolution of Parliament itself. This was not granted. *Id.*

118. *See id.* at 532–33.

execution or enforcement of any canons in England.¹¹⁹ For all intents and purposes, this Submission of the Clergy (as it was called when given statutory recognition in 1534) meant that the Catholic Church in England now had the monarch rather than the pope as its head. The next day, St. Thomas More resigned the Lord Chancellorship.¹²⁰

This is not to suggest that More had, until this point, remained on the sidelines. After appointment as Lord Chancellor, More had secured Henry VIII's promise that the King would not involve him in the divorce issue.¹²¹ More subsequently remained publicly silent on this matter, though he was required to present Parliament with the opinions of various universities throughout Christendom that favored the divorce. More did not, however, consider himself duty bound to stand aside while the Church's autonomy was under siege. In his *Confutation of Tyndale's Answer*,¹²² the first part of which was published in January 1532, More defended the Church's actions against heresy. Three days before resigning the Lord Chancellorship, More spoke in the House of Lords against the campaign to infringe on the Catholic Church's liberty.¹²³ At the time, the Imperial and Spanish Ambassador, Eustace Chapuys, reported the King's displeasure with his Lord Chancellor's actions.¹²⁴ As More well knew, the Submission of the Clergy totally contravened *Magna Carta*.

The process of eliminating the Catholic Church's liberty and even its now pro forma attachment to Rome was completed by the 1533 Act in Restraint of Appeals.¹²⁵ Its preamble contained the theory of the state and law originally articulated in the *Collectanea satis copiosa* and described England as an "empire."¹²⁶ The Act prohibited appeals

119. Cf. Elton, *supra* note 116, at 533 (noting the Convocation's "complete surrender on the question of legislative independence"); see Summary of Letter from [the Convocation] to King Henry VIII (May 15, 1532), in 5 LETTERS AND PAPERS, *supra* note 72, at 469, 469; Summary of Letter from [the Convocation] to King Henry VIII (May 16, 1532), in 5 LETTERS AND PAPERS, at 470, 470.

120. GERARD B. WEGEMER, THOMAS MORE: A PORTRAIT OF COURAGE 235 (1995).

121. See GUY, THOMAS MORE, *supra* note 31, at 149–50.

122. ST. THOMAS MORE, THE CONFUTATION OF TYNDALE'S ANSWER (1532), reprinted in vol. 8, pts. 1–2 THE COMPLETE WORKS OF ST. THOMAS MORE 1 (Louis A. Schuster et al. eds., 1973).

123. See GUY, THOMAS MORE, *supra* note 31, at 161.

124. *Id.*; see Letter from Eustace Chapuys to Emperor Charles V (May 13, 1532), in 5 LETTERS AND PAPERS, *supra* note 72, at 466, 467.

125. Act in Restraint of Appeals, 1533, 24 Hen. 8, c. 12, reprinted in 3 THE STATUTES OF THE REALM, *supra* note 114, at 427, 427; see GUY, THOMAS MORE, *supra* note 31, at 168.

126. See Act in Restraint of Appeals, *supra* note 125; GUY, THOMAS MORE, *supra* note 31, at 168.

from courts inside the realm to courts outside it,¹²⁷ thereby destroying the remnants of papal jurisdiction in England. The process was completed by two parliamentary sessions in 1534 that transferred all other papal prerogatives in England to the Crown.¹²⁸ Passed by Parliament in November 1534, the Act of Supremacy effectively declared what had been achieved already: the English monarch's complete spiritual and juridical supremacy over the Church of England.¹²⁹

IV. MORE VERSUS ST. GERMAN

St. Thomas More's departure from public life was not, however, a retreat into obscurity. Much of his time was consumed by writing books unlikely to please King Henry VIII or Thomas Cromwell. More's energies were particularly engaged by a debate about the treatment of heresy by the ecclesiastical courts and the respective merits of the Church and secular legal systems. The dispute was sparked by the publication of an anonymous text, probably toward the end of 1532, called *A Treatise Concerning the Division Between the Spiritual and the Temporal* ("*Division*"),¹³⁰ almost certainly authored by Christopher St. German.

Much about St. German is unknown. A bachelor, it seems he embarked on his legal career about 1480 and appeared in the Middle Temple's records as a barrister in 1502. He is estimated to have authored more than sixteen legal texts. St. German's shorter works are concerned not with fundamental legal theory but rather with conflicts between civil and ecclesiastical law that led to instances of inequity as a result of unjustly privileging one legal code over the other.

A consistent theme of St. German's later books was his grievances against the conflict between civil law and ecclesiastical courts.¹³¹ While *Doctor and Student*, for example, did not contest that English

127. See GUY, THOMAS MORE, *supra* note 31, at 168.

128. G.R. Elton, *The Reformation in England*, in 2 THE NEW CAMBRIDGE MODERN HISTORY 262, 271 (G.R. Elton ed., 2d ed. 1990).

129. See Act of Supremacy, 1534, 26 Hen. 8, c. 1, *reprinted in* 3 THE STATUTES OF THE REALM, *supra* note 114, at 492, 492.

130. CHRISTOPHER ST. GERMAN, TREATISE CONCERNING THE DIVISION (1533) [hereinafter ST. GERMAN, DIVISION], *reprinted in* 9 THE COMPLETE WORKS OF ST. THOMAS MORE, *supra* note 4, app. a.

131. See Trapp, *supra* note 108, at xlvi.

common law recognized Church laws made in accordance with due process and consistent with the Church's own legal powers,¹³² it did complain about matters such as the clergy's levying of tithes.¹³³ In this instance, St. German asserted that the demand for a tenth of certain items often reflected arbitrary clerical decisions, some of which had been disallowed by parliamentary statute as part of the temporal power's effort to clarify the applicability of tithing laws in light of their compatibility with existing customary and common law.¹³⁴

From the available evidence it is unclear how closely St. German was involved in Cromwell's legal and constitutional campaign.¹³⁵ Cromwell was admitted as a member of the inner ring of the King's Council in 1531, the year the last part of *Doctor and Student* was published.¹³⁶ Also that year, St. German participated in drafting legislation to enact some of the measures proposed by his works.¹³⁷ None of these proposals were considered by Parliament in that year.¹³⁸ Contemporaneously, however, St. German published *New Additions* as a supplement to *Doctor and Student*.¹³⁹ He spoke explicitly of the supreme legal authority of the King-in-Parliament and was adamant that it "hath not onely charge on the bodies, but also on the soules of his subiectes."¹⁴⁰ Nevertheless, there is no particular reason to suspect that St. German's writings on these matters were motivated by reasons akin to those of Henry VIII and Cromwell. We know, for instance, that St. German did not comply

132. See *id.* at xlv.

133. See *id.* at xlv–xlvi; see also ST. GERMAN, *supra* note 71, at 300–14 (expressing the idea that the law of God is divided from the law of the Church and that tithing is based solely in the latter).

134. See Trapp, *supra* note 108, at xlvi.

135. See *id.* at xlix–l.

136. See Barton, *supra* note 71, at xi, xii, xv (giving publication dates for the three parts of St. German's *Doctor and Student*, the third part being published in 1531); G.R. ELTON, ENGLAND UNDER THE TUDORS 129 (3d ed. 1991) (giving 1531 as the year when Cromwell became part of the inner ring of the Council).

137. See MARIUS, *supra* note 36, at 380–81; J.A. Guy, *Thomas More and Christopher St. German: The Battle of the Books*, 21 MOREANA 5, 8 (1984) [hereinafter Guy, *More and St. German*].

138. See MARIUS, *supra* note 36, at 381.

139. Barton, *supra* note 71, at xii, xv.

140. ST. GERMAN, *supra* note 71, at 327.

with a request by Cromwell for legal advice in 1534.¹⁴¹ And yet St. German was considered sufficiently dangerous by the Catholic opposition to Henry VIII that his name was included on the list of dangerous heretics drawn up by the clergy in 1536.¹⁴²

While medieval voices such as Marsilius of Padua had argued for subordinating the Catholic Church to temporal authority,¹⁴³ St. German's *Doctor and Student* and *New Additions* constituted the first complete articulation of the idea of the King-in-Parliament's legal supremacy.¹⁴⁴ The book's format was one in which a student defends English common law against the critique of a doctor of divinity. Its purpose was to articulate a legal theory that gave overall coherence to English common law and resolved ambiguities remaining from the conflict between Archbishop Becket and Henry II. It is known that St. Thomas More was also interested in the subject of reform.¹⁴⁵ Moreover, like St. German,¹⁴⁶ More wanted to improve equity provisions within the common law system.¹⁴⁷

More's difficulty at this particular juncture was that *Doctor and Student* implied that the Catholic Church's jurisdictional autonomy needed to be curbed. The last part of the book was more explicit and argued for prioritizing the claims of common law over those of canon law.¹⁴⁸ St. German argued, for example, that because property was not a divine institution created directly by God—unlike marriage—Church courts should not enjoy any jurisdiction over property

141. See Letter from Thomas Thirleby and others to Thomas Cromwell (July 25, 1534), in 7 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 384, 384 (James Gairdner ed., London, Longmans & Co. 1883).

142. See Entry for Instructions for the Second Meeting at Doncaster (Dec. 4, 1536), in 11 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 506 (James Gairdner ed., London, Eyre and Spottiswoode 1888).

143. See 1 ALAN GEWIRTH, MARSILIUS OF PADUA: THE DEFENDER OF PEACE 291–97 (Austin P. Evans ed., 1951) (examining Marsilius' concept of "The People's Church").

144. Guy, *More and St. German*, *supra* note 137, at 9–10, 17.

145. See GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 85–86; see also T.E. BRIDGETT, LIFE AND WRITINGS OF BLESSED THOMAS MORE, LORD CHANCELLOR OF ENGLAND AND MARTYR UNDER HENRY VIII 209 (3d ed. 1935) (1891) ("More, it is said, was in his early days a zealous reformer; in his later days he was a conservative and resisted the reformers. But Reform is an ambiguous word. More had lamented the prevalence of *evil* works among professing Catholics."); E.E. REYNOLDS, THE FIELD IS WON: THE LIFE AND DEATH OF SAINT THOMAS MORE 206 (1968) ("More as well recognized that some of Luther's complaints were just . . .").

146. See *generally* Barton, *supra* note 71, at xlv–li (discussing St. German's doctrine of equity).

147. See GUY, PUBLIC CAREER OF MORE, *supra* note 1, at 85.

148. See Guy, *More and St. German*, *supra* note 137, at 10–11.

disputes.¹⁴⁹ *Doctor and Student* went further, however, and stated that because statute law had its origin in the sovereignty of the King-in-Parliament, it should be given precedence not only over common law but also over Church law.¹⁵⁰ Legal disorder, the book contended, would persist until “all men within the realm, both spiritual and temporal, be ordered and ruled by one law in all things temporal.”¹⁵¹ This was, according to St. German, best achieved through adopting the principle that laity and clergy could only be equal before the law if they were all equally subject to English statute and common law, the exception being those instances where a Church law could be proved as divinely inspired.¹⁵²

Cromwell would have been attentive to St. German’s implied rejection of canon law’s universal primacy.¹⁵³ He probably would have derived even greater satisfaction from St. German’s *Division*.¹⁵⁴ It is no coincidence that the government press printed this short book no less than five times between 1533 and 1537.¹⁵⁵ The *Division* continued St. German’s theme of the necessity of removing from Church courts anything deemed to fall in the temporal realm, but focused upon attacking the procedures used by Church courts during heresy trials.¹⁵⁶

To this end, St. German’s *Division* presents five arguments. First, many ecclesiastical laws had been made in the Catholic Church’s own institutional interests and went beyond its legitimate bounds.¹⁵⁷ Second, many of these laws were made at the laity’s expense.¹⁵⁸ Third, the clergy used Church law to escape English common law jurisdiction and to protect their own jurisdiction.¹⁵⁹ Fourth, the clergy exploited ecclesiastical courts to enforce various religious obligations

149. *See id.* at 11.

150. *See* Trapp, *supra* note 108, at li.

151. ST. GERMAN, *supra* note 71, at 201.

152. *See* Trapp, *supra* note 108, at li.

153. *See id.* at xlix.

154. *See id.* at liii.

155. Guy, *More and St. German*, *supra* note 137, at 6; *cf.* Trapp, *supra* note 108, at xcii–xciii (discussing the text and publication history of the *Division* and concluding that it “seems virtually certain that all copies were set up between the last two months of 1532 and the middle of 1535”).

156. *See* Guy, *More and St. German*, *supra* note 137, at 6.

157. *Id.* at 12.

158. *Id.*

159. *Id.*

(such as tithing)—despite the fact that property issues, according to St. German, were subject to temporal jurisdiction¹⁶⁰—and to levy excessive monetary penalties against laity who did not meet their religious obligations, occasionally engaging in outright extortion.¹⁶¹ In this connection, St. German complained that many people used Church law to exempt themselves from the secular law's legitimate demands in areas ranging from making wills to clergy appearing before lay courts.¹⁶²

But perhaps the *Division's* most significant argument is that the proceedings used in heresy trials debased norms of natural justice. Here, St. German echoed a regular complaint of common lawyers¹⁶³ that Church proceedings against heretics violated the common law rights of people concerning the presumption of innocence until convicted by jury verdict.¹⁶⁴ Church courts, St. German argued, assumed that any accused heretic brought before them was probably guilty of some heretical views.¹⁶⁵ St. German was also critical of the ecclesiastical courts' ability to command persons to appear before them without the persons knowing who had made the accusation.¹⁶⁶

St. German's focus on heresy procedures likely suited Cromwell's purposes precisely because the House of Commons had expressed concerns about this matter in 1531 and 1532. These grievances had been supported for different reasons by some common lawyers, anti-clericals, as well as secret and open heretics.¹⁶⁷ Such arguments also lent credibility to the Henrician regime's broader agenda to weaken and eventually eliminate the Church's independent jurisdiction.

Initially it may seem odd that St. Thomas More considered himself obliged to write an entire book, *The Apology*, to refute the arguments of an anonymously authored pamphlet championing common law over Church law. More was, after all, the consummate common lawyer. Though familiar with canon law and ecclesiastical courts, his

160. *Id.*; see also ST. GERMAN, *DIVISION*, *supra* note 130, at 193–97 (discussing mortuaries and tithes).

161. Guy, *More and St. German*, *supra* note 137, at 12.

162. *See id.*

163. *See* Trapp, *supra* note 108, at lxi–lxiv.

164. *See* ST. GERMAN, *DIVISION*, *supra* note 130, at 191–93.

165. *See id.* at 188–91.

166. *Id.* at 188–89.

167. *Cf.* Trapp, *supra* note 108, at lii (noting that St. German's criticisms were “hardly . . . peculiar to himself and it is certainly true that others also complained”).

formal training was in common law.¹⁶⁸ More himself had not proceeded further in his education at Oxford because, it seems, his father did not view it as sufficient preparation for legal affairs in the secular realm.¹⁶⁹ Instead, More followed in his father's footsteps and received his legal education at Lincoln's Inn,¹⁷⁰ one of four Inns of Court located in Westminster.¹⁷¹ Unlike Oxford and Cambridge, which focused on canon law, the Inns of Court and the approximately ten lesser Inns of Chancery educated their students in common law.¹⁷² More's talents as a common law practitioner no doubt contributed to his teaching law at Furnivall's Inn between 1503 and 1506,¹⁷³ not to mention being asked to give the autumn lectures at Lincoln's Inn in 1511¹⁷⁴ and the Lenten lectures in 1515, honors accorded to only the most talented common law practitioners.¹⁷⁵ This involved lecturing on a theme or point of law and then discussing hypothetical cases with the audience.¹⁷⁶

More, however, recognized, as Gerard B. Wegemer has observed, that St. German was a more dangerous opponent than Luther.¹⁷⁷ Unlike Luther, St. German did not engage in long, personal denunciations. Instead, he made subtle appeals to anticlericalism and spoke in a reasonable voice that purportedly sought nothing more than peace and an end to lamentable division.¹⁷⁸ More also understood that while the *Division* was ostensibly about the legality of procedures employed in heresy cases, it was based on political and theological assumptions that lent credibility to the policies being implemented by Henry VIII and Cromwell.¹⁷⁹

Published almost a year after his resignation as Lord Chancellor, around Easter 1533,¹⁸⁰ More's *Apology* begins by continuing the

168. See GUY, THOMAS MORE, *supra* note 31, at 23.

169. See *id.*

170. See *id.*; see also WEGEMER, *supra* note 120, at 232.

171. See 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 494 (3d ed. 1923).

172. *Id.*

173. WEGEMER, *supra* note 120, at 232.

174. GUY, THOMAS MORE, *supra* note 31, at 43.

175. WEGEMER, *supra* note 120, at 56.

176. See J.H. Baker, *Introduction* to 2 READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY, at xv, lxix–lxxi (Samuel E. Thorne & J.H. Baker eds., 1990).

177. GERARD B. WEGEMER, THOMAS MORE ON STATESMANSHIP 201–02 (1996).

178. *Id.*

179. See *id.* at 202.

180. GUY, THOMAS MORE, *supra* note 31, at 107.

English intellectual offensive against heresy, especially doctrines promoted by Tyndale. The *Division's* author, More stated, was too complacent about the danger posed by heresy to the Catholic faith and civil order.¹⁸¹ It was not for trivial reasons that More addressed the *Division's* writer as "the Pacifier."¹⁸² More's point in this "masterful use of irony"¹⁸³ was that the Pacifier's ideas would actually lead to strife and disorder, not the peace St. German ostensibly intended.¹⁸⁴ It was as if More sought to draw his readers' attention to the ultimate stakes involved. It was just, More believed, that the law proceeded against heresy in an unambiguously strong manner precisely because heresy threatened the unity of Christendom and therefore Christendom itself.¹⁸⁵ Heresy, More emphasized, was an especially dangerous crime against God, the Catholic Church, and—More added for good measure—the King, who was awarded the title of Defender of the Faith. More reminded his readers of this title because of Henry VIII's devotion to Catholic orthodoxy and whose example More humbly followed as Lord Chancellor, and not least because More was required to act against heresy by the law.¹⁸⁶ These last references indicate More's awareness that, given his active enforcement of anti-heresy laws while in the King's service, the *Division* could be read as an attack on More's policies while Lord Chancellor and even his reputation for integrity; hence, More's insistence on reminding his readers that such policies had been sanctioned by the King and the law.¹⁸⁷

More's *Apology* soon turned, however, to defending the workings of the ecclesiastical courts and their jurisdiction. Against the Pacifier, More supported the "two swords" theory, according to which the spiritual and temporal realms enjoyed distinct and autonomous jurisdictions manifested by separate courts and legal systems.¹⁸⁸ While *The Apology* did not overlook the possibility of abuses by the clergy, it also claimed that it was not Parliament's role to enact Catholic Church reform by statute, precisely because Church laws

181. See MARIUS, *supra* note 36, at 437–38.

182. See *id.* at 434.

183. WEGEMER, *supra* note 177, at 202.

184. See MARIUS, *supra* note 36, at 434–35.

185. See Trapp, *supra* note 108, at lxxx–lxxxiv.

186. GUY, THOMAS MORE, *supra* note 31, at 121–22.

187. See *id.*

188. See Guy, *More and St. German*, *supra* note 137, at 12–13.

were of divine origin and part of Christendom's universal law.¹⁸⁹ More held that the temporal and spiritual spheres should coexist and, where appropriate, cooperate, especially when it came to dealing with problems as serious as heresy.¹⁹⁰ According to More, this system was not only divine in origin, but was in accord with the teachings of Scripture, Church tradition, the demands of reason, and the requirements of canon law and English constitutional law.¹⁹¹

The Apology also devotes considerable space to defending the English clergy, suggesting that, though not without fault, they are among the best in Christendom.¹⁹² While Church courts may have occasionally exceeded their authority, More stated that the same could be said of secular courts.¹⁹³ Indeed, an advantage of having two systems was that men of integrity in both systems could act together to correct those abuses that inevitably rose from the sinful condition of individual men. More was also convinced, Wegemer comments, that the bad elements in the ecclesiastical and civil courts made the preservation of two systems essential if the innocent were to be protected.¹⁹⁴ More thus underlined the ecclesiastical privilege of sanctuary¹⁹⁵ as an example of the Church's legal rights that provided some protection to innocent people when secular authorities chose to ignore due process or target specific individuals for extra-legal reasons.¹⁹⁶

Turning to St. German's critique of ecclesiastical procedures for addressing heresy, More suggested that there were fewer differences between the operation of the civil and ecclesiastical courts than the Pacifier imagined.¹⁹⁷ While ecclesiastical courts did accept the evidence of perjurers and excommunicates in heresy trials, More noted that the same was true for the civil courts when they dealt with particularly serious felonies, such as treason.¹⁹⁸ Heresy under canon

189. *See id.*

190. *See id.* at 13.

191. *Cf. id.* at 12–13.

192. *See* Trapp, *supra* note 108, at lxxvii.

193. *See* Guy, *More and St. German*, *supra* note 137, at 13.

194. WEGEMER, *supra* note 177, at 208.

195. *See* J. Duncan M. Derrett, *The Affairs of Richard Hunne and Friar Standish*, in 9 THE COMPLETE WORKS OF ST. THOMAS MORE, *supra* note 4, app. b, at 244 n.57.

196. *See* MARIUS, *supra* note 36, at 115–16.

197. *See* Trapp, *supra* note 108, at lxxx.

198. *Id.*

law, More stated, is the religious equivalent of treason.¹⁹⁹ More then recalled that, according to English common law, it was not just the responsibility of Church courts to proceed against heresy; civil authorities were bound to do so as well.²⁰⁰ Why, More asked, should civil and ecclesiastical courts not work together to combat heresy, as they did during the outbreak of Lollardy under King Henry IV?²⁰¹

More also pointed out that canon law allowed Church courts to proceed against suspected heretics without witnesses so that suspects could quickly abjure and be purged of any heretical ideas, thereby saving them immediately from the risk of losing their souls for heretical belief.²⁰² The crucial point for More, however, was the Pacifier's failure to recall that this law had been specifically approved by a Church council.²⁰³ To deny its validity was therefore to deny the authority of a Church council.²⁰⁴ This, More might have added *sotto voce*, was the act of either a schismatic or heretic.

But perhaps the most important argument made by *The Apology*—and the contention most likely to have infuriated Henry VIII and Cromwell—was that the English clergy's development of canon law did not amount to an exercise in self-aggrandizement on the clergy's part at the laity's expense.²⁰⁵ There were in fact limits, More stated, to the English clergy's ability to develop canon law.²⁰⁶ While English provincial synods had formulated pieces of canon law, this had been recognized as appropriate for those provincial synods that had been legitimately held since Roman times.²⁰⁷ But, *The Apology* stressed, most canon law in England was not the result of provincial legal decisions, but the implementation of a legal code shared by all of Christendom.²⁰⁸ The implication of More's thought was that subordinating the operations and legislation of canon law in England to civil law would by definition impair England's unity with

199. *Id.*

200. *See id.* at lxxxii.

201. *See id.*

202. *See* MORE, APOLOGY, *supra* note 4, at 132.

203. *See* Guy, *More and St. German*, *supra* note 137, at 13.

204. *See id.*

205. *See* MORE, APOLOGY, *supra* note 4, at 143–44.

206. *Id.* at 144.

207. *Id.*

208. *See id.* at 143–45.

the rest of Christendom. Neatly summarizing More's position, Guy writes:

[T]he canons which St. German had singled out for criticism were, in fact, obeyed and observed, without resistance or objection, throughout catholic Europe, and the heresy laws in particular had been ratified by temporal and spiritual powers alike for generations. It was the heretics who feared these laws. Canon law had been enacted in church councils and synods with the assistance of the Holy Spirit, who, according to Christ's own promise, was as much present and was of such assistance as in the time of the apostles.²⁰⁹

Given the challenge represented by More's critique of the *Division*, St. German was not slow to pen a response entitled *Salem and Bizance*²¹⁰ and published in September 1533, just months after *The Apology's* appearance. *Salem and Bizance* did not enter into prolonged discussion of More's central point about canon law being the law of Christendom. St. German may not have considered it necessary to engage the issue, given the manner in which the changing political climate and new and forthcoming statutes were making this discussion a moot point.

Instead, St. German produced a detailed critique of the heresy laws and their workings, as well as More's defense of the status quo.²¹¹ *Salem and Bizance* concentrated on the issue of admissibility of evidence in ecclesiastical cases involving heresy and compared it with the operations of common law courts when dealing with felonies.²¹² In addition to questioning More's grasp of everyday legal practice, St. German stressed that common law courts treated even serious felons much more fairly than canonical procedures employed by Church courts in heresy trials.²¹³ While the accused in heresy trials could be required to perform purgation or abjuration even in the

209. Guy, *Introduction*, *supra* note 6, at lxix.

210. CHRISTOPHER ST. GERMAN, *SALEM AND BIZANCE* (1533) [hereinafter ST. GERMAN, *SALEM AND BIZANCE*], *reprinted in* 10 *THE COMPLETE WORKS OF ST. THOMAS MORE*, *supra* note 5, at app. b.

211. Guy, *Introduction*, *supra* note 6, at xx.

212. *Id.* at lxxii; see ST. GERMAN, *SALEM AND BIZANCE*, *supra* note 210, at 357–59 (examining the procedural treatment of suspected felons compared to that of suspected heretics).

213. Guy, *Introduction*, *supra* note 6, at lxxii–lxxiv; see ST. GERMAN, *SALEM AND BIZANCE*, *supra* note 210, at 357 (“[F]or suspicion of felonie . . . a man may be arrested . . . and if [no man] come [to leye any thinge ageynst him] he shall be delyuered without fine or any other punishment . . .”).

absence of credible witnesses, those arrested for a suspected felony were never charged only on the basis of suspicion.²¹⁴ They were either indicted according to due process or there was a demand for evidence against the accused, the absence of which allowed the accused to be set free.²¹⁵

More's response to *Salem and Bizance* was even faster than St. German's response to *The Apology*. Printed in November 1533, much of More's *Debellation of Salem and Bizance* ("*Debellation*") was devoted to highlighting errors of fact and logic in *Salem and Bizance*. The *Debellation's* central argument remained, however, that heresy was nothing less than treason against God.²¹⁶ Such was the gravity of this offense, More held, that any liberalization of procedures that might enable suspected heretics to spread their ideas would gravely damage England's ability to resist heresy.²¹⁷ Yet despite the scale of the danger posed by heresy, More considered himself obliged to remind his readers that ecclesiastical procedure treated suspected heretics far more gently than common law courts handled suspected traitors to the realm.²¹⁸ More claimed, for example, that the very fact that Catholic Church courts gave suspected heretics the chance to abjure any heretical views at the first accusation reflected the Church's commitment to charity, even when dealing with as heinous a crime as heresy.²¹⁹ The *Debellation* even asked the Pacifier if purgation ordered by a Church judge was any more unreasonable than the wrongful execution of suspected felons who were convicted in a common law court by a jury's verdict on the basis of circumstantial evidence presented at trial.²²⁰

In the end, the *Debellation* abstracted itself from a detailed discussion of common law versus Church law procedure and instead sought, once again, to direct the reader's attention to the wider issue at stake. It is not by chance that More ends the *Debellation* by saying he will not speculate on the Pacifier's motivations and by offering a

214. Guy, *Introduction*, *supra* note 6, at lxxii; see ST. GERMAN, SALEM AND BIZANCE, *supra* note 210, at 358 ("[W]hen [a man] is purged . . . for suspicion of heresie, he is put to penance . . . as a man suspected, wherof he is not clered, and so shal he be taken amonge his neighbours, as a man worthy to do that penance for his offences . . .").

215. See ST. GERMAN, SALEM AND BIZANCE, *supra* note 210, at 357.

216. See, e.g., MORE, DEBELLATION, *supra* note 5, at 70.

217. See *id.* at 85, 229–30.

218. *Id.* at 70.

219. *Id.*

220. *Id.* at 117.

prayer for Christian unity.²²¹ Given the political climate of late 1533, the meaning of these apparently innocuous phrases would not have been lost on politically informed readers. For why would More have even suggested that other agendas might underlie St. German's writings or that it was particularly apropos at this point of time in English history to pray for Christian unity, unless More wanted his readers to understand that St. German's writings were part of a larger project, one that put in peril England's unity with the rest of Christendom?

That More's writings on these points of law were considered to reflect his opposition to the Henrician revolution is attested to by the fact that in January of 1534 the government summoned and charged More's publisher, William Rastell, with publishing a book that attacked the work of the King and his "honorable counsel."²²² This summons came after reports that More had penned a reply to the 1533 work, *Articles devised by the holle consent of the King's Council* ("Articles").²²³ The *Articles* defended Henry VIII's divorce and remarriage and also claimed that the pope's jurisdictional authority was confined to his own diocese.²²⁴ The summons indicated that Henry VIII and Cromwell understood that More's disputation of St. German's claims was an expression of his subtle but clear opposition to their own political and legal program. As long as More was widely regarded as holding such views, his continuing reputation as a man of probity made him dangerous in Cromwell's eyes and, more importantly, those of Henry VIII.²²⁵ To be regarded as a dangerous man by Henry VIII was to incur the King's anger, and as the Duke of Norfolk pointedly reminded More, "*Indignatio principis mors est*" ("The wrath of the prince is death").²²⁶

V. ENDGAME

On April 13, 1534, St. Thomas More answered a summons to appear before the King's commissioners and was asked to swear an

221. *Id.* at 230–31.

222. MARIUS, *supra* note 36, at 445.

223. *Id.*; SCARISBRICK, *supra* note 30, at 323.

224. SCARISBRICK, *supra* note 30, at 323.

225. See WEGEMER, *supra* note 120, at 159; see also MARIUS, *supra* note 36, at 445–46.

226. WILLIAM ROPER, *THE LIFE OF SIR THOMAS MORE, KNIGHT (1556)*, reprinted in *A THOMAS MORE SOURCE BOOK* 16, 50 & n.71 (Gerard B. Wegemer & Stephen W. Smith eds., 2004).

oath to the Act of Succession.²²⁷ After carefully examining the oath's text and comparing it with the actual parliamentary statute, More declined to do so.²²⁸ He never explained why. His reasons for doing so have been discussed in much detail. From a legal standpoint, we may speculate that he would have noticed that the required oath embraced more than the Act of Succession.²²⁹ It also included that the person taking the oath "obey and help to enforce this Act and all the other Acts passed by Parliament since 1529."²³⁰ Among other texts, this included all pieces of legislation that subordinated ecclesiastical courts to the royal authority, including the Acts of Appeals and Annates. The oath thus required More to accept everything that he had opposed in his debates with St. German. In this light, it is little wonder that Henry VIII refused the proposal of his new Archbishop of Canterbury, Thomas Cranmer, that More and Bishop Fisher be allowed to swear the oath without requiring their assent to the references that appeared to renounce papal authority.

One year later, after being found guilty of allegedly denying in a conversation with Sir Richard Rich that Parliament had the authority to declare Henry VIII head of the Church in England, More revealed the core of his legal objections to Henry VIII's program.²³¹ Disputing the legitimacy of his indictment, More stated that it was impossible for Parliament to make laws or acts against "the union of Christendom."²³² In other words, the common consensus of Christendom—as established by Scripture, Tradition, and general councils of the Catholic Church, and indicating the infallibility of a Christian dogma or doctrine—was a higher authority than the secular law of any one particular temporal kingdom. The King-in-Parliament could make as many laws as it liked, but such laws were not binding on conscience insofar as they conflicted with the law of Christendom. This position could not be reconciled with St. German's theory, which would later embrace the claim that even scripture and individual

227. WEGEMER, *supra* note 120, at 162.

228. *Id.* at 162–63.

229. *Id.*

230. JASPER RIDLEY, HENRY VIII 237 (1984).

231. See generally Summary of Statement of Sir Thomas More (July 6, 1535), in 8 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 394, 394–96 (James Gairdner ed., London, Longmans & Co. 1885) (summarizing one account of St. Thomas More's trial and his answer to the charges made against him).

232. *Id.* at 395.

conscience should be subject to the demands of English common law as defined and shaped by the King-in-Parliament.²³³ It was the triumph of St. German's legal design that allowed Henry VIII's Reformation Parliament to authorize particular measures such as the dissolution of the monasteries, not to mention the eventual establishment of the doctrine of Parliament as the supreme source of law in England.²³⁴

Guy remarks that the "irony is that [More's convictions on this matter were] first stimulated, if not originally derived, from his agenda as Henry VIII's surrogate against Luther."²³⁵ They solidified probably as a result of More's heavy involvement in the English Catholic intellectual and legal campaign against heresy in the 1520s.²³⁶ According to Edward Surtz, S.J., it was Bishop Fisher's defense of the pope's authority in his *Assertionis Lutheranae confutatio*²³⁷ of 1523 that was "a decisive factor in the crystallization of More's personal convictions on the papacy."²³⁸

The Pope's actions in light of England's legal revolution suggest that his view of the legal position was not dissimilar to that of More and certainly echoed that of Bishop Fisher. Pope Paul III's bestowal of a cardinal's hat upon Bishop Fisher was regarded at the time—not least by Henry VIII himself—as symbolizing the papacy's rejection of the emerging English legal position that the Church in England was not linked to the Bishop of Rome, the college of cardinals, or any other non-English bishop.²³⁹ Cardinal Fisher himself appears to have drawn conclusions, based on his understanding of the political and legal situation, that effectively involved him in an act of treason. On September 27, 1533, Imperial Ambassador Chapuys informed Emperor Charles V that Fisher believed any papal measures against Henry VIII would need to be backed up by force.²⁴⁰ According to

233. See FOX & GUY, *supra* note 96, at 208–10.

234. See *id.* at 210; SCARISBRICK, *supra* note 30, at 337, 512.

235. GUY, THOMAS MORE, *supra* note 31, at 118.

236. See *id.* at 114–15.

237. JOHN FISHER, *ASSERTIONIS LUTHERANAE CONFUTATIO IUXTA VERUM AC ORIGINALEM ARCHETYPUM* [A REFUTATION OF THE LUTHERAN DECLARATION ACCORDING TO A TRUE AND ORIGINAL COPY] (Iohannes Steelsius ed., Antwerp, final ed. 1537).

238. Edward Surtz, S.J., *More's Friendship with Fisher*, 4 MOREANA 115, 120–21 (1967).

239. See BERNARD, *supra* note 103, at 121.

240. See Letter from Eustace Chapuys to Emperor Charles V (Sept. 27, 1533), in 6 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 484, 486 (James Gairdner ed., London, Longmans & Co. 1882) [hereinafter 6 LETTERS AND PAPERS].

Chapuys, Fisher believed that “the arms of the Pope against these men . . . are more frail than lead, and that your Majesty must set your hand to it, in which you will do a work as agreeable to God as going against the Turk.”²⁴¹ Thirteen days later, Chapuys sent another dispatch informing the emperor that Fisher desired direct foreign intervention in England.²⁴²

Though Henry VIII never learned of these remarks, from his standpoint, they constituted treason. For the cardinal, however, it was the emperor’s duty as Christendom’s temporal arm to uphold the pope’s spiritual authority against a prince who was directly undermining the unity of Christendom.²⁴³ Indeed, in July 1535, Pope Paul III wrote letters concerning King Henry’s policies to various rulers of Catholic Europe—including the emperor—asking that they “censure him strongly.”²⁴⁴ Significantly, Pope Paul III made references in some of these letters, most notably in his address to the king of Scotland, to Archbishop Becket’s martyrdom, comparing Henry VIII with Henry II, and Cardinal Fisher with Archbishop Becket.²⁴⁵ Two months later, Pope Paul III issued a bull depriving Henry VIII of his kingdom, mentioning the damage that he had done to Christendom’s unity.²⁴⁶ This was a forlorn gesture as it turned out, but one that reflected an appreciation of the legal relationship between England and the Holy See akin to that of More and Bishop Fisher.

In the end, Europe’s Catholic princes did not embark upon a war to rejoin the English Church to the rest of Christendom. Within twenty years of More’s death, Christendom itself—at least according to the commonly understood legal terminology of the time—was dead. By the terms of the Peace of Augsburg in 1555, which established the principle *cuius regio eius religio* (“whose the rule, his

241. *Id.*

242. See Letter from Eustace Chapuys to Emperor Charles V (Oct. 10, 1533), in 6 LETTERS AND PAPERS, *supra* note 240, at 510, 511.

243. Cf. BERNARD, *supra* note 103, at 115–16 (considering different possible reasons for Fisher’s call for imperial aid, one of which was a “[shrewd grasp] that Christendom was imperiled and that it was time that its secular head, the emperor, should put things right”).

244. Paulus Papa III [Pope Paul III], [*Briefs to the Catholic Monarchs*] (Jul. 26, 1535) (located at Archivio Segreto Vaticano, Arm. XL, no. 52, folios 377–82) (a reference to six letters to one emperor and five kings and princes).

245. *Id.*

246. See Paulus Papa III [Pope Paul III], *Bulla copia as tra Regé Anglia* [*Bull Against the English King*] (Sept. 1535) (located at Archivio Segreto Vaticano, A.A. Arm. IXVIII, no. 1588).

the religion"), Western Europe was transformed from a plurality of secular, temporal realms existing within the single ecclesiastical state of Christendom, into many states, each of which was more or less identified with a particular Christian confession.²⁴⁷

But as one of More's biographers has stated, "More did not need to have the *Cambridge Modern History* on the shelves before him to know that the volume on *The Reformation* would be followed by the volume on *The Wars of Religion*, and that by the volume on *The Thirty Years' War*."²⁴⁸ More was not opposed to Church reform that he regarded as consistent with the Catholic faith and the consensus of Christendom. Like other humanist scholars, he had studied St. Augustine sufficiently to recognize that Christendom, existing as it did in the city of man, was not perfect. More did believe, however, that the Catholic Church embodied legal arrangements that attempted to do justice to Christ's injunction regarding God and Caesar; that manifested the Christian unity that transcended temporal, man-made borders; and that underlined the proposition that positive law needed to be tested by reference to divine law, natural law, and the law of Christendom. From this standpoint, questions concerning how the legitimacy of particular, man-made laws were determined in sixteenth-century England seem not so far removed from dilemmas confronting twenty-first-century secular legal discourse.

247. PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 486–88 (2002).

248. R.W. CHAMBERS, *THOMAS MORE* 165 (1935).