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What matters about "The King's Great Matter": a reassessment of Henry VIII's Reformation

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Abstract

Henry VIII's Reformation has certainly received its due attention from historians. However, with the growth of "history from below" and the end of G.R. Elton's supremacy in Tudor historiography, legal developments in this foundational epoch have been much neglected. Such is the obsession with the political, religious and psychological elements of Henry VIII's reign, a vital question has been left unanswered: that of the law. Since the early twentieth century, it has been argued that between 1450 and 1530 the English common law was in a period of decline. Yet, by the 1530s, it saw a remarkable resurgence. I submit that the reason for this change was the crisis over Henry VIII's marriage to Katherine of Aragon, during which a greater reliance on precedent and legitimacy prevailed than has been formerly recognised. The resultant shift in emphasis arrested the decline of the common law and brought about a period of foundational modernisation. I shall therefore challenge the consensus regarding the Break with Rome to illustrate that it was legal in both civil and canon jurisdictions. It was in the process of building Henry VIII's legal argument, I shall argue, that English common law was saved from possible usurpation by a "Reception" of Roman-style civil law.

I. Introduction[1]

The political, religious and psychological significance of King Henry VIII's "Great Matter" - the annulment of his marriage to Katherine of Aragon - has received its due attention from historians. There is a veritable mountain of scholarship - popular and academic - covering almost every aspect of its chronology, causation and subsequent influences. However, perhaps its most important and enduring implication had been neglected: that of the law. There are a number of reasons for this. Principally, it is because historians are quite timid creatures: they are generally tentative about entering into themes in which their knowledge is not supreme.[2] Thus, the precise legal connotations of Henry VIII's Reformation are reserved for what C.W Brooks calls, "the insularity and sterility of… doctrinal legal history."[3] Yet, this has created a blind spot in our perception of the nation's development.

As a result, conceptions of Henry VIII as, in Charles Dickens' famous phrase, "a most intolerable ruffian, a disgrace to human nature, and a blot of blood and grease" upon our national history, have characterised the majority of popular and even academic writing on the subject.[4] J.J. Scarisbrick's biography of Henry VIII is perhaps the best general work for its legal analysis;

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[1] The extent of my debt for the completion of this short project precludes any brief recount; however, there are a number who require special mention. To Dr. Atherstone of the Oxford Theology Faculty, I owe a great thanks for his direction on matters of canon law, in particular for pointing me to the recent work of J.F Hadwin. To Christopher Young, who gave me access to his as yet unfinished translation of the *Collectanea* – a privilege I share with very few historians – thank you, it was an honour. I can only apologise that amidst the restrictions of my topic its insights have not yet been utilised: a detailed study is ongoing and on the way to completion. To Lucy, my tutorial partner, for making Thursdays my favourite day of the week; to Samantha and Luca for ensuring that I do, in fact, eat and sleep during term-time; and to Ky and Tom for all their kindness and warmth, thank you. To Tristan Pithers and Alice O'Donnell to whom my love of the written word is owed immeasurably, and to my family whose sacrifices enabled such an education: I hope this work goes some way towards a debt that can never satisfactorily be paid. Any errors below are my own.

[2] Since the mid-twentieth century, with the growth of historical 'disciplines', such matters have gained greater attention. Nevertheless, legal history is one which has always received greater attention from the lawyers than the historians.

[3] C.W Brooks, *Law, Politics and Society in Early Modern England* (Cambridge University Press 2008) 2.

[4] Charles Dickens, *A Child's History of England* (Salt Lake City, Utah, 1885) 198.

however, even here Henry's legal case in the dispute with Rome is dismissed as 'a feeble one'.[5] G.W. Bernard, in his magisterial study of the "King's Reformation" which dedicates some two hundred pages to the divorce case, concludes that "Henry's cases in canon law were not strong."[6] Previous historical studies have also failed to connect the legal implications of Henry's "Matter" with the wider developments of the realm. Therefore, this essay seeks correct the record, and its argument is simple:

1) The common law system was in decline and under threat in the 80 years prior to the Break with Rome.
2) The Break with Rome and Henry's annulment were legal through both canon and civil law.
3) The result of the Reformation was a period of unparalleled legal development, one which saved the common law from the threat of a "Reception" of Roman-style civil law and which saw major developments in property, criminal, social welfare, and constitutional law.

In 1965, Christopher Hill summarised the state of this question:

> In the early sixteenth century, it seemed as though Chancery and the prerogative courts would secure jurisdiction over commercial cases with which the procedures of the common-law were ill-adapted to cope. But the common-law, in ways that are still obscure, made a remarkable comeback.[7]

One would be forgiven for hoping that the Brexit referendum and subsequent questions over retained EU law would have drawn attention to Henry VIII's Tudor "Brexit". After all, the patchy public support which Henry VIII's Reformation *did* receive was due to popular anticlericalism, antipapalism and its economic arguments about the end of annates to Rome: payments from the Bishops would instead go to the King, perhaps reducing the demand for tax revenue and averting the threat of another "Amicable Grant" standoff. Similarly, in 2016, Michael Gove argued that EU regulations cost the British economy "£600 million every week"; critics from left and right pilloried the European Commission as a den of entrenched privileges, resistant to reform – much like the writers of the Erasmian tradition on the clerics - and fears about migration were whipped up much like the anticlericalism which Edward Hall described permeating the 1529 Parliament.[8] In the aftermath of both, gaps and uncertainty emerged in the English legislature: in the 1530s, this was due to the slow process of integrating old ecclesiastical law into the resurgent secular courts; while throughout 2023 the disputes over the Retained EU Law (Revocation and Reform) Bill – now passed – neatly parallel the disorder found in cases varying from marriage to

[5] J.J. Scarisbrick, *Henry VIII* (University of California Press 1968) 197. His verdict is echoed by numerous scholars: G.R Elton, *Reform and Reformation* (Hodder Arnold 1989) 107; G. Parmiter, *The King's Great Matter* (Barnes & Noble 1967) 101; A.R Smith, *The Emergence of a Nation State* (2nd end, Routledge 1997) 19; H.A Kelly, *The Divorce of Henry VIII: the untold story* (Vintage 2013) 138. David Starkey, *Henry: Virtuous Prince* (Harper 2009). Notably, Elton changes sides in his *Studies in Tudor and Stuart Politics and Government* (Cambridge University Press 2003) most convincingly in the chapter on 'Political Thought', 193-259.

[6] G.W. Bernard, *The King's Reformation: Henry VIII and the Making of the English Church* (Vale University Press, Illustrated Edition 2007) 24. This work, besides Scarisbrick's, is another excellent exposition of the cases made and goes into greater detail on the matters of consummation, affinity and dispensation than is possible here. It is just a shame about Bernard's conclusion.

[7] Christopher Hill, *The Intellectual Origins of the English Revolution* (Oxford University Press 1997) 203.

[8] Michael Gove quoted from Michael Gove, 'Michael Gove makes the case for EU exit' (*The Guardian*, 19 April 2016) <https://www.theguardian.com/politics/2016/apr/19/michael-gove-makes-case-eu-exit-bbc-today> accessed 9 March 2024; Timothy Lee, 'Brexit: the Seven Most Important Arguments for Britain to Leave the EU' (*Vox*, 25 June 2016,) <https://www.vox.com/2016/6/22/11992106/brexit-arguments> accessed 9 March 2024; P.R. Cavill, 'Anticlericalism and the Early Tudor Parliament' (Cambridge University Repository) 6.

adultery, defamation, food price regulation and tithe payments in the aftermath of the Reformation.[9]

Presently, there has not been a synthesis of the three stages of my argument. The state of the common law in the fifteenth and sixteenth centuries, after a century of debate, remains unresolved. Henry VIII's divorce case is almost universally dismissed as "feeble", written off using the King's lust or his dynastic fears. The legal transformation of the post-Reformation decades has been thoroughly examined but lacks concise exposition. It is my intention to reveal a chain of causation between the nature of Henry VIII's Reformation and the changing fortunes of England's common law in order to bring light to what has so far remained, in Christopher Hill's words, "obscure".[10]

II. The Common Law Under Threat[11]

Since the late 1450s, the chief courts of the common law – the King's Bench and Common Pleas – were in decline. Their business had been on a downward trajectory since 1450 and reached its nadir in 1524-25. In the decade 1491-1500, the combined business of the King's Bench and Common Pleas was at 50% of its 1448-49 level. After twenty years of fluctuation, by 1521-30 it had declined to 35%.[12] Underpinning this was that the common law had become outdated and convoluted. It was composed, in both its civil and criminal aspects, from a heady mix of ancient and feudal practices which made it ill-equipped to tackle the rising problems of the early 16th century. John Guy writes that the basis of early Tudor common law had been "settled in an age of force rather than cunning", leaving it vulnerable to conspiracy, perjury, jury intimidation and the distortion of the rules of evidence.[13] Thus, there was a necessary cleaning to be undertaken of these decidedly Augean stables; however, with the rise of Thomas Wolsey and the courts of equity, it looked increasingly likely that no-one would be prepared to do it. The mass defection of litigants to the chancery and Star Chamber, especially on the pressing issues of the day – property settlements, title to land, contract, and mercantile debts – bespeaks a waning faith in the common law as an institution.[14] Therefore, it was not completely in jest that Sir Thomas More banned lawyers from his "Utopia".[15]

The rise of Wolsey, whose incumbency at the chancery lasted between 1515 and his fall from grace in 1529, was a threat in itself to the position of the common law in England. His hearing common law appeals in the chancery was as divisive as it was theoretically illegal, and it spawned the dangerous prospect of perpetual litigation as cases bounced between the common law courts

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[9] Retained EU Law (Revocation and Reform) Act 2023; Ruth Fox, 'Five Problems with the Retained EU Law (Revocation and Reform) Bill' (Hansard Society: London); Charmian Mansell and Mark Hailwood, *Court Depositions of South West England, 1500-1700*, University of Exeter, <http://humanities-research.exeter.ac.uk/womenswork/courtdepositions> accessed 9 March 2024.

[10] Hill, (n 7) 203.

[11] Since F.W Maitland's 1904 Rede Lecture with the title *English Law and the Renaissance,* criticism of his description of the common law's decline has come from John Baker and G.R. Elton – who argue it was not under threat - while Dafydd Jenkins took up Maitland's defence. Most recently, a statistical analysis by John Guy seems to have put the matter beyond doubt. It is, in the main, Guy's figures and analysis which I rely on here. (F.W Maitland, *English Law and the Renaissance,* 1-21; John Guy, 'Law, Lawyers and the English Reformation' (History Today, November 1985) 1-11; Dafydd Jenkins, 'English Law and the Renaissance Eighty Years On: a defence of Maitland' (1981) 2 Journal of Legal History 107; J.H Baker, 'English Law and the Renaissance' (1985) 44 Cambridge Law Journal 46-61; D.J Ibbetson, 'The Renaissance of English Legal History' (2021) 80 Cambridge Law Journal 91-106; G.R. Elton, *Tudor Revolution in Government,* (Cambridge University Press 1956) 29-36).

[12] John Guy, 'Law, Lawyers and the Reformation' (History Today, November 1985) 3.

[13] Guy, (n 11) 5.

[14] ibid 7-9.

[15] '(U)tterly exclude and banish all attorneys, proctors, sergeants at the law… In Utopia every man is a cunning lawyer. For (as I said) they have very few laws.' Sir Thomas More, *Utopia* (A. Constable and Co. 1895) 128 (spelling naturalised).

and chancery on repeated appeals.[16] As numerous young and ambitious common lawyers sought to hitch their wagons to Wolsey's accelerating locomotive - many attracted to his lavish lifestyle - fractures emerged within the common law profession. Older figures sought to ride out the decline while the young looked for money and fame through defection to the chancery. Wolsey himself was a significant obstacle to the reform of the common law, his contemporary Edward Hall suggesting that his status as the most hated royal councillor since the Duke of Suffolk was a product of this alone.[17] In the 1520s there was a movement for reform; Christopher St German, for example, asked questions about the dangers of courts, like chancery, which were presided over by a single judge.[18] But Wolsey was always protective over his hard-earned power and would block anything unwanted which came to his attention, benefitting from Henry VIII's generally "hands off" approach to the administrational matters of Kingship.[19]

Wolsey's protectiveness was illustrated in 1527, when the members of Gray's Inn hosted a Christmas play which had been written by John Roo, one of their members, some twenty years earlier. It depicted the dangers of allowing upright government to decay and disintegrate. Taking the matter personally, despite the fact the play had been written almost a decade before his ascendancy, Wolsey subjected Roo to the humiliation of being expelled from the order of the serjeants-in-law. A letter from Richard Rich, himself not the most savoury of Tudor characters, addressed to Wolsey from 1528, suggests that the pair had even more drastic ambitions. Rich argued that if Wolsey could provide a suitable list of common law abuses, they could justify its complete effacement.[20] Such ideas were particularly threatening because they were ideologically aligned with a movement which had been gaining prominence in England since the early 1510s: humanism. At its core, humanism sought to return to the study of the ancients and use them to draw lessons about fixing the present. Niccolò Machiavelli's *Discourses on Livy* are archetypal of this movement - at least in their intention - as he draws on Livy's history of the Roman Republic to inform the ideal methods for the revitalisation of the Florentine polity.[21] Therefore, doctrinally, the "Reception" of Roman civil law was congenial to this new movement – one which had lain deep roots in England through Erasmus and Vives.[22] It was the direction which the King's Reformation took, where historicity and precedent triumphed over isolated proclamation, that assured the rise of Thomas Cromwell over Wolsey and ensured that England's humanist ascendancy served to revitalise the common law rather than abandon it.[23] Furthermore, with this new emphasis on the common law in the ivory tower, a concerted attempt to reform the deficiencies which had been causing its period of decline began. Without this intervention, catalysed by Henry's annulment proceedings, these factors may have led to the common law's ultimate abandonment: this was certainly Wolsey's agenda, and it was the archaicisms of the system which gave his position such weight.

III. Henry's Case for the Annulment

The intemperate debates over Henry VIII's marriage to Katherine of Aragon saw a change in fortunes for England's common lawyers and set the foundations for the subsequent legal revolution. Nevertheless, despite its paramount importance to the very nature of our present legal system, the study of the cases laid forth by Henry VIII and Katherine has been sparse at best. The

[16] Guy (n 11) 10.
[17] Brooks, (n 3) 40.
[18] ibid.
[19] Laura Flannigan, 'Signed, Stamped and Sealed: delivering royal assent in early sixteenth-century England' (2021) 94 Historical Research 1-5.
[20] Brooks, (n 3) 39-41.
[21] Niccolò Machiavelli, *Discourses on the First Ten Books of Titus Livius* (Marxists Internet Archive), Introduction.
[22] Harold Joseph, *Law and Revolution: the Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press 1985) 71.
[23] G.R. Elton, *Studies in Tudor and Stuart Politics and Government* (Cambridge University Press 2010) 234-249.

Collectanea Satis Copiosa, a work in which the precedents and arguments for the King's side were compiled in 1531, is yet to receive a full English translation.[24] The most detailed exposition on this theme resides in Graham Nicholson's unpublished PhD. thesis, "The Nature and Function of Historical Argument in the Henrician Reformation".[25] The result is a tendency of historians to examine the case to arrive with their presuppositions about Henry VIII's character, and the Reformation's supposedly libidinous motives, firmly in place - often crowding out any detailed examination of the precise arguments put forward by either side.[26] In this section, I intend to illustrate that the King – in his case to split from Katherine of Aragon – had far stronger arguments than is usually acknowledged.

This debate, such was its complication and intricacy, will be divided into three sections.[27] First, the King legitimately required an annulment because his marriage to Katherine of Aragon was forbidden through canon law, even if Katherine's marriage to Arthur had remained unconsummated. Second, this illegality was a matter of divine law against which the Pope had no right to dispense; he had thus acted *ultra vires* and, despite papal intervention, the marriage was illegal. Third, the final resolution, which was for the abandonment of papal supremacy in England, had compelling historical, legal and theological roots. The conclusion inevitably follows that Henry VIII's case is a severe lesson in the difficulties which arise from the poor execution of legal argument.

A. The King's marriage to Katherine was forbidden by divine law.

The first stage of the debate was about the split itself. Henry argued that he needed an annulment to his marriage to Katherine of Aragon because – due to her relationship with his brother Arthur – Henry and Katherine's subsequent union was contrary to divine law. In such questions, it is scripture which holds absolute authority; after all, it is God's word in God's court. Therefore, for Henry VIII's side, the illegality of his marriage rested on two verses from Leviticus: 18.16) "you shall not uncover the nakedness of your brother's wife; she is your brother's nakedness" and 20.21) "if a man takes his brother's wife, it is impurity; he has uncovered his brother's nakedness, they shall be childless." In refutation, Katherine's side cited a verse from Deuteronomy which appeared to contradict Leviticus: 25.5) "if two brothers are living together on the same property and one of them dies without a son, his widow may not be married to anyone from outside the family. Instead, her husband's brother should marry her… and fulfil the duties of a brother-in-law."

The first argument of the defence, Katherine's side, was that her marriage to Arthur had never been consummated. This could render it null from the start, negating any questions of remarriage: Henry VIII would be her first husband, their marriage would be legal and the King would have no right to separate from her. Notably, there were prominent recent examples in which the justification of non-consummation had been upheld: Henry IV of Castile and Louis XII of

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[24] Christopher Young started a Kickstarter campaign to fund his own translation; however, it was unsuccessful in reaching its goal of £3,500. Despite this, he has completed a translation for the first eight folios, with progress ongoing. For any further information, or to offer your support, contact Chris at christopheryoung1@live.co.uk.

[25] Graham Nicholson, 'The Nature and Function of Historical Argument in the Henrician Reformation', Cambridge University PhD thesis 1977. Accessible at Cambridge University's repository on their website for pdf download: <https://www.repository.cam.ac.uk/items/e12e63ee-2ae1-425d-b663-d00e2f1aa694> accessed 9 March 2024.

[26] See n 5; also, Ethan Shagan, *The Rule of Moderation: violence, religion and the politics of restraint in early modern England* (Cambridge University Press 2012) 85: 'a capricious king who, at the end of the day, often found himself excusing greed and lust as matters of religious principle.'

[27] The chronology of the debate will be largely disregarded as we seek the legal rather than the historical or narrative significances. I will also compile arguments from a variety of the works produced by the King and his lawyers, mentioning the most compelling.

France had both seen "marriages" annulled on this basis.[28] In the absence of other arguments, if Katherine's side could prove non-consummation, it was therefore likely that Henry's case would have been dismissed: he could not have married his brother's widow because Katherine and Arthur's marriage did not count. Henry's response was erratic from the beginning. First, he alleged Katherine was a liar; she and Arthur had indeed consummated the marriage. Next, probably at Wolsey's insistence, he took the line that, if Katherine was telling the truth, Julius II's dispensation was faulty – referring only to a fully consummated marriage. Finally, he considered Thomas Cranmer's argument that even an unconsummated union was a sufficient impediment to remarriage.[29] This characterises the "scatter-fire" approach which was so detrimental to Henry VIII's side. I will argue that if the King had pursued any of these avenues with enough dedicated attention, he could have achieved his desired end in an impartial court.

If he had chased Katherine's claim to virginity, the canonical procedures for deciding non-consummation suits would have benefitted Henry VIII's side.[30] Given that, in such a suit, witnesses were questioned, it would have been a rather equal balance: one between the English servants who remembered a swaggering prince Arthur boasting of having 'been this night in the midst of Spain' and the Spanish ones who denied any recollection of such matters. Critically, where no agreement could be found, canonical rules held that it was the *husband's* view which should be favoured over that of the wife. Equally, it was held that, without any conclusive evidence, it should be presumed that consummation had occurred in a marriage of more than a few days. This would explain the reticence of Mendoza, Campeggio and Chapuys - the leading members of Katherine's faction - to engage with the King on this matter. Ultimately, by not provoking him into a deep discussion of it, they averted this particular threat.[31]

The second avenue was to criticise Pope Julius II's Bull of dispensation – granted when the pair got married to 'dispense with' the prohibition of Leviticus 18.16.[32] Julius was somewhat notorious for his incompetence, a perception given historical endurance by Machiavelli's damning indictment in *The Prince.*[33] It is telling that even the Queen's side were suspicious enough of the dispensation to produce the so-called "Spanish-brief" in the autumn of 1528. This was, allegedly, a new dispensation which had remedied Julius' errors, produced shortly after Henry VIII's and Katherine's marriage. However, in his *Henricvs Octauus* the King claimed no knowledge of this brief, despite it being in his interests to know about its production - after all it was his marriage! It is also suspicious that it was revealed so late: a year and half after the annulment debate had started. Finally, it was a dispensation of a different type than that which Henry VII and Ferdinand had originally claimed they obtained for their children – supposedly referring to *both* verses of Leviticus.[34] As a result, it would not have been unthinkable to get this "evidence" dismissed as a forgery in an impartial court. In this case, with a defective dispensation, while not formally adopted into Western law for another three centuries, the instinctive justice in the idea of *contra proferentem*

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[28] Internet Archive, AAX-1546: *Colección de documentos inéditos papa la historia de España,* 444-450. In the absence of primary sources, Louis XII's annulment receives an insightful analysis in D.L. d'Avray's *Dissolving Royal Marriages* (Cambridge University Press 2014), 190-219

[29] J.F Hadwin, *Leviticus, Deuteronomy and Henry VIII* (Cambridge University Press 2019) 4-6.

[30] Before May 1917, and the promulgation of the 'Code of Canon Law', there was no universal 'code of conduct' or procedure for the Ecclesiastical Courts. (James Harpster, 'The Ecclesiastical Tribunal in Marriage Cases', (Marquette Law Review, Volume 35, 1951), 237-241). Nevertheless, these customs had existed almost continuously since the Norman Conquest. For the general practice of the English courts in this period, see R.M. Relmholz, *Marriage Litigation in Medieval England* (Cambridge University Press 1975) 74-111.

[31] Hadwin, (n 29) 5.

[32] Alison Weir, *The Six Wives of Henry VIII* (Vintage 2007) 34; Eugene Lehman, *Lives of England's Reigning and Consort Queens* (Authorhouse 2011) 290.

[33] Niccolò Machiavelli, *The Prince* (Penguin Classics 2009) 71.

[34] Edward Surtz and Virginia Murphy, *The Divorce Tracts of Henry VIII* (Moreana 1988) 15.

may have prevailed.[35] After all, it would prove that the King had been living in a marriage condemned by divine law due to papal incompetence, of particular significance in a society believing in providentialism.

Third is the impediment of public honesty – the bonds created by a marriage even if unconsummated. After all, Julius' original dispensation had been for the affinity caused by consummation, not public honesty.[36] J.J. Scarisbrick has argued that this could have been the loophole Henry VIII needed; but despite Wolsey's advocacy, Henry VIII never trusted the foundations of this argument.[37] Its legitimacy had been established some four-hundred years prior and was bolstered by the authority of St Thomas Aquinas who suggested that an affinity might arise simply by a couple living together.[38] It was the authority of the twelfth century theologian, Hugh St Victor, which was ultimately summoned by Henry VIII. St Victor had shown that an unconsummated marriage was still a true marriage and thus a true sacrament; however, it was never argued with sufficient conviction by Henry VIII's team to have its potential impact.[39] Instead, it was tacked onto the end of chapter four of the *Censurae academiarum* – one of the tracts in which Henry VIII's team developed their case to the watching public and clerics - and obscured in the language of the text which retained an emphasis on the verse of Leviticus.[40] Therefore, had any of these three arguments been laid forth more successfully, the justice of Henry's case – that he required an annulment because Katherine's relationship with Arthur made his current relationship contrary to divine law – would have been far more apparent. This is not to say that the Pope would have then agreed to Henry's demands on the spot; after all, Charles V meant he had his own problems to think about too. Nevertheless, had any of these arguments been more successfully disseminated to the European political class, we can imagine the pressure on the Pope would have been far greater.

Ignoring the arguments which were made historically, can we prove that Henry's annulment was in fact completely legal? On this question, most significant is an argument thoroughly unconsidered by mainstream historians, and one which, given its use of scriptural authority, would have transcended any argument from custom.[41] The argument is founded upon the incompatibility of Deuteronomy with Henry VIII's situation which, if proved, would establish that the marriage was invalid in the eyes of *divine* law, thus legitimising further arguments about the insufficiency of papal authority to modify it. The verse, as quoted above, begins: "if two brothers are living together on the same property…". However, this did not reflect Henry VIII and Arthur. As David Starkey writes: "they met only on high days and holidays at their parents' court."[42] After all, Arthur, as Prince of Wales, dwelt in the far-off Marches while Henry VIII stayed in England; they had never lived together! Therefore, the attempts to impugn Deuteronomy as merely ceremonial, or as a purely Jewish law, were self-defeating: they obscured the fact that Deuteronomy did not even apply to the King's case. J.F. Hadwin has argued that this is psychologically revealing about Henry and his side: they were so nervous to win, and so unsure of themselves, that in their attempts to snatch victory from the jaws of defeat, they never spotted the ace which sat in their hand. The "incompatibility argument" – despite a letter to the Earl of Wiltshire in 1529 illustrating that Henry VIII knew of this nuance - is mentioned neither in *Censurae,* or *Determinations* – (Thomas Cranmer's English translation of *Censurae*). Even when it

[35] In short, a faulty or ambiguous contract goes against the draftsperson, and in this case, the draftsperson was firmly aligned with Katherine's side.
[36] Surtz and Murphy, (n 34) 25.
[37] Scarisbrick, (n 5)183-197.
[38] Ian Ward, "The King's Great Matter" (2018) 9 Journal of International Dispute Settlement 7
[39] Surtz and Murphy, (n 34) 25-28.
[40] H.A. Kelly, *Matrimonial Trials* (Wipf and Stock 2004) 181-186.
[41] Hadwin, (n 29) 8. This goes unconsidered even in Bernard and Scarisbrick.
[42] David Starkey, *Henry: virtuous prince* (Harper 2009) 66.

finally gets a coherent treatment in *Glasse of Truthe* it is obscured by speculative attacks on the custom of Deuteronomy more generally - the tract insisting that the verse applies only to Jews. The water is further muddied by the assertion of an alternative translation for "brother" by Robert Wakefield. All they needed to write was that it did not apply at all![43]

Hence, had the King pursued any of his three principal arguments for the annulment with more clarity, it would have been much more likely that the Pope would have assented: after all, Henry VIII was no longer the lusty divorcee but the *Fidei Defensor* who had sought to conform to God's word. Moreover, retrospectively, using Hadwin's argument from scripture, it is clear that the annulment was legal. Had Henry led with this argument, it is hard to see how the Pope could refuse the demand should he wish to maintain any semblance of legitimacy for Rome.

B. The Pope had no authority over this matter of divine law.

It has therefore been established that by the sole authority of Leviticus - Deuteronomy rendered unapplicable - the King's marriage to Katherine was forbidden by divine law. However, at this stage, Katherine's side still had a lifeline to keep her in the marriage: Pope Julius had dispensed against the marriage, and perhaps Clement VII could produce a new dispensation to make her marriage legal on these new grounds. It is therefore necessary to prove that the Pope had no authority to dispense over matters of *divine* law, and that in producing a dispensation Julius had acted *ultra vires*. Such an argument would prove that for Clement to produce one would be equally illegitimate.[44] On this question, it first appears to be the King who flew in the face of precedent. Thousands of matrimonial cases came to the ecclesiastical courts each year and it appeared that Popes had dispensed against the verses of Leviticus before. However, when we consider these examples more closely – allowing for different degrees of affinity, cases of definite non-consummation and other discrepancies which saw disputes differ from Henry VIII's – the number of precedents arguing against the King's side were two. Critically, neither of these were unproblematic.[45] Margaret Holland had been licensed to marry her late-husband's half-nephew, Thomas of Clarence, in 1411 and Joanna of Naples was briefly married to Ferdinand II, her half-brother's son in 1496.[46] Importantly, both marriages related to half-blood relationships. While ecclesiastical tradition had treated these matters as the equivalent of full-blood unions, the only half-blood sexual relationships explicitly forbidden by Leviticus are those of half-siblings. Therefore, neither of these cases represented true dispensations against the scriptural prohibition of Leviticus but against man-made traditions of the church.[47] In the absence of invokable precedent, the determination of the Councils of Neo Caesarea (circa AD315) and Agde (AD506) that the Levitical injunction was a matter of unalterable divine law still stood. This was reinforced by the only other broadly comparable case of which we have knowledge: that of the count of Armagnac in 1392, where the Pope's advisers held that his marriage to his deceased brother's wife was neither allowable nor dispensable due to divine law.[48] Therefore, in dispensing against Henry's marriage Julius had broken new ground, and given it transgressed *scriptural* authority, this was rather

[43] Hadwin, (n 29) 9.
[44] Surtz and Murphy, (n 34) 1, 15.
[45] Hadwin identifies four, but two are not directly relevant. The first is Manuel of Portugal's marriage to his late wife's sister in 1500 which did not transgress Leviticus but instead the man-made rules of the Fourth Lateran Council and is thus not an instance of dispensation against divine law. The second was a controversial argument that Innocent III's 1201 decree, *Deus qui ecclesiam,* had transgressed Leviticus in allowing individuals to marriages with brothers' widows. However, this was only permitted in cases where Deuteronomy 25.5 still stood which, as shown, was not applicable to Henry. (Hadwin, (n 29) 9).
[46] Kelly, (n 40) 9-10; Scarisbrick, (n 5) 177.
[47] Hadwin, (n 29) 13-15.
[48] ibid 12-17; Kelly, (n 40) 8-9.

fiery and heretical ground at that. The same would go for Clement should he wish to take the same course.

C. The Pope had no *a priori* authority over Henry and the English church.

It is highly likely that, had the Pope granted the annulment, the argument of Henry VIII and his men would have stopped with their challenge to the Pope on this isolated matter of divine law. However, when Rome remained recalcitrant, it was clear that a new path was necessary: to secure his annulment Henry VIII argued that the Pope had no authority in England at all.[49] This extra path was critical because it was the complete Break with Rome, not just a refutation of its dispensary power, which had such profound implications for English law. Nevertheless, while its effects were radical, even this step rested on sound legal foundations. Furthermore, it was the explicit historicity of this element of Henrician policy which confirmed the supremacy of Thomas Cromwell and the common law over Wolsey and the civil law.

The obstacle which has achieved the most attention, perhaps unsurprisingly, is that of Magna Carta.[50] This was Sir Thomas More's primary defence during his treason trial when he was charged for refusing to take the oath accepting the King's Supremacy. He argued that it would be illegitimate because it transgressed Magna Carta. After all, its first 'chapter' is on the necessity that 'the English church shall be free, and have its rights undiminished, and its liberties unimpaired.'[51] The removal of the authority of the Pope, and the attacks on clerical authority seem to transgress this most fundamental demand. However, Elton's solution is incisive: if Magna Carta, as it has been throughout our modern history, is treated as an Act of Parliament, then it was within the rights of parliament to change it.[52] After all, only four of its 63 clauses are still valid today: 1 (part), 13, 39 and 40.[53] Therefore, when we consider Henry's actions in this way, not in isolation but rather in their broader historical context, they are decidedly less revolutionary. It is also notable that much of our present reverence for Magna Carta is due to Sir Edward Coke, who mobilised it against the perceived absolutism of James I. Nevertheless, even Coke admitted that Magna Carta had been legitimately altered by statutes before.[54] Finally, it is notable that Magna Carta was given authorisation by the royal grant and the royal seal alone – its legal sanction coming before the widely accepted formation of England's first parliament under Henry III. Therefore, as Robert Brady argued during the Exclusion Crisis of 1678-83, Magna Carta was the King's, with which he could do as he liked.[55]

With this in mind, all that is left is to establish that there was no binding precedent that the King should be subordinate to the Pope. The discussions of the legal inns between 1532 and 1536, while not disinterested, certainly augur well for this view: every reading concluded that the King rather than the Pope had retained the head of the spirituality.[56] There are contested theological grounds, and much more secure historical grounds, for this position. Any theological argument ultimately rests on scriptural primacy of Peter. Certainly, it would be inappropriate to engage with

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[49] Surtz and Murphy, (n 34) 1-5.
[50] Elton, *The Parliament of England 1559-1581* (Cambridge University Press 1986) 19-20; Guy, (n 11) 2; Brooks, (n 3) 49.
[51] 'The contents of Magna Carta', *UK Parliament*. Retrieved 13 November 2023. (parliament.uk/the-evolution-of-parliament).
[52] Elton, (n 50) 19-20, 34; Brooks, (n 3) 46.
[53] 'The contents of Magna Carta', *UK Parliament*. Retrieved 13 November 2023. (parliament.uk/the-evolution-of-parliament).
[54] Hill, (n 7) 203-211.
[55] James Burns, *The Cambridge History of Political Thought* (Cambridge University Press 1992) 407-410.
[56] British Library, Dept of Manuscripts, St Pancras, London. MS Harleian 4990, fols. 154-6, 163. See also, Brooks, (n 3) 49.

this here – any perfunctory treatment inevitably leaves the sense of one side having been slighted. As a result, I shall not advocate either argument; however, in the "Age of Reformation", there were certainly an increasing number ready to take Henry VIII's side.[57]

The historical claim is much stronger. Henry VIII used the principle of borrowed authority: the present powers held by the pope had been retained only with the consent of kings. It was the papal revival, in particular under Innocent III and Boniface VIII, when papal claims had decisively expanded, which made Henry VIII's assertion appear radical, not the papacy's inherent authority.[58] After all, before the 11th century, the papacy had relied on kings for the preservation of order, protection of church property and advancing of God's cause.[59] One can equally look to Charlemagne, William the Conqueror, or Henry III – who appointed popes at his will – and recognise that there was very little in the 16th and 17th century claims of divine right and royal supremacy which cannot be traced back to the Carolingians and then further to Constantine the Great.

IV. The Legal Revolution

Considering the legality of the annulment and the Break with Rome is vital because, in challenging the prevailing views of Henry VIII motivated by lust and Thomas Cromwell by Machiavellian despotism, we leave space for a real consideration of the radical legal and constitutional implications of the Reformation.

Without the annulment crisis, there would have been no resurgence of the common law. Principally, this is because the "King's Matter" saw the fall of Wolsey – the uncrowned king of chancery – and his replacement with Thomas Cromwell – a common lawyer who maintained his practice throughout his ascendancy. The fall, alongside Wolsey, of Reginald Pole, who strongly favoured "the sweeping away of the barbaric common law and its replacement by the Enlightenment of Rome" was similarly significant.[60] The shift in attitudes at the centre of power was marked and should not be underestimated. As mentioned, Wolsey worked by proclamation, using the King's prerogative to impose measures without recourse to precedent or parliamentary sanction. In contrast, Cromwell showed a remarkable deference to common law procedure, even when formulating parliamentary statutes. For example, during the preparation of the Act of Proclamations, Cromwell sought the opinion of the judges and searched for previous measures on which his Act could be grounded – ultimately finding one under Richard II.[61] Similarly, for the Act in Restraint of Appeals, Cromwell cited a phenomenon which had been becoming increasingly common since the late 15th century: litigants attacking the jurisdiction of the ecclesiastical courts in matters of debt and defamation through common law writs of prohibition and actions based on the 1392 Statute of Praemunire.[62]

The change in attitudes also saw a shifting composition in the highest echelons of English politics: the bishops underwent a decline and in their place a troop of "new men" – common lawyers tried and trained – rose to prominence under Cromwell's patronage – for example,

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[57] An accessible modern summary of the debates involved can be found in Norman Geisler and Ralph MacKenzie, 'Papal Infallibility: The Catholic-Protestant Debate Over Papal Infallibility' (*Christian Research Institute* 9 April 2009) <https://www.equip.org/articles/papal-infallibility-the-catholic-protestant-debate-over-papal-infallibility/> accessed 4 April 2024.

[58] Elton, (n 22)198-203.

[59] ibid.

[60] ibid 223.

[61] ibid 226.

[62] Richard Helmholz, *Roman Canon Law in Reformation England* (Cambridge University Press 2009) 26-33.

Thomas Audley as Lord Chancellor.[63] The Reformation certainly revitalised the common lawyers' practices, parliamentary legislation of 1529 empowering parishioners to use the common law courts to sue clerics who had sold their parish livings or become non-resident.[64] Therefore, immediately, the ascendancy of the common lawyers in government served to revive the institution and increase its business, in this case by mobilising anti-clerical sentiment.

That said, the most immediate result of the Break with Rome was a new, innovative conception of the authority which underpinned English law and the English polity. The vacuum left by the Pope on the spiritual realm of England was remedied by a new dualistic conception of royal authority. The King had authority from above – by the executive sanction of God – which justified his control of the spiritual realm of England; while he also had authority from below which came from the consent of his people through parliament, justifying control over temporal affairs.[65] This is a thoroughly modern notion whose significance should not be understated. Alison Weir writes: Henry VIII's "reign contributed an extraordinary legacy – modern Britain. Henry began his reign in a medieval kingdom, he ended it with what was effectively a modern state. We are still living in the England of Henry VIII."[66] Hyperbolic it may be, but Weir is correct. If we refer to the Dispensations Act:

> In all and every suche lawes humayne made within this realme… your royall majestie and your lords spirituall and temporall and Commons, representing the holle state of your realm in this your most high Courte of Parliament, have full power and auctoritie…. The seid lawes…. To abriogate adnull amplyfie or dymynyshe.[67]

Therefore, the authority of a law came from its creation by this new construct – the "king-in-parliament".[68] This is often referred to by historians as the birth of the "omnicompetence of statute." To this point, "all doctrine asserted the existence of a higher law with which statute must be consonant."[69] However, with the birth of the king-in-parliament, it became self-justifying. Fortescue had held that if dissonant with the law of nature, a statute would be unjust and inevitably disregarded by the people.[70] The judges of the 15th century may have moved tentatively towards a recognition that statute could defeat canon law; but they excluded its authority from any spiritual matters. St German, on the very eve of the Reformation, despite his belief in the executive powers of statute, still held that it should conform to the laws of God and reason.[71] Therefore, Cromwell's new idea was nothing short of a revolution, and it was one which endured – becoming the keystone

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[63] Elton, (n 22) 223.
[64] Brooks, (n 3) 45.
[65] Elton, (n 22) 210-213.
[66] Weir, (n 32) 1.
[67] 25 Henry VIII c.21 (*Statutes of the Realm,* iii.) 464.
[68] A study tracing this construct through the 16th and 17th centuries would be very illuminating: it was the ambiguities which resided in the 'king-in-parliament' which contributed to the Civil War, regicide and Glorious Revolution. After all, the 'king-in-parliament' was fashioned at a time when the ends of King and parliament were the same; but what was to happen when they diverged? Thomas Cromwell had increased the power and self-importance of parliament, without correspondingly reducing the prerogative of the King. The results were the confrontations which plagued 17th century Britain and ultimately led to the Parliamentary sovereignty enshrined in 1688. We can see this, for example, in the Chief Judge's conclusion to the famous Hampden Ship Money Case: 'I agree that *parliament is the most ancient and supreme court*… But *the law knows no king-yoking policy*. There are two maxims of the law of England 'the King is a person trusted with the state of the commonwealth' and 'the King cannot do wrong.' Upon these two maxims the highest rights of majesty are grounded with *which none but the king himself has to meddle*.' (Judith Daniels, *The English Revolution: 1625-1660* (Oxford University Press 2015) 43 (my italics)).
[69] Elton, (n 22) 233.
[70] S.B. Chrimes, *English Constitutional Ideas in the XV Century* (Cambridge University Press 2013) 201.
[71] ibid 209.

of the British constitution in Albert Venn Dicey's late-Victorian treatise: *An Introduction to the Study of the Law of the Constitution*.[72] Ian Ward, in his essay on "The King's Great Matter" cannot resist the temptation of the modern parallel, writing the Break with Rome into the story of England's joining of the EEC and EU while extolling its "enticing constitutional resonance" today.[73] Perhaps most importantly, it led to the emphasis on parliament as a law-making body, exemplified by the explosion of statutory action in subsequent decades.

During this shift in the foundational authority of the law, Thomas Cromwell ensured that the Reformation entailed the complete subordination of canon law to that of common law, proclamation and statute. While canon law technically continued in its operation after 1534, it was slowly withered of its power as the plan to assimilate it into the common law never materialised. Instead, responsibility for useful aspects of its operation were encompassed in statutes, while the rest was left to decay. After 1532, Henry VIII suppressed the study of canon law at Oxford and Cambridge universities.[74] By settling the relationship between canon, common and statutory law - which beforehand had balanced on an uneasy compromise decided following the martyrdom of Thomas Beckett - the English legal system was already on its way to remedying some of the inefficiencies and complications which had plagued it during the 80 years of its decline before 1527. Previously, it was unclear as to the matters over which the ecclesiastical courts had authority, not least because the responsibility for enforcing ecclesiastical decisions - like sentences of excommunication - fell on the secular authorities.[75] Quickly after the Reformation, and its affirmation of the power of statute, these matters were clarified in legislation.

This process of clarification brought with it significant developments in English statutory law touching social welfare, criminal and property law. Perhaps most revolutionary was the formalisation of social welfare measures. Before the Reformation, village communities would leave bequests to the poor in their wills, donations would be pooled for the creation of alms-houses, and common land would be designated with cows from which the poor could take milk or common pasture on which they can graze their flock. As the number of people needing relief rose in the early-Tudor period, the action of central government became necessary – particularly in the towns. Wolsey's solution was to work through proclamations, letters and instructions to JPs and priests.[76] It was, however, with the King's Reformation that poor relief began to be addressed by statute: a product of the new emphasis on parliament and statutory law. Acts were passed in 1530 and 1536, the latter deemed "the beginning of a new legislative era in economic and social history."[77] Not only was the parish established as the unit of local government; central authorities were given the responsibility for securing voluntary donations.[78] These voluntary donations were buttressed by increasing social and institutional pressures as the century progressed until a compulsory poor-rate – essentially a tax used for poor relief - was introduced in 1572.[79] Therefore, developments ushered in by Cromwell's legal revolution laid the foundation for the vaunted Elizabethan Act of 1601, often included in a tradition of state social-interventionism that includes Gladstone, Atlee and Wilson.[80]

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[72] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan and Co. 1885) 88.
[73] Ward, (n 38)18.
[74] John Baker, *Introduction to English Legal History* (5th edn Oxford University Press 2019) 141.
[75] Samuel Gregg, 'Legal Revolution: Sir Thomas More, Christopher St German and the Schism of Henry VIII', (2007) 5 Ave Maria Law Review 177.
[76] Paul Slack, *Poverty and Policy in Tudor and Stuart England* (Longman 1988) 117.
[77] (22 Hen. 8. c. 12) and (27 Hen. 8. c. 25). Neil Kunze, 'The Origins of Modern Social Legislation: The Henrician Poor Law of 1536' (1971) 3 Albion: A Quarterly Journal Concerned with English Studies 9.
[78] ibid.
[79] (14 Eliz. 1. c. 5)
[80] (43 Eliz. 1. c. 2); Slack, (n 75) 1-6.

The removal of buggery from the church courts in 1533 was a significant development in the history of the persecution of homosexuality in England, intercourse between two men becoming a capital crime and remaining so until 1861.[81] The last hangings took place in 1835 and legalisation occurred in 1967 for those over 21. The 1533 Act saw the start of a more concerted campaign of repression against homosexuality, the level of persecution beforehand having been sporadic at most.[82] In fact, in many cases it had been written up as a misdemeanour: in 1102 a church council in England declared that priests should be degraded for committing sodomy and only anathematised if it became "obstinate sodomy".[83] In the same year St Anselm wrote to an archdeacon remonstrating against the punishment of sodomites because "this sin has been so public that hardly anyone has blushed for it, and many, therefore, have plunged into it without realising its gravity."[84] Certainly, between the Normans and the Tudor period, punishments became harsher – the association of homosexuality with heresy leading to burnings, castration and stoning to death – but as shown by the exploits of the church's priests satirised by Chaucer and analysed in many of the traditional analyses of the Reformation, sexual "deviance" was remarkably pervasive and there were few concentrated attempts to supress it.[85] With the 1533 Act, persecution became more regular and less easy to de-escalate to a misdemeanour.

The Statutes of Uses and Wills have certainly had the most enduring reception within legal writing on Henry VIII's reign, their continued relevance so great that they still receive extensive explanation in modern books on real property.[86] The Crown being England's most pre-eminent landlord, it had long suffered at the hands of evasions under "uses" – a legal expedient which allowed land to be transferred through a will and the Crown's feudal exactions to be evaded by landowners. A concerted campaign against them started in 1526 when Thomas Audley, likely seeking favour with the Crown, delivered a lecture at the Inner Temple in which he laid forth the legal case against the practice. After some considerable wrangling, during which the landowners in the House of Commons rejected the King's proposals for a compromise, Henry VIII decided on a more extreme course of action.[87] His opportunity came in 1535 when the Crown brought a case against the recently deceased peer, Lord Dacre of the South. Under heavy pressure from the King, the judges in Dacre's case ruled that "uses" and a will were not a legitimate way of establishing the inheritance of land. This created a major land-scare across the country, as anyone who held their land as a result of a will was therefore threatened in their tenure. The hard-line Statute of Uses, passed in 1536, succeeded only in bringing about Rebellion later that year, and by 1538 lawyers in the Inns were finding ways around it.[88] As a result, the Statute of Wills was passed in 1540 as a compromise for both sides. This guaranteed, for the first time, that land not owned by the Crown could be bequeathed legitimately in a will. The whole debacle had significant consequences for the progress of property law in England; Eric Ives calls it "revolutionary", William Holdsworth "the most important addition that the legislature has ever made to our private law."[89]

V. Conclusion

[81] (25 Hen. 8. c. 6); Baker, (n 73) 573.
[82] This should also be seen alongside a more general intensification of attempts at social control during the Tudor Period which saw gender differences reasserted, increasing persecution of the homeless and enforcement of licensing and sumptuary laws.
[83] Arno Karlen, 'The Homosexual Heresy' (1971) 6 The Chaucer Review 4.
[84] ibid.
[85] ibid.
[86] (27 Hen. 8. c. 10) and (32 Hen. 8. c. 1); W.R. Wade, *The Law of Real Property* (4th edn Sweet & Maxwell 1975), 160..
[87] Brooks, (n 3) 40-43.
[88] ibid.
[89] N.G. Jones, 'The Authority of Parliament and the Scope of the Statute of Uses' in Mark Godfrey's *Law and Authority in British Legal History, 1200-1900* (Cambridge University Press 2016) 13.

This essay has sought to provide a new narrative about the course of the Reformation. In connecting the developments of before, during and after the Reformation I have tried to illustrate a chain of causation previously unasserted in historical or legal scholarship.[90] The significance of the legal developments ushered in by the Reformation is hard to overstate and is more profound than allowed for by an isolated recount of each change. What has been described above is only an overview of the most enduring developments. If we consider the 1540 Parliament alone, it passed: "the Statute of Wills; legislation touching limitation of prescription; debts on executions; embracery and the buying of titles; sanctuaries; the liberties and franchises of dissolved religious houses; an Act protecting lessees; collusive recoveries; mispleading and jeofails; joint tenants for life or years; wrongful disseisin to be no descent in law; grantees of reversions; an exposition of the Statute of Fines; recovery of arrears by executors; touching marriages and pre-contracts."[91] There was quite literally an explosion of statute. In the first nine sessions of Henry VIII's reign – covering 22 years – 203 Acts were passed, 148 of which were of public significance. In Cromwell's eight sessions – covering just eight years – 333 Acts were passed, some 200 of which were of public import.[92] Furthermore, the emphasis on centralisation brought about the integration and assimilation of Wales into the English kingdom, a programme led by Thomas Cromwell.

The Reformation, enshrining parliament's significance, saw the beginning of its increasing vocality and assertiveness which would develop through Elizabeth and James' reigns, and explode during that of Charles I. The ambiguities inherent in Henry VIII's Reformation would not be resolved until the Glorious Revolution of 1688 – more than a century and a half later. Therefore, it was not just statutory law which saw an upheaval. Constitutional law was uprooted and, as was first noted in print by the seventeenth century jurist Sir Matthew Hale, a fundamental change in legal practice also occurred. There was an expansion in the volume of central court litigation and a decline in local jurisdictions; an increase in the number of legal practitioners (especially attorneys); a multiplication in the number of statutes; and the decline of some of the traditional common law actions and their replacement by a new form of action - actions on the case - which provided both a new way for people to litigate about their debts and which also opened up entirely new areas of jurisdiction, especially in connection with actions of slander.[93]

Sir Edward Coke's *Institutes of the Lawes of England* (often known as *Coke on Littleton*), in which he considers Thomas de Littleton's 15th Century legal treatise, is particularly telling. In Elton's words, the work amounts to Coke saying: "don't bother to read Littleton, it has all changed!".[94] The fact that, by the middle of Elizabeth's reign, the foundation of teaching at the Inns had transferred from the reforms of Edward I to the Acts of Henry VIII is instructive in this matter.[95]

When considering Henry VIII, legality may not be the first principle which comes to mind. Ginger – maybe, fat – most probably, but not a fundamental part of our common law heritage. For many, his position could be best associated with that given to "Dick the Butcher" in

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[90] The nearest comparison would be to John Guy's essay 'Law, Lawyers and the English Reformation', to which this essay owes much. However, even Guy fails to provide a satisfactory account of the legitimacy of the Reformation in both canon and civil aspects and he does not address the impact of the Reformation on subsequent legal developments. Nevertheless, I am deeply indebted to him, not least for the fact that his *Tudor England* (Oxford University Press 2000) was my first introduction to this period of history. In this work, for the notion that the Reformation arrested the decline of the common law, I am especially in his shadow.

[91] G.R. Elton, 'English Law in the Sixteenth Century: Reform in an Age of Change' (Selden Society Lecture delivered in the Old Hall of Lincoln's Inn; 5th July 1978) 17.

[92] G.R. Elton, (n 22) 225.

[93] Brooks, (n 3) 31.

[94] Elton, (n 90) 2.

[95] ibid 16.

Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers." However, Henry VIII and his common lawyers needed one another; and without this partnership, neither the Reformation nor the continuity of England's common law could have been assured.