# The Prosecution of Heresy in the Henrician Reformation

At the beginning of Henry VIII's reign, the prosecution of heresy was based on three statutes of the late fourteenth and early fifteenth centuries. Under this system, the Church tried the crime with the assistance of secular authority. Juries presented suspects, whose cases were then transferred to the church courts for determination. In 1532, the Supplication against the Ordinaries challenged the conduct of heresy trials. It invoked common-law principles about due process and standards of proof. Two years later, a new statute modified the system, although less drastically than had been proposed. The royal supremacy and new religious policies changed the context in which heresy was prosecuted. Up until 1539, however, the church courts still determined accusations. Thereafter, in the case of specified heresies, the Act of Six Articles made lay juries responsible for determining guilt or innocence. Commissions under this act combined elements of canon law and common law. These reforms were, however, not seen to have improved the conduct of heresy trials. It proved easier to criticize the traditional method of prosecution than to devise a better one.

Keywords: Supplication against the Ordinaries; *ex officio*; due process; two-witness rule; penance; writ *de heretico comburendo*; Act of Six Articles

## I. Introduction

At the beginning of Henry VIII's reign (1509–47), the prosecution of heresy was based on an alliance between church and state that had been forged a century earlier in reaction to Lollardy.[1] In pursuing heretics, the Church took the lead. Laypeople assisted through arrest, detection, and presentment. Notoriously, the Church relinquished the obstinate and relapsed to the secular arm to be burnt. The trial of heresy was, however, reserved for the ecclesiastical courts. The Church's definition of heresy, standard of proof, and due process applied. The Break with Rome changed the rules of engagement. It undermined the authority of canon law: a jurisprudence based on papal decretals

[1] The year is taken to begin on 1 Jan.

appeared incompatible with the royal supremacy. Hence Henry VIII ended the formal study of canon law in the universities and commissioned a new law code for the Church of England. The Supplication against the Ordinaries, presented by the House of Commons in 1532, encapsulated lay suspicion of ecclesiastical jurisdiction. Yet in diminishing the stature of the church courts, the regime created a problem for itself, because maintaining religious orthodoxy simultaneously became more urgent (as Protestant ideas proliferated) yet more difficult to achieve. In response, the prosecution of heresy was partially laicized and new offences blurred the distinction between religious error and political disobedience. Hybrid tribunals were created that combined aspects of canon law and of common law, bringing together churchmen and laymen. In so doing, notions of a fair trial for heresy were reworked, but not resolved. It proved easier to criticize the traditional method of prosecution than to devise a better one. Legal complexity compounded the regime's contradictory and confusing religious policies.

This article examines the existing laws against heresy, the Supplication against the Ordinaries, and the statutory reforms of 1534 and 1539 that changed how heresy was prosecuted. While drawing appreciatively on previous work, the article seeks to distinguish itself from the dominant mindset. Originally, heresy trials were interpreted within a martyrological tradition. The seminal work in that genre, John Foxe's *Acts and Monuments* (1563), remains a major source for the Henrician trials.[2] Although eschewing Foxe's confessional stance, modern scholarship continues to take a censorious view of proceedings. Yet treating any trial for heresy as inherently unjust impedes us from understanding what contemporaries thought was a *fair* trial for heresy.

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[2] This article uses the fourth edition, the last on which the author worked: John Foxe, *Actes and Monuments*, 2 vols., 4th ed., London, 1583.

Here the neutral term ‘prosecution’ is thus preferred to the pejorative ‘persecution’. Most modern writers, with the notable exception of Henry Angsar Kelly, have tended to endorse the common-law critique of the church courts’ proceedings.[3] So they have usually sided with Christopher St German rather than Sir Thomas More in the controversy that followed the Supplication.[4] Such an endorsement, however, misaligns contemporary criticism with our own. Outright opposition to the criminalization of false belief was absent from our sources, which instead debated the definition of heresy, judicial impartiality, standards of proof, and appropriate punishments. This article thus also parts company with the idea that only the Church prosecuted heresy in contradistinction to a more enlightened common law. Sir John Baker’s recent study treats common lawyers’ criticism of heresy proceedings as contributing to Magna Carta’s evolution into the embodiment of the right to a proper trial.[5] This article does not share Professor Baker’s view that such criticism was motivated by opposition to the punishment of belief. Rather, it was precisely because the secular legal system was engaged against heresy that proceedings in church courts were being held to common-law standards. That perspective encouraged the idea that heresy might become a common-law crime or even that it already was one. This article therefore treats heresy within a single history of criminal law that comprised both the secular and ecclesiastical

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[3] Kelly’s most relevant work is ‘Thomas More on Inquisitorial Due Process’, 123 *English Historical Review* (2008), 847.

[4] The controversy is surveyed in John Guy, ‘Thomas More and Christopher St German: The Battle of the Books’, in Alistair Fox and John Guy, *Reassessing the Henrician Age: Humanism, Politics and Reform, 1500–1550*, Oxford, 1986, 95.

[5] Sir John Baker, *The Reinvention of Magna Carta 1216–1616*, Cambridge, 2017, 110–124.

legal systems.

## II. The Existing Laws against Heresy

The status quo that was in place at Henry VIII's accession would last until 1534. Three statutes, enacted in 1382, 1401, and 1414, had formalized the collaboration between the Church and the Crown in the prosecution of heresy.[6] This legislation had been made at the request of the clergy and would be copied into episcopal registers and collections of ecclesiastical law.[7] In the eyes of churchmen, the statutes imported into domestic law the provisions in canon law that had already been adopted in the law codes of other Christian states.[8] For example, they incorporated the requirement that royal officers should swear an oath to assist the Church in opposing heresy.[9] Secular authorities were to investigate, arrest, and detain suspects, delivering them to the Church when required, but were not to judge them.[10] In his *Provinciale* of 1430 – still the major work of English canon law in Henry VIII's reign – William Lyndwood treated heresy as a purely ecclesiastical crime. He acknowledged the discrepancy introduced by the statute of 1414 over who was entitled to a heretic's forfeited property; otherwise, as far as he

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[6] 5 Ric. II, st.2, c.5; 2 Hen. IV, c.15; 2 Hen. V, st.1, c.7.

[7] John Ayton, *Constitutiones Legitime seu Legatine Regionis Anglicane*, Paris, 1504, fos.154v–155; Ian Forrest, *The Detection of Heresy in Late Medieval England*, Oxford, 2005, 92–94.

[8] H.G. Richardson and G.O. Sayles, 'Parliamentary Documents from Formularies', 11 *Bulletin of the Institute of Historical Research* (1933–34), 147, at 154.

[9] P.R. Cavill, 'Heresy, Law and the State: Forfeiture in Late Medieval and Early Modern England', 129 *English Historical Review* (2014), 270, at 277.

[10] Borthwick Institute for Archives YDA/2 Reg 26, fo.73 (vicar-general to mayor of York: 5 May 1510).

was concerned, the position in canon law applied within England.[11] In the same vein, current scholarship emphasizes the similarities, rather than the differences, between English heresy trials and continental inquisitorial practice.[12]

By adding heresy to the jury charge at quarter sessions and assizes, the legislation supplied a local application appropriate to the common law.[13] The formulary book that belonged to the JP Sir Robert Drury (d.1535) contains a charge to inquire into heretics and a specimen 'presentment for heresy' for describing the mass as a 'stupid game'.[14] Juries' presentments were then transferred to the church courts.[15] This was necessary because the secular courts could not determine indictments for heresy. For example, three presentments of John Gurney at Essex's quarter sessions in 1486 were removed to King's Bench, where a marginal note on the plea roll explained that the entry was vacated in respect of heresy, but that the other two indictments (for felony) were to be tried by the country.[16] The transferral procedure can be observed at the beginning of Henry VIII's reign in the case of the Lollard John Stilman. In 1509, Stilman faced a conviction for counterfeiting coins and an indictment for heresy (based

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[11] William Lyndwood, *Provinciale*, Oxford, 1679, 293i.

[12] John H. Arnold, 'Lollard Trials and Inquisitorial Discourse', in Chris Given-Wilson, ed., *Fourteenth Century England II*, Woodbridge, 2002, 81; Forrest, *Detection*, 52–59.

[13] Anon., *The Boke of Iustices of Peas*, London, 1505, sig.A5.

[14] British Library (BL) MS Harley 1777, fos.42, 84v (printed in Forrest, *Detection*, 106 n.98).

[15] E.g., Norman P. Tanner, ed., *Heresy Trials in the Diocese of Norwich, 1428–31* (Camden Society Fourth Series 20), London, 1977, 217–219.

[16] The National Archives: Public Record Office (PRO) KB 9/370/25; KB 27/899, rex rot.5. The heresy was hosting a gathering of Lollards at his house in Netteswell to witness the clandestine baptism of a child whose father was the prior of Latton.

on what he had told two clergymen while detained in prison). Once discharged of the conviction by the accession pardon, Stilman was delivered by indenture into the custody of the bishop of London.[17] According to the statute of 1414, such indictments were only for the 'information' of the ecclesiastical judge, who was not required to determine them. This provision reflected the Church's position and respected the autonomy of its magistrates.[18] In sum, the prosecution of heresy was a partnership in which the lead role was performed by the church courts with secular authority playing the supporting part. This view was endorsed by the Crown in a proclamation of 1529–30 that summarized the statutory responsibilities of royal officers.[19]

There was, however, another way of conceiving of this legal regime. The three statutes equipped ecclesiastical authorities with secular powers: to arrest, to imprison (both pending trial and as a punishment), to fine, and vicariously to burn. These were powers that the Church could not exercise as of right: they required royal authorization through act of parliament. Hence they were also powers that, it might be argued, should be exercised under the supervision of the king's courts and in accordance with the common law's standards. Two fifteenth-century cases had established that the Church's use of these powers could be scrutinized. *Kayser's Case* of 1465 demonstrated that

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[17] PRO KB 9/452/60–63; KB 27/993, rex rot.7d; KB 29/140, rot.12. Stilman escaped, but in 1518 was recaptured and burnt.

[18] Lyndwood, *Provinciale*, 313k.

[19] Paul L. Hughes and James F. Larkin, eds., *Tudor Royal Proclamations*, 3 vols., New Haven, 1964–69, vol.1, no.122. This proclamation may have been issued in 1529 and reissued in revised form the following year: J.A. Guy, *The Public Career of Sir Thomas More*, Brighton, 1980, 172 n.164.

King's Bench could, in narrow circumstances, bail a suspected heretic.[20] John Kayser had been imprisoned for about three weeks upon the authority of the archbishop of Canterbury when a writ of privilege brought him before King's Bench, which bailed him for two terms until he produced a certificate of discharge from the archbishop. The rationale was that the alleged heresy (scorning the sentence of excommunication) had arisen out of a testamentary case before the archiepiscopal Court of Audience in which Kayser had obtained a writ of prohibition from King's Bench.[21] The jurisdictional issue remained crucial in the early 1530s. According to a reader at an inn of court (likely Gray's Inn), 'A man is sued in Common Bench bona fide [that is, not collusively] and is arrested on suspicion of heresy: the justices will not award a writ of privilege.'[22] Merely being a litigant in the common-law court did not entitle someone to this writ.

*Warner's Case* of 1495 had broader implications. Having been arrested on suspicion of heresy, Hilary Warner successfully sued the officers of the bishop of London in Common Pleas for assault and false imprisonment.[23] The four defendants justified themselves with reference to the statute of 1401, explaining how Warner held an opinion 'contrary to the determination of Holy Church' (a quotation from the statute), namely that he was not obliged to pay tithes to the curate of his parish. As reported, the argument of counsel and justices turned on whether Warner's remark fell within the terms of that statute.[24] The court considered whether there was sufficient

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[20] PRO KB 27/818, rot.143d.

[21] Baker, *Reinvention*, 120–121.

[22] BL MS Hargrave 92, fo.128v.

[23] PRO CP 40/932, rot.276; CP 40/934, rot.327.

[24] YB Hil. 10 Hen. VII, fos.17a–18a, pl.17.

evidence of heresy. Warner's words might have been more favourably interpreted: he could have meant that he did not want to pay tithes, rather than that he was not obliged to. Perhaps there was a contextual explanation: maybe Warner said he should not pay because he had paid his tithes already, because someone else held them, or because the pope had absolved him from paying. The serjeants and justices also addressed whether the obligation to tithe was a matter of faith or merely a positive law, for only the former lay within the statute. We do not know on what basis Common Pleas found for Warner nor why, after the defendants had sued a writ of error, King's Bench confirmed its judgment.[25] Nevertheless, *Warner's Case* exemplifies how the assumption of statutory powers brought the Church's proceedings within the oversight of the common law, to the point where its definition of heresy might be debated.

Professor Baker has recently identified a reading delivered between 1530 and 1534 as 'the earliest detailed lecture in an inn of court on practical constitutional law'.[26] This reading has already been quoted in relation to *Kayser's Case*. It treated the Church's powers over heresy in terms of Convocation's capacity to make laws; these were also the first two items of the Supplication against the Ordinaries.[27] Discussing what laws Convocation could make to bind subjects' goods, the reader observed that when 'A man abjures heresy in the Convocation, they may assess a fine on him and the

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[25] PRO KB 27/945, rot.32; KB 29/128, rot.17.

[26] Baker, *Reinvention*, 101–109 (quotation at 107–108). The reading was on 14 Edw. III, st.1, c.14. The reader mentioned a statute of 1529 (21 Hen. VIII, c.13): BL MS Harg. 92, fo.121.

[27] BL MS Harg. 92, fo.122v.

estreat is in the Exchequer.'[28] Turning to the laws that might bind subjects' persons, the reader stated:

> They make a law that ordinaries may arrest heretics: one is arrested; no false imprisonment lies against him.
>
> Likewise, if they make a law that every priest who is of incontinent living will be imprisoned: if the ordinary imprisons him, no action lies against him.
>
> A contrary law is if the ordinary makes a law that priests that are common barrators etc. will be imprisoned: if the ordinary imprisons him, false imprisonment lies against him.
>
> So it is that if the ordinary imprisons any layman in any case except heresy, false imprisonment lies.
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> …
>
> The Convocation adjudge a dead man to be a heretic, and they make a law that he should be extracted and burnt, and the ordinary of the diocese does this: he is in the case of praemunire.

The laws that Convocation might make were thus dictated by the laws that Parliament had already made. Except for heresy, the Church's power to imprison was exercised only over the clergy for a single offence (fornication), and this too had been conferred

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[28] Cf. J.H. Baker, ed., *The Reports of Sir John Spelman* (Selden Society 93–94), 2 vols., London, 1977–78, vol.1, 139.

by Parliament.[29] The burning of heretics, living or dead, also had to comply with statute. The reader may have had in mind the exhumation and cremation of William Tracy, ordered by Convocation in May 1532, for which action the vicar-general of the absentee bishop of Worcester was fined.[30]

The laws against heresy had faced occasional criticism in Parliament during the fifteenth century.[31] The principal complaint at that time, long periods of pre-trial detention, endured into the 1530s. In 1515, the Commons passed a bill 'concerning heresies' whose content is unknown.[32] The probable explanation for this bill was the scandalous death in custody the previous year of Richard Hunne, a London merchant held on suspicion of heresy, which the coroner's jury found to be murder, accusing the bishop of London's chancellor. The Church's attempt to prove posthumously that Hunne had been a heretic did not convince everyone, while his family endeavoured to keep his fate in the public eye in 1523 (when Parliament next met) and again in 1529.[33] The spread of Lutheran ideas meant that from the late 1520s the prosecution of heresy faced a more concerted challenge that disseminated its message through preaching and print. Evidence of that message's resonance is Thomas More's attempted refutation in

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[29] 1 Hen. VII, c.4.

[30] Gerald Bray, ed., *Records of Convocation VII: Canterbury 1509–1603*, Woodbridge, 2006, 138, 141–142, 147–148, 185; *Hall's Chronicle*, London, 1809, 796–797. See note 134 below.

[31] Chris Given-Wilson, gen. ed., *The Parliament Rolls of Medieval England, 1275–1504*, 16 vols., Woodbridge, 2005, vol.8, 464–465; ibid., vol.10, 22, 270.

[32] *Journal of the House of Lords I: 1509–1577*, London, 1802, 56.

[33] J. Fines, ed., 'The Post-Mortem Condemnation for Heresy of Richard Hunne', 78 *English Historical Review* (1963), 528; Cavill, 'Heresy, Law and the State', 284–288.

his *Dialogue concerning Heresies* of June 1529. Through a plain-speaking but congenial character called the Messenger, More raised only to rebut objections to heresy proceedings, both generally and over particular cases (including Hunne's). While the Messenger abhorred true heresy, he thought the clergy treated it as a catch-all term to repress their critics. No great skill was required, the Messenger averred, 'to make it seme that a man shold be an heretyque'.[34] More endeavoured to reverse the Messenger's impression that the charismatic preacher Thomas Bilney had been unfairly treated at his first trial in 1527.[35]

The impetus behind the criticism that crystallized in the Supplication against the Ordinaries possibly lay not in the conduct of a generic trial, but rather in a small number of high-profile recent cases. A calendar of notable punishments may have impressed itself on the minds of the political nation. London chronicles recorded much activity in the months preceding the opening of the third session of the Reformation Parliament in January 1532: on 19 August, the burning of Bilney at Norwich; on 22 October, the penance of the merchant Thomas Patmore at Paul's Cross; on 5 November, the penance of two more men; on 11 November, the perpetual imprisonment of two others, one of whom, a priest, was brother to and namesake of Thomas Patmore; on 27 November, the burning of the monk Richard Bayfield at Smithfield; on 20 December, another burning,

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[34] Richard S. Sylvester, gen. ed., *The Complete Works of St. Thomas More*, 15 vols., New Haven, 1963–97, vol.6, pt.1, 30.

[35] Ibid., vol.6, pt.1, 255–279. Cf. Martin Ingram, *Carnal Knowledge: Regulating Sex in England, 1470–1600*, Cambridge, 2017, 264.

this time of a Londoner, the leather-seller John Tewkesbury.[36] The Patmore brothers complained to the king about their continuing imprisonment, and the merchant's servant would try to raise his master's predicament in the next session of Parliament.[37] Bilney's burning provoked controversy partly because Norwich's mayor, Edward Rede, had challenged the trial proceedings. Rede thought that, in fairness, the judge ought to admit Bilney's answers, even though they were insufficient in law; he endorsed Bilney's appeal to the king, which he believed was warranted on the ground of Henry's new title of 'supreme head' conceded by Convocation six months earlier; and he subverted the moral of Bilney's execution, throwing doubt on whether he had recanted at the stake.[38] As MP for the city, Rede was well placed to share his opinion when Parliament reassembled. Meanwhile, the intensifying of the campaign for the annulment of the king's marriage strengthened the regime's willingness to intimidate the English Church by countenancing anticlerical ideas. These different impulses resulted in the Supplication against the Ordinaries.

## III. The Supplication against the Ordinaries (1532)

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[36] C.L. Kingsford, ed., 'Two London Chronicles, from the Collections of John Stow', in *Camden Miscellany XII* (Camden Society Third Series 18), London, 1910, 5. This point is made in Susan Brigden, *London and the Reformation*, Oxford, 1989, 197–198.

[37] Foxe, *Actes and Monuments*, vol.2, 1044–45; PRO SP 1/70, fos.2v–3, calendared in J.S. Brewer, James Gairdner, and R.H. Brodie, eds., *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII* (hereafter *LP*), 21 vols., London, 1862–1932, vol.5, no.982.

[38] PRO SP 1/68, fos.75–77 (*LP*, vol.5, no.569), printed in Josiah Pratt, ed., *The Acts and Monuments of John Foxe*, 8 vols., rev. 4th ed., London, 1877, vol.4, app.6.

On 18 March 1532, a delegation of MPs presented the Supplication against the Ordinaries to Henry VIII.[39] The name reflected the focus on the exercise of ecclesiastical jurisdiction: ordinaries were the bishops and other clergy acting in judicial capacity over the souls in their charge.[40] The first item in the Supplication complained that in Convocation the clergy legislated without the king's approval and the laity's assent. The second item addressed proceedings in the church courts. Complaint focused on the office side rather than the instance (or party-versus-party) side. In this criminal or correctional dimension, cases could be instigated *ex officio* by the judge himself. The judge acted as an investigating magistrate, in a process that canon law (though seldom English church courts) called 'inquisition'.[41] The justification for dispensing with the requirement for an accuser was that fame took the accuser's place.[42] 'Fame' was what people in the neighbourhood were saying (hence 'voice' was a synonym). Common or public fame was the quantum of fame sufficient to substitute for an accuser.[43]

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[39] PRO SP 6/1, fos.86–95v (*LP*, vol.5, no.1016/1), printed in C.H. Williams, ed., *English Historical Documents V: 1485–1558*, London, 1967, 732–736.

[40] Lyndwood, *Provinciale*, 16–17l, 17a.

[41] Henry Angsar Kelly has written extensively on inquisitorial procedure in relation to England. His latest work, *Criminal-Inquisitorial Trials in English Church Courts*, is forthcoming in 2023.

[42] James A. Brundage, 'Proof in Canonical Criminal Law', 11 *Continuity and Change* (1996), 329, at 333–335.

[43] Lyndwood, *Provinciale*, 113–114f; A. Percival Moore, ed., 'Proceedings of the Ecclesiastical Courts in the Archdeaconry of Leicester, 1516–1535', 28 *Associated Architectural Societies' Reports and Papers* (1905–06), 593, at 605; William Hale Hale, ed., *A Series of Precedents and Proceedings in Criminal Causes, extending from the Year 1475 to 1640; Extracted from*

According to the Supplication, however, church courts were citing laypeople 'without any provable cause'. They did so based on neither an accusation, nor 'credible fame', nor presentment in a visitation; instead, they relied upon the mere 'Suggestion of their Somoners', who were 'very lighte and undyscryte persons'. Some of those so cited were held in custody for six months without bail before they could answer. Once in court, they were required to answer 'Subtyle questyons and interygotaries' by which they might be entrapped through ignorance. Others were convicted on the flimsy evidence of only two witnesses, no matter how discreditable or hostile these were. People were then required either to perform public penance or to redeem it for money. Their reputations, property, and even their lives were thus endangered 'uppon the onelye will and pleasure of the ordynaries'.[44]

Discrepant views were represented within the Supplication. Drafts surviving among Thomas Cromwell's papers include revisions in his hand and that of the King's Serjeant Thomas Audley, the Commons' Speaker.[45] The final version evinces the unevenness of tone of a text developed in stages by several minds. *Ex officio* prosecution was described as a nuisance, expense, and embarrassment, but also as a threat to liberty, livelihood, and life itself. The explanation lies in a failure to resolve

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*Act-Books of Ecclesiastical Courts in the Diocese of London*, London, 1847, no.303. Cf. Serjeant Mordaunt's comment in *Warner's Case*: YB Hil. 10 Hen. VII, fo.17b, pl.17.

[44] PRO SP 6/1, fos.87v–90, printed in Williams, ed., *English Historical Documents*, 733–734.

[45] Their interpretation is debated in G.R. Elton, 'The Commons' Supplication of 1532: Parliamentary Manoeuvres in the Reign of Henry VIII', 66 *English Historical Review* (1951), 507, and J.P. Cooper, 'The Supplication against the Ordinaries Reconsidered', 72 *English Historical Review* (1957), 616.

whether the grievance was *ex officio* prosecution in general or *ex officio* prosecution of heresy specifically. Several complaints implicitly related to heresy trials: long periods of detention, questioning (presumably on points of doctrine) that baffled 'a well wytted ley man', and serious jeopardy.[46] The final version of the Supplication turned a prior complaint about public penance for heresy (entailing the bearing of a symbolic faggot) into one about generic public penance.[47] It made two somewhat-contradictory requests: that, if necessary, 'more dredfull and terreble lawes' against heresy be passed and that 'som charitable' process be devised that did not depend upon *ex officio* prosecution. Opinion was divided. A draft bill shadowing the Supplication would have banned office prosecutions in the absence of pre-certified fame, accusation, or presentment in a visitation for all offences *except* heresy.[48] Here we may infer a division within Parliament between those who thought that the seriousness of the threat from heresy outweighed reservations about procedure in church courts and those who thought that these reservations made that procedure especially objectionable in cases of heresy because the consequences were more severe. The Supplication's criticism had three dimensions that will now be considered in turn: the basis on which cases were brought, the evidence used to decide them, and the treatment of suspects and convicts.

### *1. Instigation*

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[46] A draft did so explicitly: PRO SP 6/7, fos.98–99v (*LP*, vol.5, no.1016/4), printed in Roger Bigelow Merriman, ed., *Life and Letters of Thomas Cromwell*, 2 vols., Oxford, 1902, vol.1, 107–108.

[47] PRO SP 2/L, fo.173 (*LP*, vol.5, no.1016/2).

[48] PRO SP 2/M, fo.230 (*LP*, vol.5, app.28).

The issue that *ex officio* prosecution raised was who, in the absence of a formal accuser, was the source of an allegation. Somewhat unfairly, the Supplication blamed summoners.[49] Since summoners cited people to court, this suspicion was bound to arise. Respondents acknowledged that summoners were unlikely to be behind an allegation when they menacingly demanded to know who had cited them. Though literally true, it was a provocation when a summoner replied that he did so himself.[50] Money may have been presumed as the motive, since the more cases for which a summoner was responsible, the greater his fees.[51] Moreover, fame was a relatively low bar on which to initiate cases, particularly when compared with the common law's presenting juries, which were supposed to base findings on personal knowledge or sworn evidence.[52] Fame was diffuse rather than attributable. It was a memorable day in court when forty women appeared to affirm the common fame that their neighbour was a scold.[53] Only when a defendant was before the judge could they demand an inquiry into the existence

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[49] Richard Wunderli, 'Pre-Reformation London Summoners and the Murder of Richard Hunne', 33 *Journal of Ecclesiastical History* (1982), 209, at 211.

[50] Hale, ed., *London*, nos.227, 277, 315.

[51] Wunderli, 'Summoners', 213–215.

[52] Cf. note 155 below.

[53] E.M. Elvey, ed., *The Courts of the Archdeaconry of Buckingham, 1483–1523* (Buckinghamshire Record Society 19), Welwyn Garden City, 1975, no.389. It may be relevant that forty was the maximum number of witnesses allowed in a civil suit: *Decretales Gregorii IX*, 2.20.37, in Emil Friedberg, ed., *Corpus Iuris Canonici*, 2 vols., 2nd ed., Leipzig, 1879–81, vol.2, col.331.

of fame.[54] In 1517, trustworthy men established that Richard Grimm was not defamed for heresy and so he was dismissed.[55] Under examination in 1532, John Lambert observed that having to answer in the absence of infamy breached the canonical privilege against self-incrimination.[56] Most office cases, at least as recorded, were solely between the court and the individual. So the Supplication had a point when it complained that cases were brought without a proper basis, if only because it was hard to tell whether they were or not.

Yet in many office cases, it must have been obvious that particular people were behind an allegation. This is apparent in prosecutions for defamation, which were a notable feature of London's commissary court.[57] One such case of 1512 began conventionally when John Bywater was noted as a common defamer but especially of James Taylor, whom he had accused of fornication with Agnes Pyperd. But Bywater brought Agnes with him to court, where she confessed; since Agnes had a mental disability, the case pivoted to an office prosecution of Taylor for his abuse of a vulnerable individual.[58] Denunciation and defamation were thus two sides of the same

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[54] E.g., Hertfordshire Archives and Local Studies (HALS) ASA7/1, fo.6 (inquiry by '*testes sinodales et inquisitores*'); West Sussex Record Office (WSRO) Ep/I/10/1, fo.38 (adjournment so that judge '*audiat famam in parochia ibidem*'); Moore, ed., 'Leicester', 612–613.

[55] Margaret Bowker, ed., *An Episcopal Court Book for the Diocese of Lincoln, 1514–1520* (Lincoln Record Society 61), Lincoln, 1967, 33.

[56] Foxe, *Actes and Monuments*, vol.2, 1102, 1119 (quoting the maxim '*Nemo tenetur prodere seipsum*'). Cf. Lyndwood, *Provinciale*, 312k, 312o.

[57] Ingram, *Carnal Knowledge*, 67–68, 82, 99, 167, 184, 195.

[58] London Metropolitan Archives (LMA) DL/C/B/043/MS09064/011, fo.75v.

coin when it came to reporting an offence for investigation.[59] The detection of the Lollard John Bocking in 1493 originated in the prosecution of a man for defaming him.[60] Someone making an imputation of heresy outside court was expected to prove it in court.[61] To bring a defamation action was also to detect oneself. In 1529, Ralph Gammon's case against William Burgess was entered not only in the instance book of St Albans Abbey but also in its correction book, which added that Gammon had to purge himself of the imputed crime (abetting a rape).[62] Surely, it was the propensity of neighbours to defame each other that led to those petty and vexatious office cases that, according to the Supplication, 'dayly' troubled the king's subjects, 'and specially those that be of the porest sorte'.

There also existed formal ways to instigate an office case. Detection to the court was a possibility. In 1511, two men from High Wycombe detected a third man for heresy and were then examined separately under oath, presumably in preparation for an office case.[63] Someone could also promote a prosecution, including for heresy; this happened in *Kayser's Case*, where the plaintiff in the testamentary case had instigated the *ex officio* prosecution.[64] A promoted case was a hybrid that combined elements of

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[59] Ian Forrest, 'Defamation, Heresy and Late Medieval Social Life', in Linda Clark, Maureen Jurkowski, and Colin Richmond, eds., *Image, Text and Church, 1380–1600: Essays for Margaret Aston*, Toronto, 2009, 142.

[60] Hale, ed., *London*, no.134.

[61] Moore, ed., 'Leicester', 629–630.

[62] HALS ASA7/2, fo.52; ASA7/1, fo.54v.

[63] Elvey, ed., *Buckingham*, no.304. This entry corresponds to the first two steps in Kelly, 'Thomas More', 878.

[64] PRO KB 27/818, rot.143d.

instance and office procedure: for example, an unsuccessful promoter was liable for expenses.[65] In 1507 or 1508, William Cowper of Birdham (Sussex), promoting a case against William Heywood for bewitching his neighbours' ale, asked that instead 'the judge proceed against the said William [Heywood] by his office alone (*ex officio suo mero*) by way of denunciation, because the common fame labours in the aforesaid parish that the aforesaid William is noted for this kind of magical art'.[66] Fame was thus not the only basis on which offices cases were brought, though it may have been preferred. In sum, even though office cases were formally brought by the judge, overwhelmingly laypeople must have instigated them. A problem of perception gave rise to a plausible, but possibly unfair, criticism.

***2. Proof***

The second dimension of the Supplication's criticism concerned the standard of proof in church courts. The Supplication complained about the quantity and quality of witnesses. That two witnesses amounted to full proof was axiomatic in canon law.[67] It was a rule based on Scripture, as Convocation observed in its reply.[68] The Supplication presumed a literal application of the rule that tied the judge's hands, requiring him to accept as

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[65] WSRO Ep/I/10/2, fos.8v, 20v–21, 33, 38v (*Smyth* c *Hull*).

[66] WSRO Ep/I/10/1, fo.34.

[67] Brundage, 'Proof', 331.

[68] PRO SP 6/7, fo.118 (*LP*, vol.5, no.1016/5), printed in Henry Gee and William John Hardy, eds., *Documents Illustrative of English Church History*, London, 1896, 164.

proven anything attested by two witnesses.[69] Such criticism undoubtedly conferred a misleadingly arithmetical rigidity on the rule.[70] The common law also recognized the two-witness rule but did not apply it to jury trials.[71] The reason was that, formally, the jurors were held to be the witnesses. According to Sir John Fortescue, two witnesses were a minimum, twelve witnesses a superior standard of proof.[72] This meant that common law required no additional standard of proof. A jury could convict on the testimony of a single witness, as purportedly happened at Thomas More's own trial.[73] A miscarriage of justice occurred at the Suffolk assizes in 1538 when a father was convicted of murder on the evidence of his young son and subsequently hanged, only for the supposed victim to reappear alive and well.[74] A jury could even convict with no witnesses at all. That trial by jury might make conviction easier was acknowledged in a

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[69] Cf. Sir John Fortescue, *De Laudibus Legum Anglie*, ed. S.B. Chrimes, Cambridge, 1942, chs.20–21.

[70] W. Ullmann, 'Medieval Principles of Evidence', 62 *Law Quarterly Review* (1946), 77, at 82–83; Richard M. Fraher, 'Conviction according to Conscience: The Medieval Jurists' Debate concerning Judicial Discretion and the Law of Proof', 7 *Law and History Review* (1989), 23, at 27–29.

[71] J.H. Baker, ed., *Reports of Cases from the Time of King Henry VIII* (Selden Society 120–121), 2 vols., London, 2003–04, vol.2, 333.

[72] Fortescue, *De Laudibus*, ed. Chrimes, chs.31–32.

[73] L.M. Hill, 'The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law', 12 *American Journal of Legal History* (1968), 95, at 99–101.

[74] Baker, ed., *Spelman*, vol.1, 60.

statute of 1536 that transferred the prosecution of piracy from civil law to common law because witnesses were unobtainable.[75]

The Supplication also complained about the quality of witnesses, alleging them to be disreputable, untrustworthy, and malicious. Although in canon law many categories of person were inadmissible, in practice witnesses testified and afterwards had their capacity contested.[76] In 1518, suspected of relapse into heresy, Thomas Man alleged that one witness against him was an adulterer and that the other was too young.[77] But heresy was – as Convocation conceded – a crime for which 'no excepcione [to witnesses] is necessarie to be considered'.[78] Evidence from perjured witnesses was thus admissible, which appalled Christopher St German. This was justified, Thomas More responded, because co-believers might previously have denied their own involvement under oath.[79] The Supplication also complained about hostile witnesses. That witnesses did not testify in open court (unlike in common law) may

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[75] 27 Hen. VIII, c.4.

[76] Charles Donahue, Jr., 'Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law', in Morris S. Arnold, Thomas A. Green, Sally A. Scully, and Stephen D. White, eds., *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, Chapel Hill, 1981, 127.

[77] Foxe, *Actes and Monuments*, vol.2, 816.

[78] PRO SP 6/7, fo.118 (*LP*, vol.5, no.1016/5), printed in Gee and Hardy, eds., *Documents*, 164; Lyndwood, *Provinciale*, 304g.

[79] *Liber Sextus*, 5.2.8, in Friedberg, ed., *Corpus Iuris Canonici*, vol.2, col.1072; Sylvester, gen. ed., *Complete Works*, vol.9, 135–137, 189; ibid., vol.10, 146–161, 359–362. E.g., Foxe, *Actes and Monuments*, vol.2, 820–821.

have accentuated the impression that malicious testimony was being credited.[80] Heresy suspects could, however, allege enmity in a witness.[81] St German objected how canon law permitted the non-disclosure of witnesses' identities; it did, however, envisage the defendant writing down a list of their enemies.[82] Judges must have become expert at sifting statements and at inferring motivation. Witness evidence was evaluated, rather than automatically credited. It might fall short, including in cases of heresy.[83] The difficulty was not that judges were credulous, but perhaps rather that they reached their decisions without giving reasons. In a legal culture where denigrating opposing witnesses was normal (not only in the church courts but also in the equitable and conciliar courts), a standard of proof that depended on a subjective evaluation of testimony looked vulnerable. Of course, the common law merely concealed the problem behind the jury.

The other source of evidence in heresy trials was the examination of suspects. This the Supplication characterized as entrapment. The objective of examination where

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[80] A suspect who refused to confess was confronted with inculpatory testimony and then with the witnesses 'face to face': e.g., Norman Tanner, ed., *Kent Heresy Proceedings 1511–12* (Kent Records 26), Maidstone, 1997, 18, 22.

[81] BL MS Harl. 421, fos.30, 33.

[82] Sylvester, gen. ed., *Complete Works*, vol.9, 137–139, 189–190; Lyndwood, *Provinciale*, 305f; Shannon McSheffrey and Norman Tanner, eds., *Lollards of Coventry, 1486–1522* (Camden Society Fifth Series 23), Cambridge, 2003, 251. Witnesses were vulnerable to intimidation: ibid., 200; Foxe, *Actes and Monuments*, vol.2, 829.

[83] Wiltshire and Swindon History Centre D1/2/14, fos.169v–170 (abjuration by Henry Courtman of light suspicion only because 'the said witnes have not clerlie and fullie provid that heresie agenst me' in 1503); McSheffrey and Tanner, eds., *Coventry*, 207, 249.

someone was strongly suspected was confession (followed by abjuration) rather than conviction, which were differentiated even though the former entailed the latter.[84] It is therefore difficult to accept that interrogation set out to trick people into inadvertent heresy. The Supplication's complaint that laypeople were asked esoteric points of doctrine is not borne out. Articles presented to lay suspects were tailored and did not form a questionnaire. Nine of the twenty-four articles laid against the merchant Humphrey Monmouth in 1528 concerned his beliefs, but they were based on his own words, and none was recondite.[85] By contrast, the clergymen Thomas Bilney and Thomas Arthur were presented with thirty-three doctrinal questions.[86] In 1533, a layman caught in possession of erroneous texts would be allowed to disavow the contents, rather than face interrogation about the ideas within these works.[87] A coercive element was that a suspect answered articles under oath, 'without havyng eny copy or counsell' according to one draft of the Supplication.[88] Yet the Supplication as presented omitted this objection, maybe because it resonated with the Protestant critique of excessive oath-taking more than it did with MPs, who would have been aware of the use of sworn examination in the conciliar and equitable courts too.[89] Overall, it seems more

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[84] E.g., Ralph Houlbrooke, *Church Courts and the People during the English Reformation*, 1520–1570, Oxford, 1979, 224.

[85] BL MS Harl. 425, fo.9.

[86] LMA DL/A/A/005/MS09531/010, fos.117v–118v, printed in Pratt, ed., *Acts and Monuments*, vol.4, app.7.

[87] WSRO Ep/I/10/5, fo.9 (Thomas White).

[88] PRO SP 2/L, fo.181 (*LP*, vol.5, no.1016/3). Reluctant suspects might be persuaded or coerced into taking the oath: BL MS Harl. 421, fos.19v–20.

[89] William Tyndale, *The Obedience of a Christen Man*, Antwerp, 1528, fo.52.

plausible to propose that someone suspected of heresy was pushed to respond in a way that accorded with the witness evidence against them, rather than that their words under examination were taken in isolation against them.[90] Someone who admitted nothing and against whom there was bare suspicion could not be made to inculpate themselves.

### *3. Punishment*

The third dimension of the Supplication's criticism addressed the treatment of suspects and convicts. Pre-trial detention was more contentious than post-conviction imprisonment. The statute of 1401 had envisaged suspects being detained for up to three months. Yet, the Supplication complained, people were being imprisoned for half a year or even longer. One reason was that a suspect who refused to respond to articles or to confess obvious guilt prolonged their detention. The Patmore brothers remained in custody because they declined to answer on the grounds that they were not defamed.[91] John Lambert informed Archbishop Warham that 'by long imprisonment you enforced me to tell what I thought'.[92] Extending custody did, however, put off relinquishment to the secular arm as an obstinate heretic. A protracted and oppressive imprisonment was thus reserved for those who could be saved, rather than for the relapsed.[93] Detention worked: as Bishop Blyth of Coventry and Lichfield told Bishop Smith of Lincoln, 'They will not confesse but by payne of prisonment.'[94] Severe conditions could cause

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[90] E.g., McSheffrey and Tanner, eds., *Coventry*, 225.

[91] Foxe, *Actes and Monuments*, vol.2, 1044–45.

[92] Ibid., vol.2, 1102.

[93] Ibid., vol.1, 775; ibid., vol.2, 817.

[94] McSheffrey and Tanner, eds., *Coventry*, 139.

permanent damage: after fourteen weeks in Smith's custody, one man apparently could never walk upright again.[95] Close confinement and enforced fasting were inflicted in the belief that physical pain aided the endangered soul.[96] The confinement of convicted heretics in religious houses was thus a 'perpetual penance'.[97] The penitential treatment of Richard Hunne in custody was, however, construed by the coroner's jury as evidence of his gaolers' malevolence.[98] So the spiritual benefit of imprisonment was not necessarily apparent to laypeople, who may have assumed that the charitable thing to do was invariably to relieve prisoners.[99]

The punishment identified in the Supplication was public penance or its redemption for money. As noted already, the final version turned a specific complaint about heresy into a general one. The Supplication stressed the shame of 'opene penaunce', and, indeed, the prospect made one man feel suicidal.[100] The elicitation of shame was intended as a route to repentance and reform.[101] One reason for a judge to commute a penance was thus when someone already appeared contrite.[102] The public

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[95] Foxe, *Actes and Monuments*, vol.1, 774.

[96] Sara M. Butler, *Pain, Penance, and Protest: Peine Forte et Dure in Medieval England*, Cambridge, 2022, ch.4.

[97] Tanner, ed., *Kent*, 99, 104, 107, 111, 113; Foxe, *Actes and Monuments*, vol.2, 837.

[98] Anon., *The Enquirie and Verdite of the Quest Panneld of the Death of Richard Hune*, Antwerp, [*c.*1537], sigs.b2, c1v.

[99] This would have been Edward Rede's view: William Hudson and John Cottingham Tingey, eds., *The Records of the City of Norwich*, 2 vols., Norwich, 1906–10, vol.2, no.278.

[100] Elvey, ed., *Buckingham*, no.344, p.252.

[101] Ingram, *Carnal Knowledge*, 75–77, 108–115, 207–210.

[102] E.g., Hale, ed., *London*, no.333.

nature of penance entailed reconciliation as well as humiliation. Spectators were expected to behave respectfully: a heckler who called out 'horsone heretyck' was ordered to undergo penance himself.[103] The public penance imposed on heretics was specific to the crime and usually involved carrying a faggot. That anticipated for Richard Hunne was 'so grevouse ... that whan men heare of hit, they shal have greate mervayle ther of'.[104] Whether or not Hunne killed himself at the prospect, it seemed plausible that he might have done.[105] That someone had undergone such a penance 'was opynly said in the countre ther aftur his commyng home'.[106] The branding of cheeks and the wearing of badges ensured that convictions were remembered.[107] The redemption of penance was not unheard of in heresy cases. Richard Saunders 'bought out his penance, and caryed hys badge in hys purse'; the bishop of Lincoln's commissary allegedly accepted £20 from the vicar of Little Missenden to be excused.[108] The draft bill shadowing the Supplication complained that judges required excessive sums for redeeming penances and then retained the money, which should have been disbursed in charity.[109] In sum, the Supplication criticized almost every aspect of the

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[103] BL MS Harl. 421, fo.31.

[104] Anon., *Enquirie and Verdite*, sig.c2v.

[105] Supposed suicides in custody are discussed in G.W. Bernard, *The Late Medieval English Church: Vitality and Vulnerability before the Break with Rome*, New Haven, 2012, 14–15.

[106] BL MS Harl. 421, fo.26.

[107] Badges might be remitted or illegally removed, brands concealed beneath beards and hats: Bowker, ed., *Lincoln*, 15–17; Foxe, *Actes and Monuments*, vol.2, 804–805, 816, 818, 838.

[108] Foxe, *Actes and Monuments*, vol.2, 825. Cf. Bowker, ed., *Lincoln*, xxii.

[109] PRO SP 2/M, fo.229 (*LP*, vol.5, app.28). Cf. Lyndwood, *Provinciale*, 261cc.

Church's proceedings against heresy; what it did not offer was an alternative, though it recognized the need for one, given the threat heresy posed.

**IV. The New Heresy Act (1534)**

The Supplication against the Ordinaries had only a minor effect on the church courts. The sole complaint immediately to be relieved by legislation concerned people being cited outside their own diocese.[110] The objection to Convocation's autonomy was also resolved. On 16 May 1532, two days after Parliament's prorogation, the clergy capitulated. The Submission of the Clergy agreed that henceforth Convocation would assemble only by royal command and legislate only with the king's agreement.[111] Ironically, the Submission prevented Convocation from enacting a draft constitution that would have addressed the grievances over the instigation of *ex officio* prosecutions and over excessive penances.[112] The king's attitude to the rest of the Supplication was sympathetic but noncommittal. According to the imperial ambassador, Henry offered 'to remedy the rigour of the inquisition' (the terminology was possibly the ambassador's rather than the king's).[113] The royal response disappointed the MP Jasper Fyloll, who imagined a more forceful one in which Henry swept aside Convocation's

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[110] PRO SP 6/1, fo.90, printed in Williams, ed., *English Historical Documents*, 734; 23 Hen. VIII, c.9.

[111] Bray, ed., *Records of Convocation*, 188–190.

[112] Ibid., 149, 156–157; Gerald Bray, ed., *The Anglican Canons 1529–1947* (Church of England Record Society 6), Woodbridge, 1998, 16–19.

[113] Quoted in G.W. Bernard, *The King's Reformation: Henry VIII and the Remaking of the English Church*, New Haven, 2005, 64.

answer and turned the scriptural sword of justice against the clergy, since as simoniacs they were worse heretics than those whom they accused. Fyloll was frustrated that nothing was achieved at the next session of Parliament in spring 1533. So he prayed, 'The grace of god and of good kyng harry ... graunte that the byll of the laye commons callyd the byll ex officio may have good furtheraunce and spede.'[114] This prayer would be answered in the fifth session of Parliament of January to March 1534.

In this session, the Commons returned to the Supplication as unfinished business. Now the focus was on the prosecution of heresy specifically rather than on office cases generally. The trigger may have been a petition that Thomas Phillip presented to the Commons early in the session.[115] Phillip's supposed predicament personified the need for reform. He had been arrested three Christmases ago at the behest of Bishop Stokesley of London and been in custody ever since. The twelfth article against Phillip alleged the 'comen voyce And fame' around London. This Phillip flatly denied: there was no fame against him, but rather the contrary, for 'all the people before the sayd bushop showtynge in Judgement as with one voyce openly wyttnessed hys good name and fame'. Unable to prove any of the articles, Stokesley detained him in the hope of obtaining a confession and thereby salvaging episcopal honour. Phillip's petition identified the authority for his arrest and detention as the statute of 1401. Phillip

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[114] Anon., *Enormytees usyd by the Clergy*, London, [1533], sigs.B4v, C2v–C5v. Authorship and date are established in Richard Rex, 'Jasper Fyloll and the Enormities of the Clergy: Two Tracts Written during the Reformation Parliament', 31 *Sixteenth Century Journal* (2000), 1043.

[115] PRO SP 2/P, fos.141–144 (*LP*, vol.7, no.155), printed in Pratt, ed., *Acts and Monuments*, vol.5, app.2.

deduced that 'the bushop was in thys caase but an inferyor mynyster' to the king. On 7 February, the Commons sent Phillip's petition to the Lords. The Lords (with Stokesley in attendance) dismissed the petition as beneath their dignity and returned it to the Commons. On 1 March, a delegation of MPs tried to get the bishop to respond to Phillip's petition, but the Lords refused him permission to do so.[116] This rebuff likely contributed to the Commons' decision to revive the Supplication four days later.[117]

Phillip's petition focused attention on the statute of 1401. Dissatisfaction with this statute is evident in a quire endorsed 'Certain demands put to the clergy for heresies'.[118] This document rehearsed the three heresy statutes of 1382, 1401, and 1414. Against the statute of 1401 were posed rhetorical questions that objected to its failure to define terms: '[what] calle ye heretyke', the critic began by asking. At the end, these observations were summarized: 'In this forsaid Acte was forgoten to declare what ys an heretyk, what be the poyntes of heresy, what ys the determination of holy chirche' and so on. The critic demanded 'what will be taken for reasonable excuse' allowed for in the statute when proceedings were not concluded within three months: this was the loophole through which Stokesley had continued to detain Phillip. There followed a list of nine statutes that upheld due process, beginning with Chapter 29 of Magna Carta.[119] This juxtaposition implied the incompatibility of the statute of 1401 with the law of the

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[116] *Journal of the House of Lords*, 65–66, 71.

[117] BL MS Harl. 2252, fos.34v–35 (*LP*, vol.7, no.399), printed in S.E. Lehmberg, *The Reformation Parliament, 1529–1536*, Cambridge, 1970, 193.

[118] PRO SP 1/82, fos.54–58v (*LP*, vol.7, no.60). The endorsement is no longer visible.

[119] Westminster I, c.26; 5 Edw. III, c.9; 25 Edw. III, st.5, c.4; 28 Edw. III, c.3; 37 Edw. III, c.18; 42 Edw. III, c.3; 17 Ric. II, c.6; 4 Hen. IV, c.22 (alternatively, c.23).

land. Secular powers conferred upon the Church, it suggested, needed to be exercised in accordance with common-law rules of due process enshrined in legislation. The statute of 1401 was thus irredeemable, and the new heresy act would repeal it. The preamble asserted that no one should be convicted and so lose their life, property, or good name, 'onles it were by due accusacion and wytnes, or by presentment verdyd confession or proces of outlarye'. That this rule held even over high treason made it intolerable that an ordinary acted solely on 'hys owne fantasie without due accusacion or presentment'.[120]

The new heresy act had an unusual passage through Parliament during March. Introduced in the Commons, the original bill was comprehensively rewritten in the Lords under the supervision of Thomas Audley, now the Lord Chancellor.[121] In the Commons' bill, the sole form of prosecution was to become accusation.[122] In the absence of accusers, the church courts could take no action. The requirement for two accusers evoked the two-witness rule and so conflated the discrete roles of accuser and witness.[123] Only reputable individuals could serve as accusers. The exception to the canonical rules on admissibility was thus eliminated. The ordinary could cite, but neither arrest nor imprison, a suspect. The suspect was entitled to know the accusers' names. The suspect was also to receive a copy of the libel (that is, the accusers' statement of their case), which extended the pre-existing statutory requirement on the

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[120] 25 Hen. VIII, c.14.

[121] *Journal of the House of Lords*, 80–81.

[122] BL MS Harl. 2252, fos.35v–36 (*LP*, vol.7, no.399).

[123] Heresy was an exception to the rule that an accuser could not also be a witness: Lyndwood, *Provinciale*, 304g; PRO SP 1/131, fo.52 (*LP*, vol.13, pt.1, no.715); Corpus Christi College, Cambridge (CCCC) MS 128, p.230 (*LP*, vol.18, pt.2, no.546, p.349).

instance side.[124] The ordinary could not, however, convict the defendant. Instead, he referred the case to the next quarter sessions, thereby providing the indictment upon which a trial jury gave its verdict. A defendant found guilty would have to abjure within twelve days or be burned. An acquitted defendant could sue their accusers for conspiracy. This bill thus displaced the church courts, which could not initiate office cases, detain suspects, or give judgment. A higher bar for prosecution was set than for any other offence dealt with by church courts. And no one would lose their life who had not been judged by their peers. Remarkably, the Commons' bill would have taken the definition of heresy out of the Church's hands. The offence was to be confined to denying the twelve articles of faith, the seven sacraments, and the decrees of the first two ecumenical councils (Nicaea in 325 and Constantinople in 381). This appears to be the first attempt to provide a comprehensive definition of heresy in secular law.[125]

The bill that passed made much less drastic changes.[126] It established two methods by which cases could be initiated. The first was through presentment in a lay court. The capacity to present was extended from assizes and quarter sessions to sheriffs' tourns, leets, and wapentakes, which required the minimum property qualification for jurors (laid down in 1414) to be reduced.[127] Presentments were to be

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[124] 2 Hen. V, st.1, c.3.

[125] In comparison, the definition enacted in 1559 was loose and provisional: 1 Eliz. I, c.1, s.20.

[126] Parliamentary Archives HL/PO/PU/1/1533/25H8n14.

[127] This extension may have endorsed existing practice: Margaret McGlynn, ed., *The Rights and Liberties of the English Church: Readings from the Pre-Reformation Inns of Court* (Selden Society 129), London, 2015, 161.

certified to the ordinary in the usual manner.[128] The second method was when someone was 'duly accused or detected therof by two lawfull wytnesses' to an ordinary. Despite the word 'accused', these two individuals were not required to assume the role of accusers, unlike in the Commons' bill. The crucial difference between the Lords' bill and its predecessor was thus that the ordinary could still proceed *ex officio*, so long as he did so based upon testimony from two or more reputable people. Moreover, the ordinary continued to be permitted to arrest and detain individuals who had been detected to him or been indicted. For that reason, the bill laid down a procedure by which those detained might be bailed with or without his consent. Trials were to be held in open court. The ordinary remained the judge of guilt or innocence. The sole definition of heresy provided was negative: the act excluded maligning the bishop of Rome and his laws. A convicted person who abjured was to be assigned a 'resonable penaunce' at the ordinary's discretion. Someone who either refused to abjure or had relapsed was to be burnt. Notwithstanding its preamble, the new act thus reaffirmed much existing practice. The statute of 1401 had been repealed only for aspects of it to be readopted. Although lay presentment was encouraged, heresy cases could still be initiated, tried, and judged entirely within the ecclesiastical system. The only essential involvement of lay authority followed relinquishment to the secular arm. Henceforth no one could be burnt without the Crown issuing the writ *de heretico comburendo*.

The requirement for this writ was central to common lawyers' understanding of the new act. Burning was the common-law punishment for heresy. Published the same

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[128] In 1537, London's court of aldermen recorded that the forwarding of an indictment was in accordance with this act: LMA COL/CA/01/01/009, fo.253.

year, the treatise on writs of Sir Anthony Fitzherbert explained why.[129] The thirteenth-century treatise Britton had prescribed burning: 'this is the common law', Fitzherbert stated.[130] The first writ *de heretico comburendo* for the Lollard William Sawtry, condemned by Convocation, had been issued during the Parliament of 1401 but before the act had passed.[131] Thereafter this statute had empowered each ordinary to convict a heretic and deliver them to a sheriff or mayor in attendance for burning.[132] Consequently, the writ was not to be found in the current register of writs, for there was no need to sue for it anymore. To Fitzherbert, the writ thus seemed 'as it were void'. In truth, the writ continued to be sought and issued after 1401.[133] If the model writ was the one for Sawtry, however, then Fitzherbert's deduction seemed sound, for this writ had described a judgment in Convocation and had predated the statute enabling ordinaries directly to relinquish offenders.[134] Fitzherbert then brought his discussion up to date: the

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[129] Sir Anthony Fitzherbert, *La Novel Natura Brevium*, London, 1534, fo.303.

[130] Francis Morgan Nichols, ed., *Britton*, 2 vols., Oxford, 1865, vol.1, 41–42.

[131] Given-Wilson, gen. ed., *Parliament Rolls*, vol.8, 108–109, 122–125.

[132] Kent Archives DRb/Ar/1/13, fos.135v–136 (bishop of London to mayor and sheriffs of London, requiring their presence to receive John Tewkesbury on 10 May 1529); Foxe, *Actes and Monuments*, vol.2, 1024 (the same to the same, to receive Richard Bayfield on 20 Nov. 1531). The former letter was superseded when Tewkesbury recanted.

[133] F. Donald Logan, *Excommunication and the Secular Arm in Medieval England: A Study in Legal Procedure from the Thirteenth to the Sixteenth Century*, Toronto, 1968, 191–194.

[134] If we apply Fitzherbert's analysis, then it was not the absence of a writ per se that made the burning of William Tracy's body illegal, but that a conviction in Convocation required a writ, which had not been sought. A writ had been sought for Hunne's body: PRO C

new act, by repealing that of 1401, had reinstated the requirement for the writ to be issued.[135] The act of 1534 had thus restored the *status quo ante*. Christopher St German remarked that, 'as to the correction of heresie, the kynge hath alwaye sene it doone in this realme: excepte the tyme that the statute that was made in the seconde yere of kyng Henry the .iiii. concerning heresies, stode in effecte'.[136] In this view, the new act had restored the historic responsibility of the Crown that had been temporarily interrupted between 1401 and 1534.

The new act may not greatly have changed heresy trials. Only if ordinaries had been summoning suspects on a whim and then entrapping them through esoteric questioning would it have transformed the conduct of trials. As Professor Kelly has shown, whatever reforms it purported to impose, the act in fact confirmed many existing rules of canon law.[137] Indeed, the draft new domestic code of canon law of 1535 reproduced these authorities.[138] Nevertheless, judges may have become more scrupulous about recording their compliance. For example, writs relinquishing heretics to the secular arm provided more information about the offence than they had in the

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85/126/26, printed in E. Jeffries Davis, 'The Authorities for the Case of Richard Hunne (1514–15)', 30 *English Historical Review* (1915), 477, at 487–488.

[135] One reason why Mary I's government would reinstate the statute of 1401 was because its law-officers, following Fitzherbert, assumed that otherwise only Convocation could relinquish a relapsed or obdurate heretic: Sir Robert Brooke, *La Graunde Abridgement*, London, 1573, pt.2, 24; 1&2 Phil. & Mar., c.6.

[136] Christopher St German, *The Addicions of Salem and Bizance*, London, 1534, fo.36v.

[137] Kelly, 'Thomas More', 882–889.

[138] Gerald Bray, ed., *Tudor Church Reform: The Henrician Canons of 1535 and the* Reformatio Legum Ecclesiasticarum (Church of England Record Society 8), Woodbridge, 2000, 10–17.

past, sometimes including the names of witnesses.[139] The act thus did have some effect: principally perhaps before cases reached the church courts, but also in the margins of their proceedings. Both may be inferred from a trial held in the diocese of Chichester in October and November 1534.[140]

The ageing bishop, Robert Sherborne, conducted himself with a tentativeness that reflected the politically sensitive nature of the crime and his own troubles with the Crown in recent years.[141] In a piece of nominative determinism, the defendant was called John Hogsflesh ('no less horrid in name than in deeds'). The case began when a curate had presented three articles against him to two JPs. Six JPs also witnessed a handwritten statement in which Hogsflesh denied the necessity of confession to a priest, which statement was forwarded to the bishop together with the curate's articles. Sherborne wrote to Archbishop Cranmer to ask whether such a denial was still heretical, because he gathered that a preacher at Paul's Cross had declared that auricular confession was not part of divine law. Cranmer reassured him that this belief was indeed still erroneous, pointing him to canon law for confirmation.[142] The duke of Norfolk relayed the king's encouragement to prosecute. In the meantime, Sherborne

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[139] E.g., Lincolnshire Archives DIOC/REG/26, fos.270–271 (Lawrence Dawson: 21 Nov. 1536). Cf. Tanner, ed., *Kent*, 25.

[140] WSRO Ep/I/10/5, fos.80–90. Extracts are printed in C.E. Welch, 'Three Sussex Heresy Trials', 95 *Sussex Archaeological Collections* (1957), 59, at 65–70.

[141] S.J. Lander, 'The Diocese of Chichester, 1508–1558: Episcopal Reform under Robert Sherburne and its Aftermath', thesis submitted for the degree of Doctor of Philosophy, University of Cambridge, Cambridge, 1974, 18–22.

[142] *Decretum Gratiani*, D.1 de pen., in Friedberg, ed., *Corpus Iuris Canonici*, vol.1, cols.1159–90.

proceeded to investigate the curate's other articles, which Hogsflesh denied, whereupon he was detained in the bishop's prison. Even though two witnesses attested two of the curate's articles, the trial concentrated on confession, on which there was the incontrovertible personal statement. After a public debate, Hogsflesh agreed to abjure this belief and was assigned penance. One peer, four knights, and the mayor of Chichester were among the many in attendance. This documenting of lay involvement, both in a magisterial capacity and as an audience in open court, suggests that care was taken to comply with the new statute and to be seen to do so.

The royal supremacy extended to the exercise of ecclesiastical jurisdiction. It therefore changed the context in which heresy was prosecuted. The king could assume the role of final arbiter. Henry presided over the trial and condemnation of John Lambert in 1538.[143] The Crown also pardoned offences.[144] Royal commissions directed bishops, archdeacons, theologians, ecclesiastical lawyers, and royal councillors to try specific heresies and particular suspects: the first of 1535 targeted foreign Anabaptists. A *non obstante* clause in these commissions dispensed with the statutory procedural requirements.[145] As vicegerent in the spirituals, Thomas Cromwell reviewed trials and received appeals.[146] Facing possible indictment in Middlesex, Thomas Mereall

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[143] Diarmaid MacCulloch, *Thomas Cranmer: A Life*, New Haven, 1996, 232–234.

[144] Hughes and Larkin, eds., *Proclamations*, vol.1, no.188; 32 Hen. VIII, c.49.

[145] PRO SP 3/14, fo.23v (*LP*, vol.8, no.771); Lambeth Palace Library Reg. Cranmer, fos.67–70v. A common lawyer working on the new code of canon law thought that all heresy trials should be held under royal commission: McGlynn, ed., *Rights and Liberties*, 161.

[146] PRO SP 1/153, fo.43 (*LP*, vol.14, pt.2, no.75); BL MS Cotton Caligula B III, fo.218 (*LP*, vol.15, no.1029/12).

complained that the jurors (many of them servants to the bishop of London) would not hear his defence, though he was 'as innosent as the chylde that is thys night borne'.[147] A husbandman from Staffordshire told Cromwell how he had been sent to his ordinary even though no indictment had been found, how his exceptions to his accusers and witnesses' characters were not credited, and how he had been given insufficient time to produce witnesses in his defence.[148] Bishops wrote to Cromwell to defend their proceedings. In 1538, John Longland of Lincoln maintained that the trial of William Cowbridge had respected the rights of the accused, involved copious consultation of lay and clerical lawyers, and had been held in the public eye. The penance imposed was not 'accordinge to the busshoppe of Rome his decretalles', but rather 'accordinge to the aunciente custome of this realme'.[149]

In place of the now-suspect canon law, royal authority was coming to define orthodoxy. A Yorkshireman who in December 1538 denied that Christ could have shed all His blood was indicted at the quarter sessions for having offended against the king's proclamation issued the previous month.[150] Because a new religious policy was being made up as the regime went along, mixed messages were sent. In 1535, a view of frankpledge at Chesham presented William Hawkes for saying that the old Lollard

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[147] PRO SP 1/162, fo.137 (*LP*, vol.15, no.1029/47).

[148] PRO SP 1/128, fo.152 (*LP*, vol.13, pt.1, no.188).

[149] PRO SP 1/134, fos.222–223 (*LP*, vol.13, pt.1, no.1434). Cf. a letter from the bishop of London: BL MS Cotton Cleopatra E V, fo.410 (*LP*, vol.14, pt.1, no.1001).

[150] Borthwick Institute CP.G.266; Hughes and Larkin, eds., *Proclamations*, vol.1, no.186; A.G. Dickens, *Lollards and Protestants in the Diocese of York, 1509–1558*, Oxford, 1959, 36. Thomas Pratt's remark was treated as breaching his surety of the peace: PRO KB 29/172, rot.42.

Thomas Harding, executed three years earlier, would not now be burnt.[151] In reforming specific practices, royal policy called into question traditional lay devotions of fasting, honouring images, and observing holy days. Uncertainty over permissible belief combined with animosity between those of diverging religious views. In 1536, a priest from Hawkshead was indicted at Lancashire's assizes for inciting a pupil to damage statues of Christ and three saints.[152] At Buckinghamshire's assizes in the same year, a tailor listening to Bishop Longland's sermon in Little Missenden parish church was indicted for a critical comment to his neighbour.[153] In 1537, the townsmen of Salisbury attempted to indict their own bishop, the reformer Nicholas Shaxton.[154] In Warwickshire that same year, three JPs berated the foreman of a jury that had presented the parish priest Edward Large for disparaging Marian devotions and Ember days. When the foreman conceded that the indictment was based not upon definite evidence 'but oonly the voyce off the cuntrey', they incredulously demanded of him 'yff he woolde be sworne apon a booke & fynde a manne gylty ... oonly apon heresay'.[155] The

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[151] Buckinghamshire Archives D-BASM/18/207.

[152] PRO PL 25/15, rot.19d (ending with a fine). The case is discussed in Christopher Haigh, *Reformation and Resistance in Tudor Lancashire*, London, 1975, 83–84.

[153] Lincolnshire Archives DIOC/REG/26, fo.267.

[154] PRO SP 1/117, fo.153 (*LP*, vol.12, pt.1, no.756).

[155] PRO SP 1/123, fos.47, 48v (*LP*, vol.12, pt.2, no.303). The case is discussed in G.R. Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell*, Cambridge, 1972, 375–380.

Break with Rome divided the nation. This division played out in the law-courts, sometimes through tit-for-tat accusations of heresy and treason.[156]

In consequence, lay involvement in the prosecution of heresy probably grew. There was perceived to be more heresy abroad and it was more openly broached, since advocates believed that they were loyally furthering official policy and presumed upon the support of like-minded JPs and royal ministers. Magistrates balanced their own religious preferences with an awareness that they were answerable for perceived missteps.[157] Staffordshire's JPs decided that a bill offered at the quarter sessions lacked 'certente' and so, rather than give it to the jury, one of them pocketed it, which got him into trouble.[158] Religious dissent was increasingly likely to offend against royal authority. The sheriff of Suffolk did not deliver the parson of Thwaite to his ordinary 'accordyng to the Statute', because, though he had been indicted for heresy, a second indictment alleged a traitorous refusal to declare the Ten Articles, 'which is a temporall matier'.[159] Secular courts could still not try heresy. In 1537, Suffolk's assize justices did permit an indictment to go to trial (possibly because the remark seemed a slur on the king), but then declined to give judgment.[160] Another indictment of Edward Large in

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[156] Elton, *Policy and Police*, chs.1, 3, 7; Ethan H. Shagan, *Popular Politics and the English Reformation*, Cambridge, 2003, chs.1, 4.

[157] PRO SP 1/85, fos.79v–80 (*LP*, vol.7, no.1022); SP 1/92, fo.40 (*LP*, vol.8, no.570); SP 2/R, fo.17 (*LP*, vol.8, no.625).

[158] PRO SP 1/92, fo.105 (*LP*, vol.8, no.619).

[159] BL MS Cotton Cleopatra E V, fos.395–396v (*LP*, vol.12, pt.1, no.818). The Ten Articles of 1536 were the first doctrinal statement that the king authorized.

[160] PRO KB 9/545/85–86; KB 29/172, rot.36 (*sine die* on account of the general pardon); Elton, *Policy and Police*, 294.

1539 – this one for prohibiting the setting up of lights before the rood screen – was removed by writ of certiorari to King's Bench, which ended proceedings 'because the matter pertains to the courts Christian'.[161] For the same reason, the common-law courts remained reluctant to countenance defamation actions over imputations of heresy since they were a 'purely spiritual' matter.[162] The first successful action was decided in 1538; King's Bench delayed four terms before affirming judgment.[163] From 1539 onwards, however, laymen could try not only the imputation of heresy but also the fact itself.

**V. The Act of Six Articles (1539)**

Up until 1539, reforms to the prosecution of heresy had kept the ecclesiastical and secular legal systems apart. The Act of Six Articles brought them together.[164] It identified six beliefs as orthodox and proscribed contrary views. The most grievous error was denial of the real presence; the other articles concerned communion in both kinds, clerical marriage, vows of celibacy, private masses, and auricular confession.[165] The punishments imposed reflected two tiers of error and combined the secular and the

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[161] PRO KB 9/545/74–75; KB 29/172, rot.36d.

[162] YB Trin. 27 Hen. VIII, fo.14a–b, pl.4; R.H. Helmholz, ed., *Select Cases on Defamation to 1600* (Selden Society 101), London, 1985, no.81. Common Pleas and King's Bench had started to accept actions for other kinds of defamation in the first decade of the sixteenth century: ibid., lxvii, lxxii–lxxv.

[163] PRO KB 27/1105, rot.11 (*Howard* v *Pynnes*).

[164] 31 Hen. VIII, c.14.

[165] The act is usually interpreted as inaugurating a conservative reaction: Alec Ryrie, *The Gospel and Henry VIII: Evangelicals in the Early English Reformation*, Cambridge, 2003, ch.1.

ecclesiastical: deniers of the real presence were not allowed to abjure but were to be burnt; other offenders risked hanging as a felon either for a first offence or for recidivism after forfeiture and imprisonment.[166] The act took from church courts responsibility for trying offences. When on 12 April 1542 two men from Southfleet appeared before him to accuse a third of failing to confess and take communion, the commissary at Rochester certified a commissioner under the act, remanded the accused in custody, and bound his accusers to attend 'the day of the triall of suche offendors'.[167] The act did not, however, provide a comprehensive definition of heresy; notably, it ignored Anabaptism, a major concern of the mid-to-late 1530s.[168] The church courts thus continued to exercise the old jurisdiction over heresy under the modified terms of the statute of 1534. Indictments in secular courts were still forwarded for determination.[169] In 1540, the ordinary jurisdiction of Ely resolved three indictments for erroneous remarks about images, the Virgin Mary, and infant baptism.[170] The act may nevertheless have diverted cases away from church courts. Two men from Kelvedon in

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[166] The death penalty for clerical marriage and concubinage was removed in 1540: 32 Hen. VIII, c.10.

[167] Kent Archives DRb/Ar/1/15, fo.13. The commissary was complying with section 9 of the act.

[168] Anabaptist heresies were excepted from the general pardon of 1540: 32 Hen. VIII, c.49, s.11.

[169] E.g., LMA DL/A/A/006/MS09531/012/001, fo.254 (writ from King's Bench sending John Athee, indicted at the Middlesex sessions, to the bishop of Westminster in 1543).

[170] Cambridge University Library EDR G/1/8, fos.1–5v. Thomas Potto appeared voluntarily to plead the recent general pardon (32 Hen. VIII, c.49). William Thornton and Humphrey Turner were ordered to purge themselves with twelve neighbours, the number perhaps being chosen to resemble a jury trial.

Essex who promoted an office prosecution of their vicar in London's consistory court in 1542 were redirected to the county's commission under the Six Articles, even though the words alleged were not clearly within the act.[171]

The Act of Six Articles created a hybrid model for the prosecution of offences. Special commissions combining churchmen and laymen were to be appointed. At least one sitting commissioner had to be a bishop, his chancellor, or his commissary.[172] Nevertheless, the commissions needed to include laymen because churchmen could not pass capital sentence. None of the commissioners at Windsor in 1543 wished to pass sentence, but whereas three knights 'said they wold not', Bishop Capon 'sayde he might not'.[173] The commissions oversaw every stage of the prosecution. They were to receive three kinds of allegation that blended secular and ecclesiastical forms: sworn accusation or information from two witnesses and presentment from specially convened juries.[174] Each was to be treated as an indictment that a trial jury then determined. Laymen were thus to decide guilt or innocence. The comprehensiveness of the commissions' jurisdiction was confirmed in 1541, when the Lord Chancellor ruled that no writ *de heretico comburendo* was required to burn those convicted under the act.[175] The breadth of the commissions' powers meant that proceedings were not automatically returned to

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[171] LMA DL/C/0003, under 21 June 1542 (foliation invisible on microfilm), partly printed in Hale, ed., *London*, no.405. Cf. Houlbrooke, *Church Courts*, 229–231.

[172] Archdeacons and their officials were added in 1540: 32 Hen. VIII, c.15.

[173] Foxe, *Actes and Monuments*, vol.2, 1219.

[174] Section 8 of the act enabled church courts also to receive accusations and informations (as in note 167 above), and secular courts also to receive presentments. A draft charge for a court leet incorporated offences under the act: PRO SP 1/156, fo.149 (*LP*, vol.14, pt.2, app.47).

[175] LMA COL/CA/01/01/010, fo.214v.

a court of record, although indictments might be removed by writ of certiorari.[176] Hence little is known about the commissions' activities. Sets of indictments have been identified for only two commissions: London in 1540 and Coventry in 1542. Commissions were appointed irregularly on a county-by-county basis.[177] Some responded to local requests; others reflected court politics.[178] Prosecutions continued up until Henry VIII's death in January 1547 and maybe afterwards.[179] A twelve-year-old boy named John Davis, who had been indicted at Worcester in late 1546, was arraigned at the assizes the following Lent.[180] In May 1547, the Council of the North still had in custody several people indicted or convicted under the act who could not afford Edward VI's coronation pardon.[181] The act was repealed at the end of the year.[182]

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[176] E.g., PRO C 244/177/19 (certiorari for Robert Pavys, indicted at Ipswich for concubinage: 8 June 1540).

[177] PRO C 193/3, fo.61 (undated template for Essex); PRO 30/26/116, fo.124 (commission for Bedfordshire: 18 Feb. and 14 Aug. 1540). In March 1540, the Council of the North asked that its commission for the three ridings of Yorkshire be extended to York, Hull, and the part of the archdeaconry of Richmond in Lancashire: PRO SP 1/158, fo.51 (*LP*, vol.15, no.362).

[178] E.g., CCCC MS 128, p.166c (*LP*, vol.18, pt.2, no.546, p.332).

[179] In April 1547, a commission for London was issued, though it may not have sat: LMA DL/A/A/006/MS09531/012/001, fos.122v–123, partly printed in Pratt, ed., *Acts and Monuments*, vol.5, app.20.

[180] John Gough Nichols, ed., *Narratives of the Days of the Reformation* (Camden Society First Series 77), London, 1859, 67–68.

[181] Nicholas Pocock, ed., 'Papers of Archbishop Holgate, 1547', 9 *English Historical Review* (1894), 542, at 543–544.

[182] 1 Edw. VI, c.12, s.2.

The first commission for London sat in July 1540.[183] Twenty bills of indictment, dated 17 July, survive.[184] They were presumably returned to Chancery in response to the writ of certiorari issued on 1 August.[185] Twenty-six people were indicted, four of whom were clergy (three for their preaching). The offences were statements against the mass, confession, and private masses, a refusal to confess, and a refusal to take communion. Two accounts suggest that more people were targeted. In his continuation of Edward Hall's chronicle (1548), the printer Richard Grafton stated that 500 people were presented.[186] The martyrologist John Foxe drew on a source in which almost 200 individuals were identified.[187] Twenty-two of those indicted also appeared in Foxe's source, though not all for the identical offence. Possibly, some indictments have been lost. Foxe's source may have included accusations and informations: for example, a shoemaker was 'Presented by three witnesses for holding against the Sacrament of the aulter'.[188] The indictments were confined to statutory offences. Fewer than half of those in Foxe's source had directly contravened the act; the commonest offence was refusing to attend church or participate in services. For example, thirteen people 'were put up by

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[183] This commission has not been found, unlike ones for London in 1541, 1542, 1545, and 1546: LMA DL/A/A/006/MS09531/012/001, fos.18v, 38, 67, 90v–91. The commission of 1541 is printed in Pratt, ed., *Acts and Monuments*, vol.5, app.9.

[184] PRO SP 1/243, fos.45–64 (*LP*, addenda, vol.1, pt.2, no.1463).

[185] LMA COL/AD/01/015, fo.219v.

[186] *Hall's Chronicle*, 828. Grafton was himself suspected: Foxe, *Actes and Monuments*, vol.2, 1203 (misprinted as 1194).

[187] Foxe, *Actes and Monuments*, vol.2, 1202–06. Foxe's source is analysed in Ryrie, *Gospel*, 224–225.

[188] Foxe, *Actes and Monuments*, vol.2, 1204.

the Inquisition, for giving small reverence at the sacring of the Masse'.[189] Grafton commented that the jury deemed offences that were not strictly within the act's terms its 'braunches'; these included not holding up hands or knocking breasts at the consecration of the mass. So whether an allegation lay within the act's compass may account for the small number of indictments as against the many suspects. Foxe's explanation for the volume of allegations was that parish priests had given evidence to jurors. Apparently, when the commission met in 1541, two juries failed to identify any offenders. The reason, a juryman said, was that their request 'to have the Persons & Curates of every Parish to geve us instructions' had been denied. This request had been refused, the city's recorder retorted, because previous juries had done 'many thinges naughtely and foolishly ... & therefore it was thought not meete, that they should geve information to you'.[190] This shifting of responsibility, however, deflects from the reality that the volume of allegations could only have come about through the collaboration of London's clergy and citizenry.[191]

The fault line in implementing the act lay not between clergy and laity, but between conservatives and reformers. This is the picture to emerge from Coventry in July 1542. On one side were the vicar of St Michael's Church (John Ramridge), the mayor, and the bishop's chancellor; on the other, some of Ramridge's parishioners and other inhabitants. The ambiguities of Henrician religion enabled both sides to accuse the

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[189] Ibid., vol.2, 1204.

[190] Ibid., vol.2, 1202.

[191] Subsequent commissions for London are discussed in Henry Angsar Kelly, 'Mixing Canon and Common Law in Religious Prosecutions under Henry VIII and Edward VI: Bishop Bonner, Anne Askew, and Beyond', 46 *Sixteenth Century Journal* (2015), 927, at 934–941.

other of religious error. The reformers complained that the issuing of a commission under the act was a response to their allegations against Ramridge.[192] They had accused the vicar of upholding the existence of purgatory. A sermon on 2 October 1541 had indeed sailed close to the wind: Ramridge could not resist pointing out the illogicality of a Church that upheld private masses but had made a taboo out of their doctrinal rationale. Moreover, in another sermon of 17 April 1542, Ramridge had appeared to accuse the king of over-taxing the clergy by likening his benefice to a Banbury cheese (that is, a meagre one, the rind being removed). On 10 July, three local gentry were instructed to take depositions and to examine the chancellor and the mayor, who had imprisoned a man for complaining about the vicar's second sermon.[193] The very same day, a jury was summoned under the act; on this commission were the mayor and chancellor. The two investigations worked in parallel: on 27 July, the jury sat and the third day of depositions was taken. Twelve people were indicted, chiefly for denial of the real presence, auricular confession, and clerical celibacy.[194] Seven of them had testified in an incriminating way against the vicar; one was the original complainant. There may not have been severe consequences for anyone implicated. Those presented managed to have the indictments removed by writ of certiorari to be examined by the king's council.[195] The competing inquiries seem to have cancelled each other out. They

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[192] PRO STAC 2/3/24 (attributing to the mayor, Christopher Warren, the admission that 'this matter had never bene begoon if the commission agenst the vicar had never coommen Downe').

[193] PRO C 47/7/9.

[194] PRO KB 9/129 (*LP*, vol.17, no.537).

[195] PRO STAC 2/3/24.

exemplify how accusations of heresy were one manoeuvre in an increasingly divided society within which the contours of orthodoxy were both excessively penal and highly ambiguous.

The same point could be made about the diocese of Canterbury in the following year. The so-called 'Prebendaries' Plot' of 1543 has usually been told as the story of Archbishop Cranmer's escape from his conservative enemies at court and in his diocese.[196] Yet the plot had its origins in the understandable complaints of the traditionally minded members of his cathedral chapter that Cranmer and his commissary were not impartial in enforcing orthodoxy within the diocese. The legal process that should have been directed against those disseminating heresy was muzzled, whereas preachers who opposed them were charged with sedition.[197] Two disreputable witnesses were readily believed against the prebendaries, so they complained.[198] The commissary manipulated the rules of evidence to protect evangelicals and to cow conservatives, crediting testimony when it suited him but dismissing it as hearsay when it did not.[199] Since redress through the normal channel was barred, the prebendaries hoped for a new commission under the Act of Six Articles that would override the protection that the supposed heretics enjoyed. For their plan to succeed, it was crucial that Cranmer himself was not again appointed a commissioner and that he never found out who the

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[196] MacCulloch, *Cranmer*, 297–322.

[197] CCCC MS 128, pp.185–186, 255, 278, 289–290, 297–298, 305 (*LP*, vol.18, pt.2, no.546, pp.337, 354, 361, 363, 365, 367).

[198] CCCC MS 128, pp.10, 220 (*LP*, vol.18, pt.2, no.546, pp.292, 346).

[199] CCCC MS 128, pp. 75–80, 87, 171, 220 (*LP*, vol.18, pt.2, no.546, pp.313–314, 317, 334, 346).

witnesses were (lest he intimidate them).[200] Speculation was rife about who might be appointed and the prebendaries hoped to be joined with Kent's conservative gentry.[201] JPs, the clerk of the peace, and the former undersheriff advised on how to frame indictments; they also offered to ensure favourable jury panels.[202] The prebendaries took encouragement from the appointment of a commission covering Windsor and from the likelihood of others.[203] Famously, their hopes were dashed when Cranmer was appointed to investigate their allegations himself. The moral of the story was that commissions under the act had become tools of local and national faction.

Unlike that for Kent, the commission for Berkshire, covering Windsor, did meet. Foxe recounted its trial of four men on 26 July 1543: the tailor Henry Filmer, the musician John Marbeck, the priest Anthony Pearson, and the chorister Robert Testwood.[204] The commissioners were Bishop Capon of Salisbury, the dean of Windsor, three knights, and a gentleman called Thomas Vachell. A partisan jury was obtained from the ranks of Windsor College's farmers; the foreman came from Abingdon, thirty miles away.[205] The defendants objected that the jurors were strangers who did not know their 'daily conversations' but were overruled. The indictments being read, the defendants responded as best they could. The king's attorney prosecuted the

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[200] CCCC MS 128, pp.102, 168, 267, 298 (*LP*, vol.18, pt.2, no.546, pp.320, 334, 359, 366).

[201] CCCC MS 128, pp.161, 203, 265a (*LP*, vol.18, pt.2, no.546, pp.331, 342, 357).

[202] CCCC MS 128, pp.105–110, 135–137, 171–172, 214–215, 256, 279 (*LP*, vol.18, pt.2, no.546, pp.320–321, 323–324, 334, 344, 355, 361).

[203] CCCC MS 128, pp.141, 146, 166c (*LP*, vol.18, pt.2, no.546, pp.324, 326, 332).

[204] Foxe, *Actes and Monuments*, vol.2, 1218–19.

[205] Abingdon was transferred from Berkshire to Oxfordshire in 1974.

cases.[206] The bishop prevented Anthony Pearson from responding properly on the ground that the attorney was speaking for the king. Present was the principal accuser, the local gentleman William Symonds (also the town's MP), who argued with the defendants. None of the defendants produced witnesses, but rather adduced malice and falsity on the adverse side. Henry Filmer procured a book of statutes, much to the bishop's annoyance. He objected that there was only one witness against him, whereas the act had required two. The king's attorney retorted that since the single witness was Filmer's own brother, his testimony deserved extra credit. Over John Marbeck, a commissioner intervened to suggest that since there was no accuser but only the evidence of a text that he had copied at an unknown date, the jury might look sympathetically on him. Vachell retorted that Marbeck might equally have copied the text after rather than (as he maintained) before the most recent general pardon of 1540.[207] The jury then retired to consider its verdict. After a quarter of an hour, Symonds went to talk to them. One juryman then conversed with the commissioners, which reflected indecision over Marbeck's fate. Eventually, the jury returned to deliver four guilty verdicts. None of the other commissioners wished to pass sentence, and so it fell to the most junior, Vachell. Although Marbeck was pardoned, the other three men were burnt two days later. Shortly after, Symonds got his comeuppance when he was

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[206] 'Bucklayer' is probably to be identified with Richard Buckland: Sir John Baker, *The Men of Court 1440 to 1550: A Prosopography of the Inns of Court and Chancery and the Courts of Law* (Selden Society Supplementary Series 18), 2 vols., London, 2012, vol.1, 394.

[207] 32 Hen. VIII, c.49. According to Marbeck's pardon, however, he had written the text on 10 March 1543: PRO C 82/815/16 (*LP*, vol.18, pt.2, no.327/9).

punished for perjury. His real offence was to have implicated members of the king's Privy Chamber.[208]

To modern eyes, these proceedings fall far short of a fair trial, an impression that, of course, Foxe fostered. But most of what Foxe described was standard in contemporary criminal trials: a defendant's spontaneous response to the indictment, an altercation with their accuser, the absence of defence counsel, the omission of defence witnesses, and the judges' furtherance of the Crown's case. Filmer's objection that two witnesses were required may have been a misreading of the act: arguably, testimony from two witnesses was one means of generating an indictment, not a standard of proof for the trial jury.[209] The act prevented defendants from challenging the jury panel, as they might otherwise have done. Symonds's labouring of the jury, if it occurred, did breach contemporary norms, although the jury's consulting of the commissioners did not. Even so, the Windsor trials and the wider plotting led to the Act of Six Articles being modified in the parliament of spring 1544. Given his own narrow escape, Cranmer likely sponsored this measure.[210] The new act acknowledged that its predecessor had encouraged 'divers secret and untrue accusacions and presentmentes'.[211] It therefore limited the source of indictment to juries, eliminating the

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[208] *Hall's Chronicle*, 859; Foxe, *Actes and Monuments*, vol.2, 1220–21.

[209] In 1546, the commissioners for Essex distinguished between remarks attested by two witnesses and by one witness, but it is unclear whether John Camper had been convicted for both remarks: PRO SP 1/218, fo.140 (*LP*, vol.21, pt.1, no.836).

[210] MacCulloch, *Cranmer*, 327–328.

[211] 35 Hen. VIII, c.5. A template for the 'newly reformed' commission was devised, although a modified version of the old commission was sometimes used instead: PRO PRO 30/26/116, fos.24v–25; Kent Archives DRb/Ar/1/15, fos.45v–46 (commission for Kent: 29 Jan. 1545).

sworn accusation and the information of two witnesses. Commissioners were allowed to reform jury panels, although whether this would have advantaged defendants depended on the commissioners' attitude.[212] The right of the accused to challenge jurors was enhanced. Thus the new act brought procedure into greater conformity with the standard criminal trial. It built in a further protection by requiring a complaint to be made within a year or forty days in the case of a sermon (whereas Anthony Pearson had been indicted for what he had preached two years previously). Naively, the act hoped that future trials 'maye justlie and charitablie procede without corrupcion or malice'.

The operation of the Act of Six Articles thus supports the claim with which this article opened: that it proved easier to criticize the traditional method of prosecution than to devise a better one. The model whereby juries would determine guilt had not shown itself to be superior. According to Richard Grafton, the act led to many innocent people being executed, for jurors were credulous, choosing to believe witnesses 'false or true' over the accused's denial and avowal of orthodoxy.[213] An alternative was to dispense with a jury and hold a magistrate-led 'tryall by witnes' instead. This was the model adopted in an act of 1543 that is better known for imposing restrictions on bible-reading.[214] This act established new forms of trial for anyone who advanced opinions

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[212] Cf. CCCC MS 128, pp.135–136 (*LP*, vol.18, pt.2, no.546, p.324); Foxe, *Actes and Monuments*, vol.2, 1202.

[213] *Hall's Chronicle*, 828.

[214] 34&35 Hen. VIII, c.1. The act's passage is discussed in Stanford E. Lehmberg, *The Later Parliaments of Henry VIII, 1536–1547*, Cambridge, 1977, 186–188.

contrary to doctrine set forth since 1540.[215] Trials could be conducted before an ordinary and two JPs, before two members of the royal council, or before special commissioners. In the original bill, the ordinary would have been able to judge cases on his own; the addition of the JPs suggests that concern about the autonomous exercise of ecclesiastical jurisdiction persisted.[216] Someone convicted would be compelled to recant; on a second offence, to abjure and perform penance. A third offence would result in a clergyman being burnt and a layperson being imprisoned for life. Albeit only for a recidivist or obstinate clergyman, this act envisaged someone being executed for heresy who had been convicted neither by his ordinary nor by a jury. The magistrate was enjoined to appraise the witnesses on both sides and then to 'condempne or dismisse' the accused 'as to his owne discreacion shall seme best to agre with conscience and equytie'. Such judicial latitude seems far removed from the common-law ideal of due process in the Supplication against the Ordinaries. This procedural diversity typifies the contingent and unsettled nature of Henrician policymaking. Revolutionary ends were pursued through ad hoc and draconian means. The result looks like a legal muddle.

## VI. Conclusion

The prosecution of heresy evolved over Henry VIII's reign. The co-option of canon-law provisions into native secular law a century earlier had empowered the church courts,

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[215] 34&35 Hen. VIII, c.1, ss.17–20. Section 21 confirmed that the Act of Six Articles was not affected.

[216] Parliamentary Archives HL/PO/PU/1/1542/34&35H8n1. The Commons were responsible for the proviso (s.23) requiring JPs to respond to an ordinary's summons.

but this turned out to have compromised the independence of ecclesiastical jurisdiction because it generated the expectation that common-law rules of due process would apply. The reforms to the prosecution of heresy of the 1530s and 1540s combined two discrete ideas: first, criticism of the church courts' proceedings from the perspective of common-law standards; second, the principle that secular law should be more involved in the prosecution of heresy. These two ideas are separable. Even with the Supplication against the Ordinaries, it is mistaken to equate criticism of the church courts with opposition to the prosecution of heresy. In the Edict of Fontainebleau of 1540, Francis I of France transferred heresy cases from the church courts to his *parlements* in order to make prosecution more vigorous and effective.[217] The position in Henrician England was different, but not wholly contrary. Greater lay involvement in the prosecution of heresy was, like the royal supremacy itself, justified as a return to the *status quo ante* when the Crown had ruled over the English Church. Burning was the common-law punishment for heresy, and so it would remain after the second repeal of the statute of 1401 in 1559.[218] The combination of secular and ecclesiastical procedures was intended to improve, rather than to curtail, the prosecution of heresy. Collaboration continued, but no longer on the Church's terms.

Henry's reign laid the basis for how subsequent regimes would approach the legal problem of religious dissent. Increasingly, statute law defined offences that were prosecuted in secular courts or judged by royal commissions combining clergymen and

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[217] William Monter, *Judging the French Reformation: Heresy Trials by Sixteenth-Century Parlements*, Cambridge, MA, 1999, chs.3–4.

[218] 1 Eliz. I, c.1, s.6. The writ *de heretico comburendo* would be abolished by 29 Car. II, c.9.

laymen.[219] But never again did juries try heresies. Maybe heresy turned out to be a bridge too far in the secularisation of ecclesiastical crimes. During the Henrician Reformation, 'buggery' and witchcraft became statutory offences.[220] Unlike those activities, heresy was essentially a crime of expressed belief. A common-law approach to heresy meant that something said *once* constituted the crime, no matter whether the statement was retracted. This was the same approach as was taken with treasonous and seditious speech. So common law's refusal to concern itself with the soul, though lauded by Professor Baker, made it potentially stricter against heresy than canon law.[221] That the Henrician Reformation did not lead to more burnings was thus only indirectly the result of increasing the secular element in the prosecution of heresy.[222] No more general pardons were available for heresy after 1540 and so thereafter reprieves were discretionary, even arbitrary.[223] Arguably, it was recognition of the operational vulnerabilities of the statutory system of 1539 that saved lives. Malicious accusers, mendacious witnesses, unreliable juries, and partisan magistrates caused convictions to seem unsound. The Henrician model made the outcome of heresy trials more capricious.

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[219] Houlbrooke, *Church Courts*, 214–222; John F. Davis, *Heresy and Reformation in the South-East of England, 1520–1559*, London, 1983, 19–21; Kelly, 'Mixing Canon and Common Law', 941–955.

[220] 25 Hen. VIII, c.6; 33 Hen. VIII, c.8. 'Buggery' meant sodomy and bestiality.

[221] Baker, *Reinvention*, 110–114.

[222] Thirty-three burnings between the Act of Six Articles and the king's death are counted in Ryrie, *Gospel*, 261–265.

[223] John Roche Dasent, ed., *Acts of the Privy Council of England I: 1542–1547*, London, 1890, 418. The general pardon of 1544 excluded all heresies: 35 Hen. VIII, c.18.

If one criterion of a fair trial is consistency (that is, getting the same result from the same circumstances), then on that measure the church courts had perhaps been fairer.

Yet to pronounce one model fairer than the other is ultimately specious. Like has not been compared with like. Up until the late 1520s, church and state were of one mind; there existed a consensus over what heresy was and hence widespread support for its prosecution. Thereafter prosecution occurred within a society that, from top to bottom, was divided about the nature of orthodoxy. In such a scenario, any legal system would have struggled to operate as it was supposed to. So maybe instead we should envisage ideas about standards of proof, due process, and reliable testimony existing independently of any single legal system. This possibility is suggested in the acquittal of the cleric Richard Benger of treason at Kent's assizes in 1541.[224] Dr Benger's statement to the jury invoked two Romano-canonical principles: 'the defendant is more to be favoured than the accuser' and 'in all graver offences, proofs ought to be clearer than daylight'.[225] Benger denied that Cranmer's uncorroborated report of their private conversation was sufficient proof, since the supporting depositions had been made by the archbishop's 'household servants and domestics'.[226] Benger thus used a canon-law rule about the admissibility of witnesses to defeat the king's attorney. To the jury, principles from one legal system applied in another. For most people, who were not

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[224] PRO STAC 2/24/163. The case is discussed in Elton, *Policy and Police*, 317–321.

[225] I.e., '*favendum pocius est reo quam Accusatori*' and '*in omnibus gravioribus delictis probaciones debent esse luce clariores*'. Cf. Lyndwood, *Provinciale*, 296o, 304g; Bray, ed., *Tudor Church Reform*, 566, 736; Fraher, 'Conviction', 24.

[226] I.e., '*familiares et domestici*'. Cf. Ullmann, 'Medieval Principles', 82; Donahue, 'Proof by Witnesses', 130–131.

trained in jurisprudence, the meaning of a fair trial may have been a composite notion, based on experience of several legal systems rather than on a principled preference for one over the other. For them, a fair trial for heresy resembled a fair trial for other serious crimes. However distinctive heresy may have been, it was part of criminal law.