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CANON LAW ORIGINS OF COMMON LAW DEFAMATION, THE HUNNE WHODUNIT AND WESTERN LEGAL SCIENCE: AN HISTORICAL CHALLENGE FOR MODERN LAWYERS

THE mysterious death of Richard Hunne was a *cause célèbre* in the conflict between church and state in pre-Reformation England. As a moment in political history, the Hunne affair is perhaps no more significant than any other conflict involving factional community luminaries. At a political level, Hunne's demise bespeaks just one more clash in hundreds of years of contained conflict between the spiritual and temporal realms. The Hunne affair is, however, a far more significant moment in legal history.

The defamation suit of Hunne illustrates the way in which Western legal systems have evolved, in this instance the systems of canon law and common law. Such a theory of legal evolution issues an historical challenge to the lawyer. It is a challenge to lawyers to think not of their professionalism as a craft of what is; rather, lawyers are challenged to conceive themselves as practitioners in a craft of what is *not*. The theory and practice of law is about what is *not* rather than what *is*: what *is* law may be considered the problematical triumph over what is *not* law. This proposition is aptly demonstrated by the Hunne incident taken in the context of the ensuing Protestant Reformation in England. When Hunne brought his defamation action, the correct jurisdiction was ecclesiastical; this *was not* a secular matter. Notwithstanding this, Hunne sued for defamation under the common law rather than the canon law, and yet within twenty years of his death, his choice of jurisdiction had been vindicated. What was *not* was now what *was*; what was incorrect was now correct.

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* B Ec, LL B (Hons) (Macquarie); Doctoral student, University of Sydney. Paper delivered at the 14th Annual Law & History Conference. Gratitude is extended to Patrick Kavanagh for his valuable supervision of the author's earlier work from which this paper is derived: *Western Legal Science and the Henrician Reformation: A Case Study of Law and Theology as Causation in History* (LL B thesis, Macquarie University School of Law, 1994).

Richard Hunne, though unsuccessful as a litigant, should be recognised for his role in the evolutionary reinterpretation of canon law and common law which culminated in the Protestant Reformation of Henry VIII.

SETTING THE SCENE

Hunne had developed a reputation for being something of a sympathiser of Lollardism, a contemporary sect of heretic reformers. In 1510 Hunne apparently became a 'marked man' when he defended his neighbour, Joan Baker, against a heresy charge; and in November 1511 he and his friend William Lambarde were involved in a property dispute with the parson and church wardens of St Michael's, Cornhill.[1]

On 29 March 1511, the infant son of Hunne, Stephen, died in the parish of St Mary Matfellon, Whitechapel.[2] As was the custom throughout Europe, the parish priest became entitled to a mortuary payment of the child's christening robe or best piece of clothing, or money in lieu thereof.[3] Hunne refused to pay the mortuary, and was sued on 26 April 1512, in the Archbishop's Court at Westminster by Henry Marshall, the chaplain and parish priest at Whitechapel, on behalf of the rector, Thomas Dryffeld.[4] This might be construed as a political act against Hunne, given Hunne's background, because "[s]trictly speaking, a mortuary was demanded on every death *but there is some reason to doubt that it was always collected*".[5] On 28 April and 13 May, Hunne appeared before Cuthbert Tunstall, the Archbishop's Chancellor. Speculation may only be ventured as to the legal basis for Hunne denying the charge of not paying the mortuary. Presumably Hunne argued that the robe did not belong to the baby, or that the baby's assets were insignificant to rate a mortuary gift.[6] If

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1 Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 132.

2 At 131.

3 Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More,* Vol 9 (Yale University Press, New Haven 1979) p222.

4 Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 132.

5 As above at 131. Emphasis added.

6 Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More* p222. Schoeck suggests Hunne may have refused the mortuary because he lived in a different parish from the one where his infant son Stephen was put to nurse: Schoeck, "Common Law and Canon Law in the Writings of Thomas More: The Affair of Richard Hunne" in Kuttner (ed) *Proceedings of the Third International Congress of Medieval Canon Law,*

this were the basis for Hunne's denial, it would appear that in this act of legal unconventionality, Hunne was applying a common law concept of ownership to an ecclesiastical matter. This would support a contention, which emerges from Hunne's ensuing litigation, that he was a man on a mission to stretch the boundaries of common law jurisdiction. Needless to say, Tunstall found against Hunne.[7]

Hunne appears to have acted in contempt of the mortuary order made by Tunstall. On 13 or 27 December, Marshall excluded Hunne from a service at St Mary Matfellon; Marshall said Hunne had been excommunicated, the implication being that Hunne had not obeyed the mortuary order.[8] At the commencement of the new legal term of the King's Bench on 25 January 1513, Hunne, with either some injured feelings or opportunely vented litigiousness (or both),[9] sued Marshall for slander. At the same time, Hunne also sued a *præmunire* not only against Dryffeld as principal defendant, but also against Marshall and all of the mortuary case participants including the judge, and interestingly, Charles Joseph the summoner, later to be suspected for Hunne's murder.[10]

These actions introduce the concept of legal science. To see how the Western legal tradition evolved is to see how, given a separation of jurisdictions such as that of the ecclesiastical and the secular, opposing laws of the same legal order could be reconciled.[11] Western legal science operated as a transcendent meta-law which encompassed the competing

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Strasbourg, 3-6 September, 1968 (Biblioteca Apostolica Vaticana, Citta Del Vaticano 1971) p243.

7 Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 132.

8 As above at 131. There is a possibility that Hunne may already have been detected of heresy: Schoeck, "Common Law and Canon Law in the Writings of Thomas More: The Affair of Richard Hunne" in Kuttner (ed) *Proceedings of the Third International Congress of Medieval Canon Law* p244.

9 According to Sir Thomas More, Hunne was:

> a man high mynded, & set on the glorie of a victorye, whiche he hoped to have in ye premunyre, whereof he muche boasted as they sayd, among his familiar frendes, that he trusted to bee spoken of long after hys dayes, and have his mater in the yeres and termes called Hunne's case.

It was to become known as "Hunne's case", but not for the reasons Hunne would have wished! Quoted from Milsom, "Note and Document: Richard Hunne's 'Præmunire'" (1961) 76 *English Historical Review* 80 at 81.

10 As above at 81.

11 See Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Cambridge, Mass 1983) p160.

jurisdictions with the means for reconciliation, while at the same time being employable within the competing jurisdictions themselves as an intellectual technique for reconciling the opposites.

The *præmunire* statutes provided for:

> any subject who shall draw out of the realm in plea whereof the cognizance pertaineth to the king's court or which do sue in any other court to defeat or impeach the judgements given in the king's court.[12]

Jack writes that, "This meant that courts, especially ecclesiastical courts, were exceeding their jurisdiction when there was a remedy at common law. The courts in question did not necessarily have to be physically outside the kingdom."[13]

This statutory prescription of jurisdiction might belie the transcendent, meta-law significance of the prescription. It should be borne in mind that the statutes of the day were believed to be declaratory of existing law; and that the particular prescription of *præmunire* was the manifestation of a very complicated and immensely academic theo-nomological tension between the jurisdictions of pope and emperor, spiritual and temporal, referred to as the "two swords theory of authority".[14]

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12 27 Ed III and 16 Ric II. Richard's statute was in response to threats by Pope Boniface IX to excommunicate bishops who enforced decisions of the King's courts regarding advowsons, and to shift from see to see bishops who accepted secular offices: Dickens, *The English Reformation* (B T Batsford Ltd, London 1964) p87. Thus the Act was originally much narrower in scope compared with what it later covered under Henry VIII.

13 Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 131.

14 The two swords theory is based upon Chapter 22 of the Gospel of Luke, where Christ commands a disciple to put his sword back after cutting off the ear of a slave, when Christ was being arrested. It was taken to be the foundation for independent church and state authorities. It is well expressed by Carlyle:

> To the Western Church it was in the main clear that there were two great authorities in the world, not one, that the Spiritual Power was in its own sphere independent of the temporal, while it did not doubt that the Temporal Power was also independent and supreme in its sphere ... This conception of the two autonomous authorities existing in human society, each supreme, each obedient, is the principle of society which the Fathers handed down to the Middle Ages, not any conception of a unity founded upon the supremacy of one or other of the powers.

Hunne demurred to the defendants in his *præmunire* action. "They pleaded in justification, telling the story with the part played by each, and asserting that the whole process was lawful."[15] Unfortunately, the question of law was never decided, so we cannot know whether "at law" the church actions had been an "invasion of the rights of the common law".[16] The case was repeatedly adjourned[17] until Hunne's death, and nothing more was entered into the roll. From the record of Sir Thomas More, it appears that the demurrer had been effectively decided against Hunne, which More contends prompted Hunne to suicide.[18] It seems safe to hypothesise that the argument Hunne would have relied upon could have been an embryonic precursor to the grand manoeuvre which legitimated Henry VIII breaking from Rome and asserting his supremacy.

Concerning the slander action, Marshall, the defendant, was recorded on the roll as allegedly saying:

> Hunne thowe arte accursed and thowe stondist acursed and therefore go thowe oute of the churche for as long as thowe arte in this churche I wyll sey no evynsong nor servyce.[19]

Marshall demurred in this case. We can be no wiser as to the verdict than in the *præmunire* case. A series of adjournments continued until after Hunne's death, so it is unknown if the court would have accepted Hunne's pleading that "his good name and credit were so damaged that the

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Cited in Watt, "Spiritual and Temporal Powers" in Burns (ed), *The Cambridge History of Medieval Political Thought c350-c1450* (CUP, Cambridge 1988) p367.

15 Milsom, "Note and Document: Richard Hunne's 'Præmunire'" (1961) 76 *English Historical Review* 80 at 81.

16 Elton, *Reform and Reformation: England 1509-1558* (Arnold, London 1977) p52.

17 The formal reason for adjournment was *quia curia ... nondum advisatur* — the court must consider its judgment: Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More* p223. He attributes this delay to the affair of Friar Standish.

18 More, in Milsom, "Note and Document: Richard Hunne's 'Præmunire'" (1961) 76 *English Historical Review* 80 at 81:

> Which when he perceived would goe agaynst his purpose, and that in the temporal lawe he should not winne his spurres, and over that in the spiritual law perceived so much of his secrete sores unwrapped and dyscovered, that he beganne to fal in feare of worldly shame. It is to me much more likely, that for werinesse of hys lyfe, he ridde hymselfe out therof.

19 As above at 82.

merchants with whom he ordinarily dealt dared not and would not trade with him".[20]

THE SIGNIFICANCE OF THE DEFAMATION SUIT

The slander case is even more interesting when it is asked why Hunne might have chosen to sue the spiritual matter of defamation in a secular court. Milsom writes of this case: "There are earlier examples of slander in the rolls, but I have not seen one trenching so obviously as this on the ecclesiastical jurisdiction."[21] Although defamation was a spiritual wrong with which temporal law was not concerned until just before the Reformation, in 1433 a slander investigation was conducted by the Star Chamber, although it does not seem to have involved the issue of damages between parties.[22] The canon law was not concerned with damages; rather the concern was with the parties' positions before God, with the tendency to conclude litigation only when the parties had acquiesced.[23] If necessary, punishment would be exacted not through damages but penance.[24]

Between 1501 and 1517, a dramatic change occurred. The common law started awarding damages for temporal loss occasioned by publication of the slander, attracting plaintiffs and common law intervention in a traditionally spiritual matter.[25] As stated in 1528 by Richard Pynson, a legal publisher of that time, jurisdiction *in causa diffamacionis* was twofold. Ecclesiastical jurisdiction extended to offences against the spiritual law, such as if a man slanders another that he committed fornication, adultery, simony or eating flesh on a fasting day. Secular courts had jurisdiction over offences against the temporal law, for example if a man defames another of treason, murder or felony. Importantly for the latter, temporal matters, the plaintiff must have suffered damage by the defamation, although curiously the issue of the case should not have been on the damage, but upon the speaking of the words.[26] This is curious

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20 As above.
21 As above.
22 Baker, *Introduction to the Reports of Sir John Spelman,* Vol II (Selden Society, London 1978) p236.
23 Helmholz, *Canon Law and the Law of England* (Hambledon Press, London 1987) p33.
24 See Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons Ltd, London 1949) p127.
25 Baker, *Introduction to the Reports of Sir John Spelman* p239.
26 At p240.

because the formal emphasis upon the speaking of the words was a canon law relic.

Hence Baker writes of the Hunne case as "[t]he first clear case of spiritual slander in the King's Bench".[27] Hunne's pleading shows that damages were sought for the lost custom. After all, excommunication (and being called an excommunicate) did have the effect of rendering the subject a pariah, with whom the Christian community was expected to cease associating, be it in social or mercantile situations.[28] Here was a case involving the claim of a temporal loss, although the allegation was of a spiritual matter, which explains the demurrer by the priest. A committee established in 1535 to report on the future of ecclesiastical jurisdiction found that the royal courts had concurrent jurisdiction over spiritual matters, provided that temporal damage was incurred.[29] However, it seemed not nearly so straightforward in 1513, when Hunne brought his defamation suit; especially considering that common law defamation covered the temporal accusations of crime and not sin. It was, of course, an accusation of sin for which Hunne sought remedy.

Why did Hunne choose to bring such an uncertain defamation suit before King's Bench? In the ecclesiastical courts there should not have been nearly so much difficulty succeeding on the facts. To pronounce someone excommunicated without fact was surely a grievous slander, satisfying the canon law requirement of malice necessary to succeed in defamation against the defendant in canon law.[30] Whilst establishing damage was not a prerequisite to success, nonetheless, in the canon law, the damage suffered was "relevant to assessing the amount of harm done and the proper way of restoring a complainant to good fame".[31] This should have given Hunne a strong case in canon law. So why did Hunne sue for defamation at common law? It may not have just been a political grudge against the church which motivated Hunne; he may sincerely have sought redress for the economic wound inflicted by Marshall's words, which justified the risk of the common law action. Perhaps, given Hunne's subversive and commercial background, his motives were subversive and commercial. Reflected in this action may have been a bourgeois impatience to have damages available for traditionally spiritual causes

27 As above.
28 See Helmholz, *Canon Law and the Law of England* p104.
29 Baker, *Introduction to the Reports of Sir John Spelman* p240.
30 Helmholz, "Canonical Defamation in Medieval England" (1971) 15 *American Journal of Legal History* 255 at 261.
31 At 263.

with tangible losses. In addition, he may have been genuinely concerned at the excesses of the church, considering it his mission to reform society.[32] Whichever way it is evaluated, Hunne was pushing at the boundaries of the common law. It cannot be known whether he would have succeeded had he lived, although if uncertainty were the decisive predictive factor, he would have lost which indeed is what More suggested was the likely motivation for the suicide. What may be asserted confidently is that a good deal of thought by Hunne and his lawyers must have gone into choosing the common law. These intellectual labourers were chipping away at the stone partition between spiritual and temporal jurisdictions, although the sophistication and legal timeliness[33] appear not to have been on hand to demolish the partition at this stage of history. Their appeal reflected a belief in Western legal science — in a meta-law. Otherwise there would have been no reason for bringing suit in what would otherwise be considered, on a positivistic interpretation, as 'the wrong court'. Hunne was rebelling through law, not against law. That was an avenue for social change in the Western legal tradition.

WHODUNIT?

On 23 January 1514, Parliament and the Convocation (of the church) commenced sitting and Hunne was cited before the Convocation for heresy, although he could not be found. Bishop Fitzjames of London, "a noted conservative of cholerically authoritarian views",[34] obviously infuriated with Hunne's attack on clerical privilege, had him charged for possessing a Lollard Bible and other forbidden works.[35]

> In October, Hunne was arrested for heresy and sent to the Bishop of London's prison, the Lollard's Tower in St Paul's. On 2 December he went to Fulham palace for examination

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32 More testified that Hunne was known for his charity and fair dealing: Schoeck, "Common Law and Canon Law in the Writings of Thomas More: The Affair of Richard Hunne" in Kuttner (ed) *Proceedings of the Third International Congress of Medieval Canon Law* p237.

33 The concept of legal timeliness is important for legal science, because much historical groundwork in intellectual argumentation is usually required before a change will be embraced by the courts. For example, it took hundreds of years for common law negligence to emerge from the simple action on the case.

34 Elton, *Reform and Reformation* p52.

35 For the depositions of witnesses in the posthumous trial, see Fines, "The Post-Mortem Condemnation for Heresy of Richard Hunne" (1963) 78 *English Historical Review* 528. Recall that English translations of the Bible were still, at this time, illegal (in this case a Wycliffite Bible).

> by Fitzjames, bishop of London. He was returned to the Lollard's Tower where he was found hanging on 4 December.[36]

Was Hunne murdered, or did he commit suicide? A response might suitably begin by questioning the motive for the church in bringing the action for heresy. Was it a reaction against the defamation and *præmunire* actions brought by Hunne? Probably not, for it is difficult to explain the delay between Hunne's proceedings and the church's heresy charge: "the church authorities may have been reluctant to accuse a leading man of heresy"; it might look as though the church was trying to influence the outcome of the two actions brought by Hunne, and if Hunne succeeded in these actions, it could have been more difficult to have him convicted of heresy.[37] It is unlikely that there was a motive on the part of the church to avenge the *præmunire* action brought by Hunne, because many people brought *præmunire* actions against the clergy with little suggestion that these plaintiffs were consequently accused of heresy.[38] Of more likelihood is it that the church waited until it seemed Hunne would lose his *præmunire* action, poised with the information to launch heresy proceedings.[39] The church appears to have possessed the political wisdom not to display retributory tendencies at this time. A fortiori, Hunne had anyway made a partial confession two days before his death:

> and according to the evidence of his heresy trials, he did possess Lollard literature, he was prepared to defend a convicted Lollard, Joan Baker, and he did deny any obligation of the laity to pay tithes. He did also make highly critical remarks about the church establishment, including a statement that the bishops and priests were just

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36 Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 132.

37 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* (Pimlico, London 1990) p35.

38 At 35; cf Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 135, citing Wriothesley in an 1875 publication, which seems not as compelling as the analysis by Gwyn. Jack writes of other matters, such as not paying tithes, to which the bishops might respond with heresy proceedings, not specifically triggered by *præmunire* actions by the laity. There may, nonetheless, have been a *desire* on the part of bishops to excommunicate as heretics those who brought *præmunire* actions: see Houlbrooke, *Church Courts and the People During the English Reformation 1520-1570* (Oxford University Press, Oxford 1979) p9.

39 Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More* p217.

> like the scribes and pharisees who had crucified Christ. It looks suspicious, at any rate, and if More's evidence that Hunne haunted the midnight lectures patronized by Lollards is not an invention, the case against him hardens.[40]

Hunne was a heretic awaiting unholy confirmation — so why should the church wish him dead? Surely, he was worth more to the church alive.[41] Indeed, there were sound reasons for Hunne to feel suicidal.[42]

Although the institution of the church should not wish Hunne dead, the institution did act unwisely upon finding his body hanging from a beam.

> In an attempt to hush the matter up, the church authorities acted rashly and foolishly. They maintained that Hunne, conscious of his heresy, had committed suicide, and they proceeded posthumously with the process against him. On 10 December a sermon was preached on his sins at St Paul's Cross; on the 16th sentence was pronounced; on the 20th his corpse was burned for heresy.[43]

Burning the corpse conveyed a gratuitously vindictive impression of the church, which caused "an uproar in London where Hunne had friends".[44] It was not, however, the practice of the church to burn heretics; rather, the church sought the abjuration or return of erring sheep to the fold.[45]

> The problem in Hunne's case was simply that since he was already dead, he was in no position to abjure, and therefore under canon law had to be burnt — and it was only the fact of his unexpected death that had resulted in the posthumous trial.[46]

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40 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p35.

41 Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More* p218.

42 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p39; cf Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 esp at 141, where she argues that Hunne could not be shown to be a heretic on the evidence (unconvincingly, it is respectfully submitted) of a 1495 judgment which narrowly defines heresy.

43 Elton, *Reform and Reformation* pp52-53.

44 At 53.

45 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p36.

46 As above.

With the cause of the death of Hunne unexplained, the subsequent coroner's inquest resulted in a jury verdict of murder at the hands of Dr Horsey (the Bishop of London's vicar-general) and Charles Joseph (the gaoler and summoner) and his assistant, John Spalding. It seems that only Horsey was tried before King's Bench, where his plea of not guilty was accepted. This would seem justifiable, as argued by Gwyn, for the only evidence against Horsey was a ridiculous, propagandistic, anti-clerical booklet.[47] The only remaining quandary is the coronial confession by Joseph, perhaps made under duress,[48] that he murdered Hunne at Horsey's instigation. Consonant with this, perhaps, the jury did find bruises on the body of Hunne (suggesting foul play prior to suicide) in addition to the broken neck which caused his death,[49] and there was strong public sentiment that Hunne had been murdered by the church. However, it could not be beyond reasonable doubt that the physical evidence indicated murder.[50] Joseph's plea of not guilty was accepted by the Crown, and if the church had thought Joseph guilty there would have been tactical sense in pressing the case against the insignificant figure, thus deflecting suspicion from the church itself.[51]

WESTERN LEGAL SCIENCE

It has been suggested above that one of the ways in which Western legal science developed was through competing jurisdictions:

> The very complexity of a common legal *order* containing diverse legal *systems* contributed to legal sophistication. Which court has jurisdiction? Which law is applicable? How are legal differences to be reconciled? Behind the

47 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p38.

48 See Ogle, *The Tragedy of the Lollards' Tower: The Case of Richard Hunne and its Aftermath in the Reformation Parliament 1529-1533* (Pen-in-Hand Publishing, Oxford 1949) pp81-82, cited in Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p39.

49 Elton, *Reform and Reformation* p53.

50 Marius, *Thomas More: A Biography* (J M Bent, London 1984) p131, argues that the fact that Hunne's body and face were clean of any discharge indicates murder, because "hangmen of all times" know that if a body is hanged alive, it is "bound to" bleed from the nose and mouth, and discharge bowels and bladder. It is submitted that "bound to" is not conclusive proof that Hunne was murdered before he was found hanging. In any case, Derrett maintains that "Hunne was found hanging with certain bleeding wounds" which obfuscates matters: Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More* p216.

51 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p38.

> technical questions lay important political and economic considerations: church versus crown, crown versus town, town versus lord, lord versus merchant, and so on. Law was a way of resolving the political and economic conflicts. Yet law could also exacerbate them.[52]

If law was the way of resolving the conflict between the common legal order shared by church and state which culminated in the Reformation, the principal legal systems at the time of Hunne (canon law and common law) were on the way to being rationalised. The conflict between secular and ecclesiastical jurisdictions was perhaps only as much of a conflict as that between different parts of the secular court structure through the use of various writs. All jurisdictions had become dependent upon the exercise of royal power to have judgments enforced,[53] which power would have been subject to common law. Furthermore, jurisdiction over certain defamation cases, for example, where one man called another a thief or a murderer, no longer belonged to the canon law.[54] There was even a conflict of jurisdictions between the bishops and archbishops: the jurisdiction of the bishops was part of the King's own domestic jurisdiction, wherein Hunne was being tried for heresy;[55] as opposed to the legatine jurisdiction over the archbishops' courts.[56] As may be seen, there was an institutional tilt towards the common law away from the canon law at that time.

These conflicts of jurisdiction were not insoluble because there was a final arbiter:[57]

> There were various ways in which different courts could safeguard or extend their jurisdiction and prevent cases being heard in various courts at once ... A writ of prevention meant that a case was already proceeding elsewhere. An inhibition was a writ from a higher court stopping a case from proceeding further in a lower court and a prohibition issued from chancery, stopping a case

52 Berman, *Law and Revolution: The Formation of the Western Legal Tradition* p10.
53 See Jack, "The Conflict of Common Law and Canon Law in Early Sixteenth Century England: Richard Hunne Revisited" (1985) 3 *Parergon* 131 at 137.
54 As above.
55 At 143.
56 At 140.
57 At 137.

from proceeding at all until certain legal issues were cleared up.[58]

Ecclesiastical courts were the most popular, and not surprisingly the cheapest, with broad jurisdiction as can be conceived in the ambit of *pro salute animae* (for the health of the soul). There were jealousies between the practitioners of the prestigious Romano-canonical law and the common lawyers who suffered delusions of civic grandeur. Real power lay with the royal courts: "[a]ppointment of the right men by agreement between king and pope secured on the whole that the ecclesiastical courts did not tread too hardly on the heels of the lay authorities";[59] and "consultation between bishops and judges was, we know, regular in secular contexts".[60] Political balance therefore depended upon a complex interplay between established institutions of law being eroded or accreted under two opposing figureheads, King and Pope, operating within the parameters of their malleable inheritances. Differences between the two were historically solved by recourse to a transcendent understanding of law — a meta-law. Political balance depended upon this Western legal science — upon parameters set by extant knowledge, ever open to change through reinterpretation and newly discovered knowledge.

CONCLUSION: OF THE VOCATION OF LAWYERS FOR MAKING HISTORY

Despite the omens, the Catholic church was not in the throes of death in England at the time of Hunne. Although the church courts lost much of the lucrative work they had enjoyed under Edward IV,[61] "the Hunne case was notorious precisely because it was unique in its bitterness, and should be set in the broader perspective of religious observance".[62] The church system had been running smoothly since long before the accession of Henry VII.[63] In the first three decades of the sixteenth century, the laity was lavishing money upon enlarging and beautifying parish churches. Indeed, the general level of contentment with the church was reflected in

58 At 140.
59 See Derrett, "The Affairs of Richard Hunne and Friar Standish" in Trapp (ed), *The Complete Works of St Thomas More* p220.
60 At 224.
61 Houlbrooke, *Church Courts and the People During the English Reformation 1520-1570* p9.
62 Thomson, *The Early Tudor Church and Society 1485-1529* (Longman, London 1993) at p361.
63 At 360.

the absence of any "headlong rush" into Lutheranism.[64] Nor was the state machinery necessarily desperate to dispossess the church of its spiritual calling. Possibly this was due to the Tudor proclivity to advance people in the church if they were useful to the King's government, and to use bishops and councillors as administrators in the King's government;[65] bishops were mostly lawyers and not theologians.[66] The response to the death of Richard Hunne was actually quite tame compared with the attacks on papal powers in the late fourteenth and early fifteenth centuries, according to Gwyn.[67] The early Tudor period formed no landmark when compared with the encroachment of fifteenth century common lawyers on the ecclesiastical jurisdiction. There was a "homogeneous ruling class" created by "the ready movement of men from lay to ecclesiastical service and *vice versa*"; "churchmen were allowed to discover the very real advantages of cooperation with the lay power".[68] Thus said, there was more required for a revolution to occur than the haphazard conflict of ideologies and powers in a society demonstrably well-ordered.

Yet, within twenty years of Hunne's death, the issues he had raised and the cause he had challenged had been resolved in the Henrician Reformation in such a way that Hunne's will had been posthumously effectuated, at least in the reign of Henry VIII. The Hunne case serves as a valuable context for evaluating the role of law in history. It would seem that the massive upheavals of the Reformation, at a legal level, were foreshadowed by the claims being made by Hunne as a common law litigant. The legacy of the Hunne case, therefore, was its evolutionary contribution to history. It was by bringing issues before the courts that such issues could be explored. It was in this exploration that new knowledge was gained about the relationship between the issue and the rest of the legal world. This new knowledge was added to the storehouse of possibilities for new legal precedents, not only in the legal system, but transcending it, in a body of knowledge wherein lay the authority for reconciling the systems should they be in conflict. For it was by reflecting on the propositions of the past, in a broader intellectual context, in Western legal science, that radical new possibilities could be imagined and justified for social change. Whilst the Henrician Reformation was delivered by the exigency of "the King's Great Matter" — Henry's need to divorce Catherine of Aragon and remarry to

64 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p41.
65 See Elton, *Reform and Reformation* p11.
66 Dickens, *The English Reformation* p43.
67 Gwyn, *The King's Cardinal: The Rise and Fall of Thomas Wolsey* p42.
68 Watt, "Spiritual and Temporal Powers" in Burns (ed), *The Cambridge History of Medieval Political Thought c350-c1450* p396.

procreate a male heir — no doubt the possible social mood and the viability of challenging the spiritual jurisdiction could be measured against and planned by strategic reference to the explorations already conducted by those such as Hunne.

Such a theory of law and social progress places great responsibility on those whose activity impacts upon the practice of law. Every lost case, as well as every won case, becomes a constraint on the possibilities for the future. Regardless of whether a legal proposition is radical or reactionary, liberating or enslaving, the proposition limits what can be imagined for new times, because it is only the proposition which can be called upon for guidance. So it must be for all knowledge. This dilemma becomes serious for lawyers because their knowledge impacts so directly upon society. Legal propositions all vie for expression in an evolving social order. There is an obligation, then, for lawyers to understand that what they do will shape the future, and that their future will be a history upon which a newer future will be built.

Appendix

Dramatis Personae

Joan Baker:	alleged heretic, sought Hunne's counsel.
Thomas Dryffeld:	rector at Whitechapel.
Richard Fitzjames:	Bishop of London, prosecutor of Hunne for heresy.
Dr William Horsey:	Bishop of London's vicar-general, acquitted of Hunne's murder.
Richard Hunne:	livery merchant; suicide; alleged murder victim; heretic.
Stephen Hunne:	deceased son of Richard Hunne.
Charles Joseph:	gaoler and summoner, possible murderer of Hunne.
William Lambarde:	Hunne's fellow church tenement disputant.
Henry Marshall:	chaplain and parish priest at Whitechapel.
Cuthbert Tunstall:	the archbishop's chancellor.

Plot

1510	Richard Hunne defends Baker, his neighbour, against heresy.
November 1511	Hunne, with Lambarde, disputes against parson and church wardens of St Michael's, Cornhill, over church tenement.
29 March 1511	Hunne's infant son Stephen dies in parish of St Mary Matfellon, Whitechapel.
26 April 1512	Marshall, on behalf of Dryffeld, sues Hunne for not paying the mortuary fee, before Tunstall.
May 1512	Hunne loses mortuary case; acts in contempt of court order.
13 or 27 December 1512	Marshall excludes Hunne from service at Whitechapel, calling Hunne an excommunicate
25 January 1513	Hunne sues Marshall for slander
	Hunne sues Dryffeld, Marshall, all of the mortuary prosecution retinue including the judge, and Joseph, for *præmunire*.
23 January 1514	Hunne cited before Convocation for heresy.
October 1514	Hunne arrested for heresy, imprisoned in Lollards' Tower in St Paul's.
2 December 1514	Hunne examined by Fitzjames in Fulham palace.
4 December 1514	Hunne found hanging in Lollards' Tower.