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Humanist Lawyer, Public Career: Thomas More and Conscience

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Because Thomas More did not introduce grand programs of Utopian policy through new legislation, or modify the fundamental nature of British law with principles of humanist jurisprudence, most scholars regard More as a follower of Cardinal Wolsey's legal innovations and not much of a reformer himself. This essay will challenge that perception, presenting More as a humanist reformer by examining the importance of equity to humanist legal and rhetorical studies and by showing how More viewed the law as part of the liberal arts.

Keywords: reform, humanist jurisprudence, equity and conscience, rhetoric.

Parce que Thomas More n'a pas appliqué de grandes réformes utopiques dans la législation, et n'a pas non plus réformé la nature fondamentale du droit britannique en y incluant des principes humanistes, la plupart des critiques considèrent que More a été un disciple du cardinal Wolsey plutôt qu'un réformateur lui-même. Dans cet article, on remettra en cause cette perception de More en le présentant comme un réformateur humaniste; on examinera l'importance de l'équité dans les études de droit et de rhétorique, et on montrera que More considérait le droit comme faisant partie des sciences humaines.

Mots clés : réforme, droit humaniste, équité et conscience, rhétorique.

Dado que Thomas More no puso en práctica grandes programas de política utópica mediante nueva legislación, ni modificó la naturaleza fundamental de la ley británica con principios de jurisprudencia humanista, la mayoría

de los estudiosos le consideran más un seguidor de las innovaciones legales del Cardenal Wolsey, que un reformista. Este ensayo pone en tela de juicio este planteamiento al presentar a More como un humanista reformador, examinando la importancia de la equidad en los estudios humanistas legales y retóricos, y también al mostrar cómo More concebía la ley como parte de las artes liberales.

Palabras clave: reforma, jurisprudencia humanista, equidad de conciencia, retórica

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Though Thomas More's concerns with "conscience" were paramount to his last writings, we find the term in his legal work where he addresses questions of "equity."¹ As chancellor, More was responsible for the Chancery and the Star Chamber courts, which employed the principle of conscience, a standard and a coercive power that enabled judges to administer the sometimes ambiguous common law to particular cases. As a matter of law, investigating More's sense of conscience involves an inquiry into sixteenth century legal jurisprudence, the role of justices in dispensing equity, and the broader controversy over whether or not More remained a humanist reformer once he began work for the Crown. In the absence of new, Utopia-like legislation, or radical reforms of law, More emerges in most scholarship as a mere follower of Cardinal Wolsey's legal innovations.² Such scholarship, however, investigates

¹ "Equity" and "conscience" are used interchangeably during both More and Wolsey's tenures as chancellor. See J.H. Baker, *An Introduction to English Legal History*, Fourth Edition, London: Butterworths Tolley, 2002, p. 105-108.

² For examples of More as a follower of Wolsey, see E.W. Ives, *The Common Lawyers of Pre-Reformation England: Thomas Kebell: A Case Study*, Cambridge University Press, 1983, 198-99; Stuart E. Prall, "The Development of Equity in

More's legal career without granting priority to the relationship between humanism and the law, and in particular, humanist jurisprudence and equity. Though humanist reforms in continental Europe did emphasize Roman law to a degree not realized in England, a fundamental principle of reform in England was equity, an obvious observation, yet one surprisingly detached from humanist concerns when scholars assess More's legal career. John Guy's highly influential books on More, for example, credit Wolsey, not More, for legal reform, primarily because the archival record would seem to warrant such a conclusion. In Guy's *Thomas More* (2000), More's "independent achievements" as chancellor provoke "the question of whether he [More] was still a Utopian reformer in 1529."³ Guy finds the evidence "unpersuasive" that More was a reformer. He argues: "If equitable jurisdiction is itself to be equated with Utopian reform, then Wolsey was as much a Utopian reformer as More."⁴ Yet the question of More's understanding of equity should involve a historiography that depends less on reading the archival record. As John Gueguen writes of Guy's earlier work on this subject, *The Public Career of Thomas More* (1980), Guy believes archival records "provide our best window to reality," thereby elevating whatever occurred at the Star Chamber and diminishing More as Church apologist, humanist, author of prayers and spiritual exercises, providing us, in the end, with a "narrow understanding of

Tudor England," *The American Journal of Legal History* 8, no. 1, January 1964, p. 7, who cites for support; J.H. Hexter, *More's Utopia: The Biography of an Idea*, Princeton, 1952, p. 150; and Russell K. Osgood, "Law in Sir Thomas More's *Utopia* as Compared to his Lord Chancellorship," *Thomas More Studies* 1, 2006, p. 183 at <http://www.thomasmorestudies.org>.

³ John Guy, *Thomas More* (New York: Oxford University Press, 2000), p. 127.

⁴ *Ibid.*, p. 140.

what constitutes a man's 'public career.'⁵ Guegen's observation may be applied to Guy's treatment of Wolsey as well, where, as Brendan Bradshaw writes of Guy, "he seems little interested in the mental attitude which the cardinal brought to his work in Star Chamber."⁶ For Bradshaw, "Wolsey was exposed to what might loosely be called an ideology of reform," a reform that focused on "social problems" with a "new intensity," and Wolsey's attitude toward reform was "precisely what Christian humanism was preaching in the second decade of the 16th century."⁷ More, after all, could be initiating ideas of reform in his humanist writings before he followed them as Wolsey's successor. Bradshaw's critique, too, would appear to be incorporated into Guy's own most recent position on More's ideas of equity. In *A Daughter's Love: Thomas & Margaret More* (2008), Guy suggests More's own practice of equitable jurisprudence results from More's "philosophical approach" to the professional practice of law, though even in this text, Wolsey is still named as first in legal reform, and Guy has praised and minimized the very same record of More's achievements before, calling More's record a "magisterial performance" in *Public Career* and claiming "one cannot become too excited over More's legal work" in *Thomas More*.⁸ In this essay, I will suggest More as a humanist reformer of the law with less ambiguity

⁵ John A. Guegen, review: *The Public Career of Sir Thomas More*, *Sixteenth Century Journal*, Vol. 14, No. 2, Summer, 1983, p. 248-249.

⁶ Brendan Bradshaw, "The Tudor Commonwealth: Reform and Revision," *The Historical Journal* 22.2, June 1979, p. 458.

⁷ *Ibid.*, p. 458-9.

⁸ John A. Guy, *The Public Career of Sir Thomas More*, New Haven: Yale University Press, 1980, p. 93, and *Thomas More*, p. 218. To survey Guy's assessments of More as follower of Wolsey versus More as humanist reformer, compare the following statements: *The Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber*, Totowa, NJ: Rowman and Littlefield, 1977, p. 124; *Public Career*, p. 14, p. 50-1; *Thomas More*, p. 127, p. 140; and *A Daughter's Love: Thomas & Margaret More*, London: Harper Collins, 2008, p.56, p. 86-7.

by examining the importance of equity to humanist legal and rhetorical studies and by showing how More viewed the law as part of the liberal arts. Legal or Tudor period historians like Guy often undervalue the rhetorical training of lawyers especially, privileging archival public records as evidence.⁹ The close relationship between the humanist revival of rhetoric and the law in 16th century England, however, invites us to reconsider More's role as a humanist reformer of the law.¹⁰

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For humanist jurisprudence, interpreting the law begins with the application of historical and philological criticism to ancient Roman laws. Quentin Skinner explains the humanist intention:

"They wanted to challenge the orthodox scholastic approach to the interpretation of the Civil Code, above all the deliberately unhistorical assumption that the main aim of the jurist should be to adapt the letter of the law as closely as possible to fit existing legal circumstances."

Moving from Italy northward, Guillaume Budé, More's French counterpart, produced "the earliest and greatest manifesto of legal

⁹ For sources other than Guy and Baker on equity, conscience, and the court, see Prall, "The Development of Equity in Tudor England"; Ives, *The Common Lawyers*, p. 189-221; P. Tucker, "The Early History of the Court of Chancery: A Comparative Study" *English Historical Review* 115, (2000), p.791-811; Mike Macnair, "Equity and Conscience," *Oxford Journal of Legal Studies* 27, no. 4 (January 1, 2007), p. 659-681; for a broader reception history of Aristotelian equity, see Darian Shanske, "Four Theses: Preliminary to an Appeal to Equity," *Stanford Law Review* 57.6 (2005).

¹⁰ See *Rhetoric and Law in Early Modern Europe*, eds. Lorna Hutson and Victoria Kahn, New Haven: Yale University Press, 2001.

humanism to be published north of the Alps." As the method migrated, it also expanded, such that Ulrich Zasius, praised by Erasmus, employed the *studia humanitatis* to Medieval jurists and feudal law, thus becoming, according to Skinner, "one of the earliest civil lawyers to apply the techniques of humanist jurisprudence to the study of a legal system other than that of Rome."¹¹ Scholars like Budé knew that feudal or princely laws of the day were different from those of antiquity, but the traditions of current practice were considered derivative of Roman ones, and *civilis sapientia* revealed the philosophy of justice within civil laws.¹² Thus, we find Peter Giles, writing on the sources of the Justinian code, Vives writing notes on Cicero's *De legibus*, and Budé writing *Annotaciones* on Roman law. Giles and Budé were part of *Utopia*'s publication, and Vives stayed in More's home.¹³ Vives, too, addressed juristic humanism at Oxford, arriving from the University of Louvain on the invitation of Cardinal Wolsey. The first professor of Civil Law at Cambridge — Thomas Smith (1513-1577) praised humanist jurisprudence as well.¹⁴

Important studies by F.W. Maitland and Donald Kelley have suggested only a slight influence upon England from humanistic reforms on the continent. Maitland believed the "English character" preserved their laws from reform, and Kelley, though originally

¹¹ Quentin Skinner, *The Foundations of Modern Political Thought, Vol. 1: The Renaissance*, Cambridge: Cambridge University Press, 1978, p. 202-07.

¹² Donald R. Kelley, "Law" in *The Cambridge History of Political Thought: 1450-1700*, ed. J.H. Burns, Cambridge University Press, 1991, p. 77.

¹³ These points are made by R.J. Schoeck, "Thomas More, Humanist and Lawyer" in *Essential Articles for the Study of Thomas More*, Hamden, CN: Archon Books, 1977, p. 572-73; hereafter *Essential Articles* is abbreviated as *EA*. See, too, William Nelson, "Thomas More, Grammarian and Orator" in *EA*, p. 156-60.

¹⁴ Martha A. Ziskind, "John Selden: Criticism and Affirmation of the Common Law Tradition" *The American Journal of Legal History*, vol. 19, no. 1 (Jan. 1975), p. 26.

describing England as "insular," later conceded some influence upon Britain by the humanists, though it was primarily academic rather than in practice.¹⁵ Scholarly consensus remains with Maitland, providing what Mike MacNair calls "the current orthodoxy," where only "miscellaneous defects" in common law were corrected by the Chancellor's office.¹⁶ Given More's associations with Vives and Budé especially, however, his acquaintance with humanist jurisprudence seems certain. More, after all, applied the exegetical method of "positive theology" to find a law-giver's intention in *A Dialogue concerning Heresies*, and a principle behind humanist reforms of the law, equity, was a term he used in light of its classical derivation.¹⁷

More's connection to Budé immediately shows the importance of equity. Budé's letter recommending More's *Utopia* emphasizes social justice with regard to property rights and inheritance. The letter was published in the second edition of *Utopia*, and as R.J. Schoeck comments, it lent "Budé's legal prestige on the Continent to More's great publication."¹⁸ Comparing the complexities of the law to the simplicity of Christ's commandments, Budé claims lawyers are no longer concerned with the ancient virtue of justice, defined as giving each his due, but with the distribution of wealth and land according to technicalities of law. In short, legal positivism

¹⁵ F.W. Maitland, "English Law and the Renaissance" in *Selected Historical Essays of F.W. Maitland*, Boston: Beacon Press, 1962, p. 135-51; Donald R. Kelley, "History, English Law and the Renaissance: A Rejoinder," *Past and Present*, no. 72 (August 1976): p. 143-146.

¹⁶ Mike Macnair, "Equity and Conscience," p. 664.

¹⁷ See *CW* 6, part 1, *A Dialogue Concerning Heresies*, ed. Thomas M.C. Lawler, Germain Marc'hadour, Richard C. Marius, New Haven: Yale University Press, 1981, p. 356/5-358/25. For More's use of *ex aequo bonoque*, see *CW* 5, part 1, *Responsio Ad Lutherum*, trans. Sister Scholastica Mandeville, ed. John M. Headley, New Haven: Yale University Press, 1969, p. 278-9 and Headley's comments, *CW* 5, part 2, p. 754-56.

¹⁸ Schoeck, "Thomas More, Humanist and Lawyer," p. 573.

dominates the profession of More's day, a positivism that creates "Gordian knots and charlatan methods" in service of the strong, who may accumulate most of the wealth. Does God direct men to hoard goods, Budé asks, separating rich from poor? If so, why do the apostles teach that all good should be held in common (as More does in CW 15)? Budé finds a formulaic set of rules very far from the Christian ideal of a just society. Here the ancient virtue of justice is presented as commensurate with Christ's teaching and the way to a more just, and therefore more Christian society, is through correcting the positive law.¹⁹ That assessment, though broad, corresponds to the demands of conscience and equity to reform the common law. As Guido Kisch writes, "it is to the humanist-jurists that modern legal thought owes the theoretical opening up of the wide domains of *epikeia* and equity," who illustrate to us "the varied evolution of legal-dogmatic ideas from Aristotle to Budé."²⁰ Less than an illustration of More's own thought, the letter of Budé provokes a question whether the humanist emphasis upon social justice could augment the practice of equity in England.

In searching for More's own thoughts on reform, legal theorists and archival historians have underestimated the importance of rhetoric for the study of equity in 16th century England. "Such questions as More's reading in rhetoric, one of the

¹⁹ "William Bude to Thomas Lupset" in CW 4, *Utopia*, ed. Edward Surtz, S.J. and J.H. Hexter, New Haven: Yale University Press, 1965, p. 4-11. On Budé's argument and its significance for *Utopia*, see Peter R. Allen, "Utopia and European Humanism: The Function of the Prefatory Letters and Verses," *Studies in the Renaissance*, 10 (1963), p. 91-107. For a reading of the letter as a response to Utopia on the issue of equity, see Andrew J. Majeske, *Equity in English Renaissance Literature: Thomas More and Edmund Spenser*, New York: Routledge, 2006, p. 64-9.

²⁰ Guido Kisch, "Humanistic Jurisprudence" *Studies in the Renaissance* 8 (1961), p. 80.

liberal arts but one directly contributory to the practice of the law, and one in whose development during the 16th century common lawyers played a very large role, have scarcely been asked": though Schoeck wrote the above in 1964, and much work has been done since on the use of rhetoric in early modern England, his observation largely stands with regard to More's legal work.²¹ As Schoeck argues, law was no longer a subdivision of rhetoric, but "lawyers in England studied their classical rhetoric long before the time of Thomas More, and in fact the relation between law and rhetoric may already have a firm tradition before Chaucer (who studied both) and John Gower." When More cites Cicero in the *Utopia*, Schoeck observes, it occurs with reference to the law, implying that "More was richly aware of the extent to which Cicero was concerned with the study of law, as well as with legal argument."²² To Schoeck's more general points about an education in rhetoric, Andrew J. Majeske adds the emphasis upon equity: "More's familiarity with equity (as *aequitas*) would have begun in his grammar school education, probably when he encountered Cicero's uses of *aequitas* in the *De Finibus*, the *Topica*, and the *Pro Murena*, texts typically drawn upon for rhetorical exercises and translation practice." But also, after finishing at Lincoln's Inn, More studied Greek with Grocyn and Linacre; the latter just returned from Italy after helping publish Aristotle's works, where equity would have been addressed

²¹ Schoeck, "Thomas More, Humanist Lawyer," p. 576.

²² Richard J. Schoeck, "Lawyers and Rhetoric in Sixteenth-Century England" in *Renaissance Eloquence: Studies in the Theory and Practice of Renaissance Rhetoric*, ed. James J. Murphy, Berkeley: University of California Press, 1983, p. 279, p. 284. See, too, *Rhetoric and Law in Early Modern Europe*, ed. Victoria Kahn and Lorna Hutson, especially p. 1-25 and p. 55-72.

especially in the *Rhetoric*.²³ Majeske concludes that *Utopia*, too, shows a knowledge of “the relevant texts” — ranging from Plato’s *Republic* and the *Laws* to Aristotle’s *Rhetoric*, *Ethics* and *Politics* — for identifying equity.²⁴

The connection between equity and rhetoric illustrates how legal studies were combined with liberal learning, suggesting the vocation of a “humanist lawyer.”²⁵ Here the Inns of Court were important, a point difficult to grasp, because “our culture and our public life,” argues R.S. White, “have lost the equal valuing of literature, law, politics and religion in the tight knit which could be fostered in the environment of the Inns of Court.”²⁶ Legal associations, like the kind formed at Inns, included exposure to rhetoric and poetry.²⁷ Though late, the examples of George Puttenham and Thomas Wilson are suggestive. Puttenham, author of the influential *The Art of Poesy*, was a student at Middle Temple beginning in 1556 who compared a poet’s craft to that of an advocate “because our maker or poet is appointed not for a judge but rather for a pleader.”²⁸ As Thomas Smith, professor of Civil Law, praised

²³ On studying Greek, see *St. Thomas More: Selected Letters*, ed. Elizabeth Rogers, New Haven: Yale University Press, 1967, p. 2. And, for a bilingual presentation, see *CW* 15 129/49.

²⁴ Andrew J. Majeske, *Equity in English Renaissance Literature*, p. 65. Majeske adds that at Oxford More would have read Aquinas’ account, and at New Inn, Fortescue’s interpretation in *De laudibus legume Anglie*.

²⁵ On British common law and Renaissance rhetoric, see Peter Goodrich, “We Orators: Review Article of Brian Vickers’ *In Defense of Rhetoric*,” *The Modern Law Review* 53:4 (July, 1990), p. 546-63.

²⁶ White, *Natural Law in English Renaissance Literature*, Cambridge University Press, 1996, p. 75.

²⁷ On the Inns of Court and rhetoric, see *Ibid.*, p. 73-87; see, too, Schoeck, “Thomas More, Humanist and Lawyer,” p. 573-6 and his “Lawyers and Rhetoric.”

²⁸ George Puttenham, *The Art of English Poesy: A Critical Edition*, ed. Frank Whigham and Wayne A. Reborn, Ithaca: Cornell University Press, 2007, p. 239; see, too, Schoeck “Lawyers and Rhetoric”, p. 288-9.

the eloquence of common lawyers who spoke in the vernacular, one of Cambridge’s students, Thomas Wilson, would write the *Art of Rhetoric* (1560), where rhetoric is taught as complementary to law.²⁹ In fact, the *Art of Rhetoric* includes equity as one of seven “places of confirmation” — that is, subjects in which “the state of right or wrong” may be argued.³⁰ These rhetorical manuals are often cited by scholars to provide context to Shakespeare plays, or to show the importance of rhetoric to poetry, or more recently, to demonstrate the presence of republican thought in the Early Modern period, but they emerge, as from their sources in Cicero, as texts that incorporate law with rhetoric.³¹ “Books of rhetoric,” argues White, were mostly “aimed particularly at either lawyers or poets” because both, “the one through oratory and the other through writing, shared a professional, vested interest in the classical strategy of rhetoric to move hearts and minds in a certain direction through language.”³² In short, the “common heritage of classical rhetoric” that inspired humanist reforms in education, poetry, and politics came from the

²⁹ Peter Medicine, “Introduction” to Wilson’s *Art of Rhetoric (1560)*, ed. Peter E. Medicine, University Park, PA: The Pennsylvania State University Press, 1994, p. 5.

³⁰ Wilson, *Art of Rhetoric*, p. 131.

³¹ On how classical rhetoric was received in Renaissance England and was part of the humanist ideal of *vir civilis*, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, Cambridge University Press, 1996, p. 19-211; on the related issue of republicanism, see Markku Peltonen, *Classical Humanism and Republicanism in English Political Thought: 1570-1640*, Cambridge University Press, 1995, p. 1-17, which address republicanism before the civil war. On rhetoric and education, see Peter Mack’s “Rhetoric in the grammar school” in *Elizabethan Rhetoric*, Cambridge University Press, 2002; on rhetoric, politics and education, see Heinrich R. Plett, *Rhetoric and Renaissance Culture*, Berlin: Walter de Gruyter, 2005, p. 47-52. For an example of Shakespeare’s use of classical rhetoric, see Miriam Joseph’s *Shakespeare’s Use of the Arts of Language*, New York: Hafner Publishing Company, 1966.

³² White, *Natural Law*, p. 79.

same texts that dealt with the law.³³ Though More is an expert in rhetoric and a pioneer in humanist education, the relationship of these interests to law does not pervade discussion of his public career, which may suggest, perhaps, that much of the current picture about More's legal work is anachronistically viewed in light of modern divisions between disciplines.

The connection between rhetoric and jurisprudence illustrates not just the importance of humanist exegetical techniques, but an educative vision that emphasizes prudential judgment. More demonstrates his own understanding of how legal and liberal learning contributes to shaping judgment in the *Dialogue Concerning Heresies*, where he specifically associates the liberal arts with law. More writes:

so is it no doubt but that reason is by study / labour and exercise of logic / philosophy and other liberal arts corroborated and quickened / and the judgment both in them and also in orators / laws & stories much ripened.³⁴

Along with the study of oratory and poetry, "laws" are a means by which "judgment" ripens or matures. Liberal arts may "quicken" reason, giving it life, animating reason (number 1 in *OED*), but More viewed "judgment" as distinct from the sharpening of reason that occurs with an education in the *trivium*; judgment would mature over time, advanced by studying orators, laws and stories. Cultivating "judgment" through the study of law suggests the literal sense of "to sit as judge" (*OED*, 1.b) and the more figurative "to pass judgment upon," but includes, too, other denotations of the word, as fruit from the study of *humanitas*, such as an "ability to form an opinion," (*OED*, 8.a) and "discernment, discretion, wisdom" or "good sense" (*OED*,

³³ *Ibid.*, p. 78.

³⁴ *CW* 6, part 1, 132/6-11

8.b). To be a judge at court would not only entail technical expertise of the law, but should mean exercising mature judgment. Though a defender of Luther, Philip Melancthon would express a similar finding: "And there was no way that men, who were ignorant of the more refined sorts of literature, could have devised something sensible in the study of law, justice, and equity, because that particular discipline comes right from the humanities, and the works of the lawyers of antiquity are full of erudition that is both ancient and true."³⁵ For Melancthon, in words that resonate with those from the *Dialogue*, "prudential judgment" was "sharpened" by studying the "arts of speech" or the "humanities." By studying ancient authors, who were "involved in handling and managing the greatest of affairs," readers may "contract a certain capacity for judging," as they are "tanned" by the ancients, just as people "who walk in the sun."³⁶ Rhetoric did not constitute merely power delivered by persuasion, but informed prudential judgment. Germain Marc'hadour observes of More's own inclusion of law to humanist studies,

the adding of law in a noble place between rhetoric and history may reflect the experience of More as Chancellor of the Duchy of Lancaster, in duty bound already to apply the humanizing categories of equity, or *juris-prudence*, to the letter of the statute.³⁷

³⁵ On More and Luther, see A. Young, "Martin Luther and Thomas More: Two Trials of Conscience" in *Moreana* vol. 40, n°153, p. 173-192.

³⁶ Philip Melancthon, from *The Praise of Eloquence in Renaissance Debates on Rhetoric*, ed. and trans. Wayne A. Rebhorn, Ithaca: Cornell University Press, 2000, p. 110, p. 103.

³⁷ Germain Marc'hadour, "Basil the Great and Thomas More," *Moreana* vol. 29, n°111-112 (November, 1992), p. 43.

Here the judicial experience of More leads him to elevate law, but more likely it was the opposite; the humanist studies, especially rhetoric, already prepared more to think of jurisprudence as an intellectual virtue.

The interrelation of prudence, equity, and rhetoric may be seen in More's discussion of decorum at the end of Book One in *Utopia*. More appears as character, debating with a traveler, Raphael, over what philosophy is best suited to court. Raphael maintains that ideals should be clearly and bluntly stated and More that such "academic philosophy is pleasant enough in the private conversation of close friends, but in the councils of kings, where grave matters are being authoritatively decided, there is no room for it."³⁸ More advocates decorum here, as is often noted, following the Ciceronian formulation as "the form of wisdom that the orator must especially employ," adapting himself "to occasions and persons," for "one must not speak in the same style at all times, nor before all people."³⁹ Not simply a style of speaking, decorum constitutes "wisdom," a prudential judgment of what will be heard and may be achieved, given a particular group of interlocutors. The political concomitant to decorum is More's famous oblique approach, urging your case tactfully, and thus "what you cannot turn to good, you may at least make as little bad as possible." Finally, as Majeske shows, equity is the legal collateral teaching to both the political and rhetorical positions.⁴⁰ Raphael replies to More by asking how customs of men may ever be changed for the better without the use

³⁸ Thomas More, *Utopia*, ed. George M. Logan, Robert M. Adams, Cambridge University Press, p. 35.

³⁹ *The Orator*, XXXV.123, is cited from *Ibid.*, n.70.

⁴⁰ Majeske, *Equity in English Renaissance Literature*, 82-4. Majeske provides a reading of both books of *Utopia* in light of equity, p.63-91.

of challenging candor. Christ himself did not adjust his teaching to the way men were living, though subsequent crafty preachers did. Here Raphael calls More's decorum a "leadен yardstick," an important allusion to Aristotle's *Nicomachean Ethics*. For Aristotle, as MacNair summarizes, equity is "like the lead ruler allegedly invented in ancient Lesbos, which adapts the fixed measurements (the terms of the law) to the irregular stone (the particular situation)."⁴¹ Law as a universal will never be sufficient unto itself because it cannot account for all the diversity of particular cases that may emerge; hence, to attain justice, a flexible application of the law must occur. The Cambridge editors recognize that Raphael refers to the Lesbian ruler, but view it incorrectly as a "metaphor for adaptable moral standards."⁴² Aristotle, more precisely, is discussing equity, and the allusion provides Raphael a transition to a wonderful, wise Utopia, where laws are few. What emerges in the dialogue at the end of Book One is prudence as a governing virtue for speech, politics, and law, where decorum, indirect method, and equity are advanced against philosophy, force, and laws rigorously applied without exception.

From theory to practice: equity, conscience, and prudential judgment emerge in William Roper's account of More's work with common law judges as well. As chancellor, the injunctions granted by More were "mislaked," and so More directed a clerk to collate "the whole number and causes of all such injunctions." More then invited those judges with complaints to dine with him, and afterwards, when More "had broken with them what complaints he

⁴¹ MacNair, "Equity and Conscience," p. 660.

⁴² Thomas More, *Utopia*, 36-7, n. 74. For passage from Aristotle in question, see *Aristotle's Nicomachean Ethics*, trans. Hippocrates G. Apostle, Grinnell, Iowa: The Peripatetic Press, 1984, 1137b10-15.

had heard of his injunctions, and moreover showed them both the number of causes of every one of them, in order, so plainly that, full debating of those matters, they were all enforced to confess that they, in like case, could have done no otherwise themselves." More advised that "the reformation of the rigor of the law" could be accomplished by their own "reasonable considerations" and "discretion" because they, too, were "conscience bound."⁴³ Applying the law equitably would mean administering it in conscience, and in advising the judges to do what he himself had, More both claims a difference and a similarity with the common law magistrates. On the one hand, the chancellor's courts obviously have an appellate function according to conscience, but on the other, there need be no appeal, if common law justices implement judgments according to conscience. In other words, it is within the purview of the common law to implement conscience. The rigor of the law, not the law itself, should be reformed. Rather than sweeping, new legislation, More's reforms, such as they were, deal with the application of equity through conscience.

For MacNair, expanded injunctions through equity by Wolsey and, by implication, More, constitute a kind of "anti-law." MacNair interprets Guy's archival research as an indication that Chancery and Star Chamber courts would "receive almost any claim"; the increase in judicial accessibility could not be processed, and so, most cases were sent "for compulsory arbitration by local worthies." This practice seems like "anti-law" or "alternative dispute resolution"; hence, if conscience simply meant dispute resolution

⁴³ More, Thomas, *A Thomas More Source Book*, ed. Gerard B. Wegemer and Stephen W. Smith, Washington, D.C.: Catholic University of America Press, 2004, p. 37-8.

under a new aegis, the term would mean anything or nothing at all.⁴⁴ Yet even arbitration is precisely the sort of equity Cicero speaks of in *De Officiis*. Though the example concerns a negative outcome, the following passage is commonly cited as one that illustrates the Roman concept of equity as justice, and one that illustrates how arbitration aids the process:

Injustice often arises also through chicanery, that is, through an over-subtle and even fraudulent construction of the law. This it is that gave rise to the now familiar saw, "More law, less justice." Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general went to ravaging their fields by night, because, he said, the truce stipulated "days," not nights. Not even our own countryman's action is to be commended, if what is told of Quintus Fabius Labeo is true — or whoever it was (for I have no authority but hearsay): appointed by the Senate to arbitrate a boundary dispute between Nola and Naples, he took up the case and interviewed both parties separately, asking them not to proceed in a covetous or grasping spirit, but to make some concession rather than claim some accession. When each party had agreed to this, there was a considerable strip of territory left between them. And so he set the boundary of each city as each had severally agreed; and the tract in between he awarded to the Roman People. Now that is swindling, not arbitration.⁴⁵

Arbitration should deliver equity. The same point is made in Aristotle's *Rhetoric*, where arbitrators should mitigate the law's rigor by deciding matters with a view to equity.⁴⁶ Equity achieved

⁴⁴ MacNair, "Equity and Conscience," p. 670.

⁴⁵ Cicero, *De Officiis*, trans. Walter Miller, Cambridge, MA: Harvard University Press, 1975, pp. 1, 10, 33.

⁴⁶ See Aristotle's *Rhetoric*, trans. W. Rhys Roberts, in *Aristotle: Rhetoric and Poetics*, New York: The Modern Library, 1954, 1374b10-25.

through arbitration should involve the same standards of good judgment we have already seen More define. Nor am I sure the first part of MacNair's argument — increased accessibility to litigants — entails the conclusion, that conscience meant nothing, other than a commonplace by which one would increase the scope of equity courts.

After the Star Chamber records reviewed by John Guy in *Public Career*, there is little available to connect arbitration to equity in More's judicial record, yet in a rare study of More as Chancellor of the Duchy, Margaret Hastings reviews the Decree and Order Books, which mostly contains a record of judicial proceedings. Reviewing 358 entries taken during More's four year tenure, she finds More's proceedings as judge according to "equity and conscience" the "nearest approximation" to fulfillment of humanist hopes for justice.⁴⁷ Though Hastings' findings are admittedly tentative, her examples of More's implementation of equity are suggestive. In one case, Thomas Hesketh's legitimate wife remains childless, and his will provides for his four illegitimate sons, with the eldest receiving the greatest portion. After Thomas's death, however, the "nearest legitimate heirs" — the four grandsons of Hesketh's four sisters — bring suit, and More rendered settlement in 1526. There is no decree because the matter was settled by arbitration, but More's decision may be inferred by the fact that Thomas's eldest illegitimate son inherited everything given to him by his father's will.⁴⁸ Hastings observes how unusual it was for a Chancery court to hear such a

⁴⁷ Margaret Hastings, "Sir Thomas More: Maker of English Law" in *EA*, p. 105.

⁴⁸ For the customs of the common law on this issue, see Christopher St. German, *Doctor and Student*, ed. T.F.T. Plucknett and J.L. Barton, London: Seldon Society, 1974, pp. 51, 55, 57. Even in St. German's theory, where equity is bound within the law, particular cases admit ambiguity.

case, and then replies: "An allegation of riot put in by the executors" may explain why.⁴⁹ "Riot" was one of the customary causes for appeal to Chancery courts. The addition of an allegation to change jurisdiction corresponds with MacNair's notion that an "anti-law" of a sort is at work, an easily manipulated means of finding courts to apply injunctions. Yet if the Hesketh case shows how arbitration often became the business of equity courts, it also resonates with Guy's general point that Chancery courts expanded accessibility by offering more flexible means of appeal. Hastings concludes her review of More's work by acknowledging there is only insubstantial evidence for the claim that More was a "maker of law," but enough of the Duchy record exists to show a "hard-working administrator," a "peacemaker," and an "astute lawyer who could cut through a mass of detail to the heart of the matter at hand."⁵⁰ Part of argument seems a matter of prejudicial adjectives. What MacNair calls "anti-law" by way of mere arbitration, Hastings terms as "peacemaking," an ability to find "what is essential." Applying the law in a way that cut through procedure in the name of conscience seems like a cliché to MacNair, but it could have appeared otherwise to the parties involved.

What emerges in a fuller study of More's ideas of conscience is the potential for harmony between his humanist studies and legal work. In the above reevaluation, I have suggested that matters of conscience were not an exclusively religious preoccupation before More's death or a function of Wolsey's legacy, but a humanist concern. More's sense of conscience was part of a larger constellation of ideas he pursued, including equity in light of liberal

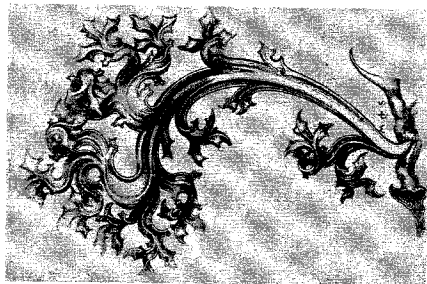
⁴⁹ For the Hesketh case, see Hastings, "Maker of English Law," p. 116-7.

⁵⁰ *Ibid.*, 118.

learning, and the liberal arts as part of developing the virtue of prudence. Conscience implies formation, an education that should include those ancient authors who sharpen judgment. Such liberal learning, More ultimately believed, would only prepare the soul for virtue.⁵¹ Though prudence could mature with study, if true equity were to be achieved, an ability to remain steadfast would be necessary as well.

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Thistle ornament (Nat. Gal)

⁵¹ On liberal education and virtue, see Daniel Kinney's translation of More's letter to Oxford in *CW 15, In Defense of Humanism*, ed. Daniel Kinney, New Haven: Yale University Press, 1986, p. 139.

His Word Was His Bond: The Role of the Oath in Thomas More's Trial¹

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More refused to take the oath in support of the Act of Succession because the oath included a repudiation of papal supremacy. While the purpose of that oath and More's refusal to take it were central to his trial, that oath was not the only oath that determined his fate. The oaths taken by the lawyers, witnesses, jurors, judges, and the King's coronation oath were all involved in More's trial. Were these oaths kept? More believed his oath was an affirmation of his faith and a means of establishing objective facts, while the other participants in his trial used their oaths to express their

¹ The citations in this article follow the *The Bluebook: A Uniform System of Citation*, which is the citation system followed by the legal discipline. See *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). For example, "*id.*" is used when citing the immediately preceding authority. *Id.*

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