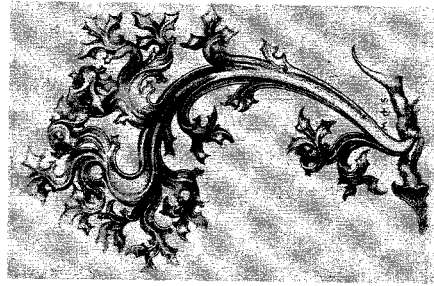


learning, and the liberal arts as part of developing the virtue of prudence. Conscience implies formation, an education that should include those ancient authors who sharpen judgment. Such liberal learning, More ultimately believed, would only prepare the soul for virtue.⁵¹ Though prudence could mature 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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solidarity with Henry VIII and to ensure the Crown's cause prevailed by obtaining More's conviction. After a review of the objective role of the oath and the specific oaths implicated in More's trial, the manner in which these oaths were employed, and the manner and degree to which those oaths were observed are examined.

Keywords: oath, Thomas More's trial, Act of Succession, papal supremacy.

More refusa de prêter serment à l'Acte de Succession parce que le serment impliquait une répudiation de la suprématie du pape. Alors que le but de ce serment et le refus de More furent au cœur de son procès, ce serment ne fut pas le seul qui détermina son destin. Les serments que prêtèrent les juristes, les témoins, les jurés, les juges et le serment que prêta le roi lors de son couronnement, tous furent impliqués dans le procès de More. Tous ces serments ont-ils été honorés? More croyait que son serment était une affirmation de sa foi et un moyen d'établir des faits objectifs, alors que les autres participants à son procès ont utilisé leur serment pour exprimer leur solidarité avec Henry VIII et pour montrer qu'en condamnant More, ils soutenaient la couronne. Après avoir passé en revue le rôle objectif du serment en général et des serments spécifiques impliqués dans le procès de More, on examinera de quelle manière ces serments furent employés et à quel degré ils furent respectés.

Mots clés: serment, procès de Thomas More, Acte de Succession, suprématie du pape.

More se negó a acatar con juramento el Acta de Sucesión porque ésta incluía un rechazo a la supremacía papal. Si bien su negativa a jurar fue central en el juicio, no fue esto lo único que selló su destino; hubo otros que sí juraron: los juramentos hechos por abogados, testigos, jurados y jueces, así como el juramento de coronación del Rey, se vieron todos implicados en el juicio de More. ¿Pero se mantuvieron? Moro creía que su juramento era una afirmación de su fe y un medio de establecer hechos objetivos, mientras que para los otros participantes en el juicio sus juramentos eran una forma de expresar su solidaridad con el Rey y garantizar que su causa prevalecía mediante la condena de More. Tras una revisión de la finalidad del juramento en sí, así como de los distintos juramentos que se presentaron a More en su juicio, examinaremos el modo en el que éstos fueron empleados y el grado en el que después fueron mantenidos.

Palabras clave: juramento, juicio de Thomas More, Acta de Sucesión, supremacía papal

* * *

I. Introduction

At various times in history, the oath has been used as a tool of political, religious, and social oppression.³ On hearing that Archbishop Cranmer annulled Henry VIII's marriage to Catherine of Aragon, Thomas More expressed the fear that an oath would be used as a tool for political, religious, and social control when he said to his son-in-law, Roper, "God give grace, son, that these matters within a while be not confirmed with oaths."⁴ More's fear proved to be warranted.

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?

In my view, 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 solidarity

³ Gaylen L. Box, *Oaths—Putting Principles to the Test*, 50-NOV Advocate (Idaho) 9 (2007).

⁴ GERARD B. WEGEMER, *THOMAS MORE: A PORTRAIT OF COURAGE* 157 (Scepter Publishers 1995).

with Henry VIII and to ensure the Crown's cause prevailed by obtaining More's conviction. The first part of this paper reviews the objective role of the oath and the specific oaths involved in More's trial. The second part of this paper examines More's trial as to how the oaths were employed, and the manner and degree to which the oaths were observed.

II. The Oath

There is a great deal of scholarship on legal oaths. This analysis does not purport to be a comprehensive review of the legal oath, but rather hopes to signal paths for further examination of the oaths taken by the participants in More's trial. This section will attempt to provide: (A) a basic overview of the evolution of the oath; and (B) a review of the various oaths implicated in More's trial.

A. Evolution of the Oath

The oath is an integral part of the legal system. It serves as both a secular and religious means of ensuring truth.⁵ The oath is an ancient tradition.⁶ On its most basic level, the oath is a self-curse, carrying with it the sanction of divine punishment, either in time or

⁵ See Daniel Blau, *Holy Scriptures and Unholy Strictures: Why the Enforcement of a Religious Orthodoxy in North Carolina Demands a More Refined Establishment Clause Analysis of Courtroom Oaths*, 4 FIRST AMEND. L. REV. 223, 229 (2006).
⁶ Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800 Year Evolution*, 57 SMU L. REV. 1385, 1392 (2004).

eternity, should the taker deliberately deceive.⁷ Essentially, the oath imposes on its taker a more binding responsibility than his mere word.⁸

It is argued that an oath and a promise are not the same.⁹ While oaths often reinforce a promise, the oath is a solemn attestation of the truth of one's statement.¹⁰ The statement may be an assertion of fact or a promise to act or refrain from acting.¹¹ While all forms of the oath are based on truth, the "truth" supported by the oath is not the same.¹² Two common themes of "truth" seem to emerge: truth as an expression of solidarity or power; and truth as an affirmation of faith or objective facts.

The history of our present oath is rooted in the Bible and the different types of "truth" are reflected there.¹³ In Genesis, there are examples of the oath as an expression of solidarity. In Genesis 24:2-9 the oath was taken on the male genitalia of one's father, placing the self-curse on the generative power of man, possibly as an expression of adherence to one's clan.¹⁴ Also, in Genesis 31:53-54, Jacob takes an oath by the "fear of his father Isaac."¹⁵ However, in other books of the Bible, the oath is an assertion of faith. In Deuteronomy 6:14 and

⁷ See Blau, *supra* n. 5, at 222-29; Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1330, 1334, 1348 (1959); Eric G. Andersen, *Three Degrees of Oaths*, 2003 B.Y.U. L. REV. 829, 846 (2003).

⁸ See Blau, *supra* n. 5, at 227, *discussing* JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE, AND HISTORY 6 (1834).

⁹ Andersen, *supra* n. 7, at 839.

¹⁰ *Id.*

¹¹ *Id.*

¹² Silving, *supra* n. 7, at 1334-35.

¹³ *Id.* at 1331.

¹⁴ *Id.* at 1331-32.

¹⁵ *Id.* at 1332.

10:21, Isaiah 48:1, and Psalms 63:11 the Bible recognizes the oath as an affirmation of faith, permitting only an oath that invokes God because the oath is an expression of faith in God and His power.¹⁶

In addition to the religious tradition of the oath, there is also a religious tradition for abstention. As seen in Exodus 20:7 and Deuteronomy 5:11, the Old Testament prohibits the taking of unnecessary oaths.¹⁷ In addition, based on a distinction made by St. Augustine, false oaths and those taken without necessity are prohibited and abstention from taking an oath is recommended because of its dangers.¹⁸ Also, St. Thomas Aquinas argued a man who takes an oath is not required to tell the whole truth, making a distinction between silence and falsehood.¹⁹

In various cultures the oath has had different purposes which reflect the different "truths" attested to. Oaths have been categorized as assertive, decisive, party, judicial, evidentiary, and testimonial in nature.²⁰

Among the Germanic tribes, to keep one's oath was an expression of power.²¹ As a result, men swore to matters of which they had no knowledge.²² A man took an oath to express solidarity with the group he wished to prevail.²³ The assertive oath carries

¹⁶ *Id.* Also, Silving points out there is a similar requirement in Islam. *Id.*

¹⁷ *See id.* at 1333.

¹⁸ *See id.* at 1344.

¹⁹ *See id.* at 1346.

²⁰ *Id.* at 1334-48.

²¹ *See id.* at 1334.

²² *Id.* at 1334.

²³ *See id.*

with it the promise that it will prevail, i.e., "truth" is the successful assertion of one's cause.²⁴ Similarly, the decisive oath was an expression of power, its strength depending on the social power of the oath-taker and his family or clan support.²⁵ These oaths required oath-helpers or compurgators, who were members of the oath-taker's clan who swore as a group that the taker's oath was "pure and not perjurious."²⁶ The compurgators strengthened the initial oath by taking a secondary oath that the initial oath was good.²⁷ The oath did not support testimonial evidence.²⁸ Rather, witnesses supported the oath.²⁹ Over time, the compurgators were no longer required to belong to the oath-taker's clan and they were required to swear individually.³⁰ By the end of the Middle Ages, compurgators converted into witnesses and were required to have actual knowledge of the act.³¹

Initially, in the Roman civil law and canon law traditions, the oath was proof because it was believed the event invoked would occur if the oath was false.³² As proof, the oath was binding on the judge and not subject to the court's evaluation.³³ The party oath decided issues and appeared in two forms: decisory and suppletory.³⁴

²⁴ *Id.* at 1334-35.

²⁵ *Id.* at 1336.

²⁶ *Id.* at 1340.

²⁷ Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 AM. U. J. GENDER SOC. POL'Y & L. 251, 306 (2005).

²⁸ Silving, *supra* n. 7 at 1335.

²⁹ *Id.* at 1335.

³⁰ *Id.* at 1341.

³¹ *Id.* at 1342.

³² *Id.* at 1335.

³³ *Id.*

³⁴ *Id.* at 1338.

In the Roman civil law tradition, the decisory oath was given by the oath-taker to another party to resolve a dispute and served as a substitute for a judicial decision.³⁵ This type of oath has been compared to the modern-day pretrial settlement.³⁶ In canon law, the decisory oath required judicial approval and was admissible only in matters of contract.³⁷ The suppletory oath in the Roman civil law tradition involved a concept of mathematical ratios of proof.³⁸ If the evidence submitted was entitled to some weight, but it was insufficient, the judge could permit the party he had confidence in to take an oath, which effectively supplied the missing portion of proof.³⁹ This was a departure from the classic Roman principle that the parties were to present the proof.⁴⁰ It is argued the suppletory oath marks the beginning of proof as objective truth.⁴¹ Similarly, in canon law, the suppletory oath was permitted when only partial proof was presented and other proof was unavailable.⁴² However, in canon law, the suppletory oath was not permitted in criminal cases.⁴³

Eventually, in the Roman civil and canon law traditions, the oath developed into evidence and the judge was free to evaluate its weight.⁴⁴ In the canon law tradition, evidentiary and testimonial

³⁵ *Id.*

³⁶ *Id.* at 1339.

³⁷ *Id.* at 1348.

³⁸ Helen Silving, *The Oath: II*, 68 *Yale L.J.* 1527, 1528 (1959).

³⁹ Silving, *supra* n. 7, at 1338-39; Silving, *supra* n. 38, at 1528.

⁴⁰ Silving, *supra* n. 7, at 1338-39.

⁴¹ *Id.* at 1339.

⁴² *Id.* at 1348.

⁴³ *Id.*

⁴⁴ *Id.* at 1335.

oaths combined legal proof with free judicial appraisal and in the judicial oath, "truth" was accordance with objective facts.⁴⁵

The difference between the Germanic and Roman traditions of the oath may also be observed in their perjury laws.⁴⁶ In the Germanic tradition, perjury laws were designed to protect the purity of the oath.⁴⁷ The false invocation of God was the essence of a crime.⁴⁸ However, in the Roman tradition, perjury laws sought to aid the person affected by the false testimony.⁴⁹

England adopted both the Germanic and Roman oath traditions. Initially, the development of the oath in England was influenced by Germanic oath practices.⁵⁰ Later, canon law brought the Roman oath tradition to the common law.⁵¹ Early English proceedings recognized the witness oath, the party oath, with or without oath-helpers, the ordeal, and battle.⁵² As a result, in English proceedings the "truth" sworn to could be an expression of social power, accordance with objective reality, or a combination of the

⁴⁵ *Id.* at 1334, 1348.

⁴⁶ *See id.* at 1343.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.* at 1361.

⁵¹ *See id.*

⁵² *Id.* at 1362; George Fisher, *The Jury's Rise as Lie-Detector*, 107 *YALE L.J.* 575, 585-86 (1997). In 1215, the Church forbade priests to officiate at ordeals, resulting in English and European justice systems abandoning the trial by ordeal. Although the Church did not forbid the trial by battle, it lacked popular support because combat often resulted in a weaker, but worthy, litigant losing and it was not always clear who should do battle for the prosecution. Fisher, 107 *YALE L.J.* at 586.

two.⁵³ If England adopted both types of oath tradition, is it arguable both More and his enemies kept their oaths?

B. Oaths Implicated in More's Trial

Whatever the form of the oath, it carried a self-curse inviting punishment for false swearing. The oath calls on God to witness the event, reminding the taker that God will punish him if he takes a false oath and invoking God's punishment if the taker speaks falsely.⁵⁴ In More's trial, the oaths taken by the lawyers, witnesses, jurors, judges, and the king's coronation oath were involved. Each of these oaths will be explored for evidence of the responsibility each oath-taker gave his word to be bound by and the type of "truth" he swore to ensure.

1. The Lawyer's Oath

Traditionally, professions have been characterized by esoteric knowledge, formal education, elevated status, self-regulation, monopoly over the provision of professional services, role-morality, and public service.⁵⁵ The traditional professions were law, medicine, the clergy, the military, and university teaching.⁵⁶ In fact, it is argued:

⁵³ Silving, *supra* n. 7, at 1362.

⁵⁴ Blau, *supra* n. 5, at 229.

⁵⁵ Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 240 (2007); James A. Brundage, *The Rise of the Professional Jurist in the Thirteenth Century*, 20 SYRACUSE J. INT'L L. & COM. 185 (1994).

⁵⁶ That definition has expanded and often includes accountants, business, and government. See generally, David B. Wilkins, *Redefining the "Professional" in*

The law's claim to professional status has historically never been questioned, as the practice of law easily satisfies the definition of professional work: the law is a body of esoteric knowledge consisting of statutes, case law, doctrines, rules of evidence and procedures, and, among other data, theories of interpretation; it features institutionalized formal educational requirements in law school and the bar exam; it boasts elevated social-economic and cultural status; it relies almost exclusively on self-regulation and has a monopoly over the provision of legal services; it has a unique role-morality codified in the Rules; and it has had a credible claim for public service.⁵⁷

It has been observed that the standards of conduct for lawyers have a theme of six core duties: (1) litigation fairness; (2) competence; (3) loyalty; (4) confidentiality; (5) reasonable fees; and (6) public service or service to poor.⁵⁸ These core duties were the primary duties of medieval, English lawyers and they remain the central duties of modern-day lawyers.⁵⁹ The principle source of these duties was the lawyer's oath.⁶⁰

Early English lawyers were divided into two groups: (1) pleaders and serjeants, which evolved into the modern-day barrister; and (2) attorneys, which evolved into the modern-day solicitor.⁶¹ Both groups of lawyers were required to take an oath.

Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism, 58-AUT Law & Contemp. Probs. 241, 242 (1995).

⁵⁷ Wald, *supra* n. 55, at 241-42.

⁵⁸ Andrews, *supra* n. 6, at 1387.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1388.

⁶¹ *Id.* at 1391-92.

The First Statute of Westminster in 1275 is considered the first formal regulation of English lawyers.⁶² Chapter 29 of that statute included specific duties and a range of conduct standards for serjeants.⁶³ Although the precise origin of the oath is unknown, serjeants appear to have taken some version of the following oath:

That he shall well and truly serve the king's people as one of the serjeants of the law. That he shall truly counsel them, that he shall be retained with after his cunning. That he shall not defer, tract, or delay their causes willingly, for covetousness of money, or other thing that may tend to profit. That he shall give due attendance accordingly.⁶⁴

Although the 1275 First Statute of Westminster states it pertains only to serjeants, the cases brought for violations of chapter 29 included attorneys.⁶⁵

Also, the 1280 London ordinance provided a detailed set of ethical standards. These duties included respect for the court and other litigants, competence, to avoid conflicts of interests, and to not engage in champerty.⁶⁶ The 1280 London ordinance required serjeants to take an oath to abide by the duties of the ordinance.⁶⁷ Also, serjeants took a more general oath of office.⁶⁸

⁶² *Id.* at 1394-95.

⁶³ *Id.* at 1395-96.

⁶⁴ *Id.* at 1397, quoting Edward Coke, Second Institute of the Laws of England 213 (1809).

⁶⁵ *Id.* at 1403.

⁶⁶ *Id.* at 1396.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1397.

In about 1285, the Mirror Des Justice, a more informal source, also outlined ethical standards for serjeants.⁶⁹ The Mirror Des Justice contained an oath, requiring a serjeant to swear he "will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing."⁷⁰

In 1402, Parliament attempted to address the concern that there were a large number of incompetent attorneys.⁷¹ The 1402 act regulated the admission of attorneys, including the judicial examination of all attorneys and the maintenance of a roll of attorneys.⁷² Although the 1402 act did not establish standards of conduct, it did require attorneys to be "sworn well and truly to serve in their offices."⁷³ However, in practice, the oath taken by the attorneys stated their duties in greater detail.⁷⁴ While the exact date and origin of the oath used pursuant to the 1402 act is uncertain, attorneys reportedly took some version of the following oath as early as the thirteenth century:

You shall doe [sic] no Falsehood nor consent to any to be done in the Office of Pleas of this court wherein you are admitted an Attorney. And if you shall know of any to be done you shall give Knowledge thereof to the Lord Chief Baron or other his Brethren that it may be reformed you shall Delay no Man for lucre Gain or Malice you shall increase no

⁶⁹ *Id.* at 1398.

⁷⁰ *Id.* at 1398-99, quoting The Mirror of Justices 48 (Seldon Society 1893). Andrews comments "The author and date are unknown, but scholars believe it was written in the late thirteenth century." *Id.* at 1398, citing EDMUND B.V. CHRISTIAN, A SHORT HISTORY OF SOLICITORS 11 (1896).

⁷¹ *Id.* at 1403.

⁷² *Id.* at 1403-04.

⁷³ *Id.* at 1404, quoting Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 135 (1998).

⁷⁴ *Id.*

fee but you shall be contented with the old Fee accustomed. And further you shall use your self in Office of Attorney in the said office of Pleas in this Court according to your best learning and discretion. So help you God.⁷⁵

In the United States, lawyers admitted to the Bar must affirm they will uphold the law and do so in accordance with the rules of professional conduct.⁷⁶ In addition to rules of professional conduct, many states have aspirational creeds stating the conduct expected of lawyers. Many of these lawyers' creeds include the maxim "my word is my bond."⁷⁷ This is a clear mandate for lawyers to be honest and to tell the truth.⁷⁸ Like the oath, the origin of this maxim appears to be derived from a belief held in most faiths that a person's word establishes a valid contract or covenant, hence it is his bond.⁷⁹ As a result, the giver of his word commits a serious sin or offense by failing to keep his word or promise.⁸⁰

It is clear the "truth" required by the modern-day lawyer's oath is truth as an affirmation of objective facts, not an expression of solidarity. But what of the lawyer's oath taken by More and his contemporaries?

⁷⁵ *Id.*, quoting JOSIAH HENRY BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 28 (Rockwell and Churchill Press 1909).

⁷⁶ Box, *supra* n. 3 at 10.

⁷⁷ *E.g.*, TEX. LAWYERS CREED—A Mandate for Professionalism, I, § 1 (Order of Adoption Nov. 7, 1989); N.M. CREED OF PROFESSIONALISM, Lawyer's Preamble (A); FLA. BAR CREED OF PROFESSIONALISM; MISS. BAR LAWYER'S CREED (5); WASH. STATE BAR ASS'N CREED OF PROFESSIONALISM (adopted by Wash. State Bar Ass'n Bd. of Governors Jul. 27, 2001).

⁷⁸ Douglas S. Lang, *The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism*, 42 S. TEX. L. REV. 509, 516 (2001).

⁷⁹ See Anthony R. Benedetto, *The Impact on "The Vanishing Trial" if People of Faith were faithful to religious Principles of Settling Disputes without Litigation*, 6 PEPP. DISP. RESOL. L.J. 253, 256 (2006).

⁸⁰ Benedetto, *supra* n. 79, at 256.

Several of the oaths taken by the lawyers in More's time specifically referred to truth or falsehood. The 1275 First Statute of Westminster and the 1402 act both referenced truth. The oath pursuant to the 1275 First Statute of Westminster required a lawyer to swear "That he shall well and truly serve the king's people as one of the sergeants of the law."⁸¹ The 1402 act required a lawyer to be "sworn to truly serve in their offices."⁸² Similarly, the Mirror Des Justice and the more detailed oath taken as early as the thirteenth century prohibited falsehood. The Mirror Des Justice required a serjeant to swear "he will not knowingly maintain or defend wrong or falsehood."⁸³ The more detailed oath taken as early as the thirteenth century stated "You shall doe [sic] no Falsehood nor consent to any to be done in the Office of Pleas of this court wherein you are admitted an Attorney."⁸⁴

The oaths taken pursuant to the 1275 First Statute of Westminster, the 1402 act, the Mirror Des Justice, and the oath taken as early as the thirteenth century do not appear to be an expression of power or a lawyer's solidarity with others of his profession, his clients, or the Crown. Rather, these oaths suggest allegiance to the "truth" as objective fact. The Mirror Des Justice required the lawyer to "abandon his client immediately that he perceives his wrongdoing" and the oath taken as early as the thirteenth century required a lawyer to report any falsehood, stating "and if you shall know of any [falsehood] to be done you shall give

⁸¹ Andrews, *supra* n. 6, at 1397 (emphasis added).

⁸² *Id.* at 1404 (emphasis added).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* (emphasis added).

Knowledge thereof to the Lord Chief Baron or others his Brethren."⁸⁵ Further, references to "service" negate any inference that the oath was an expression of power. The 1275 First Statute of Westminster requires the lawyer to "truly serve the king's people" and the oath of the 1402 act required lawyers to "truly serve in their offices."⁸⁶ Accordingly, it would seem the lawyer's oath taken by More and his contemporaries required the same adherence to "truth" as that of the modern-day lawyer oaths—truth as objective fact.

2. The Juror's Oath

The origin of the jury has been traced to the Anglo-Saxon oath-swearers.⁸⁷ The general composition of the jury as a twelve-member body rendering unanimous verdicts was clearly established by 1377, the time of Edward III.⁸⁸ It appears that the Biblical significance of the number twelve influenced the number of jurors.⁸⁹

Even if the number of jurors has been retained to this day, the nature of the jury's role has changed over time. Medieval jurors were the witnesses who came to speak rather than listen.⁹⁰ In Norman times, jurors were self-informed, usually already having knowledge

⁸⁵ *Id.*

⁸⁶ *Id.* at 1397, 1404.

⁸⁷ Robert H. Miller, *Six of One is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. Pa. L. Rev 621, 632 n. 66 (1998). However, Miller notes that there is no agreement about the precise origin of the jury with scholars tracing it to ancient Greece, the Roman Conquest, the Bible, astrologers and the Anglo-Saxon era in England. *Id.* at 632.

⁸⁸ *Id.* at 638-39.

⁸⁹ *Id.* at 634-35.

⁹⁰ Robert J. McWhirter, *How the Sixth Amendment Guarantees You the Right to a Lawyer, A Fair Trial, and a Chamber Pot*, 44-DEC Ariz. Att'y 12, 16 (2007); Fisher, *supra* n. 55, at 591.

of the case or by investigating the case themselves.⁹¹ By the fifteenth-century, the jury was essentially an oath-taking body that resembled compurgators, with the exception that the defendant did not determine the jury's composition.⁹² However, by the middle of the fifteenth century, jurors became dependent on in-court testimony for their knowledge of the case and great importance was placed on the evidence of sworn witnesses.⁹³

Jurors took an oath "to give a true verdict."⁹⁴ Around 1015, during the reign of King Ethelred, it was required that jurors "shall swear, with their hand on a holy thing, that they will condemn no man that is innocent, nor acquit any that is guilty."⁹⁵ In 1164, under Henry II, the Constitution of Clarendon was enacted, which provided that "[t]he sheriff shall cause 12 legal men of the neighborhood . . . to take an oath in the presence of the bishop that they will declare the truth."⁹⁶ It has also been recorded that jurors took an oath to "faithfully discharge the duties of their office, and not suffer an innocent man to be condemned, nor any guilty person to be acquitted."⁹⁷

In the United States, jurors continue to be sworn to give a "true verdict." For example, in Texas criminal proceedings, jurors are required to take the following oath:

⁹¹ McWhirter *supra* n. 90, at 16.

⁹² Keren, *supra* n. 27, at 308 n.258.

⁹³ McWhirter, *supra* n. 90, at 16; Fisher, *supra* n. 55, at 595.

⁹⁴ McWhirter, *supra* n. 90, at 16 (emphasis in orig.).

⁹⁵ Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229, 263 (1996).

⁹⁶ Miller, *supra* n. 87, at 635, quoting LLOYD E. MOORE, *THE JURY* 35 (2d ed., Lenox Hill Publ'g & Distrib. Co. 1971).

⁹⁷ Cascarelli, *supra* n. 95, at 263.

You and each of you swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God.⁹⁸

Similarly, federal jurors take "an oath to decide the case upon the law and the evidence."⁹⁹ Also, some courts permit jurors to affirm instead of swear.¹⁰⁰

The "truth" required by the modern-day jury oath is truth as an affirmation of objective facts, not an expression of solidarity. This is obvious from its statement that the "true verdict" must be rendered according to the evidence. But what of the oath taken by the jurors in early England? Those oaths are not as clear. References to the guilty and innocent man suggest truth as objective fact. However, the similarity between early English jurors and compurgators casts a shadow on any certainty.

⁹⁸ TEX. CODE CRIM. PROC. ANN. Art. 35.22 (Vernon 2006). In Texas civil procedure, the jury is required to swear as follows:

You, and each of you, do solemnly swear that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law, as it may be given to you in charge by the court, and the evidence submitted to you under the rulings of the court. So help you God.

TEX. R. CIV. P. 236.

⁹⁹ Handbook for Trial Jurors Serving in the United States District Courts, <http://www.uscourts.gov/pdf/jurybook.pdf>, at 4.

¹⁰⁰ *E.g.*, 1 U.S.C.A. § 1 (oath includes affirmation and sworn includes affirmed); TEX. CONST. Art. 1, § 5 (witness not disqualified because of religious beliefs—all oaths and affirmations to be administered in mode most binding on witness's conscience); Handbook for Trial Jurors, *supra* n. 99, at 3.

2. The Witness' Oath

The witness oath serves two purposes. First, the oath gives a witness's testimony weight.¹⁰¹ Second, it reminds the witness of the gravity of his undertaking and the penalty associated with dishonesty.¹⁰² In Germanic law, the oath was always a part of testimony.¹⁰³ In the ancient Germanic tradition, only sworn testimony had full evidentiary weight. However, in Germanic law, a party submitted his oath to the opposing party, not the court as was the custom in countries whose oaths were based on Roman Law. Although Jewish and Christian authorities recognize there is no warrant in the Bible for the requirement of a witness oath, in the fourth century, Constantine institutionalized the testimonial oath, requiring witnesses to be sworn.¹⁰⁴ This requirement was incorporated into the Code of Justinian and adopted by all of European Christendom.¹⁰⁵

In sixteenth century criminal procedure, the accuser's allegations were sworn, but the accused's denial was not.¹⁰⁶ Although the accused could speak at trial and present his version of events, he could not take the oath or call witnesses on his behalf.¹⁰⁷ The justice system appeared to place greater concern on the peril a false oath placed on the soul of the accused who may lie to protect

¹⁰¹ Nadine Farid, *Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise*, 40 NEW ENG. L. REV. 555, 557 (2006).

¹⁰² *Id.*

¹⁰³ See Silving, *supra* n. 7, at 1342.

¹⁰⁴ *Id.* at 1337, 1343.

¹⁰⁵ See *id.* at 1337.

¹⁰⁶ Fisher, *supra* n. 52, at 603-06.

¹⁰⁷ *Id.* at 579, 603-06.

himself and his witnesses whom the system feared might lie to protect the guilty.¹⁰⁸ In the instances where the accused was permitted to call witnesses, their testimony was unsworn.¹⁰⁹ It was not until the eighteenth century that the witnesses called by the accused were permitted to take the oath.¹¹⁰ And, it was not until the second half of the nineteenth century that an accused was permitted to testify under oath.¹¹¹ It is of interest to note that the practice of allowing the accused to appear by attorney was a legal reform introduced by Thomas More when he was head of the Chancery and Star Chamber.¹¹²

Currently, in the United States, witnesses are required to take an oath to testify truthfully.¹¹³ The oath is required to be administered in a form calculated to awaken the witness's conscience and impress on his mind this duty.¹¹⁴

It is accepted that the "truth" of the modern-day witness oath is truth as objective fact. It would seem the sixteenth-century witness oath in England required the same adherence to "truth" as objective fact. Otherwise, the practice of prohibiting the accused

¹⁰⁸ *Id.* at 599.

¹⁰⁹ *Id.* at 579.

¹¹⁰ *Id.* at 579-80. However, it appears that defense witnesses in misdemeanor and civil trials were permitted to be sworn prior to the eighteenth century. *Id.* at 597.

¹¹¹ *Id.* at 579.

¹¹² Veryl Victoria Miles, *A Legal Career for All Seasons: Remembering St. Thomas More's Vocation*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 425 (2006). However, More did not have the benefit of counsel at his trial. See WEGEMER, *supra* n. 4, at 211.

¹¹³ *E.g.*, FED. R. EVID. 603; TEX. R. EVID. 603.

¹¹⁴ *See, e.g.*, FED. R. EVID. 603; TEX. R. EVID. 603.

and his witnesses from taking the oath for fear they would lie and place their souls in jeopardy would have been unnecessary.

3. The Judge's Oath

Although some form of code of ethics and oath for judges probably existed prior to the later half of the twelfth century, the earliest written source of a judicial oath appears in the legal treatise known as Bracton.¹¹⁵ The Bracton oath applied to justices of the eyre and is believed to have been taken in the late 1220s or early 1230s.¹¹⁶ The Bracton oath has been divided into three main elements: (1) "that they will do right justice to the best of their ability in the counties in which they are to hold eyres, to both the poor and the rich"; (2) "to keep the assize in accordance with the chapters below written"; and (3) "to perform all duties and jurisdiction belonging to the crown of the lord king."¹¹⁷ It has also been noted that although Bracton advised that the justice does not take an oath "to act for profit of the king," after he took his oath, he was reminded to keep it in mind.¹¹⁸ This reminder has been interpreted to mean that the justice had no ethical duty to balance the interests of the king with those of his subjects.¹¹⁹

Letters of appointment to the Common Bench in the year 1234 refer generally to the judge's oath "to faithfully attend the king's

¹¹⁵ Paul Brand, *Ethical Standards for Royal Justices in England, c. 1175-1307*, 8 U. CHI. L. SCH. ROUNDTABLE 239, 239-40 (2001).

¹¹⁶ *Id.* at 240. Justices of the eyre were the justices who took royal justice to the individual counties of England. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

business in the Bench" and "to faithfully attend the king's business and activities."¹²⁰ Similarly, letters of appointment to the Exchequer of the Jews sent prior to 1260 mentioned an "oath that [the justice] will faithfully serve the king in the said office."¹²¹ Materials from November 1278 of the Close Roll for 1277-78 indicate that justices of the eyre took an oath they would "serve the king well and loyally in the office of justice in your eyre" followed by the promise of equal justice contained in the Bracton oath.¹²² Around 1257 a third clause was added that required justices to promise "you will not prevent or delay justice by any trick or device against right or against the laws of the land, whether because of high status or wealth, nor for any benefit, gift or promise made by anyone to you or which could be made, but that without regard for position or person you will loyally have right done to all in accordance with the laws that have been customary."¹²³ The fourth clause of the oath contained a general promise "not to receive anything from anyone."¹²⁴ It has been suggested that although the oath pertained to justices of the eyre, it is likely royal justices took a similar oath.¹²⁵

Chapter 25 of the First Statute of Westminster, enacted in 1275, established rules and sanctions for the king's officials, including justices.¹²⁶ It prohibited them from "maintaining (a general term, meaning giving any kind of support to) pleas, cases or business in the king's court" with punishment for doing so at the

¹²⁰ *Id.* at 241.

¹²¹ *Id.*

¹²² *Id.* at 243.

¹²³ *Id.* at 243-44.

¹²⁴ *Id.* at 244.

¹²⁵ *Id.*

¹²⁶ *Id.*

king's discretion.¹²⁷ This prohibition extended to the justice's clerks and servants.¹²⁸

Chapter 49 of the Second Statute of Westminster, enacted in 1285, applied to a wider group of royal officials and prohibited them from accepting "any church or advowson of a church agreement or in some other manner, if the property concerned was the subject of a plea before the king or any of the king's officials, or from receiving any other reward."¹²⁹ Punishment for violations of this prohibition was again at the king's discretion and applied to both the acquirer and the person from whom the rights were acquired.¹³⁰

In 1290, the judicial oath was revised to include a promise "not to receive anything from anyone without the king's permission and the king is reported to have given permission for justices to accept food and drink, but only enough to supply them for a single day."¹³¹ Also, a new clause was added to the oath that prohibited justices from assenting to any wrongdoing on the part of their colleagues and to attempt to prevent it if possible.¹³² If the justice was unable to prevent the wrongdoing, the oath required him to report it to the king's council.¹³³ And, if the king's council failed to take appropriate action, the justice was required to report the wrongdoing to the king.¹³⁴

¹²⁷ *Id.* at 244-45.

¹²⁸ *Id.* at 244.

¹²⁹ *Id.* at 245.

¹³⁰ *Id.*

¹³¹ *Id.* at 274.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

Although the early English justices were required to take an oath and there were some limited sanctions attached to violations of the oath, it has been noted that there were no procedures for the recusal of biased justices.¹³⁵ Nevertheless, it seems there was some notion, if only aspirational, that a justice should be impartial, i.e., he should not distinguish between rich and poor, accept bribes, act as a judge in his own cause, use his influence to affect the outcome of cases, or tolerate such behavior on the part of his colleagues.¹³⁶

In the United States, justices and judges take oaths to uphold the Constitution and the law. For example 28 U.S.C.A. section 453 requires justices and judges to take the following oath:

I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.¹³⁷

In addition to the judicial oath, modern-day judges are required to follow codes of judicial conduct that require them to avoid the appearance of impropriety, to perform their duties impartially and without bias or prejudice, to refrain from inappropriate political activities, to refrain from using the prestige of the office to advance the private interests of the judge or others, and to report another judge's violation of the rules.¹³⁸

¹³⁵ *Id.* at 278.

¹³⁶ See Brand, *supra* n. 115.

¹³⁷ 28 U.S.C.A. § 453.

¹³⁸ *E.g.*, TEX. CODE JUDICIAL CONDUCT.

It appears both the early English and modern-day judicial oaths express the guarantee of a promise—to act impartially and to refrain from using the office to advance the interests of others. With the reminder, of course, in the case of the early English lawyers, that although they did not take an oath to act for the king's profit, they should keep it in mind.

4. The King's Coronation Oath

In English constitutional history, the king's "coronation oath to conserve the peace," and the king's power to take appropriate royal actions to preserve the peace of the realm were important.¹³⁹ At the time of Henry VIII's coronation, the text of the king's coronation oath was as follows:

This is the oath that the king shall swear at the coronation, that he shall keep and maintain the right and the liberties of holy Church of old time granted by the righteous Christian King of England and that he shall keep all lands, honours and dignities righteous and free of the crown of England in all manner whole without any manner of a minishment, and the rights of the Crown hurt, decayed or lost to his power shall call again into ancient estate. And that he shall keep the peace of the holy church and of the clergy and of the people with good accord. And that he shall do in his judgments equity and right and justice with discretion and mercy. And that he shall grant to hold the laws and customs of the realm, and to his power keep them and affirm them which the folk and people have made and chosen. And the evil laws and customs wholly to put out and steadfast and stable peace to

¹³⁹ Robert F. Blomquist, *American National Security Presiprudence*, 26 QUINNIPAC L. REV. 439, 444 (2008), citing Forest McDonald, *The American Presidency: an Intellectual History* 33-34 (1994) and 1 William Blackstone, *Commentaries on the Laws of England* 259 (1791).

the people of his realm keep and cause to be kept to his power.¹⁴⁰

The King's coronation oath appears to encompass two types of "truth." Perhaps this serves as a good reflection of England's adoption of both types of oath tradition. First, the coronation oath appears to be a guarantee for a promise. Use of the terms "keep," "maintain," and "hold" suggest the Crown's promise to protect the rights, liberties, and peace of the Church and the people that, in fact, already existed. On the other hand, use of the terms "power," "grant," "affirm," "discretion," and "mercy" appear to be expressions of power and solidarity in the person of the king. Although the oath appears to encompass both types of oath tradition, it does not appear to be an affirmation of faith or a means of establishing objective facts.

III. The Oaths in More's Trial

It is interesting to note that More swore to the same oaths as the lawyers and judges in his trial. Also, on becoming Lord Chancellor of England, he took an oath of loyalty to the King.¹⁴¹ By virtue of his former position at court and his having held the positions of lawyer and judge, he would have been acutely aware of

¹⁴⁰ JAMES MONTI, *THE KING'S GOOD SERVANT BUT GOD'S FIRST: THE LIFE AND WRITINGS OF ST. THOMAS MORE* 439 (Ignatius Press 1997), quoting Notes, *The Manner of the Coronation of King Charles the First of England at Westminster*, 2 Feb., 1626, ed. Rev. Christopher Wordsworth, Henry Bradshaw Society, vol. 2 (London: Henry Bradshaw Society, 1892) 19-20. Monti notes that the text of the king's coronation oath was derived from the *Liber Regalis*, the liturgical book that governed English coronations for centuries. *Id.*

¹⁴¹ C.M.A. McCauliff, *Parliament and the Supreme Headship: Church-State Relations According to Thomas More*, 48 CATH. U. L. REV. 653, 682 (1999).

the King's coronation oath, the witness's oath, and the juror's oath. As a result, what better evidence is there than More's comments and actions during his trial for determining the purpose or "truth" sworn to and whether the trial participants kept their oaths?

A. "Truth" of the Oath in More's Trial

Did More believe his oath was an affirmation of his faith and a means of establishing fact? More's own comments during his trial suggest he clearly saw the purpose of the oath and the proceedings against him as a means of affirming one's faith and establishing objective facts.

When denouncing Rich's testimony More took an oath stating, "And if this oath of yours, Master Rich, be true, then pray I that I never see God in the face."¹⁴² More commented that Rich had a bad reputation and an untrustworthy tongue. He questioned whether it was plausible he would disclose his views to such a man and asked the judges "Can this in your judgments, my lords seem likely to be true?"¹⁴³ Also, toward the conclusion of his trial, when the Duke of Norfolk accused More of malice, again he responded with a kind of oath calling on God as a witness when he replied that "it was not malice but solely the obligation of his conscience that compelled him to declare his mind — God knew this to be true."¹⁴⁴ Given that an accused was not permitted to testify under oath,

¹⁴² MONTI, *supra* n. 140, at 435-36, quoting William Roper, *The Lyfe of Syr Thomas More, Sometymes Lord Chancellor of England by Ro: Bar.*, ed. E.V. Hitchcock and Msgr. P.E. Hallett, Early English Text Society, original series no. 222 (London: Early English Text Society 1950); WEGEMER, *supra* n. 4, at 212.

¹⁴³ MONTI, *supra* n. 140, at 436, quoting Roper, *supra* n. 137, at 87-89.
¹⁴⁴ MONTI, *supra* n. 140 at 441.

More's choice to respond with an oath is interesting. It serves to highlight the difference between the purpose to which he believed the oaths were taken — truth as an affirmation of faith and objective fact — and the purpose to which the oaths appear to have been employed — truth as an expression of solidarity and power.

On the other hand, Rich provides the best support for the belief that the other participants in More's trial used their oaths to show solidarity with Henry VIII and further the Crown's objectives. Before More's trial, Bishop John Fisher was tried for treason. Rich accused the Bishop of saying "the king our sovereign lord is not supreme head in earth of the Church of England" and was the only witness called.¹⁴⁵ The Bishop did not deny this statement. Instead, he described the events that preceded it.¹⁴⁶ The Bishop related that Rich brought him a message from the King requesting his confidential counsel as to the supremacy question and guaranteeing him immunity as to his answer.¹⁴⁷ Also, the Bishop reminded Rich of his oath to divulge his answer to only the King.¹⁴⁸ Rich admitted having given the Bishop these assurances.¹⁴⁹

When discussing the prosecution's consent to drop the first three counts against More, it has been observed that:

The prosecution could afford to do so, for the fourth count, after all, was built on far more secure ground—it was built on

¹⁴⁵ *Id.*, at 429, quoting E.E. REYNOLDS, SAINT JOHN FISHER 267, 274-76 (New York: P.J. Kenedy and Sons, 1953).

¹⁴⁶ *Id.*, at 430.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

one man's willingness to perjure himself in order to get the job done of ridding the Crown of this meddling lawyer.¹⁵⁰

Rich's use of his oaths in the trials of Bishop Fisher and More are evidence that he viewed his oath as a means of demonstrating his solidarity with the Crown, not for establishing the facts. Although Rich's deception and perjury are perhaps the most extreme example, it is probable that out of politics or fear, especially given the recent executions of those deemed against the Crown's interests, this view extended to the other participants in More's trial.

B. Adherence to the Oaths in More's Trial

A review of the oaths taken by the lawyers, witnesses, judges and, perhaps to a less clear extent, the jurors in More's trial support the conclusion that these oaths required "truth" as an affirmation of objective fact. If this was the case, did the participants in More's trial adhere to their oaths? Or, did they use their oaths to express their solidarity with the King and to ensure the Crown's cause prevailed by ensuring More's conviction? A review of the King's coronation oath demonstrates it expressed truth as a guarantee for a promise, and an expression of power and solidarity in the person of the king. Did Henry VIII adhere to his coronation oath?

First, adherence to the lawyer's and witness's oath must be examined. Richard Rich was both the solicitor general and sole witness against More. As was the custom, Rich testified under oath.¹⁵¹ More leaves us with no doubt of what he thought of Rich's

¹⁵⁰ *Id.*, at 435.

¹⁵¹ *See id.* (More responded to Rich's testimony by referencing Rich's oath, saying "And if this oath of yours, Master Rich, be true").

testimony and oath. He, in no uncertain terms, denounced Rich's testimony as perjury when he responded "In good faith, Master Rich, I am sorrier for your perjury than for my own peril."¹⁵² As to Rich's adherence to his lawyer's oath, although there is some dispute as to the origin of the advocate-witness rule, some argue it was Rich's role as solicitor general and witness in More' trial that served as the genesis for this prohibition.¹⁵³ The advocate-witness rule prohibits trial counsel from acting as an advocate and a witness in the same proceedings.¹⁵⁴ The rule maintains the integrity of the advocate's role and attempts to protect the legal process and law profession from derision, suspicion, and cynicism.¹⁵⁵ The rule is usually used to disqualify legal counsel rather than for discipline.¹⁵⁶ Does the appearance in English law of the advocate-witness rule in temporal proximity to Rich's testimony suggest others also believed Rich violated the lawyer's and witness's oaths?

Second, the jurors' adherence to their oath to give a "true verdict" must be examined. It has been noted that regardless of the legal merits, if any, to the case against More, it is shocking that the jurors pronounced his guilt with almost no deliberation.¹⁵⁷ The jurors deliberated fifteen minutes before returning a guilty verdict.¹⁵⁸

¹⁵² *Id.* at 436.

¹⁵³ Erik G. Luna, *Avoiding a "Carnival Atmosphere": Trial Court Discretion and the Advocate witness Rule*, 18 WHITTIER L. REV. 447, 453 (1997).

¹⁵⁴ *Id.* at 451.

¹⁵⁵ Luna, *supra* n. 153 at 451.

¹⁵⁶ *Id.* at 452.

¹⁵⁷ Edward McGlynn Gaffney, *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 77 (1997).

¹⁵⁸ WEGEMER, *supra* n. 4, at 214; MONTI, *supra* n. 140, at 437.

The swiftness of their verdict suggests there was no reasoned deliberation or weighing of the evidence.¹⁵⁹

Two trials, which occurred before More's trial, may provide some insight into the jury's deliberations or lack thereof. In the trial of Bishop Fisher, it has been noted that although the jury returned a guilty verdict, they were first subjected to threats.¹⁶⁰ Also, in the trials of Richard Reynolds of Syon Abbey and the Carthusians John Houghton, Robert Lawrence, and Augustine Webster, the jury was unable to reach a guilty verdict.¹⁶¹ An enraged Cromwell was reported to have threatened that jury until they pronounced a guilty verdict.¹⁶² It has been noted that Cromwell did not need to repeat those events with the jurors in More's trial.¹⁶³ The total lack of credible evidence and the threats to jurors in the earlier trials support the conclusion that the jurors failed to keep their oaths.

Third, the conduct of the judges' adherence to the judicial oath should be reviewed. There were fifteen judges in More's trial.¹⁶⁴ However, these judges were not impartial, including among their numbers Lord Chancellor Audley, Royal Secretary Cromwell, the Duke of Norfolk, and Anne Boleyn's father, brother, and uncle.¹⁶⁵ These men had already shown their solidarity with Henry VIII and had a strong interest in convicting More.¹⁶⁶

¹⁵⁹ MONTI, *supra* n. 140, at 437.

¹⁶⁰ *Id.* at 430.

¹⁶¹ *Id.* at 423.

¹⁶² *Id.*

¹⁶³ *Id.* at 437.

¹⁶⁴ WEGEMER, *supra* n. 4, at 210.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 210.

Consequently, it may never have occurred to the judges in More's trial that they should have resigned, rather than play a role in the perversion of justice.¹⁶⁷ But More, with gentle reprobation addressed the bench with the following prayer:

More have I not to say my lords, . . . but that, like as the blessed apostle St. Paul, as we read in the Acts of the Apostles, was present and consented to the death of St. Stephen, and kept their clothes who stoned him to death, — and yet be they now both twain holy saints in heaven, and shall continue there friends together for ever—so I verily trust, and shall therefore right heartily pray, that though your lordships have now here in earth been judges to my condemnation, we may yet hereafter in heaven all meet together, to everlasting salvation.¹⁶⁸

More compared St. Paul's presence and consent to the judgment against St. Stephen with the judges' consent to his condemnation. Also, he prayed he may "yet" meet the judges in heaven, perhaps implying there was a reason they might not. Did More's prayer and Biblical comparison hint that he believed the judges violated their oaths made before God?

Finally, Henry VIII's adherence to his coronation oath must be examined. After his conviction, but before the pronouncement of sentence, More commented that the Act of Treason violated the King's coronation oath.¹⁶⁹ That oath stated, in part, the King "shall keep and maintain the right and liberties of holy Church of old time

¹⁶⁷ Gaffney, *supra* n. 157, at 77.

¹⁶⁸ *Id.*, quoting 1 ARTHUR CAVLEY, MEMOIRS OF SIR THOMAS MORE WITH A NEW TRANSLATION OF HIS UTOPIA, HIS HISTORY OF KING RICHARD III, AND HIS LATIN POEMS 227 (1808).

¹⁶⁹ MONTI, *supra* n. 140, at 439.

granted by the righteous Christian King of England," and "shall keep the peace of the holy Church and of the clergy and of the people with good accord."¹⁷⁰ The coronation oath bound the King to guarantee the rights and liberties of the Church and its peaceful existence in England.¹⁷¹

A redrafting of the coronation oath subsequent to More's trial implies that Henry VIII agreed with More's accusation that he had violated his coronation oath.¹⁷² It has been pointed out that one cannot "refrain from speculating that this redrafting of the coronation oath was done in the wake of More's comments in Westminster Hall, perhaps after Cromwell reported back to the King what had been said at the trial."¹⁷³ An undated paraphrased English translation of the coronation oath includes modifications in Henry VIII's handwriting:

The redrafted version changed the phrase:

shall keep and maintain the right and liberties of holy Church of old time granted by the righteous Christian King of England

to read:

shall keep and maintain the lawful right and liberties of old time granted by the righteous Christian King of England to the holy Church of England not prejudicial to his Jurisdiction and dignity royal.¹⁷⁴

¹⁷⁰ *Id.* at 439.

¹⁷¹ *Id.*

¹⁷² *Id.* at 439-40.

¹⁷³ *Id.* at 440.

¹⁷⁴ *Id.*

Also, the redrafted version deleted the phrase:

shall keep the peace of the holy Church and of the clergy and of the people with good accord

and replaced it with:

shall endeavor himself to keep unity in his clergy and temporal subject[s].¹⁷⁵

These modifications remove the very promises in the coronation oath More criticized Henry VIII for failing to honor.

IV. Conclusion

While, as humans, we are unable to look into the hearts and minds of the participants in More's trial, More's criticism, during his trial, of their conduct serves as their indictment. A review of the oaths taken and the trial proceedings suggest that, although the oaths required adherence to objective facts, the participants in More's trial used their oaths as an expression of their solidarity with Henry VIII and to ensure the Crown's cause prevailed. In refusing to take the oath in support of the Act of Succession and continuing to adhere throughout his trial to "truth" as an affirmation of faith and objective fact, the objective facts demonstrate More was the only participant in his trial who kept his oaths.

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Der Actenman.



*The Plowman from Dance of Death
1524-26 - Hans Holbein the Younger*

Woodcut, 65 x 48 mm

Kupferstichkabinett, Öffentliche Kunstsammlung, Basle

¹⁷⁵ *Id.* at 439-40.