

English Heresy Procedures in Thomas More's *Dialogue Concerning Heresies*

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*HE SO CONDUCTED HIMSELF ALL THROUGH THIS SERIES OF HIGH OFFICES OR HONORS THAT HIS EXCELLENT SOVEREIGN FOUND NO FAULT WITH HIS SERVICE, NEITHER DID HE MAKE HIMSELF ODIOUS TO THE NOBLES NOR UNPLEASANT TO THE POPULACE, BUT HE WAS A SOURCE OF TROUBLE TO THIEVES, MURDERERS AND HERETICS.*¹

Introduction

The aim of this paper is to supply some background for a better understanding of Thomas More's defense of heresy proceedings, as discussed in Part Three, chapters 2-7, of his *Dialogue Concerning Heresies*.² In the context of the case of Thomas Bilney, these chapters take up three issues: (1) reliability of witnesses, (2) limitations on the number of defense witnesses, and (3) self-incrimination and perjury. This paper deals with them in turn after a brief overview of heresy proceedings in general and the case of Thomas Bilney.

Inquisition in England and Elsewhere

"Inquisition" is not as ominous as it sounds. It would be inaccurate to refer to "The Inquisition," especially in the case of England. No centralized prosecution of heresy ever existed for all Christendom; and it certainly never existed for all England. Rather, as discussed below, inquisition or "*inquisitio ex officio*" was a general legal procedure in ecclesiastical courts since the Thirteenth Century for all sorts of cases, not just heresy. During More's time it had obviously come under attack by proto-Protestants. And, presumably, More's interlocutor, the student-tutor, in the *Dialogue* is advancing the prevalent, popular criticisms; More is setting out to refute them.

¹ Inscription on the Tomb of Thomas More, in *A Thomas More Source Book*, ed. Gerard B. Wegemer and Stephen W. Smith (Washington, D.C. 2004), 308, emphasis mine. On the restored tombstone in Chelsea Old Church, the word "heretics" has been left out.

² Thomas More, *Dialogue Concerning Heresies* (rendered in Modern English by Mary Gottschalk) (New York 2006). All citations are from this edition in the following format: book.chapter.page.

Heresy proceedings belong to ecclesiastical courts and law. In the late 12th and early 13th Century the Church first codified and standardized heresy proceedings, granting to ordinaries (the bishops of dioceses) and papal legates the power to detect and condemn heretics.³ Remarkably, in England at least, there was no actual definition of heresy.⁴ “Heretic” means one convicted of heresy who is obstinate, impenitent, that is, refuses to abjure or is a repeat-offender. Famously, they were handed over to the state, “secular arm,” for execution, usually by burning. In England, this arrangement was codified by Parliament in 1401 in response to Lollardy.⁵

The process granted to the accused was the *inquisitio ex officio*, instituted and formalized under Pope Innocent III, in the decretal, *Qualiter et quando*, at Fourth Lateran Council in 1215). As H. A. Kelly demonstrates, the inquisition was “not originally designed as a procedure against heresy or *only* against heresy.”⁶

[It] became the universal method of trial procedure in all ecclesiastical courts, except “civil” actions or instance cases, where plaintiffs brought suits against defendants. The *inquisitio* was used at all levels, from the courts of archdeacons and rural archpriests or deans charging rustics with fornication or adultery to papally commissioned trials presided over by cardinals on charges brought against kings and queens. For instance, all of Henry VIII’s annulment trials were inquisitions.⁷

This procedure constituted progress in fairness for the accused. “Inquisition was devised as a more comprehensive and satisfactory alternative to ‘accusation.’”⁸ Under the procedure known as accusation or *accusatio*, a private party would accuse someone of a crime and attempt to prove it. Thus, the judge did not take sides but simply decided the contest between two independent parties. In contrast, inquisition required *publica fama*, that is, reputable opinion that a certain person is guilty of a given crime. Here one finds the advance in procedural fairness. *Fama* takes the place of the accuser; and the judge himself levels the charge and prosecutes the case.⁹

In the *Debellatio of Salem and Byzance*, More discusses this procedure in his refutation of Christopher St. German. According to Prof. Kelly, he sets out an accurate description “of how a proper process should run.”¹⁰ (1) An informant alerts the bishop to a malefactor, and ideally, supplies the names of likely witnesses. (2) The bishop interviews them in a preliminary investigation to see if there is a plausible case. There must be at least two witnesses to justify the inquisition. (3) If he concludes that there is a case, he cites the suspect and charges him with the crime. (4) If, at this point, upon hearing the charges, a suspect confesses, the judge or bishop imposes punishment.¹¹ On the other hand, if he denies the charge, the bishop calls witnesses, including his original informant, binds them under oath in the presence of the defendant, requiring them to answer truthfully questions concerning the charged crime. (5) In the next phase, the

³ John Guy, “Legal Context of the Controversy: the Law of Heresy,” xlvii, Thomas More, *The Debellatio of Salem and Byzance*, ed. John Guy et al., *Complete Works*, vol. 10 (New Haven: 1987)

⁴ The relevant secular statutes in England date from the Lollard controversy in the 14th Century and merely refer to “heresies and notorious errors,” and to “divers new doctrines” (*Ibid.*, lii).

⁵ *Ibid.*, xlix & lii.

⁶ H. A. Kelly, “Inquisitions and Prosecution of Heresy: Misconceptions and Abuses,” *Church History* 58 (1989), 440, Kelly’s italics.

⁷ *Ibid.*, 441.

⁸ H. A. Kelly, “Thomas More on Inquisitorial Due Process,” *English Historical Review* 123 (2008), unpublished manuscript, 10.

⁹ *Ibid.*

¹⁰ Kelly, “Thomas More on Inquisitorial Due Process,” 10.

¹¹ Note that, as discussed below, an accused may incriminate himself. Once the charges issue, he can be summoned and questioned—but only concerning the offenses with which he is charged (*Ibid.*, 42).

witnesses' depositions are taken in private, by notary, who ask them to state their belief about the defendant's guilt—this is *publica fama*—and /or their knowledge of his actual guilt. (6) The informant becomes a witness and swears to the truth of the deposition in the defendant's presence. (7) The bishop declares that the testimony proves the defendant's *fama*—that reputable people believe him to be guilty of the heresies charged. (8) The Bishop orders purgation: the defendant must swear to his innocence, and find a number of compurgators, that is, reputable persons who will swear to his good reputation. (9) If the defendant fails purgation, the bishop orders him to perform a penance.¹² (10) On the other hand, if the witnesses' testimony proves defendant guilty of the crime of heresy, the bishop does not order purgation but abjuration and penance; or if the defendant refuses to abjure, the bishop declares him to be a convicted and unrepentant heretic and delivers him to the "secular arm."¹³

One significant difference between *ex officio* heresy cases and other *ex officio* proceedings is the use of anonymous witnesses. Names could be suppressed where revealing them would put the witnesses in real danger. "Other alleged privileges of heresy judges or restrictions on heresy defendants turn out to be nonexistent, either misinterpretations by historians or violations or distortions of the law by the judges themselves."¹⁴ Of course, heresy defendants labored under the same, considerable procedural disadvantages as other defendants. In particular, torture was permissible. Furthermore, the testimony of convicted criminals was admissible. However, "the admission of tainted or criminous witnesses in heresy inquisitions was not peculiar to heresy cases but applied to other 'exempt' crimes, namely treason, that is *lesa majestas*, and simony."¹⁵

Finally, there was no right against self-incrimination, as was the case for accusatorial processes and secular criminal procedure, at least on the Continent.¹⁶ Inquisition was not a particularly deft instrument for prosecuting heresy, mainly a private crime.¹⁷ *Fama*, or public opinion, was needed. "Thus only public crimes publicly connected to a specific person were eligible for prosecution; the judge could inquire (that is, start an inquisition) *ex officio* only against someone who was 'infamous' by reputation."¹⁸ At the same time, mere belief in heresy was a crime in ecclesiastical law. According to Prof. Kelly, this circumstance led to the establishment of a second "exemption" for the prosecution of heresy. By the mid-Thirteenth Century, in the investigative phase of a proceeding, the judge could compel a suspect to answer the charges and, thus, incriminate himself.¹⁹ At the same time, it is important to recall that the question was strictly limited to the

¹² *Ibid.*, 64. Thus, the bishop, where witnesses cannot actually prove one guilty of heresy but deep-seated suspicion remains, the bishop can order purgation. If the suspect fails to produce the stipulated number of character witnesses, the bishop may impose a penance (*Ibid.*).

¹³ *Ibid.*, 19-20; 39-40; 48-49.

¹⁴ Kelly, "Inquisitions and Prosecution of Heresy: Misconceptions and Abuses," 443-44. Prof. Kelly goes on to mention that heresy defendants were not presumed to be guilty and that no one could be legally convicted without adequate proof. Furthermore, persons accused of heresy had a right to appeal from the judge to the pope and to be represented by legal counsel. Kelly writes, "If one wants to find a legal system in which persons who were only charged with a felony were denied a trial lawyer, one can look to the English common law. This infringement of the defendant's rights was eliminated in 1836" *Ibid.*, 444-45.

¹⁵ *Ibid.*, 446.

¹⁶ H. A. Kelly, "The Right to Remain Silent: Before and After Joan of Arc," *Inquisitions and Other Trial Procedures in the Medieval West*, (Suffolk 2001), 996. See also R. H. Helmoltz, "Origins of the Privilege against Self-Incrimination," *New York Univ. L. Rev.* 65 (1990), 985.

¹⁷ H.A. Kelly, "Inquisitorial Due Process and Secret Crimes," *Inquisitions and Other Trial Procedures in the Medieval West*, (Suffolk 2001), 414. It "is obvious that the occult nature of heresy would make it particularly unsuitable for a trial procedure that depends essentially on *publica fama*."

¹⁸ Kelly, "Inquisitions and Prosecution of Heresy: Misconceptions and Abuses," 446-47.

¹⁹ Kelly writes, "In the English common-law tradition, in contrast, charges were not answered under oath, and it was recognized that a plea of 'Not Guilty' could be made by a guilty person without perjury" (Kelly, "The Right to Remain

charge, as established by the *fama* and that the suspect was informed of the charges. There were in principle no “fishing expeditions.” And More, in the *Debellation*, argues (convincingly to Prof. Kelly) that this limitation was respected in England where “[no] convictions for heresy had been obtained on the basis of deceptive questioning or ambiguous charges.”²⁰ The fact remains that “a restriction on unlimited inquiry was a fundamental principle of the new inquisitorial system set up by Innocent III.” It honored the ancient principle that “*Ecclesia de occultis non iudicat*” (“the Church does not judge secret matters”).²¹

The Case of Thomas Bilney

It is no surprise that the *Dialogue* takes up the heresy proceeding against Thomas Bilney. A 1958 article by Elizabeth Gow²² makes clear that this was a “high-profile” case and for good reasons. A priest and doctor of laws at Cambridge University, Bilney was much-esteemed for his preaching, piety, charitable works, and austerity of life. Furthermore, he evidently commanded, if not the admiration, certainly the sympathy, of many high-ranking ecclesiastical and secular authorities.

Bilney was a true believer, if ever there was one, in the doctrine of *sola fide*, faith without works. More’s portrayal of Bilney as unbalanced, suffering from extreme scrupulosity (3.2.295), seems fair and accurate.²³ Even John Foxe, in a predictably sympathetic portrait of “poor Bilney” in his *Acts and Monuments*, does not omit the extreme measures which his troubled conscience led him to employ. And Bilney himself, in a letter to his judge, Bishop Tunstall, relates how his sense of sin had made him try many “physicians” but all in vain; “... for they appointed me fastings, watching, buying of pardons and masses; in all which things ... they sought rather their own gain, than the salvation of my sick and languishing soul.”²⁴ Undoubtedly, Bilney’s conflicted condition was compounded by his adherence to the doctrine of unity of the Church in the teeth of the Church’s unambiguous condemnation of Luther’s teachings. In any event, the sincerity of Bilney’s beliefs was beyond reproach. For good reason then, More in the *Dialogue* keeps the focus on his preaching, not his conscience:

“By my word,” said your friend, “that [More’s suspicion that Bilney and his fellow-travellers were not above lying under oath] really surprises me. For he was called a good man, and a very devout one.”
“I will not,” said I, “as I told you in the beginning, attempt to impugn his conduct, since the question stands not but in his teaching.” (3.2.295)

A list of his closest friends and “converts” reads like a “Who’s Who” of the English Reformation: Edward Foxe, Stephen Gardiner, Dr. Barnes, Thomas Arthur, John Lambert, Matthew Parker, William Warner, Nicholas Shaxton, William Warner and, most famously, Hugh Latimer.²⁵

Silent: Before and After Joan of Arc,” 996). By subsequent Church legislation, a defendant who confessed could not be heard to complain that the judge failed to first establish the *fama* or present the charges before placing him under oath. At the same time, the deliberate omission or postponing of formal charges would invalidate the confession. Nevertheless, the potential for abuse by unscrupulous judges if obvious (Ibid., 996-98).

²⁰ Ibid., 1025 (citing More, *Debellation*, 86).

²¹ Kelly, “The Right to Remain Silent,” 995. Thus, as discussed *infra*, More in his own case could maintain his adherence to the ancient principle by insisting that he had said nothing to anyone concerning his views on the King’s marriage or new title.

²² Elizabeth Gow, “Thomas Bilney and His Relations with Sir Thomas More,” *Norfolk Archeology* 32 part 4 (1961).

²³ Ibid., 293-94.

²⁴ Ibid., 294

²⁵ Gow, “Thomas Bilney and His Relations with Sir Thomas More,” 294-96

Undoubtedly he was on the radar of More and like-minded secular and ecclesiastical officials for a long time before his trial in 1527. Following his conversion to Luther's doctrine of *sola fide* in 1516,²⁶ he joined a group of like-minded Cambridge university men who met at the White Horse Inn to discuss events in and ideas from Germany; indeed the inn, for this reason became known as "Little Germany."²⁷

Ordained in 1519, and made a fellow in canon and civil law by the mid-1520's, he also took up the study of theology and Scripture. His zeal for souls led him to undertake preaching tours which, in turn, led to his prosecution. In 1527, after some initial reluctance on account of sympathy for Cambridge men, Cardinal Wolsey initiated proceedings. The main points testified against him by twenty witnesses of his preaching mirror the doctrinal points addressed in *Dialogue*: that saints are ineffectual as mediators between God and man; that man can in no wise merit by his own deeds; that it is great folly to go on pilgrimage; that the miracles at Walsingham and other shrines were performed by the Devil; that the Pope has not the keys which Peter had; that Christians should not light candles before images of saints and that kings and princes ought to destroy such images.²⁸

At his trial, Bilney never admitted to preaching heresy. Evidently, the evidence was overwhelming and actual guilt of heresy—not just *fama*—was proven to the satisfaction of Bishop Tunstall and the other judges, without any confession by the accused. When commanded to abjure, as More reports in the *Dialogue*, Bilney received special treatment, or "exceptional kindness," at the hands of his judges. Not only was the judgment delayed for several days to allow him to consult with friends and advisors but—to More's consternation—Bilney was permitted to both abjure the heresies and to maintain at the same time that he had never uttered them (3.5.311-318).

The case of Thomas Bilney does not end with his unorthodox abjuration, but continues to a startling conclusion on a date after the writing (and revision) of the *Dialogue*. Following a year in jail, he returned to Cambridge, but with a tortured conscience. In 1531, after two years of internal turmoil brought on by deep regret over his abjuration, he arranged his own arrest and prosecution for heresy. With a copy in hand of Tyndale's New Testament and the same author's *Obedience of a Christian Gentleman*, he turned himself in to the Bishop of Norwich.²⁹ The resulting proceeding ended with Bilney's death by burning. To the end he was conflicted, attempting to unite obedience to pope and ecclesial unity with justification by faith alone. By Foxe's account, he died the first Protestant martyr in England.³⁰

Reliability of Witnesses to Prove a Heinous Crime

More's interlocutor, the student and tutor, has just returned from a visit to his university. He reports that many of his colleagues "concerning the abjuration of that man [Thomas Bilney] are extremely convinced that he was done very wrong" (293). Interestingly, the inquiry assumes that heretics ought to be punished. Apparently, there is little doubt that his opinions were heretical. Rather, the "wrong" pertained to the way "those charges were proved" (3.2.293).

For the law does, as I [the student-tutor] hear it said, require but two, and moreover, in a heresy case does not much care how bad they are; they could even be heretics themselves. And this not an

²⁶ Indeed he attributed his conversion to Erasmus' Greek New Testament, especially, 1Timothy 1 ("...Jesus came into the world to save sinners, of whom I am the chief and principal"). *Ibid.*, 294.

²⁷ *Ibid.*, 294.

²⁸ *Ibid.*, 299.

²⁹ *Ibid.*, 303.

³⁰ *Ibid.*, 308.

astounding situation, that whereas in a matter of little money no law allows the admitting of any witness who is not honest and credible, the law made by the Church should in so great a matter ... allow the admitting of a convicted felon, and give faith and credence to an infidel, someone they have time and again proved false to God in his faith. (299)

He goes on to argue that, given the stakes, the evidentiary bar ought to be raised, not lowered: “the more heinous, odious, and abominable the crime is, the more slow we should be to believe it, and the more certain and complete the proof should we have before we judge anyone to have been so evil as to commit it” (3.3.300).

More’s three-part response demonstrates his faith in judges and law and zeal for public order. First, the judges have adequate discretion to sift through the statements of witnesses. They are to be “astutely and separately examined” (3.3.300). Second, the impartiality of judges is assured in part because “laws always are made only for punishment of things that are yet to come, and who it is that will fall into peril, the makers cannot tell” (301). Third, and most important, lowering the evidentiary bar is necessary for the public safety:

For the chief reason why in heinous criminal cases, such as theft, murder, treason, and heresy, the law admits as witnesses people that it will not accept in a case about some financial or other kind of contract made between two parties, is that otherwise all such heinous crimes would go unpunished, and as a result the world would swarm full of such injurious people, for lack of evidence and examination in the matter. For those who go about such heinous deeds as, once coming to knowledge would bring them to a shameful death—these people do not ordinarily take along with them a notary or an honest witness to make an instrument thereof. (3.3.301-302)

More, of course, is on firm ground arguing that heresy does not come in for special treatment. All felonies in the secular courts, and treason and simony in ecclesiastical courts allowed the use of tainted witnesses. Indeed, submitting heresy to the same procedural disadvantages as treason, More could point to more than traditional practice. “Given [his] conviction that heresy was inherently violent and seditious (at least Lutheran heresies), the spread of Lutheranism into England could only mean one thing: that England would slide relentlessly towards chaos unless heresy were exterminated.”³¹

That judges bring the action after hearing the testimony of at least two witnesses constitutes a procedural advantage for a suspect. Recall that the alternative in ecclesiastical law to the inquisition was the accusation. In the latter process, a defendant is at the mercy of his accuser. The judge merely decides the case between the parties; he has no power to sift the evidence before initiating an inquest, or summoning a suspect. Needless to say, the fairness of the system depends on the integrity of judges. And More, once a judge himself, like his father before him, had a high opinion of judges. To conclude from how he and perhaps his father acquitted their judicial duties, that estimation is justified. As for others’ performance, he defended English ecclesiastical judges who—unlike certain of their counterparts on the Continent, especially France—adhered to the rules of procedural fairness so consistently that St. German could not cite an instance in England where a judge’s trickery secured a heresy conviction.³²

To be fair, however, More’s defense of the admissibility of tainted witnesses is also driven by his concern for the commonwealth. Under a system of accusation, heresy would scarcely be prosecuted. As Prof. Kelly observes, “one can readily understand the awkwardness of having to

³¹ Alistaire Fox, *Thomas More: History and Providence* (New Haven 1983), 139.

³² Kelly, “The Right to Remain Silent: Before and After Joan of Arc,” (citing More, *The Debellation*, 86).

depend on the volunteering of good citizens willing to risk their own livelihood or even lives in order to have criminals brought to justice. For the vulnerable accuser Pope Innocent substituted trustworthy informants who could testify to the belief that a certain person had committed a crime.”³³ Furthermore, heresy—certainly of the sort not announced from a pulpit—would go uncorrected without tainted witnesses. More makes the point—urged by many a prosecutor today in summations today to a jury—that the only evidence may be testimony of “the parties themselves,” that is, accomplices who are as unsavory as the accused (3.3.302).

Limitation on the Number of Defense Witnesses

In 3.4, the exchange focuses on a peculiar occurrence in the proceedings against Bilney. After the decision of the judges, as many as 30 witnesses appeared ready to contradict the 20 or so witnesses who testified that Bilney had preached sundry heresies. The judges after some deliberation refused to hear the witnesses (3.4.303). More’s interlocutor maintains that a search for the truth should consider all the evidence available: “it always seems to me that it ought to be heard, all that anyone wants to say, and that it should all be taken in the best way for the once accused, and especially in regard to heresy purportedly being preached where so many are present” (3.4.305). Where the student-tutor perceives a defect of justice, More sees adherence to the rule of law and, most important (and once again), the need for vigorous prosecution of heresy.

More is certain that the witnesses were properly turned away by Bishop Tunstall. As in the case of the admissibility of tainted witnesses, he is on firm ground. More notes that Bilney “himself was well-versed in the law, and never could say that he was denied any favor that the law would grant” (3.4.303-04). Prof. Kelly and Elizabeth Gow conclude that the decision not to hear from the thirty witnesses proffered by Bilney after the close of the proceedings was in keeping with due process and would have been a highly unusual departure from procedure.³⁴ Besides, More, the prudent jurist, recognizes that permitting testimony of more witnesses after the testimony of witnesses previously sworn in was read in court is an invitation to perjury, or “the threat of subornation and dishonest instruction of witnesses” (3.4.305). (For this same reason, prudent judges and alert prosecutors and defense counsel request the sequestration of witnesses.)

Prescinding from the poor timing of Bilney’s witnesses, More refuses to grant his interlocutor that more witnesses is better even where proffered witnesses would have contradicted the “slated witnesses” (3.4.304). More presses the point:

The whole world, virtually, is in agreement in understanding that with regard to all such heinous crimes, reason dictates the complete opposite and goes quite against your way of thinking. And . . . it certainly seems to me that of all crimes, heresy is the one in regard to which it could least be allowed. For well you know that heresies are false beliefs and factious ways full of feverish activity. And such as give themselves thereto are staunch and studious about the furtherance of their seditious act. And

³³ H. A. Kelly, “The Right to Remain Silent: Before and After Joan of Arc,” 995. St. German advocated a return to accusation. More in the *Apology* replies, in words strikingly similar to the *Dialogue*, (3.3.301), that if available procedures were restricted to “the means of accusation” the result would be a “swarm of heretics.” Kelly, “Thomas More on Inquisitorial Due Process,” 22 (citing *The Apology of Sir Thomas More, Knight*, ed. J.B. Trapp, *The Complete Works of St. Thomas More*, vol. 9 [New Haven 1979], ch. 24, 88-89).

³⁴Kelly writes, “The reasons given by the Bishops for not admitting defense witnesses (they were not allowed after the testimony of witnesses previously sworn in was read in court) are reported by Foxe, and More thinks that this was probably the reason” (Kelly, “Thomas More on Inquisitorial Due Process,” 69). See also Gow, “Thomas Bilney and His Relations with Sir Thomas More,” 299.

since they have fallen from God and his true faith, they have no great care about truth, nor have too many scruples about lending an oath till they have need in a like case to be paid back. So ... the false preacher can be brazen enough to say whatever he pleases. For he will never fail to have his witnesses. (3.4.305-06)

More's point is not difficult to appreciate, especially where the case does not include any tangible evidence, typically illegal books or incriminating marginalia. Where the only evidence is the defendant's preaching and where confederates or sympathizers are ready to violate the oath, the search for truth could easily be undermined. What is more, there is some evidence that Bilney himself on principle flouted his oath in maintaining his innocence in the face of twenty witnesses to his sermons. Among marginalia written by him in his copy of the Vulgate "there are two notes or 'adversia' which imply that Bilney thought that some lies were justified:" 1. I Kings 9, David's wife, Mychal, practices deceit blamelessly; and 2. Jeremiah 24, Jeremiah's pious lie.³⁵ Perhaps More's suspicion of Bilney and his witnesses and, certainly, his exasperation with the controversy surrounding the Bilney case are illustrated by the instructive tale of Wilkins' and Simkins' wager (3.4.315ff).³⁶ The lesson he draws (with a sneer, perhaps) is obvious: "when there were so many such clear and obvious testimonies against the man of whom we have been speaking all this time, although it is possible that all of them could be false, yet no impartial judge could think this was the case unless it was proved to be, and by other means than the mere oath of the accused party, who is swearing alone against them all" (3.4.317).³⁷

Discussion Concerning Perjury

The last issues raised in these chapters of the *Dialogue* addressing heresy proceedings is perjury and, by extension, self-incrimination. More takes, by modern lights, a broad view of perjury and a constricted view of a right against self-incrimination. Judges have wide-ranging but not unlimited powers of inquiry. Thus, More maintains an inviolable personal—albeit cramped—precinct.

According to the student-tutor, "some very learned men say that if someone is accused of a crime that he is in fact guilty of, but this is not known and cannot be proved, then under oath administered to him he may and ought to swear not guilty, because about secret and unknown things no man can be his judge" (3.6.322). More responds with surprising solemnity: "For I hold this once and for all, as a sure and infallible conclusion: that a person can never legitimately commit perjury" (3.6.323).

If he has been denounced to or found out by him, by way of either common knowledge or other information giving rise to such conjectures and likelihoods that the law gives the judge authority to administer to the party an oath for the further investigation of the matter, there he is plainly bound

³⁵ Gow, "Thomas Bilney and His Relations with Sir Thomas More," 300-01.

³⁶ Wilkins lays a wager with Simkins that along a path known to both of them a "there has recently walked a horse or two and that he will prove it so clearly that the contrary cannot be true." Although Wilkins shows the path with prints of or horseshoes, Simkins claims victory because "it could be that they were geldings or mares." (3.4.315) Simkins goes on to show how a person could fabricate the prints using "long steel poles with horseshoes fastened to them." (3.4.316) Of course, the student will not declare Simkins the winner (316). More raises the stakes and asks if it would change the outcome if Simkins "swears[s] on a Bible that he himself saw when the people made those prints on the ground with horseshoes held in their hands" (3.4.316). Of course, it does not.

³⁷ There seems to be no accounting for the conclusion of G. R. Elton that the "bishops ... extorted a recantation from poor Thomas Bilney, convicted of heresy on very slender grounds" (G. R. Elton, *Reform & Reformation: England, 1509-1558* [Cambridge 1977], 96).

upon pain of eternal damnation, to tell and disclose the plain truth, without any covering up for craftiness, and to have more regard to his soul than to his shame. (3.6.324)

This position, however, is nuanced. One who maintained his own counsel, who did not share his views with others, could not be compelled to incriminate himself. Thus, More holds firm to the axiom, “*Ecclesia de occultis non iudicat*” (“the Church does not judge secret matters”).³⁸

First of all, More insists, or certainly assumes, that, before summoning a suspect, a judge has found a plausible case or *publica fama*—noting that a defendant “has been denounced.” Second, any inquiry, or the judge’s “jurisdiction,” is limited by the *fama* and resulting charge. Third, and most interesting, More opens a way for the defendant to resist a judge who has exceeded his competence. If a judge after placing the accused under oath were to ask “questions about matters belonging not at all to his jurisdiction, I would not by my oath be bound to answer him.” More allows silence under such circumstances (3.6.323); or one may refuse to swear (3.6.324). This approach accords with Aquinas who held that a judge has no right to prosecute a crime unless there is an accuser or public infamy. Where there is, the accused, when charged, is bound to reply and even though the response will convict him. On the other hand, if the question is against the rule of law, he is not required to answer at all (or appeal or avoid answering in some licit way), although he still may not lie.³⁹

Limiting judicial discretion and opportunities for self-incrimination, More displays perhaps a will to check abuses to which *ex officio* proceedings were particularly vulnerable. As Prof. Kelly uncovers, ecclesiastic judges on the Continent, especially in France, from time to time, customarily summoned suspects without evidence and subjected them to protracted interrogations on doctrinal questions of all sorts. (The heresy trial Joan of Arc is such an instance.) “[Inquisition] is a reasonable proceeding; it becomes unreasonable when the oath is administered before charges are levied or the requisite ill-fame is established.”⁴⁰ Yet more intriguing, More anticipates his own prosecution for treason. It is little wonder that he insists that he has spoken his mind concerning the king’s marriage and new title to no man. Indeed, his thoughts while in the Tower of London (April 1534 to July 1535) revisited his understanding of perjury: “I have treated this subject in the fourth [sic] book of my Dialogue, not thoroughly enough, I think, but I don’t remember.”⁴¹ “Perjury is a violation of a lawful oath. Otherwise, he who swears to kill someone, would sin if he did not kill.” The context is someone placed under oath with information damaging to another, but the point applies equally well to self-incrimination.

No one has the power to tender an oath to any one else binding him to reveal such a secret as can and should be kept hidden. If a general oath is tendered, it is always understood that it applies to misdeeds the knowledge of which was acquired by the swearer in such a way that he can lawfully reveal them. If the particular kind of oath is tendered, even with the express clause saying: “whether you can lawfully or cannot lawfully, you will swear that you will reveal,” he ought to refuse this oath as unlawful, no less unlawful than if he were constrained to swear to kill a man.⁴²

No one can deny More’s integrity in applying the same standard to himself *in extremis* as to others when he possessed the upper hand.

³⁸ Kelly, “The Right to Remain Silent,” 995.

³⁹ *Ibid.* 1002 (citing Thomas Aquinas, *Summa theologie* 2-2.67.3 ad 2).

⁴⁰ Kelly, *Inquisitions and Other Trial Procedures in the Medieval West*, xii.

⁴¹ Thomas More, “More’s Discussion of Perjury,” *Complete Works*, ed. John Guy et al., vol. 6 (New Haven 1987), 767.

⁴² *Ibid.* 765.

Conclusion

In light of the *Dialogue*, there emerges More's approach to heresy proceedings: fairness and vigor. Concern for fairness is evident in his adherence to inquisition procedures, *fama publica* as well as the role of disinterested, thorough and discerning judges. *Fama* constitutes a genuine procedural safeguard, especially in the prosecution of the often-occult crime of heresy. Insistence on this requirement also placed reasonable limits on self-incrimination. His fairness is evidenced in his own case, where he held that silence, taking care not to share his disfavored views with any man, was the mainstay of his defense against prosecution.⁴³ Thus, More in his own case could maintain his adherence to the ancient principle by insisting that he had said nothing to anyone concerning his views on the King's marriage or new title. More was prepared to leave a subject secure in his beliefs. However, to share them with one's neighbor or to preach them *in flagrante* and with the authority of the universal Church, invited prosecution. In the view of one editor of the *Dialogue*, W. E. Campbell:

More accepted the stern theory, then held by every civil lawyer in Christendom, that in a Catholic State obstinate heresy should be punishable by death—and that death by burning. For the civil law in those days held heresy to be the worst kind of sedition against the State, since, as was known by experience, it was the most disturbing.⁴⁴

To be sure, More is impatient with and suspicious of the critics of heresy proceedings. Besides condemning rashness to believe criticisms of the Church, including Bilney's judges (3.2.294; 3.3.298-299), the motives of such critics are suspect: "they persuade with false representations to conceive a bad opinion of the judges, in order to incline their hearts first, for pity, to a favoring of the man, and afterward to a favoring of the things he was forced to abjure" (3.2.294). Still, there is no getting around the seriousness and deliberateness which characterize his responses in these chapters of the *Dialogue*. Even a scholar of Tudor England hardly sympathetic toward More opines that "true to his convictions More reserved the actual execution of the [heresy] laws to the ecclesiastical court."⁴⁵ Campbell, more sympathetic and a scholar of More himself, concludes that "there is not a shred of evidence to prove that More himself ever exercised cruelty in his treatment of heretics."⁴⁶

A final note of fairness in the prosecution of heretics is More's understanding of such proceedings as, ultimately, not penal, but medicinal. His consternation over Bilney's unusual abjuration is not some disappointing lack of noblesse oblige. Rather, in More's words, "I ... can never conceive a good hope of his amendment as long as I see still abiding in his heart that pride that cannot, for fear of shame, allow him to admit his guilt" (3.5.320). Assimilating ecclesiastical courts to the mission of Christ's Church, More can say with undiluted sincerity: "Trust me: really and

⁴³ I recognize that the force of this argument rests on a premise unexamined in this paper, namely, whether the principle, "*Ecclesia de occultis non iudicat*," extends to the secular realm. I suspect it does, however, recalling Prof. Kelly's understanding that this axiom is derived from Roman law and formed part of the *ius commune*.

⁴⁴ "Toleration was in the sixteenth century no more part of the orthodox Protestant creed than it was of Roman Catholicism. Protestants as well as Catholics thought that only one form of truth could be true, and that that form must be preserved at all costs" (W. E. Campbell, "The Spirit and Doctrine of the *Dialogue*," in *English Works of St. Thomas More*, ed. Id. and A. W. Reed, vol. 2, [London: Eyre & Spottiswoode; New York: Lincoln MacVeagh], 78). Id., 107. Recall also that portion of More's proposed tombstone inscription quoted at the beginning of this paper: "he was a source of trouble to thieves, murderers and heretics" (see above, p.71).

⁴⁵ G. R. Elton, *Reform & Reformation: England, 1509-1558* (Cambridge 1977), 127.

⁴⁶ Campbell, "The Spirit and Doctrine of the *Dialogue*," 78.

truly, when someone has done evil, if he is duly sworn, it is an honorable shame and a joyful sorrow for him to confess the truth. And good folk, though they abhor the sin, yet love and commend the person as one who was bad and is good” (3.7.325).

As for the vigor which characterizes More’s approach to the prosecution of heresy, the *Dialogue* speaks for itself—for the most part. The choice of Thomas Bilney, however, may be a less obvious indicator of the utter seriousness which he attached to the prosecution of heresy. (Even if only the exigencies of controversy forced him to discuss Bilney’s cause, one is left to ponder the manner with which he approaches the subject.) Bilney represents ground zero for the Protestant revolution in England. In the view of John Foxe, he was to become England’s first Protestant martyr. He is the first Lutheran, not a Lollard throwback; or at least he died for that mainstay of Luther’s teaching, *sola fide*. Further, Bilney’s spiritual biography tracks Luther’s (3.2.295). Both men escaped insufferable emotional turmoil and found peace in the same, peculiar reading of St. Paul. This invitation to consider Luther summons up the full horror of heresy. “More’s horror of civil violence was as real as his belief in its connection with heresy was genuine. As early as 1523 he had discerned a potential threat to social and political order on the Continent, and prophesied direly in the *Responsio [ad Lutherum]* that heretical subversion of the clergy would lead to anarchy.”⁴⁷

Finally, Bilney was a sympathetic and admirable character who enjoyed the esteem and the protection of powerful personages. Nevertheless, More bucks elite opinion, decrying the “exceptional kindness” shown him. Thus, More’s choice anticipates his later, more courageous confrontation with St. German whose efforts were probably backed by Henry VIII. Undoubtedly, Bilney’s stature was one of many indications to More that Catholic England was in crisis: Luther’s revolt could cross the Channel or Christendom could continue to reign. Lutheran ecclesiology held an attraction for Henry VIII; and Lutheran theology had gained adherents among the intellectual and commercial elites, and probably at Court, as seen in the ascendancy of Thomas Cromwell in 1531 and the protection afforded Tyndale (for a time) and Dr. Barnes.⁴⁸ Bilney himself may have justified his half-baked abjuration by the hope that the revolution was just around the corner. “If nearly every Protestant heretic recanted at least once before holding firm, the reason was not only for fear of the fire. Each was feeling his way against the great army of authority, hoping that the Church would follow him in the reformation of abuses, surprised and disappointed when she threatened to cast him out of her midst.”⁴⁹ More, for his part, while he formed part of the “great army of authority,” was determined to eradicate the “pestilence” of heresy from England by *inquisitio ex officio*.

⁴⁷ Fox, *History and Providence*, 138.

⁴⁸ Campbell, “The Spirit and Doctrine of the Dialogue,” 77.

⁴⁹ Gow, “Thomas Bilney and His Relations with Sir Thomas More,” 301-02.